



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACKACOS**

**Civil Case 62 of 2007**

**HENRY NJUGUNA MUROKI ..... 1<sup>ST</sup> PLAINTIFF**

**ZIPPORAH WANJIRU MUROKI (*Suing as Administrators of the***

***Estate of The Late JANE KABURA MWANGI (DECEASED) ..... 2<sup>ND</sup> PLAINTIFF***

**VERSUS**

**SCANDINAVIA EXPRESS KENYA LTD. .... DEFENDANT**

**JUDGMENT**

1. Henry Njuguna Muroki and his daughter Zipporah Wanjiru Muroki are joint administrators of the estate of Jane Kabura Mwangi (deceased) who died on 30/5/2006 after a road traffic accident along the Nairobi-Mombasa Road involving motor vehicles registration numbers KAU 132 J and KAV 457 F (trailer). In their Complaint dated 5/7/2007, they averred at paragraph 4 thereof that the accident occurred as a result of negligence on the part of the Defendant's agent and/or servant who was driving m/v registration number KAU 132J while in the employment of and with the authority of the Defendant.

2. The particulars of negligence were given as that:

**“The defendant's agent, servant and/or driver and/or servant was negligent in:-**

- a. Driving at unwarranted and excessive speed in the circumstances**
- b. Failing to control and or manage motor vehicle KAU 132J.**
- c. Failing to keep a proper look out while driving.**
- d. Driving motor vehicle KAU 132 J without due care and attention.**
- e. Failing to swerve skip or otherwise control the vehicle to avoid the accident**

**f. Failing to brake in time or at all in order to avoid the accident.”**

3. The Plaintiffs also pleaded the principle of res ipsa loquitur and their claim is both under the Law Reform Act and the Fatal Accidents Act and they claim damages. The particulars of special damages amounting to Kshs.79,286/= are given at paragraph 7 of the Plaint as follows:-

a. “Funeral Expenses - 78,186/=

b. Police Abstract - 100/=

c. Copy of Records - 1,000/=

**Total Kshs. 79,286/=**

4. Costs of the suit and interest therein are also claimed.

5. In a Statement of Defence dated 7/8/2007 (apparently filed on 22/8/2007 because although not stamped, a court receipt of even date is on the record) the Defendant at paragraph 4 denied that the deceased was involved in the said accident and at paragraph 5 thereof denied negligence on its part and pleaded that the accident was caused by the sole negligence on the part of the driver of m/v registration number KAV 457 F and particulars were given as follows:-

**“ PARTICULARS OF NEGLIGENCE OF THE THIRD PARTY, HIS SERVANT, AGENT AND/OR EMPLOYEE**

a. **Driving at an excessive speed in the circumstances.**

b. **Failing to keep any or any proper look out or have sufficient regard for other motor vehicles on the said road.**

c. **Driving without due care and attention.**

d. **Failing to keep any or any proper control of motor vehicle registration number KAV 457 F (Trailer).**

e. **Failing to steer a safe and/or proper course.**

f. **Failing to stop, slow down or swerve or otherwise so to manage or control the said motor vehicle registration number KAV 457 F. (Trailer) as to avoid the said collision.”**

6. The Defendants further denied that the Plaintiffs suffered any special damage or any damage at all.

7. Subsequently by an application dated 5/11/2007, leave to issue a third party notice to M/s Clean Well Products Ltd of P O Box 43427 Nairobi was sought and the Notice was duly issued and it was filed on 23/6/2008. There is however no evidence on record that it was ever served with the notice or pleadings and there is also no evidence on record that the 3<sup>rd</sup> party filed any response to the claim of indemnity by the Defendant.

8. When the suit came for hearing, the Defendant called no evidence either in support of its case or towards proving any negligence on the part of the 3<sup>rd</sup> party but the Plaintiffs gave the following evidence;

9. PW1, Patrick Kimani Maina said that he was a resident of Malindi and was in the business of buying and selling clothes and shoes there. He recalled travelling to Nairobi on 29/5/2006 to buy his merchandise and decided to travel back to Malindi on the night bus. He did so and took the Defendant’s bus and at 8 p.m. the journey started. Upon reaching the Machakos junction, the driver of the bus increased his speed substantially and at Makindu he stopped to pick more passengers and he was

apparently speeding up in competition with another bus belonging to “**Mash Services**”. As the bus belonging to the Defendant stopped at Makindu, the latter bus passed it and on picking up passengers, the Defendant’s bus sped in pursuit of the “**Mash**” bus. PW1 who was seated in seat No. 5 produced a bus manifest (P.Exh.1) showing that the driver of the bus was one Patrick and the conductor was one Elkana. One “**Kim**” was passenger on seat No. 5 and one “**Jane**” was passenger on seat No. 21. The manifest also indicated to my count, 14 empty seats and it was PW1’s further evidence that because of the empty seats, the bus driver had to periodically stop to pick up extra passengers hence the competition with the “**Mash**” bus.

10. In any event, PW1 further stated that when the bus reached Mtito Andei, a fellow passenger complained that the driver was driving dangerously because he reached Mtito Andei at 11.30 p.m instead of 12.30 a.m and PW1 knew that to be true because he was a regular passenger on the route. That between Manyani and Voi and as he sped on, the driver of KAU 132 J tried to overtake a trailer and as he did so, he came face to face with an oncoming trailer and as both vehicles veered off the road to avoid the accident, they collided head on and PW1 lost consciousness and only came to in hospital. He learnt later that 14 people had died and many more were injured in the accident.

11. PW1 added that as a resident of Malindi, he knew the deceased who was popularly known as “**Mama Cheese**” and that she was seated behind him in the bus on the material night. He lay blame on the bus driver and further stated that the driver of the lorry which was involved in the head on collision was not to blame for the tragic accident.

12. It is instructive to note that PW1 was not cross-examined because on the date that he testified, the advocate for the Defendant although served, did not attend court.

13. PW2, Henry Njuguna Muroki, husband of the deceased, recalled that he was issued with letters of administration to the deceased’s estate in **H.C Succ. 2541/2006 (Nrb) – P Exh. 2** and that on the night of 29/6/2006, he escorted his wife to the bus stage in Nairobi and she boarded a bus belonging to the Defendant together with her mother. At midnight, he received a call from a police officer at Voi Police Station who told him that his wife had been involved in an accident and the next day he travelled to Voi and found her body at Voi Hospital Mortuary.

14. PW1 produced a receipt No. 27908 (P. Exh.3) in the name of “**Jane**” showing that she was a passenger in the Defendant’s bus and that together with another person (her mother) they were to occupy seats Nos. 21 and 22 and that they were travelling from Nairobi and Malindi.

15. He also produced the following documents:

- i. Post-mortem Report – P. Exh.4
- ii. Death Certificate – P Exh.5.
- iii. Police Abstract – P. Exh.6.
- iv. Certificate of Registration of a business entity called “**Dairy Line Enterprises**” with himself and the deceased as proprietors – P Exh. 7.
- v. Notification of Birth of the 2<sup>nd</sup> Plaintiff – P. Exh. 8.
- vi. Search Certificate confirming that the defendant owned m/v registration number KAU 132J – P. Exh. 9
- vii. Receipts for funeral and related expenses totaling Kshs.55,102/= - P. Exh. 10 – 15.

16. It was also his case that the deceased was engaged in cheese making and that she was making about

Kshs. 100,000/= every month and was responsible for upkeep of her family to the tune of Kshs.60,000/= every month. He generally supported her in the business but upon her death, the business faltered and later collapsed. He is now engaged in other business.

17. PW3, Moses Kago Mukunya, a Certified Public Accountant with 30 years experience, prepared accounts for Dairyline Enterprises and produced a report (P. Exh.16) and he confirmed that the deceased paid water bills and electricity bills for her residence and that her income for the year 2004 was kshs.485,672/= and Kshs.625,498/= for the year 2005 and for the period upto May 2006, her income was Kshs.386,274/=.

18. I have taken into account the submissions made by the advocates for the parties and my analysis and evaluation of the evidence is as follows:-

19. It cannot be doubted from the available evidence that the deceased was a passenger in m/v KAU 132J on the material date. The bus manifest (P. Exhibit 1) and the receipt in her name (P. Exhibit 3) are clear proof of that fact. It is also true that she died during the accident and there is no evidence to disprove that fact. The question is, was the defendant's servant and/or agent negligent in the way that he managed the bus? The evidence of PW1 is unchallenged on the point. He was in the bus, saw the manner in which the driver drove the bus in competition to pick up extra passengers on the road and the manifest corroborates that fact because the bus had 14 empty seats at the beginning of the journey and more likely than not, the need to pick up extra passengers and make a quick buck caused him to over speed and compete with the rival "Mash" bus.

20. In any event, I take the view that once the principle of res ipsa loquitur is pleaded and the Defendant chooses to call no evidence at all in defence of the claim against it, then things speak for themselves and I can only but hold the Defendant vicariously liable for the accident at 100%.

21. On quantum under the Law Reform Act, the advocate for the Plaintiff has proposed the modest sum of Kshs.10,000/= for pain and suffering and I accept the figure since the deceased died on the spot.

22. On loss of expectation of life, a sum of Kshs.70,000/= based on the decision of Ang'awa J in **Grace Gichuki vs Peter Gateru Macharia – H.C.C.C 1 of 1999**, is proposed and again I accept the sum as reasonable in the circumstances of this case.

23. Dependency was proved only to the extent that the Plaintiffs were not wholly dependent on the deceased as the 1<sup>st</sup> Plaintiff also had his own business and was a partner in the deceased's cheese making business. A 1/3 ratio is therefore fair and reasonable in the circumstances.

24. On the multiplier, the deceased was 35 years and using the authority of **Eunice Njenga vs Ng'ang'a Njau & Others – H.C.C.C 3150/1984** per Mbogholi J, one would be expected to maintain his family upto at least 55 years and so a multiplier of 20 is reasonable and fair.

25. What is a fair multiplicand in this matter? PW3 gave a detailed account of how much the deceased was earning from her business. In his estimation, averagely she took home between Kshs. 50,000 and Ksh.60,000/= every month. The learned advocate for the Defendant calculated the annual income and came up with a figure of Kshs.50,000/= which he taxed and came up with the take home sum of Kshs.39,906.00. I have carefully considered that argument and I accept it because the sum of Kshs.50,000/= for 2005 was gross and not net. In the event, I will accept that with taxation, the net pay for the deceased would have been about kshs.40,000/= or thereabouts and so I will take that sum as the multiplicand. The judgment of Kimaru J in **Pauline Mburu vs Benedict Kutondo Nkr H.C.C.C 210/2000** is very persuasive in that regard.

26. I will therefore calculate loss of dependency as follows:-

Kshs. 40,000 x 12 x 20 x 1/3 =3,200,000/=.

27. Special Damages were pleaded but only the sum of Kshs.55,102/= was specifically proved and I award that sum.

28. In the end, judgment is entered for the Plaintiffs against the Defendants as follows:-

Pain and Suffering – Kshs. 10,000/=

Loss of Expectation of Life - Kshs. 70,000/=

Loss of Dependency - Kshs. 3,200,000/=

Special Damages - Kshs. 55,100/=

Less Damages under

Fatal Accidents Act - Kshs. 70,000/=

Total - **Kshs. 3,285,000/=**

29. Costs and interest shall also be awarded to the Plaintiffs.

30. Orders accordingly.

Dated and delivered at Machakos this **23<sup>rd</sup>** day of **April** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Bw'omote h/b for Mr Wahome for Plaintiff**

**N/A for Defendant**

ISAAC LENAOLA

JUDGE