



ELIZABETH NGINA MUTHOKA (*Suing as the Administratrix of the Estate of*
PROF. PAUL MUTHOKA MUSAU (DECEASED) **PLAINTIFF**

VERSUS

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE 124 OF 2004

MARTIN MUSILA KOMBO **1ST DEFENDANT**

DEON MUSAU **2ND DEFENDANT**

JUDGMENT

1. In the Complaint dated 19/10/2004, Elizabeth Ngina Muthoka sued as administratrix of the estate of Professor Paul Muthoka Musau (deceased) who died on 5/10/2003 in a road accident involving m/v Reg. No. KAD 479 J and m/v Reg. No. KAN 254 E belonging to the 2nd Defendant and on the material day, driven by the 1st Defendant.

2. It is averred in the Complaint that the accident occurred as a result of negligence on the part of the 1st Defendant and at paragraph 5 thereof, particulars of negligence are given as;

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

b. Failing to slow down, brake, swerve or in any other manner drive the said motor vehicle to avoid the said accident.

c. Driving the said motor vehicle without due care and attention to other road users and in particular to the deceased’s motor vehicle.

d. Driving contrary to the Traffic Act, Rules and Highway Code.

- e. **Driving recklessly and permitting the said vehicle to veer off the road.**
- f. **Failing to heed the presence of the deceased or his motor vehicle along the said road.**
- g. **Failing to keep on its correct lane.”**

3. It is further averred that as a result of the accident, the plaintiff suffered loss and damage because the deceased lost the normal expectation of life and his dependants have been deprived of his care aside from the total write off of m/v KAD 479 J belonging to the deceased. Particulars of special damage are given at paragraph 8 of the Plaint as being;

- a. **“Police abstract and death certificate Kshs. 150.00**
- b. **Obtaining letters of administration Kshs. 26,460.00**
- c. **Mortuary and funeral expenses Kshs. 200,000.00**
- d. **Loss of use of motor vehicle KAD 479J Kshs. 237,071.00**

TOTAL Kshs.463,681.00”

4. At the time of his death, it is pleaded that the deceased left behind his widow, the Plaintiff and 4 children viz Peninah, Christine, Jane and Victor aged between 19 and 6 years. The deceased was 46 years old when he died and was an Associate Professor and lecturer at Kenyatta University but he also served in other institutions where he pursued his scholarly goals.

5. The Plaintiff sought general and special damages under the Fatal Accidents Act and the Law Reform Act as well as special damages amounting to Kshs.463,681/=.

6. The Defendants filed a joint Statement of Defence on 16/3/2006 and in it they denied that an accident occurred at the place and time pleaded in the Plaint; they also denied that the deceased was travelling in the motor vehicle subject of the accident and denied the particulars of negligence on the part of the 1st Defendant or at all and denied that any loss or injury was suffered as alleged. The particulars of the dependants of the deceased are also denied but in the alternative, it is pleaded that if the accident occurred at all, it was caused by or the accident was substantially contributed to by the breakage of the steering drag hub link. Further, that the accident was wholly and/or substantially contributed to by the deceased in the manner that he drove or managed m/v KAD 479J.

7. It is alleged that he was negligent and the particulars thereof are;

- a. **“Driving across the road in total disregard of Motor Vehicle Registration Number KAN 254 E.**
- b. **Failing to adhere to the provisions of the Highway Code and the Traffic Act.**
- c. **Failing to have due regard for his own safety.**
- d. **Failing to have due or any regard for the safety of other road users and in particular motor vehicle Registration Number KAN 254 E.**
- e. **Driving at an excessive speed in the circumstances.**
- f. **Driving at an excessive speed in the circumstances.**
- g. **Driving m/v reg no. KAD 479 J so carelessly that he caused it to ram into m/v reg no. KAN 254 E.**

h. Driving into the path of M/v reg No. KAN 254 E.

i. Failing to give way to m/v KAN 254 E.

j. Failing to slow down, brake, swerve or in any other manner prevent the occurrence of the said accident.

k. Causing the said accident.”

8. The Defendants further pleaded that m/v KAN 254 had no pre-accident defect and was maintained to the required level.

9. When the suit came for hearing, only the Plaintiff and her witnesses tendered evidence because on 24/9/2008, although Mr Matheka for the Defendants intimated on record that he intended to call only the 1st Defendant as a witness, on 16/12/2008 he stated that he was closing his case and had no witness to call. That being the case, I should summarize the evidence for the Plaintiff as follows:-

10. PW1, Elizabeth Ngina Muthoka, spouse and lawful administratrix of the deceased narrated the events leading to her husband's death and it was her evidence that on 5/10/2003 at 5 p.m. the deceased was driving m/v KAD 479J towards Nairobi along the Mombasa-Nairobi Road with herself and their 6 year old son, Victor Mutua as passengers. She was sitting in the passenger seat next to the deceased and it was her evidence that on reaching Muia Kalii's home on the said road, and on a hilly stretch, a motor-vehicle suddenly appeared on their lane as it tried to overtake lorries that were in front of it. The deceased tried to swerve off the road and the other motor-vehicle did the same and both collided head-on. It was her evidence that the other driver was careless because he overtook other vehicles at a blind corner and at high speed and she lost consciousness and came to at midnight. Later she was told that her husband had died.

11. To buttress her case, the Plaintiff produced the proceedings and judgment in **Kilungu RM'S Court Traffic Case No. 412/2003 (P.Exh.5)** where the 1st Defendant was tried and convicted of the offence of causing death by dangerous driving. His driving license was also cancelled and he was to reapply for it after 3 years of such cancellation.

12. It was also PW1's case that prior to his death, the deceased was the Director of the Kenyatta University's Post-Graduate Board of Studies and was a consultant for many organizations and institutions including the International Centre for Rural Reconstruction, Forum for African Women Educationists, the Catholic University of East Africa, the East African Educational Publishers, Longhorn Publishers, Kenya Literature Bureau and Jomo Kenyatta Foundation. For his efforts and engagements with these bodies, he received payments at different times and they ranged from Kshs.5,000/= to kshs.15,000/=. He also had a scholarship to visit and study at Bayreuth University in Germany and his upkeep was fully paid by the University. He was a frequent participant and presenter in conferences in Africa and Europe and was a regular contributor to Scholarly Journals and publications in Germany, Poland, Ireland, U.S.A and South Africa amongst others. A number of his publications were produced and they were all scholarly texts in linguistics including, "**Kunga za Kiswahili**", "**Utata wa Kiswahili Sanifu**" and "**Aspects of Interphonology; the Study of Kenyan Learners in Kiswahili**".

13. PW1 produced the deceased's last payslip (**P. Exh.20**) and his monthly salary was Kshs.112,993/= (gross). The net pay was however Kshs.52,448.75 and it was his responsibility to pay school fees, medical fees and general upkeep of his spouse and children. PW1 admitted that she contributed to family expenses as her net salary was Kshs.28,492/= but subsequent to his death she struggled because she had to survive on loans to keep the family afloat. Her payslip (**P. Exh.22**) confirmed that her net pay had since dropped to Kshs.7,000/=.

14. On funeral expenses, PW1 stated that she spent Kshs.100,000/= on food and related expenses (**P. Exh.23a**) and Kshs.50,000/= on tents and chairs (**P. Exh.2 3b**). She was unable to produce any receipts for the Police Abstract – Kshs.150/=, Letters of Administration – Kshs.26,460/= and Taxi fare and

transport – Kshs.237,071/= (which in the Plaintiff is said to be the value of m/v KAD 479J).

15. PW2, Isaac Ominde, Deputy Registrar – Personnel at Kenyatta University gave a history of the deceased's rise from a Tutorial Fellow in 1986, lecturer in 1988, Senior Lecturer in 1997 and Associate Professor in 2002. He produced evidence that for added responsibility as Director he was entitled to Σ 3,000 per annum and his retirement age would have been 75 years although he could voluntarily retire at 55 years.

16. PW3, Prof. Eric Asike Masinde confirmed that he knew the deceased well as they had worked together on various scholarly projects. He produced documents showing that apart from his salary, the deceased received fees as rapporteur and presenter in conferences which were all in the range of Kshs.25,000/=. The deceased was recognized as a serious scholar and appeared in the American Biographical Institute as a respected scholar and according to PW3, the deceased would certainly have become a full professor by 2007 due to his work as shown by his curriculum vitae (**P. Exh.32**).

17. The evidence above was not seriously challenged even in cross-examination and when the Defendants failed to call any evidence in support of the serious issues raised in their Statement of Defence, all I can say is that since the Plaintiff pleaded the doctrine of res ipsa loquitur and once no evidence whatsoever was called to challenge the evidence of PW1 who was an eye witness to the accident, it can only be that the facts as pleaded in the Plaintiff and proved by the uncontested evidence of PW1 speak for themselves and the particulars of negligence cannot but be accepted as true. Even if this were not so, there is the further evidence of the conviction of the 1st Defendant for the offence of causing death by dangerous driving which only further corroborates the evidence of PW1. I note that the advocate for the Defendant has proposed that the deceased should bear 20% liability but on what basis should such liability be apportioned? No evidence was led to show that the deceased in any way contributed to the accident. It is indeed true that M/V KAD 497J and KAN 254E collided off the deceased's lane and this was not because of any fault of his own but because he was swerving to avoid KAN 254 E which had been driven on his side and carelessly so as was the evidence in the traffic case. I see no reason to apportion liability but will instead hold the Defendants 100% for the accident, the 2nd Defendant, vicariously so.

Quantum

18. Loss of Dependency is payable under the Fatal Accidents Act and in this case, there is no doubt that at the date of his death, the deceased's net pay was Kshs.52,448.75 which was the salary that he received in September 2003. Apart from that, the deceased earned averagely Kshs.25,000/= per month from other professional engagements and pursuits and I have elsewhere above detailed out the basis for that holding. I use the word "**averagely**" because the deceased's income from consultancies, honoraria and related activities would rise and fall depending on the undertaking but I believe PW3's evidence on the issue which in any event is not contested. I will therefore take a global sum of Kshs.80,000/= as the deceased's monthly income.

19. The deceased was 46 years old and his retirement age was going to be 75 years. However, it is common knowledge that scholars hardly retire and so the multiplier of 7 years proposed by the Defendants is unreasonable. The age of retirement has recently been raised for all public servants to 60 years and I take the age of 75 years not to be unreasonable for a scholar of the deceased's repute. I accept the multiplier of 29 years as proposed by the advocate for the Plaintiff.

20. The deceased's wife had income and was not totally dependent on the deceased and therefore a 1/3 ratio is properly applicable in this case. I say so inspite of her present financial situation.

21. In the end, the damages under this heading shall be;

Kshs. 80,000 x 12 x 29 x 1/3 = 9,280,000/=.

22. In doing the above I accept the holding in **Ibrahim Adam Mire vs Patel Shailesh Keshavla,**

H.C.C.C. 99/2004 (Kericho) where Kimaru J used the retirement age to calculate the multiplier under the Fatal Accidents Act.

Pain and Suffering

23. The deceased died on the same day the accident happened and I accept the holding in **Rev. Fr. Leonard Ekisa & Another vs Major K Birgen** where Dulu Ag. J (as he then was) awarded Kshs.30,000/= in similar circumstances.

Loss of Expectation of Life

24. The advocate for the Plaintiff has proposed Kshs.200,000/= under this heading while the advocate for the Defendant has proposed Kshs.30,000/=. I accept the argument that the deceased was a vibrant and focused scholar in his area of expertise and Kshs..30,000/= is unreasonable. For a man destined to the highest level of academic excellence and scholarship, Kshs.200,000/= must be the fairer and reasonable award.

Special Damages

25. This head of damages must be strictly pleaded and proved and before me as elsewhere above explained, only Kshs.150,000/= was properly proved and I shall award that sum.

26. Lastly, costs and interest are properly due to the Plaintiff and the final judgment is as follows:-

- a. Loss of Dependency - Kshs. 9,280,000.00
- b. Pain and Suffering - Kshs. 30,000.00
- c. Loss of Expectation of Life - Kshs. 200,000.00
- d. Special Damages - Kshs. 150,000.00

Total Kshs. **9,660,000.00**

27. Less Damages under the

Fatal Accidents Act - Kshs. 200,000.00

Total Kshs. 9,460,000.00

28. The Plaintiff will also have costs and interest as prayed in the Plaint.

29. Orders accordingly.

Dated and delivered at Machakos this **13th** day of **May** 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Makau h/b for Mr Gikandi**

N/A for Defendants

ISAAC LENAOLA

JUDGE