



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 216 OF 2000

GICHUHI MWAURA GITHINJIPLAINTIFF

VERSUS

1. GREENSTEDS SCHOOL

2. DAVID KAMAU MUIRURI.....DEFENDANTS

JUDGMENT

The plaintiff suing in his capacity as the personal and legal representative of the estate of the late Joseph Mwaura Githinji filed this suit against the defendants on his own behalf, the estate and dependants of the deceased under the law Reform Act and the Fatal Accident Act. The plaintiff alleged that on or about 4th October, 1999, the deceased was a lawful pedestrian along Njoro road. The 2nd defendant negligently managed or controlled motor vehicle registration number KAE 118D and caused it to knock the deceased, thereby causing him fatal injuries as result the estate of the deceased and dependants have suffered loss and damage.

The plaintiff gave the particulars of negligence on the part of the 2nd defendant. The particulars of the persons for whose this suit is brought, pursuant to the Fatal Accident Act are given as Gichuhi Mwaura Githinji – brother, Samuel Njoroge – brother and Daniel Kamunya Mwaura – brother. The plaintiff therefore sought for general and special damages.

The plaintiff gave evidence in support of his claim; he testified that he is the brother of the deceased. The deceased was aged 36 years at the time of his death. He was working at Elburgon as a carpenter where he used to earn Kshs.10, 000/- per month. The plaintiff further testified that on 4th day of October, 1999, he waited for the deceased but he failed to come home. On 6th October, 1999, he decided to make an enquiry at Elburgon police station where he was informed that the deceased was knocked down by a vehicle on 4th October, 1999 at around 6.30 p.m. The plaintiff was referred to Nakuru Municipal Mortuary and he identified the body of the deceased. A post-mortem examination was carried out by Dr. Wasike. The post-mortem report was marked for identification but was not produced in evidence. Thereafter the plaintiff was issued with a police abstract form, and a death certificate.

The evidence of Juma Kisela was abandoned. PC Evans Ombui testified that on 4th October, 1999 at about 7.00 p.m. he received a report of a hit and run accident along Elburgon Njoro road. He went to the scene and found the deceased lying dead on the off lane. He took over the scene and drew a sketch plan. He reported the matter to the OCS and the OCPD. He transported the body of the deceased to the Nakuru Municipal Mortuary and opened an investigation file.

At about 10.-00 p.m. on the same day, he received a call from the radio room Nakuru, although the person calling did not identify himself. He was informed that the vehicle that was involved in the accident belonged to the Greendsted School Nakuru. He was also given the motor vehicle registration number as KAE 118D. The following day, he went to the Greensted School with the OCS, they found Mr. Morgan who told them that he was aware of the accident and the driver with the motor vehicle were at Elburgon police station. They went back to Elburgon police station and found the driver with the motor vehicle. The motor vehicle was taken for inspection, but no pre-accident defects were noted on the motor vehicle during the inspection.

On cross examination, this witness confirmed that he did not find any blood or body tissue on the motor vehicle. He issued the driver with a notice of intended prosecution and recommended a public inquest to be conducted because he did not have enough evidence to charge the driver of the motor vehicle with an offence. This witness was later transferred to Bomett police station. After several adjournments, the plaintiffs closed their case on 25th March, 2009.

David Kamau Muiruri, the 2nd defendant testified that on 4th October, 1999 he was driving motor vehicle registration number KAE 118D belonging to Greensteds school. He has been a driver for a total of 46 years. He was travelling from Turi towards Nakuru, when he reached Nyakiambi area there were two Lorries a head of him. He was able to overtake one lorry. While driving behind the other lorry, he saw the lorry which was ahead swerve as if it was trying to avoid going over something. He then saw a tractor had dropped logs on the roadside. The lorry passed the logs and he passed behind the lorry trying to avoid the logs. There were many people on the right side and while he was passing them he heard them saying “even Greedsted” At the time, he assumed it was because he was driving a bus written Greenstead, thus he went on driving up to the school.

The following day, he was told that he had driven over a person. He was told to take the same bus to the scene of the accident. He took the bus at the Elburgon Police station, the vehicle was inspected but no dents or blood was found on the vehicle. He denied that he knocked down a person by the name Joseph Ndungu Mwaura. There were many people on the road, but when he visited the police station, there was not a single statement by those people. He insisted that he was driving at moderate speed of 30KPH behind a lorry.

Counsel for the plaintiff filed written submission and urged the court to find the defendants liable for the accident. He submitted that the plaintiff established their claim on a balance of probability. He urged the court to be guided by the decision in the case of;

Berkeley – Steard Ltd, David Cottle and Susan Cottle –vs- Lewis Kimani Waiyaki 1 KAR (1982 – 88)
Where it was held that the

“court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

On quantum, counsel submitted that the deceased was 36 years old, at the time of the accident, although he was not married, he used to support his brothers, and he was earning a salary of Kshs.10, 000 /- per month. Counsel was of the view that the court should make an award of Kshs.100, 000/- for loss of expectation of life to adopt a multiplier of 20 years to award for lost years.

On the part of defendants, counsel submitted that the plaintiff failed to prove the case against the defendants on a balance of probability. The pleadings filed by the plaintiffs are in respect of Joseph Ndungu Mwaura. A post-mortem report which was marked for identification reads the name of the deceased as Josphat Ndungu. Whereas in the verifying affidavit, the deceased name is indicated as Joseph Mwaura Githinji. The burial permit filed by the plaintiff’s counsel in the list of documents, reads the name of Mwaura Gichuki 80 years old. Due to these inconsistencies, counsel asked the court to find that it is not known on whose behalf this suit is filed.

Secondly, no post-mortem report was produced although it was marked for identification. Thirdly, the plaintiff heard about the deceased death after the accident when he made enquiries at the police station. PC Ombui testified that he received the report from an unknown person at around 10.00 p.m. on the same day. In addition PW2 did not see any skid marks or broken glass or blood on the scene of the accident. PW2 was not able to recommend a prosecution since the evidence he had was not enough. He therefore recommended an inquest to be conducted which was never conducted.

The cause of the deceased death as indicated in the death certificate is at variance with the cause of death indicated in the post-mortem report. Due to the disparity in the two documents, the cause of death remains a mystery as to whether it was as a result of being run over by the defendant's motor vehicle registration number KAE 118D or other causes.

The plaintiff also did not adduce evidence of ownership of the motor vehicle despite the fact that the defence denied ownership under paragraph 4 of the defence. Counsel made reference in the case of **Karauri –vs. - Ncheche {1988}1EAla**. The Court of Appeal held, that where ownership of a motor vehicle is denied it is necessary for a party to produce a certified copy of the register. The other issue to consider, is whether the death of the deceased was caused by the second defendant's negligence. In this regard counsel referred to the Text; Halsbury's Laws of England Third Edition Vol. 28 at page 64-56 states,

“When two parties on the highway are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care and this is true whether they are both in control of vehicles or both proceeding on foot, or whether one is on foot and the other controlling a motor vehicle. The public have a right to proceed by vehicular traffic on the highway, and, if persons or property on or near it are injured by the traffic, the injured party must bear his own loss unless he can establish a breach of duty on the part of some other persons.”

On quantum counsel was on the view that going by the evidence on record; it is most likely that the deceased may have laid on the road in a drunken stupor. On a busy road he could have been hit by any vehicle in which case the plaintiff should bear the 90% of liability. Moreover the age of the deceased was not disclosed. The death certificate indicated the deceased was aged 36 years, while the burial permit indicated the deceased was aged 80 years. The discrepancies in the plaintiff evidence are serious but should the court consider awarding lost years, an award of Kshs.30,000/-would be reasonable compensation.

Under the Fatal Accident's Act, Counsel drew the attention of this Court to the provisions of the **Act, section 4(1)** which states ***“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and or child of the person whose death was so called ...”***

Having set out the summary of the pleading, the evidence and the submissions the issue for determination is whether the plaintiff proved his case to the required standard. The plaintiff was not present when the accident occurred. He relied on the evidence by PC Ombui who completed the police abstract form showing the 2nd defendant was to blame for the accident. PC Ombui testified that he never witnessed the accident he only received a radio call from an un identified caller from Nakuru who told him that the accident was caused by a motor vehicle belonging to the 1st defendant and was given the motor vehicle registration number. According to PC Ombui, he recommended an inquest because he did not have enough evidence to prosecute the 2nd defendant. However no inquest was carried out.

The 2nd defendant denied having caused the accident. He testified that he found a group of people. He was driving behind a lorry and swerved when the lorry swerved. He only heard people say 'even Greensted'. When he reached the school that is when he was informed he had caused an accident. The motor vehicle he was driving was inspected, no dents, blood stains or human tissue were found.

With this kind of evidence I am not satisfied that the plaintiff has proved his case to the required standard. There was no evidence by an eye witness although the plaintiff admitted in cross examination that Elburgon area especially the scene of accident there are many people. For those reasons, I am not

able to find the defendants liable for the accident.

Besides the insufficient evidence, there are other legal issues which were raised by the defence counsel which are also pertinent such as the real identity of the deceased in view of the different names interchangeably used to describe the deceased in the pleadings. Secondly the defendant denied under paragraph 4 of the defence the ownership of the motor vehicle and following the Court of Appeal decision in the case of **Karauri –vs. - Ncheche {supra}**. The Plaintiff had a duty of providing a certificate of search signed by the Registrar of the motor vehicle to prove ownership of the motor vehicle. These issues taken with the scanty evidence by the plaintiff, the plaintiff's case renders itself for dismissal.

If the plaintiff's claim were to succeed, bearing in mind there was no eye witness and one would only buy the story by the 2nd defendant, that there was a lorry and a tractor on the road ahead of the 2nd defendant when the lorry swerved the 2nd defendant also swerved, perhaps the deceased was run over even by other motorist, I would have apportioned liability among the other motorists and the defendants would have been liable at 40% contributory negligence.

Under the loss of expectation of life, it is indicated in the death certificate that the deceased was aged 36 years taking all the vicissitudes of life; I would award a multiplier of 15 years. No evidence was adduced regarding the deceased's salary; I would go for the minimum salary in labour market which is about Kshs.6000/- per month. Considering that the deceased was not married had no child and his parents were long deceased, nothing would have been awarded under the Fatal Accident Act. Similarly no award would be made under special damages because none were proved. If the plaintiff were successful in this case, the award would have been computed as above.

For now, I dismiss the plaintiff's case with costs to the defendants.

Judgment read and signed this 25th day of June, 2009

M. KOOME

JUDGE