



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 107 of 1999

BEATRICE WAMBUI NGINGA.....PLAINTIFF

VERSUS

SAMUEL GICHURA KARIUKI.....1ST DEFENDANT

JOSEPH MATU MACHARIA.....2ND DEFENDANT

JOEL M. GITAI.....3RD DEFENDANT

JOEL WANYEKI.....4TH DEFENDANT

JUDGMENT

The plaintiff, Beatrice Wambui Nginga is the widow and administratrix of the estate of John Nginga Kimotho, who died on 29th February, 1988 following a road accident along the Molo-Elburgon (Olenguruone?) road. The suit herein was filed on 28th February 1991 under a plaint dated 26th February 1991 and was brought under both the Law Reform Act (Cap 26, of the Laws of Kenya) and the Fatal Accidents Act (Cap 32 of the Laws of Kenya). Although the suit was filed in Nairobi, the plaintiff later applied to have the same transferred to Nakuru High Court and her application was allowed by consent on 24th November 1998. It appears from the record that attempts were made towards an amicable settlement but the same bore no fruit.

The plaintiff states in paragraph 7 of the plaint that the deceased was travelling in the 4th defendant's motor vehicle KXU 556 along the Molo-Elburgon road when the said motor vehicle collided with the 2nd defendant's motor vehicle KYT 504 and the 3rd defendant's motor vehicle KYC 498. Her husband died in the accident. She claims, under paragraph 8 of the plaint, that the accident was caused by the negligence of the 1st, 3rd and 4th defendants, the particulars of which have been set out in the said paragraph. She states, inter alia, that the 1st defendant, being the driver of the 2nd defendant's motor vehicle failed to see KXU 556 and/or to manage and control his motor vehicle KYT 504 in a proper manner thereby causing it to collide with the vehicle in which her husband was travelling. She further blames the 3rd defendant or his driver for causing the motor vehicle KYC 498 to go off the road and causing it to collide with the other two vehicles KYC 556 and KYT 504. The 4th defendant's driver is equally blamed for, inter alia, causing the motor vehicle registration KUX 556 to go off the road thereby colliding with the motor vehicles registration numbers KYT 504 and KYC 498.

The defendants filed a joint defence admitting the occurrence of the accident and also that the 2nd, 3rd and 4th defendants were registered owners of the motor vehicles as set out in paragraph 6 of the plaint. They nevertheless denied that the accident occurred as a result of any negligence on their part and put the plaintiff to the strict proof of the allegation of negligence as particularised in the plaint. The defendants aver instead that the accident was caused by circumstances beyond their respective drivers' control and attributed the same to sudden skidding, which, despite the exercise of due care and skill caused the subject vehicles to collide. The defendants, therefore, pleaded, in the alternative and without prejudice to their earlier averments, that the accident was inevitable. The defence of limitation under the Limitation of Actions Act (Cap 22) was also raised in paragraph 7 of the defence.

The issues for determination were framed and agreed as follows :

1. Whether the plaintiff had locus standi to institute the proceedings.
2. Whether the accident was caused by negligence of the defendants' driver(s) as detailed in paragraph 7 & 8 of the plaint.
3. Whether the accident was caused by circumstances beyond anyone's control as alleged in the defence.
4. Whether the suit was brought within the time stipulated under the limitation of actions Act (Cap 22)
5. Whether the accident was inevitable as alleged in the defence.
6. Whether the deceased sustained severe injuries from which he died as stated in paragraph 9 of the plaint.
7. Whether the plaintiff is entitled to special damages as set out in paragraph 10 of the plaint.
8. What quantum, if any, is the plaintiff entitled to.
9. What orders should be made as regards the costs of the suit.

The plaintiff testified as PW1 and called an eye witness by the name Geoffrey Gikonyo Wanjohi (PW2). Having not witnessed the accident PW1 relied on the evidence of PW2 as to what took place and also on a police abstract which she obtained on 5th December 2001 and produced in evidence as "ex.1". Regarding the accident she only stated that her deceased husband was travelling in a matatu from Molo to Nakuru and that she was told that 'he was dead at 2.00 p.m.' In what seemed to be a departure in the averments in her plaint the plaintiff testified that only 2 vehicles were involved in the accident, motor vehicle registration KXU 556 whose owner she could not remember and motor vehicle registration KYC 498 a Peugeot 404. She produced a death certificate confirming the death of her husband (*exhibit 3*) and also a grant of letters of administration intestate which she obtained in respect of the death. She testified further that the deceased was 42 years old when he died, that they were married under the Kikuyu Customary Law and that they had 5 children together, born between the years 1982 and 1994. To support this, the plaintiff produced the relevant birth certificates as exhibits. PW1 told the court that the deceased was an employee of Nakuru County Council and that his salary was Kshs 5,050/= . She also testified that the deceased was a businessman owning two lorries with which he did transport business. He was contracted to transport barley for Kenya Breweries Limited and also used to transport milk to KCC. From the said business the couple used to earn Kshs 30,000/= per month. PW1 testified that after her husband's death, this business collapsed due to the fact that the plaintiff was unable to manage it as she was taking care of young children. She was forced to sell the Lorries to pay off certain debts that the deceased had with Barclays bank.

Additionally PW1 testified that she incurred expenses for the storage of the deceased's body at the Nakuru Mortuary and the hiring of motor vehicle(s) to take his body for burial. Although she did not keep the receipts for the funeral expenses she asked the court to consider the same when assessing

damages payable by the defendants for the death of her husband.

PW2 testified that he was a Molo resident and a farmer. He stated that he witnessed the accident herein as he stood by the roadside. He said it occurred 200m from where he was standing and that it involved two motor vehicles namely KYC 498 a Peugeot, which was travelling from the Molo direction and an Isuzu minibus KXU 556 coming from the Nakuru direction. According to PW2 the two motor vehicles collided in the middle of the road. He told the court that the Peugeot was moving very fast and that he blamed the same for the accident '*...because it was not being driven on its lane*'. He testified that many people died in the accident, one of them being the deceased herein, who was well known to him. PW2 testified however that he could not tell '*if he (the deceased) was in the motor vehicle*'.

The defendants chose not to call any evidence leaving the court to decide the matter on the basis of the evidence adduced by the plaintiff and the written submissions filed by either side. Submitting on behalf of the defendants the firm of Wangai & Company Advocates stated that as far as they could see liability for the accident and the death of the deceased rested solely on only two issues, vis; whether the deceased was travelling aboard the subject motor vehicle and whether the motor vehicle (*without stating which of the three*) was owned by the defendants. They submitted that the two witnesses who testified did not state that they had any knowledge as to whether the deceased was travelling '*on board the subject vehicle*' and that none of them produced documents to demonstrate that the motor vehicle "*in question*" was owned by the defendants. Relying on the authority of Moitalel Ole Sapit vs. Festus Muchoki Kibira Civil Appeal No. 118 of 2003 [2004] eKLR counsel for the defendants prayed that the suit be dismissed with costs on the ground that liability cannot attach where the ownership of the vehicle is not proved. On quantum, counsel for the defendants submitted that a sum of Kshs 35,000/= would be fair compensation under the Law Reform Act. Regarding loss of dependency under the Fatal Accidents Act the said advocates submitted that there was no documentary evidence to support the deceased's earnings, stating that a figure of Kshs 3,000 per month and a multiplier of 6 years would adequately compensate the plaintiff under the Fatal Accident Act. They further submitted that the evidence adduced confirmed that the deceased was only an employee and that any other business he may have had was carried out through the agency of his workers. They submitted further that the plaintiff's claim of a monthly income of Kshs 30,000/= was not supported by any evidence. Relying on the case of Zipporah Wanjiru Kamau vs. James G. Wathigo & Anor. Nakuru Civil Suit No. 392 of 1996 [2005 eKLR] the defendants advocates submitted that no award should be made under the Law Reform Act in this case and that only the loss of dependency of Kshs134,000/= based on the suggested figure of Kshs 3,000/= and a multiplier of 6 years should be awarded, if at all.

Submitting on behalf of the plaintiffs the firm of Mirugi Kariuki and Company urged this court to disregard the defendants defence of inevitable accident or act of God on the ground that no evidence was adduced to support the allegation, yet the law requires that the defence of an act of God be strictly proved by the party raising it. They submitted further that, based on the evidence of the eye witness (*who is erroneously referred to as DW2 in the written submissions*) the court should find that '*both vehicles were 50:50 to blame since none of the drivers testified to exonerate himself.*' The plaintiff's advocates state in their submissions, that PW2 testified that the 1st defendant's vehicle was trying to overtake whereas the 3rd defendant's bus was driven at a very high speed. PW2 never testified that the 1st defendant's vehicle was trying to overtake. He clearly stated that it was the Peugeot, registration number KYC 498, travelling from the Molo direction which was moving very fast.

No witness account was given regarding the part played by motor vehicle registration No. KYT 504 in the accident. However, in the abstract report produced in evidence, the driver of the said motor vehicle, Samuel Gichuru Kariuki (*the 1st defendant*) is stated as being the person that the police considered culpable. The abstract states that a charge of causing death by dangerous driving was preferred against him but the case was subsequently withdrawn under section 87(a) of the Criminal Procedure Code. Clearly the evidence adduced by the two witnesses is in contrast with the contents of the police abstract and falls short of proving the allegations of negligence as stated in the plaint.

There is no conclusive evidence as to which of the motor vehicle KYT 504 and KYC 498 collided with KXU 556. If both of them did, no evidence was adduced as would demonstrate the extent of their

respective contributions to the collision. Whereas PW1 stated that her husband was travelling in a matatu (*mini bus*) from Molo towards Nakuru, PW2's testimony tends to suggest that the mini bus was travelling from the Nakuru direction towards Molo. He stated that the accident occurred about 200 metres from where he stood. In my view, it is highly improbable that he would have seen what exactly happened. The speed at which either of the vehicles was driving was not stated in evidence. Neither was the point of impact. Furthermore, no attempt was made to describe the scene of the accident. With such scanty pieces of evidence it is quite impossible for this court to attribute liability to any of the defendants, or their respective drivers, despite the fact that the ownership of the motor vehicles is admitted in the defence as is the fact that the accident did occur. Save for the abstract and the death certificate, which confirm that the deceased may have died at the scene, the evidence tendered does prove that the deceased died as a result of the defendants' negligence.

Liability can only be established on the basis of facts as tendered in evidence. As matters stand herein the evidence adduced to support the plaintiff's case is quite insufficient and her suit cannot succeed. That being the case, this court cannot therefore, make any findings on agreed issues Nos. 2, 3 and 5. As regards issue No. 1 the plaintiff's locus standi to institute these proceedings is proved by the grant of letters of administration produced in evidence. Regarding issue No. 4, the accident, having occurred on 29th February 1988 and the suit having been commenced on 28th February 1991 then the same is within the statutory period. The cause of death stated in the death certificate produced by the in evidence consistent with the entries recorded in the Occurrence Book No. 38 of 28th February 1998 as reproduced in the abstract report which also shows that the deceased was a passenger and died alongside others in the accident. Issue No. 6 is therefore decided in the affirmative.

Had this court been able to decide on liability and find in favour of the plaintiff, issue No. 7 (*as regards special damages*) would have been decided in the plaintiff's favour since the particulars of special damage represent reasonable funeral expenses in addition to the costs of obtaining a death certificate and the abstract. Regarding quantum I would have awarded a global figure of Kshs 100,000/= under the Fatal Accidents Act following the decision of the Court of Appeal in Kemfro Africa t/a Meru Express (1976) & Anor. vs. Lubia & Anor.[1982-88] 1KAR where the Court of Appeal held and I am bound to agree with its holding, that:

“In view of the provisions of section 2(5) of the Law Reform Act the right of claim where the cause of action survives the deceased shall be in addition to and not in derogation of rights conferred upon the estate under ... The Fatal Accidents Act”.

The deceased having died instantly there would be no award made in respect of pain and suffering. As regards the claim under the Fatal Accidents Act I would have considered the plaintiffs figure of Kshs 30,000/= being of the view that the same represents a reasonable monthly earnings of the deceased based on the exhibit Nos. 7(a)-(e), as read with exhibit 11, which clearly showed that the deceased had a healthy bank account with a loan facility in respect of which he made a repayment of Kshs 23,155.20. In this regard I am guided by decision of the Court of Appeal in Jacob Ahiga Maruja vs. Simon Obayo Kisumu Civil Appeal No. 167 of 2002 where it was held that a claimant need not strictly prove earnings by documentary evidence and that a reasonable figure given the occupation of the deceased is acceptable. The document tendered to support the plaintiffs' evidence that the deceased was an employee of the Nakuru County Council, earning a sum of Kshs 5,050, being a photocopy of form No. LB, 104, is of no evidential value. The certificate of service produced as exhibit 6 shows clearly that the deceased was terminated on 30th September 1974 and that while he worked with the Nakuru County Council he earned Kshs 400/= monthly. Documentary evidence was tendered showing that the deceased's annual earnings for milk deliveries in the year 1997 amounted to Kshs 16,128/=-, which would give an average monthly earning of Kshs 1,344/-. There can be no dispute that the deceased, who was 42 years old at the time of his demise was an industrious young man who, given his situation in life, would have lived to the prime age of 65 years as suggested by the plaintiff's advocates. A multiplier of 13 years would therefore be appropriate. The award under the Fatal Accidents Act, therefore, based on monthly earnings of Kshs 31,344/= would have been as follows:

Kshs 31,344 x 13 x $\frac{2}{3}$ = 3,259,776

Taking this figure and adding to it the sum of Kshs 100,000/- under the Law Reform Act and the specials of Kshs 12,850/-, I would have awarded a sum of Kshs 3,372,626 as damages. However, the plaintiff having failed to prove her case on the balance of probabilities this court has no option but to dismiss the suit. Each party shall bear its own costs of the suit.

Orders accordingly.

Dated, signed and delivered at Nakuru this 5th day of August, 2009

M. G. MUGO

JUDGE