



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU**

Civil Case 72 of 1999

MBENGE MATILU KIOKO.....1ST PLAINTIFF

MUTUNGA MATILU.....2ND PLAINTIFF

VERSUS

TELCOM KENYA LIMITED.....1ST DEFENDANT

POSTAL CORPORATION OF KENYA.....2ND DEFENDANT

COMMUNICATION COMMISSION OF KENYA.....3RD DEFENDANT

JUDGMENT

The Plaintiffs in this case are the administrators of the estate of Aron Matilu (deceased). The defendants are:-

1. Telcom (K) Ltd
2. Communications Commission of Kenya and
3. Postal Co-orporation of Kenya.

The cause of action arose out of an accident involving motor vehicle KAH 358 F registered in the name of KPTC and driven by Francis Kimani Thairu working for KPTC Co-orporation in cause of his employment. And deceased's vehicle No. KTN 437 Datsun along Kamiti Road. The plaintiff blamed the KPTC driver the said Francis Kimani Thairu and particulars of negligence are set out in the plaint. The defence filed by first Defendant Telcom (K) Ltd stated that the motor vehicle KAH 358 F belonged to Kenya Posts and Telecommunication Corporation and that the accident occurred as pleaded in the plaint. However this defendant denies negligence and attributed the case of accident to the deceased. It was pleaded that this defendant shall rely on the doctrine of volenti non fit injuries. Otherwise there is general denial of the plaintiff's claim. The second defendant also filed a statement of Defence. It is pleaded that the Kenya Posts & Telecommunications is defunct and a preliminary point shall be raised before hearing. Otherwise it is a general denial to the plaintiff claim. The third Defendant statement of defence denies being rightful owner of vehicle KAH 353 F or that the driver above named was their employee. However it admits that it was the successor of defunct Kenya Posts & Telecommunications and denies that it is liable to pay liabilities which were subsisting before the dissolution of the said corporation. The evidence shows that there is a certificate Exhibit to which shows motor vehicle KAH 358 F as at 15/5/98 was owned by Kenya Posts and Telecommunications Co-orporation. There is an exhibited Police Abstract

showing that an accident occurred on 15/5/98 and that Aron Malilu is described as deceased. And a death certificate Exhibit 1 shows the cause of death was “death injury due to motor vehicle accident”. The death occurred on the same date of the accident. PW1 the widow of the deceased gave evidence. She was not present when the accident occurred but was informed of the accident after the event. She traveled to the scene she found her husband’s vehicle by roadside. Her husband was still in the vehicle. She saw the vehicle KAH 358F in the middle of the road blocking traffic. Some people came to help and got him out of the vehicle and the body was taken to the mortuary. She testified that she incurred expenses. However she has pleaded only Shs.10,000/= funeral expenses. Her evidence also shows that her husband was working with prison service and had attained the grade of Senior Sergeant earning Shs.10,095/= per month out of which he was giving her Shs.7000/= for household expenses. Exhibit 3 (payslip) shows that his total earnings was 11,135/= and after deductions Net pay was Shs.6422.60. It cannot therefore be true that he released to his wife Shs.7000/= household expenses. He must have spent some money on himself before giving his wife household money. I will use the formula of 1/3 to himself and 2/3 for his family. The two thirds of the net pay amounts to Shs.4281/= per month. The widow said that her husband was involved in other income earning activities but there is no evidence of what activities or how much income was earned. The evidence of PW2 who testified that he knew the deceased on 15/9/1998 he was at Kamiti corner standing at the stage. He saw the deceased drive passed the stage driving a vehicle KTN 437. He was hit by another vehicle from Kahawa West KAH 358 F which was traveling fast on a small hill. It was not easy to see in front but the driver was overtaking and he hit the deceased vehicle and his vehicle it came to rest in the middle of the road while that of deceased stopped by roadside. The vehicle of the Defendant was on the wrongside and was driving fast.

PW3 was the second plaintiff, a brother of deceased. He was not present when the accident occurred. He produced Exhibit 5 police Abstract and the certificate of ownership of defendant vehicle Exhibit 6. The case for 2nd and 3rd Defendant was presented by an Advocate. DW1 testified that he was an employee of 3rd Defendant as legal officer of the Corporation. He testified of how 3rd Defendant was established under Act of Parliament by Act 2 of 1998. Under legal notice the suit vehicle was vested in first Defendant in July 1999 and that this suit was instituted after effective date. At that time the vehicle was vested in first defendant. He stated that the suit was filed without compliance with provisions as to the time of suing the corporation. DW2 also testified but reiterated evidence of DW1. It is to be noted here that the 2nd and 3rd Defendants did not contest the issue of negligence. They only testified as to who was liable. The first Defendant gave evidence. The driver, Francis Kimani Thairu, was the one who was driving the vehicle KAH 358F. He admitted driving on Kamiti Road by a small shopping centre where there was a small corner and he could not see an oncoming vehicle KTN 437 which was a small vehicle. The driver of small vehicle was at high speed he hit the lorry on the driver’s side. It is to be noted here that this witness had already testified that because of a corner he could not see the oncoming vehicle therefore it was not true that he could see the small car speeding. The eye witness said the lorry was on the middle of road and the small car by roadside. It is more likely than not that the small car was hit by the lorry. This witness evidence is not reliable. This driver was charged in Traffic Case No. 1254/2002 at Kiambu. He was acquitted but a perusal of the Judgment shows that the evidence placed before the court at that time is quite different for example the accident occurred on 15/5/1999 not on 21/5/1998. Also the court was concerned by the delay caused in bringing the case before court. This influenced the court in coming to the decision to acquit the driver. It is to be noted that PW2 an independent witness did not give evidence at the Traffic case. He was not summoned and his evidence in this court was not controverted by the defendants.

I therefore find the evidence given on behalf of plaintiff supports the view that the driver of the Defendants vehicle was negligent. His evidence is that at that spot he could not see the oncoming vehicle. By his evidence he also confirms that he was traveling to Kiambu by Kamiti Road. The plaintiffs say they could not file suit against any one of the three defendants and therefore they opted to apply the provisions of Order 1 rule 7 Civil Procedure Rules for the court to decide which of them is liable. After considering the issue, I have noted that although the original registered owner of the vehicle was defunct KPCT Corporation and that when that happened, the assets and liabilities were distributed under provisions of law. The effective date was 1/7/1999 and the vehicle KAH 358F was vested in first Defendant. The accident which gave rise to this cause of action occurred on 15/5/1998 before the effective date. Demand letter was issued on 17/5/1999 to the then registered owner of the vehicle. The

notice therefore must have passed on to first Defendant together with other documents relating to that vehicle on effective date 1/7/1999 and did not abate but was saved by section 5 (4) of Communication Commission Act.

The other side of this issue is that the suit was filed out of time limited by the Act to 12 months. This defence was raised by the third defendant on defence and Preliminary Objection on the issue was raised, the plaintiff relied on decision by Court of Appeal the decision in the case of **Kiringari Farmers Co. Ltd Vs Mbugua KLR 476** cited by the Plaintiff's Counsel where the court said "The appellant cannot be allowed to rely upon the law of Limitation because it did not specifically plead it as required by order VI rule 4". Therefore this suit having been filed on 15/9/1999 the important dates are the date of service of intention to sue which was dated 17/5/1999 and the cause of action arose on 15/5/1998.

According to the record the issues of section 98 (a) and 98 (b) on issue of Notice of Intention to sue and suit being time barred were raised before the court by notice of motion dated 26/4/2001 as a Preliminary Objection but the court dismissed the same ordering that Notice of Intention having been given on 17/5/1999 it was valid. The learned Judge (late Hon Tuiyot) left the other issues that the suit was filed outside time prescribed and that this suit was not vested on third Defendant by legal Notice No. 156, Supplement No. 59 of 5/11/1999. It is not therefore correct to submit as the plaintiff now submits that the issue of limitation was not raised. It is clearly pleaded in the third Defendant Defence paragraph 7 thereof. I do not find the decision of court of Appeal then relevant to this case. It is clear the notice was issued on 17/5/1999 but the suit was not filed until 15/9/1999. Outside the 12 months next after the day the negligence was committed giving rise to the cause of action. The court has perused the authority cited by 2nd and 3rd Defendant – **Joel Kiprono Langat vs K.P. & T Corporation 1999 LLR 1015 CAK** and has no hesitation in making a finding that although the notice may have been served as submitted the action was not filed within the prescribed time. The important date is when the accident occurred. Infact by the time the notice was issued on 17/5/1999 twelve months had expired and it does not matter that law applicable was or was not to operate retrospectively. Therefore as the first Defendant inherited the vehicle KAH 358F together with its liabilities the suit was its liability but it was filed after the expiration of time prescribed.

It is my finding that the suit is time barred against all the defendants and the same is for dismissal. For the purposes of record however, I am obliged to assess proposed quantum which I do as follows:-

The death occurred instantly and only nominal award can be made.

I have awarded Shs. 5000/- on this head.

On the item of loss of expectation of life I would award Shs.100,000/=.

Regarding the claim for lost of years the deceased aged 34 years. His net salary as shown was about Shs.6,422.60 out of which he gave to his wife 2/3 (4,281/=) for up keep of family. The figure of 19 years multiplier is on the high side, I would allow for 15 years. Therefore the assessment is as follows:-

$4,281/= \times 12 \times 15 = 770,580/=$

Regarding special damages only Shs.10,000/= is pleaded for funeral expenses. There is the facts of life that the body must be buried and transported to the place of burial and other customs in accordance with African way of life must be complied with. I would award Shs.10,000/= whether there is receipt or not.

The total award would have been then Shs.885,580/=

As it is, this suit is found incompetent for being time barred contrary to law. No order is made as to costs to the estate of deceased. I find oppressive to order costs in favour of the Corporations against a poor widow who has lost her case because her legal advices failed to comply with the law.

It is so ordered.

Dated this 18th of January, 2008.

J. N. KHAMINWA

JUDGE

Khaminwa – Judge

Njue- Clerk

Mr. Kathungu HB.

Judgment read in open court.

J. N. KHAMINWA

JUDGE