



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 194 of 2005

LORNA AMIMO.....PLAINTIFF

VERSUS

AKAMBA PUBLIC ROAD SERVICE

PAUL NGAMAU MWANGI.....DEFENDANT

JUDGMENT

The Plaintiff moved to this Court vide a plaint dated 21st February 2005 and filed on 22nd February 2005. The action is brought by the Plaintiff in her capacity as the widow and administratrix of the estate of the deceased Kisito Mutakha subject of these proceedings.

The action is brought on the Plaintiffs own behalf and on behalf of the other dependants of the deceased, in pursuance to the provisions of the Law Reform Act Cap.26 Laws of Kenya and the Fatal Accidents Act Cap.32 Laws of Kenya. The action is brought against the first defendant AKAMBA PUBLIC ROAD SERVICE as the first defendant, in their capacity as the owners of motor vehicle registration number KAL 068 C, and THE SECOND DEFENANT Paul Ngamau Mwangi, the second defendant, in his capacity as the employee, servants, agents and driver of the 1st defendant.

The nature of the complaint is that on the material date, the deceased who was the owner and driver of motor vehicle registration number KAL 922 w (Toyota Corolla), that the said deceased was lawfully driving the said vehicle along Nakuru – Nairobi Road near St. Mary's college, when the second defendant drove, managed and/or controlled motor vehicle registration number KAL 068C so negligently that he caused it to collide into the deceased's motor vehicle registration number KAL 922 W killing the deceased instantly.

The particulars of negligence are given in paragraph 5 of the plaint. As a result of the said negligence, the second defendant was charged in Nakuru Court vide Traffic case number 287/03 with the offence of causing death by dangerous driving.

In addition to the particulars of negligence enumerated in paragraph 5 the plaintiff also sought to rely on the doctrines of *Res ipsa loquitor* and vicarious liability in support of their case.

By reason of matters complained of the deceased who working as an engineer with Kenya Pipe line earning 108,365.00 suffered fatal injuries from which he died and lost his normal expectation of a happy and successful life. The Plaintiff and the children on the other hand cost their dependency on the deceased particulars pursuant to statute are set out in paragraph 10 of

the plaint.

In consequence of the matters stated above the Plaintiff sought judgment in terms of;

- (a) Special damages.
- (b) Damages for the benefit of the deceased dependants under the Fatal Accidents Act.
- (c) Damages for the benefit of the estate of the deceased under the Law Reform Act.
- (d) Costs of this suit.
- (e) Interests at Court rates on (a) (b) (c) and (d) above.
- (f) Any other relief that this court may deem fit to grant.

The defence herein is dated 4th March 2005 and filed the same date. The salient features of the same are that:-

- Denied that the Plaintiff had capacity to bring the action on behalf of the deceased and put the plaintiff to strict proof.
- Denied ownership of the accident motor vehicle and invited strict proof.
- Denied occurrence of the accident between motor vehicle registration number KAL 068 C and KAL 922 W on the alleged 25th July, 2003 and invited strict proof.
- In the alternative attributed the occurrence of the alleged accident if indeed it did occur then the same is attributable to the negligence of the driver of motor vehicle registration number KAC 922 w who is the deceased.
- The particulars of negligence attributed to the deceased are set out in paragraph 7 of the defence.
- Further reliance is placed on the Traffic Act, the rules and Regulations made there under and the provisions of the highway code.
- Denied the contents of paragraph 6,8,9 and 10 of the Plaint and put the plaintiff to strict proof.

In consequence thereof prayed for the suit to be dismissed with costs.

In her reply to defence the plaintiff denied that the accident complained of was caused or substantially contributed to by the deceased and denied that the negligent as alleged or at all went on to deny the particulars of negligence attributed to the deceased in paragraph 7(a) to (g) both inclusive of the defence and the defendants are put to strict proof.

The Plaintiff fielded two witnesses, P.W.1 the Plaintiff's sum total of the evidence is to the effect that:-

- She is wife of the deceased as per exhibit 1.
- The deceased left home after duty heading to one of the stations where he was told that there had been a break down. At around 10.00 p.m. he called, he was on his way home but never showed up. At 5.00 a.m. she was informed he had been involved in an accident and had died on the spot.

- She went to the scene and took the names of Kevin Mbugua and Maina as witnesses.
- The abstract exhibit 2 is proof that there was a collision between motor vehicle KAC 068C and KAL 922 W.
- The death certificate exhibit 3 is proof of death
- Exhibit 4, the grant is proof that she is an administrator of the deceased's estate and has locus standi to bring the action.
- They had 4 children between them enumerated in the plaint, born on the dates indicated against their names in the plaint whose birth certificates she produced as exhibit 5(a) (b) (c) and (d).
- The deceased was a good worker as he earned promotion in the course of his employment culminating in the grade and salary he was earning at the time of death as shown on exhibit 6 and 7. Her sole mission for coming to court is to seek compensation in the manner shown.

In cross examination she stated that she was not at the scene of the accident and that though there are 2 administrators the suit is solely brought in her name. The deceased's earnings both gross and net are as shown on his last pay slip.

P.W.2 Kevin Kibera Mbugua presented himself to the Court as an eye witness. The salient features of his evidence are:

- His place of residence was opposite Nakuru pastrol centre.
- He was coming from a church meeting between 10.00 -11.00 a.m.
- On reaching the road there were vehicles by passing each other going into the opposite direction. Him P.W.2 and colleague stopped on the side of the road to allow the vehicles to pass so that they can cross the road.
- He saw a trailer followed by an Akamba Bus coming from the Nairobi side while there was also vehicles from Nakuru side headed to Nairobi side.
- He saw the Akamba Bus overtake the trailer a head of it in the lane of traffic from Nakuru side. It over took when the road was not very clear.
- The small vehicle KAL 922 W which was coming from the opposite direction to the Akamba, tried to swerve to its left, to avoid the collusion but the bus was too fast and the two collided killing the driver of the small vehicle instantly.

According to him he blames the bus driver for the accident because, the bus driver was driving too fast, and over took the trailer a head of it, when the road, was not very clear.

- Maintained that the bus was not on its side as at the time of the accident.

When cross-examined the responses PW.2 put forward are that:

- That view was brought because there was light from the vehicles on both sides. There was also a bright moon light.
- He was about to cross and was standing 10-15 meters away from the point of impact.
- The accident took a matter of seconds.

- He could not see the Akamba bus clearly before pulling out as there was a vehicle in front of it.

- There were other vehicles behind the small vehicle but at a distance.

He saw the vehicle approach and then within seconds there was an impact.

- He maintained he was present, witnessed the accident but he was not invited by police to give a statement. It is his evidence that if the small car had overtaken it would have hit the lorry which did not stop.

- The next morning he came back to the scene and that is when he learned that the deceased was an employee of Kenya Pipeline.

He took upon himself to inform Kenya Pipe Line who in turn took his number and called him to come to court and give evidence.

He confirmed that he witnessed the accident.

The defence fielded one witness. D.W.1 whose salient features of his evidence are that:-

He is a bus conductor with Akamba Bus services and on the material day he was in the bus registration number KAL 068 C heading to Kisumu. On reaching St. Mary's college, there was a small car trying to overtake another small car and in the process came into the lane of the on going bus. The bus driver tried to avoid the accident but since the small car was speeding the two collided.

He was seated on the left side of the driver next to the windscreen and so he could see clearly.

To him it is the Toyota which is responsible for the accident because it was trying to overtake.

He agrees that there was a trailer in front of them but denied that the bus was trying to overtake it.

DW1,s responses to cross-examination are as follows:-

- He was seated on the left of his driver at the front.

- He cannot tell the speed at which the vehicle was going.

- He saw the small car overtaking

- After the impact the bus went off to the left and landed in a ditch.

- Agreed the small car did not hit the tractor.

- The small car upon impact, turned and faced the direction it had come from.

- He agrees their driver did not stop immediately after the impact.

- He is not aware that the driver was charged with the offence of causing death by dangerous driving but he could see in the subtract that his driver was the one blamed for the causation the accident.

- That the distance between the bus and the tractor was 10 meters and the small car started over taking after passing the trailer in between the trailer and the bus.

Both counsels filed written submissions.

The salient features of the plaintiffs counsel's submissions after reviewing the evidence on liability are that:-

- (1) The court was urged to find that P.W.2's evidence which was not challenged on cross-examination proves that the defendant was negligent.
- (2) The abstract indicates that the 2nd defendant was charged with the offence of causing death by dangerous driving.
- (3) Since D.W.1 who alleged that he was seated at the front testified that he could not tell the speed at which the vehicle was going, the court should take it that if he could not see the speedometer, then he was not in a position to have a view of the road ahead of him and so his evidence should be rejected.
- (4) P.W.2 on the other hand was outside and his evidence on what transpired should be believed.
- (5) The Court to reject the mere denials in the defendants defence as evidence exists that demonstrates that an accident occurred as alleged, that the plaintiff has a letter of administration, that the defendant caused the accident and that there was no negligence on the part of the deceased.
- (6) The evidence confirms that during the accident the defendants driver went out of his lane into the deceased's lane while overtaking, when it was not safe, to overtake, and caused the accident. The defendant is therefore 100% to blame for the accident.
- (7) On quantum Counsel suggested a multiplier of 26 years giving rise to 22,539.920, kshs 60,000/= for pain and suffering before death, 100,000.00 for loss of expectation of life, and 60,000/= for funeral expenses even if receipts were not produced.

The defence on the other hand stressed the following points in their written submissions.

- (1) That the court was presented with two versions as to how the accident occurred and the court is urged to note that the defence witness should be taken as the most convincing witness as to how the accident occurred.
- (2) That D.W.1 testified how the deceased moved to overtake a trailer which was moving in the same direction as the deceased.
- (3) That the deceased misjudged the distance that he needed to overtake the trailer in the wake of the defendants bus and suddenly moved into the defendants by path and despite all efforts on the part of the bus driver, to avoid the accident, he collided with the defendant's vehicle.
- (4) The defendant's driver who would have given first hand information died before the trial.
- (5) The court is urged to find that the plaintiff's evidence through P.W.2 is meant to mislead the court into finding blame on to the defendant.
- (ii) It is their stand that P.W.2S evidence for him to have been standing by the road side at 11.00 p.m. and watch the accident happen should not be believed more so when he does not appear in police records as an eye witness. This makes one wonder as from where he had surfaced to come and conveniently give evidence on behalf of the plaintiff.
- (iii) It is their stand that P.W.2 is a doctored witness who should not be believed once his

evidence is discarded, the court, has not alternative but to go by the only evidence of D.W.1 make findings that the deceased is the author of his own misfortune and for this reason no damages are awardable to him.

On quantum counsel submitted that should the court rule otherwise on liability then it should take Kshs 39,315.25 as the multiplier and a multiplicand and of 10 years. Pain and suffering should attract only 10,000.00 as it is on record that the deceased died instantly. Loss of expectation of life should attract Kshs 70,000.00. No award should be made for funeral expenses as these were not specifically pleaded, particularized and proved.

A total of 16 issues were agreed between the parties for purposes of guiding this court in the assessment of liability and damages.

Issues number 1 and 2 relate to locus standi of the plaintiff to file this action for her own benefit as well as other dependants. Locus standi to file the action is proved by production of the grant exhibit 4 issued on 14th January, 2005 where as the action is dated 21.2.2005 and filed on 22.2.05. The suit is therefore competent.

Issue No.3 and 4 relate to the ownership of KAL 068 C and the employment of 2nd defendant by the first defendant. Though no documentary proof was exhibited the evidence of D.W.1. that the bus KAL 068C belonged to the first defendant and it was being driven by the second defendant on the material date while him D.W.1 was the conductor, the court is therefore satisfied that the defence denial of the ownership of the said bus registration number KAC 068 C and the 2nd defendants employment by the 1st defendant has been ousted by the defence own evidence. The court makes findings that the accident bus belonged to the 1st defendant and was at the material time of the accident being driven by the 2nd defendant who unfortunately had passed on as at the time of trial. Himind was the driver of the said bus as an employee of the 1st defendant.

Issue number 5 relates to the ownership of motor vehicle KAC 922 W(Toyota Corolla). This has been answered by the evidence of P.W.1 that it belonged to the deceased and that him deceased was driving the same on the date he met his death.

Issues no. 6, 7, 8, 9 and 10 relate to the collision between the two vehicles and blameworthiness, or causation of the said accident. The evidence on the record from PW 2 and DW 1 as well as the police abstract confirm or prove that a collision occurred between motor vehicle bus Reg. No. KAL 068 C belonging to the 1st defendant and motor vehicle KAL 922 W belonging to the deceased. PW 1 was not at the scene. However even if PW 1's evidence were to be ignored as suggested by the defence, DW's evidence is sufficient to confirm that such a collision occurred.

As for blame worthiness for the said collision, it is on record that each side has blamed the other for the causation of the accident. The particulars of negligence relied upon are set out in the pleadings. Each side produced one eye witness. PW 2's version is that the bus was to blame because it set out to overtake a trailer ahead of the bus in the wake of the on coming small vehicle and caused the collision. Where as the version of DW 1 on behalf of the defence is that the small vehicle is the one which overtook another small vehicle ahead of it came into the path of the bus and caused the collision. Where as the defence submissions suggests that the small vehicle was trying to overtake the trailer when it caused the collision.

Assistance was sought from the police abstract exhibit 2 which indicated that the driver had been charged with the offence of causing death by dangerous driving. This however does not assist much as it is not known as to whether the prosecution was carried through or not and if carried through what the end result was. For this reason the content of exhibit 1 does not assist much. The court has to rely on the evidence of PW 2 and DW 1.

PW 2 said he was standing on the side of the road waiting to cross the road at the said time. He said he was coming from a church meeting. The defence lawyer doubted this. It is however to be noted that at no time was it put to PW 2 that people are not permitted to walk at that hour more so when PW 2 said that he was coming from a church meeting.

Issue was also raised about his failure to volunteer information to police. He PW 2 explained that he was not approached to give a statement but he gave out his contact and that is why he was traced to give evidence for the plaintiff.

It is on record that there is no suggestion that he PW 2 had access to police records, had access to DW 1 in order to relay the action to him in order for him to refine it for the court drama.

There is nothing to suggest that him PW 2 was approached to give a statement to police but declined to do so. In the absence of that the court, has no alternative but to accept the explanation given that he was not approached by police to volunteer a statement. More so when there is no evidence from the police to show what efforts they made to get evidence.

The version of PW2 has to be compared with that of DW 1. Him DW1 said that the bus was behind the trailer and the deceased started overtaking when the bus was only 10 meters from the trailer. If indeed the small vehicle had passed the trailer then there was nothing else to overtake. It therefore follows that the version of the defence is not plausible. That of PW 2 is sound and more realistic.

There is no thing to show that PW 2 had pecuniary interest in the matter as this was not put to him in cross-examination. The court is therefore satisfied that PW 2's version is the correct version. The accident was caused by the bus driver overtaking the trailer in the wake of the oncoming small car. It is on record that the deceased tried to swerve off the road but it was too late and the collision occurred. The court finds no blame worthiness on the deceased. The defendant has to take all the blame as the deceased did not anticipate the bus to pull out suddenly. There will therefore be no apportionment of liability between the defence and the deceased. The defence will shoulder all the blame at 100%.

On quantum the court was referred to numerous authorities. The case of **RABECCAS MWANGI VERSUS EASTERN SERVICES LTD. AND CHRISTOPHER NGARA KAUKO NAIROBI HCCC NO. 2750 OF 1998**. The deceased was aged 36 years left a wife and 3 children with a salary of 10,620/= per month as a shop manager. The court awarded Kshs.100,000.00 under the Law Reform, 50,000.00 for pain and suffering, special damages of Kshs.50,000.00 and under the Fatal Accidents Act Kshs.10,620 x 12 x 19 x 1/3 to the tune of Kshs.1,614, 240.00.

The case of **JOYCE NYAMBURA KABERA VERSUS SAM STEEL LTD NAIROBI HCCC NO. 1320 OF 1996** in which the deceased aged 36 years was earning 7,864.00 from the salary and the rest from business making a total of kshs.12,000.00. He died shortly on arrival at the hospital. The court chose a multiplier of 18 years to a ratio of 2/3 and a salary of Kshs.7,900.00 giving a resultant award of Kshs.1,137, 600.00 for loss of dependency, funeral expenses 5,000.00, pain and suffering Kshs.20,000.00 and police abstract 100.00. Total Kshs.1,046,430.00.

The case of **MARIA KOKONYA AND ANOTHER VERSUS BOB – INDUSTRIES AND ANOTHER, NAIROBI HCCC NO. 6089 OF 1993**. On liability, the same was based on conviction which is not the case herein. On quantum the court used a salary of Kshs.10, 986.00 using a multiplicand of 18 years working out to Ksh.1,586,984.00 funeral expenses Kshs.25,000.00, less 10% contribution.

The case of **CONSTANCE KANYOGOTA NGUGI VERSUS COAST BUS CO. LTD. AND**

ANOTHER NAIROBI HCCC NO. 3344 OF 1994 where the deceased was aged 51 years, a business man earning Kshs.26 – 30,000.00 liability was at 100% against the defendant. Quantum worked out as Kshs.100,00.00 under the Law Reform Act, loss of dependency under the Fatal Accidents Act worked out as Kshs.14 x 12 x 14,000 x 2/3 which comes to Kshs. 1,568,000.00 and special damages of Kshs.50,000.00.

Applying the foregoing awards to the facts herein it is clear that the first head to be assessed is the head of special damages. As submitted by the defence counsel, although death is not disputed and definitely funeral expenses were incurred, the court cannot divorce itself from the requirements of the law that this head of claim should be specifically pleaded, particularized and proved. Indeed it has been pleaded as a specific head. It has not however been particularized. Neither has it been proved by production of receipts. This court is aware that in the case of **JOYCE NYAMBURA KABERA VERSUS SAM STEEL LTD.** (supra) my sister Judge Justice K. H. Rawal made observation that no evidence had been adduced on funeral expenses but since there was no dispute that these had been incurred went ahead to award a nominal figure of Kshs.5,000.00. The facts presented to that court on funeral expenses are not explicit in the judgment. All the same this court though not bound by that decision finds that the court had a right to exercise that discretion to award the same. This court, also observes that it has discretion to award the same if facts warranting the exercise of such discretion are demonstrated before it.

It is to be noted that PW 1 never mentioned funeral expenses. The assumption is that they are not claimable or were met by the employer, friends and relatives. On this account this court finds no basis upon which to exercise its discretion and award the same.

On the award of damages for loss of expectation of life under the law Reform Act Cap 26, Laws of Kenya, this court, has judicial notice that the courts normally award a conventional figure. The plaintiffs counsel has suggested 100,000.00. Where as the defence have suggested 70,000.00. This court has given due consideration to the two suggested figures and considered them in the light of the past awards in the cases cited, though these are just to be treated as mere guides, as well as the age of the deceased and the fact that his estate has suffered by virtue of his death. In this courts opinion an award of 100,000.00 under this head is not inordinately high.

As for damages under the Fatal Accidents Act Cap 32 Laws of Kenya. The court has judicial notice that the damages awardable under this head are two namely:-

- (a) For pain and suffering.
- (b) Loss of dependency.

Pain and suffering in the event of death is for the pain suffered before death. Herein death was instantaneous. That notwithstanding the deceased suffered pain before death. The plaintiffs counsel suggested 50,000/=. The defence 10,000.00. In this courts opinion Kshs.35,000.00 would be adequate compensation.

As for loss of dependency, the mode of working out is based on the choice of a multiplier, being the number of years lost – years of gainful earnings.

- (ii) Choice of a multiplicand that is the income lost.
- (iii) The dependency ratio – that is the percentage of the deceased's income spent on his dependants.
- (iv) Identification of dependants.

(v) Sharing of the resultant proceeds among dependants.

Herein the number of dependants is pleaded and it is indicated as the widow and her children. Marriage proved by affidavit exhibit 1 is not in dispute. The court can add its own of long cohabitation. The children's dependency is proved by production of birth certificate exhibit 5 and whose paternity is attributed to the deceased.

There is no dispute that the deceased was in gainful employment as shown by exhibit 6 (a) (b) as well as the pay slip exhibit 7. The death certificate exhibit 3 indicates he was aged 39 years. The presumption is that since he was in gainful employment, he would have retired at the age of 55 years for civil servants having been a civil servant. He therefore lost 16 years. Out of this figure the court has to consider death through natural causes and departure from the employment for greener pastures else where. In this court's opinion a choice of 13 as the number of lost years is not unreasonable.

As for choice of lost income the court is alive to the fact that what is to be taken into consideration is usually the gross income less statutory deductions. Any deductions made for the benefit of the deceased i.e. co-operative societies contributions pension schemes etc are for the benefit of the deceased and are usually not discounted.

Exhibit 7 the last pay slip shows compulsory deduction of tax of Kshs.25,916.00 other compulsory deductions would be N.H.I.F of Kshs.320.00 and NSSF Kshs.200.00 that would come to Kshs.26,436.00. This would be reduced from the gross figure of kshs.108,365.00 leaving a balance of Kshs.82,129.00 to be used as the multiplicand,.

The ratio to be applied is one that this court has judicial notice of, namely that where a deceased supports a family the presumption is that he takes 1/3rd of his income and spends it on himself, while he spares 2/3rd of it for his family. Both counsels, opted for the 2/3rd ratio and the court has no quarrel with that. Loss of dependency will work out as Kshs.82,129.00 x 12 x 13 x 2/3rd which comes to Kshs.8,541,416.00.

Judgement is therefore entered for the plaintiff as against the defendant on the following terms:

- (1)** Liability in favour of the plaintiff as against the defendant at 100%.
- (2)** Special damages disallowed.
- (3)** General damages:-
 - (a)** Under the Law Reform Act Cap 26 Laws of Kenya for loss of expectation of life Kshs.100,000.00.
 - (b)** Under the Fatal Accidents Act Cap 32 Laws of Kenya.
 - (i)** For pain and suffering before death Kshs.35,000.00.
 - (ii)** Loss of dependency of Kshs.8,541,416.00.
- (4)** Interest at court rates on general damages from the date of judgment till payment in full.

Apportionment

Grand total Kshs.8,676,416.00

- A. (1)** Loran Amino widow Kshs.4,000,000.00.

- (2) Ian Anduvale – son born in 1992 - Kshs.1,332,854.00.
- (3) Ikeluyenji – son born in 1994 - Kshs.1,132,854.00
- (4) Idenivor Savayi – son born on 10th December 1998 - Kshs.1,132,854.0.
- (5) Ida Amakove – daughter born on 13th August 2002 - Kshs.1,132,854.00.

B. The share of the widow to be paid out to her forthwith.

C. The share of the minor children to be invested in separate interest generating accounts in any sound financial institution in the joint names of the mother Lorna Amino and the Deputy Registrar of this court.

(ii) Interest accrued on those accounts to be withdrawn from time to time as need arises and the same to be applied towards the general maintenance and educational needs of the minors under the authority and order of the Deputy Registrar of this court.

D. The main amount so invested not to be withdrawn or any part of it except with the authority of the court upon good cause being shown. Which good cause should be for and in the interest of the particular beneficiaries.

E. The said money invested for the minors, to be paid out to the minors when they attain the age of majority

F. There will be liberty to apply.

DATED, READ AND DELIVERED AT NARIOBI THIS 23ND DAY OF MAY 2008.

R. N. NAMBUYE

JUDGE