



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

**Civil Case 1081 of 2001**

**PHILLIP J. WISHAMINYA (Suing on Behalf of the Estate of Peter James  
Wishaminya, deceased).....PLAINTIFF**

**Versus**

**UNITED DISABLED PERSONS OF KENYA.....1<sup>ST</sup> DEFENDANT**

**CHARLES MATHENGE NJOGU.....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

The Plaintiff filed this suit praying for judgment against the Defendants jointly and/or severally for:

- “(a) General damages for pain and suffering;***
- (b) Damages for lost years;***
- (c) Loss of expectation of life;***
- (d) Special damages in the – sum of Kshs.183,115.15;***
- (e) Costs of this suit;***
- (f) Interest on (a), (b), (c), (d) and (e) above.”***

There is no dispute that the Plaintiff is the father of the deceased Peter James Wishaminya who died at Kenyatta National Hospital on 2<sup>nd</sup> august 1998 and that he is lawfully entitled to bring this suit having obtained a grant of Letters of Administration to the estate of his deceased son as was stated in H.C.C.C. NO.512 of 1999 in this court.

In his plaint in this suit therefore, the Plaintiff says that at all material times relevant to this suit, the 1<sup>st</sup> Defendant was the registered owner of motor vehicle registration number KAJ 105R and the 2<sup>nd</sup> Defendant was the driver thereof. That was on the 2<sup>nd</sup> day of August 1998 at about 5.00 p.m. when the deceased was lawfully driving motor vehicle registration number KJX 268 along Ngong Road near Mbagathi River in Nairobi when the 2<sup>nd</sup> Defendant, so negligently and carelessly drove, managed and controlled motor vehicle registration number KAJ 105R that it hit motor vehicle registration number KJX

268 head on. The Plaintiff blames the Defendants for the accident in that whereas the 2<sup>nd</sup> Defendant was negligent the 1<sup>st</sup> defendant is vicariously liable for the acts of the 2<sup>nd</sup> Defendant because the 2<sup>nd</sup> Defendant was the 1<sup>st</sup> Defendant's driver; servant and or agent.

The Plaintiff gave in paragraph 5 particulars of the negligence of the 2<sup>nd</sup> Defendant as:

- (a) *Driving at an excessive or high speed in the circumstances.***
- (b) *Suddenly swerving to the lawful side of the deceased's motor vehicle to avoid a pothole on the said road.***
- (c) *Driving on the wrong side of the road and on the side/lane of the deceased's motor vehicle.***
- (d) *Failing to keep any or proper look out.***
- (e) *Failing to swerve, brake, stop, slow down or in any other way control the said vehicle so as to avoid the accident.***
- (f) *Driving carelessly and recklessly.***

In paragraph 6 of the plaint the Plaintiff states that as a result of the accident, the deceased sustained very sever injuries, he was rushed to Kenyatta National Hospital where he was admitted but succumbed to the injuries on 3<sup>rd</sup> August 1998 at about 2.15 a.m.

In paragraph 7 the Plaintiff points out that the deceased was a young, healthy, energetic and intelligent man of nineteen (19) years who was trained as a pilot with a Private Pilots Licence from the Directorate of Civil Aviation, Kenya, and was intending to further his career to be a Commercial Pilot as he had enrolled at 43 Air School for training. He unfortunately met his death before he accomplished his goal and his estate has suffered great loss and damages and claims the same from the Defendants. The Plaintiff proceeds to give particulars of his claim itemised as in the prayer in paragraph 10.

Paragraph 8 of the plaint states there is no other suit pending between the Plaintiff and the Defendants, while paragraph 9 states that despite demand and notice of intention to sue having been made, the Defendants have failed to admit liability hence this suit.

The Defendants filed a joint defence admitting paragraphs 2, 3 and 4 of the plaint and stating that they had no knowledge of and did deny the averments in paragraphs 1, 5, 6, 7 and 9 of the plaint. They said Paragraphs 2 and 3 of the plaint merely describe the defendants while paragraph 4 states that the 1<sup>st</sup> Defendant was the registered owner of motor vehicle KAJ 105R and that the 2<sup>nd</sup> Defendant was the driver of that motor vehicle.

By the time this suit was filed on 2<sup>nd</sup> July 2001 and the defence filed on 21<sup>st</sup> July 2001, the Plaintiff in this suit had filed another suit, H.C.C.C. No.512 of 1999 against KENYATTA NATIONAL HOSPITAL BOARD arising out of the manner in which that Hospital handled the deceased from the time the deceased was received by the Hospital for treatment upto to the time the deceased died at that Hospital. That case was heard and judgment delivered sometime in the year 2004 against Kenyatta National Hospital Board which was ordered to pay the Plaintiff a total sum of Kshs.8,853,500/= for negligence to the deceased. That sum included: -

- (i) Special Damages - Kshs. 41,000/=**
- (ii) Pain and suffering - Kshs. 50,000/=**
- (iii) Lost years - Kshs. 100,000/=**

**(iv) Loss of expectation of life**

**- Kshs. 8,662,500/=**

Parties in the suit before me, who include the Plaintiff concerned in both suits, have told me, verbally and through their respective written and filed submissions that after that judgment was entered, there followed a consent or compromise between the parties (apparently outside and without participation of court) whereby that judgment was settled by payment of Kshs.6,846,525/= only.

However, as concerns the instant suit before me, one thing seems to have emerged from that judgment in H.C.C.C. 512 of 1999. It is that the parties in the instant suit did not thereafter see the need to call witnesses to testify in this suit. As a result Mr. Keyonzo, counsel for the Plaintiff and M/s Gathambi from the law firm of M/s Malonza & Company Advocates, acting for the Defendants, appeared before me on 30<sup>th</sup> July 2008, when this case was for the first time listed before me, and they recorded a consent to the effect that they file written submissions for the court to proceed to write and deliver judgment in this suit on the basis of the pleadings and the said written submissions. They subsequently complied with that consent order and this is the judgment intended.

It means that notwithstanding the issues raised in pleadings in this suit, the parties herein on the basis of the judgment in HCCC No.512 of 1999 do agree that the deceased in the instant suit was involved in a motor traffic accident on 2<sup>nd</sup> August 1998 along Ngong Road Nairobi. Good Samaritans took him to Kenyatta National Hospital where he was subsequently admitted and later died from the accident injuries because the hospital failed to administer any form of treatment thereby failing in its duty of care to a patient – the deceased – who was taken to the hospital already bleeding and had broken limbs – and bruises externally and internally.

Focusing upon the injuries therefore Dr. A. O. Kirasi Olumbe had identified the cause of death of the deceased as chest and lower limb fractures resulting from motor vehicle accident. In his Autopsy Report, Dr. Olumbe said he found simple fracture of the distal aspect of the femur on the right side of the deceased. He found another simple fracture of the distal aspect of the femur on the left. Both lungs were markedly increased in weight with severe contusion of both lower lobes. The cut surfaces showed marked congestion. Blood stained frothy fluid could be expressed from the surfaces. The Doctor's significant anatomical findings were:-

1. Bilateral simple fractures of both femur.
2. Contusion of lungs.
3. Bruise on the right side of chest.
4. Contusion of thoracic vertebra.

He concluded that the cause of death was “chest and lower limb injuries due to motor vehicle accident. He said: -

*“Death in this man is due to chest and lower limb injuries sustained in a motor vehicle accident. The most significant injuries were due to the lungs where there were contusions, and bilateral fractures of both femur (thigh bone).”*

The deceased having been taken to Kenyatta National Hospital with those injuries, the question before the court in H.C.C.C. No.512 of 1999 was whether Kenyatta National Hospital owed the deceased person a duty of care with respect to those injuries. That is whether the hospital took all reasonable steps to ensure that the deceased, who was in the casualty wing, received emergency care – managing bleeding and broken limbs and administering necessary treatment. That was a question of medical negligence between the plaintiff or the deceased in that suit and the Defendant in that suit.

The defendants in this suit before me were not party in H.C.C.C No.512 of 1999 but are now saying that the plaintiff having got the judgment in that case, there is nothing more for the same plaintiff to claim

from the defendants in this suit. The plaintiff does not agree as he insists that there is something remaining which must be recovered from the Defendants through this suit.

Through their respective written submissions therefore, the message now is that the parties in this suit want me determine four agreed issues as follows: -

**“(i) Did the deceased die as a result of the injuries sustained in road traffic accident of 2<sup>nd</sup> August 1998?”**

**(ii) Did the deceased die as a result of negligence as was determined against the defendant in H.C.C. No.512 of 1999?**

**(iii) In view of the judgment and settlement by consent of the parties in H.C.C. No.512 of 1999 is the defendant herein liable to pay damages to the plaintiff in this suit? If so, to what extent?**

**(iv) Who should pay for costs of this suit?”**

M/s Malonza and Company, Advocates for the Defendants, have, in their written submissions handled issues (i) and (ii) together stating that in light of the final judgment in H.C.C.C. No.512 of 1999 and more specifically to paragraphs (4) and (5) of the plaint thereto the deceased died as a result of negligence of the defendant therein in failure to accord necessary medical care.

The issue of negligence leading to death of the deceased was therefore fully and finally determined in H.C.C.C. No.512 of 1999 against Kenyatta National Hospital Board and cannot form the basis of the instant suit.

In any event the plaintiff cannot be compensated for the death twice as damages can only be awarded once. This suit is therefore an abuse of the court process in which the plaintiff seeks unjust enrichment.

Concerning issue (iii) the learned counsel uses the word “defendant” instead of the word “defendants” without explanation to the court as pleadings are to the effect that there are two defendants in this suit before me. In any case, counsel, states that the defendant herein is not liable to damages to the plaintiff. The remedies the plaintiff seeks were granted in H.C.C.C. No.512 of 1999 and the same damages as sought herein paid in satisfaction of the judgment thereto. He says that if the plaintiff had any cause of action he ought to have joined the defendant herein as a party in H.C.C.C. No.512 of 1999. The plaintiff cannot purport to server negligence against the defendants in both suits with a view to obtaining separate judgments for the same death in negligence.

With regard to issue (iv), the Defendant’s counsel submits that the plaintiff should bear costs of this suit having filed the same with knowledge that he had been compensated in H.C.C.C. No.512 of 1999. In the end, the Defendant’s counsel submit that this suit be dismissed.

I said earlier that the plaintiff’s counsel does not agree with what the Defendant’s counsel are saying. On issue (i) therefore, the Plaintiff’s counsel says that the pathologist report is clear; that the deceased died due to injuries sustained in the road traffic accident. Counsel therefore submits that the answer to issue (i) must be in the affirmative.

On issue (ii) the plaintiff’s counsel states that the judgment in H.C.C.C 512 of 1999 was that no reasonable medical care was given to the deceased and therefore in that respect the hospital was negligent. He says that the Judge was referring to lack of medical care as an aspect of negligence, and that was negligence as between the hospital and the deceased. In that, the Judge was right as that was the kind of negligence in issue.

Concerning issue (iii) the plaintiff’s counsel submitted that the finding in H.C.C.C No.512 of 1999 that the hospital was negligent in the management of the deceased did not and does not mean the defendants in this suit were not Negligent as their negligence also led to the death of the deceased. Counsel stated:

*“In fact in our view the proximate cause of the Deceased death were in the injuries occasioned to the Deceased in the road traffic accident for which the defendants are responsible: In Law, both the defendants in this case and the defendants in HCCC No.512 of 1999 are Tortfeasors but not joint Tortfeasors but several. It was the injuries occasioned by the defendants on the Deceased that made the deceased go to the hospital to seek treatment. However it was the hospital’s conduct in not treating the deceased that led to his death. Both are responsible.”*

The learned counsel referred to Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 45 Paragraph 1235 where the law on several tortfeasors is stated as follows: -

***“If each of several persons not acting in concert commits a tort against another person substantially contemporaneous and causing the same or indivisible damage, each of several tortfeasor is liable for the whole damage. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortious act assuming the damage proximately caused by each tort to be distinct. Thus if the second tortfeasor’s act caused no further damage or merely duplicated damage caused by the first tort, the second tort-feasor will not be liable but if his act aggravated merely the damage caused by the first tort, each tort-feasor will be liable only in respect of that part of the damage which his tort caused assuming that it is possible to separate and quantify the aggravation of the damage.”***

Among the cases cited in the passage, in the book, the plaintiff’s counsel enclosed copies of the following: *Durk vs Mayeu* (1892) 2 QB, 511; *Bank View Mill Ltd. & Others vs Nelson Corp. and Fryer & Co. (Nelson), Ltd.* (1942) 2 AU ER 477.

The learned counsel therefore concluded that in their view, the tortuous act of the defendants in this suit is quite different from the tortuous act of the defendant in H.C.C.C No.512 of 1999. The defendant in HCCC 512 of 1999 never gave treatment for the deceased which led to his death but the defendants in this suit caused the accident and the injuries to the deceased. They should be held liable for their separate distinct torts.

From all those submissions and in light of pleadings in this suit, my concluding remarks are that enough has already been said and adding more may not add any value to what is already there. But let me conclude the discussion.

Start with issue (ii). That issue was determined in H.C.C.C No.512 of 1999 and the relevant judgment remains intact. Properly in law, this court ought not say anything different from what the court said in that suit on that issue. The answer there is therefore in the affirmative.

As to issue (i) the deceased was rushed to Kenyatta National Hospital by good Samaritans because the deceased had sustained injuries from a motor traffic accident involving the deceased’s motor vehicle and the motor vehicle of the 1<sup>st</sup> Defendant driven by the 2<sup>nd</sup> Defendant. Had that accident not taken place, no good Samaritan would have rushed the deceased to any hospital, leave alone Kenyatta National Hospital. On the other hand, had the deceased been abandoned at the scene or put anywhere else without medical care, the deceased would still have died from the accident injuries.

But whether the deceased would have died or not the fact would have remained that the injuries he sustained were from the aforesaid motor traffic accident for which, of necessity, the Defendants would still have remained accused of being responsible. Such was the pointer in the evidence of Dr. Kirasi Olumbe referred to earlier. Being a postmortem doctor or pathologist, that doctor had to talk about the “cause of death” at the end. Before he reached that end, Dr. Karasi Olumbe, like any other doctor, first talked of the injuries he found on and in the body of the deceased, which injuries he clearly stated had been caused by a motor vehicle accident. That is the truth and negligence by Kenyatta National Hospital as found in HCCC No.512 of 1999 did not obliterate that truth. Judgment in that case did not say Kenyatta National Hospital was involved in the motor traffic or motor vehicle accident or that the hospital caused the motor vehicle accident injuries the deceased had sustained. As it was found in that suit, Kenyatta National Hospital owed the deceased a duty of care with respect to the sustained injuries only.

That was a duty of care with respect to the medical treatment and medical care of the injuries the deceased was taken to that hospital for. He was taken to that hospital for the purpose of getting the said medical treatment and medical care and the hospital failed to give that medical treatment and medical care. That was why the hospital was found negligent.

The issue before that court was the issue of medical negligence and not the issue of motor traffic accident negligence which is the issue before this court. Although those two negligences are both involved in the death of the deceased, they are separate each with its own Tortfeasor separate and distinct from the other. In this matter, the two Tortfeasors were not joint Tortfeasors and I think the filing of HCCC No.512 of 1999 and HCCC No.1081 of 2001, separately, was proper and preferable. However the two suits having been separately filed ought to have been consolidated for hearing to avoid the kind of situation we now find ourselves in when dealing with HCCC No.1081 of 2001 – to-day.

I say so bearing in mind that in HCCC No.512 of 1999 my learned brother Lenaola J. in making his award, fully considered every prayer in the plaint before him, and he was perfectly entitled to do so in the circumstances, and proceeded to make full award on each prayer. That having happened, it becomes difficult to decide in the instant suit, HCCC No.1081 of 2001, the proper award to be granted to the plaintiff – against the defendants.

To my mind, the plaintiff appears to have got everything through HCCC No.512 of 1999 and to proceed to give him similar and separate awards in the instant suit would amount to giving him double compensation when he ought not get all that.

The Defendant's counsel have submitted that the plaintiff should be awarded nothing because the plaintiff got compensated in HCCC No.512 of 1999. The Plaintiff's counsel has submitted that since the judgment sum of Kshs.8,853,500/= in HCCC No.512 of 1999 was compromised to Kshs.6,846,525/=, the Defendants in the instant suit HCCC No.1081 of 2001 should pay the plaintiff the difference which is Kshs.2,006,975/=.

It appears to me what the plaintiff's counsel is saying is reasonable because it is also reasonable to think that had these two suits been consolidated for hearing before Lenaola J, the learned judge could have awarded the plaintiff the sum of Kshs.8,853,500/= against the defendants in both suits jointly and/or severally and in those circumstances the subsequent compromised figure of Kshs.6,846,525/= leading to a loss to the plaintiff of Kshs.2,006,975/= may not have been there.

In the circumstances of this case therefore, it is hereby ordered that the Defendants jointly and/or severally do pay the plaintiff the sum of Kshs.2,006,975/= general damages under prayer (a). I decline to make awards under prayers (b), (c) and (d).

Concerning costs of the suit, counsel for the Defendant submitted that the plaintiff should bear those costs because he filed this suit "with knowledge that he had been compensated in HCCC No.512 of 1999." Since this suit, HCCC No.1081 of 2001 was filed in the year 2001 and the judgment in HCCC (HCC) No.512 of 1999 which each party is relying upon indicates was delivered in the year 2004; I have no evidence to show that the plaintiff filed HCCC No.1081 of 2001 "with knowledge that he had been compensated in HCCC No.512 of 1999". In any case, I have said earlier that the filing of HCCC No.1081 of 2001 was proper and preferable.

Accordingly, the Defendants to pay costs of this suit jointly and/or severally, to the plaintiff. Interest be paid on the total sum due.

Delivered, dated and signed at Nairobi this 29<sup>th</sup> day of September of 2008.

J. M. KHAMONI

JUDGE