



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

Civil Case 4511 of 1989

SIMON MUTUKU MUSWII PLAINTIFF

VERSUS

MBUGUA MWANGI DEFENDANT

JUDGMENT

This case was heard by me ex-parte on 27th June, 2000. Thereafter the matter was adjourned for submissions. The Plaintiff's counsel failed to do so despite being summoned by the court. Eventually, the court gave up and after being transferred to various other divisions I decided to write this judgment to close the file of this unfortunate case.

The Plaintiff filed this suit on behalf of the estate of the deceased Mutuku Muswii and claims damages under Fatal Accidents Act and Law Reform (Miscellaneous Provisions Act.)

It is alleged that on or about 5th April, 1988 while the deceased was carrying on his duties as a sand harvester along Yangure River, Machakos District, the Defendant's driver negligently and carelessly reversed, managed and/or controlled motor vehicle registration No. KXH 750 and allowed and/or caused violently and fatally hit the deceased.

Particulars of negligence was mentioned, which were:

- a) **Failing to apply brakes sufficiently in time or at all.**
- b) **Failing to heed the presence of the deceased or at all reversing without any or any proper care and look out.**
- c) **Failing to see the deceased in sufficient time or at all to avoid hitting him.**
- d) **Failing to stop, swerve, brake and in any manner and/or prevent the said motor vehicle from colliding with the deceased.**
- e) **Driving in a manner that was reckless and dangerous in the circumstances.**
- f) **In so far as may be necessary, the Plaintiff shall rely on the doctrine of RES IPSA LOQUITUR.**

In proof of the claims made in the plaint, two witnesses testified. PW.1 Simon Mutuku Muswii is brother

to the deceased. From his evidence it was evident that he was not present when the alleged accident occurred.

He testified that the deceased was working as a sand harvester earning Shs.15,000 per month. Even though, the plaint mentions only the deceased's parents as dependants of the deceased, he stated in his evidence that his brothers who were students also were depending on the deceased. The ID cards of the parents were produced and the Police abstract from Yatta Police Station dated 27th April, 2008 was produced in evidence.

I note from the Police abstract that against the name of the deceased it is mentioned as "passenger". No other comments are written on the Police Abstract as regards the cause of accident or the nature of investigation.

In the certificate of death produced the cause of death is shown as severe brain damage due to fractured skull due to blunt injuries.

Despite stating that he was earning Shs.15,000 per month, no evidence to prove that averment is produced. The court was not even availed a letter of employment or receipts of salary.

He further testified that when he was called and visited the scene, the body was at a distance of about 5 meters from the vehicle and the accident was along a small road going to sand mine. I am not told on which side of the vehicle the body was lying and whether it was on the road or in the pit. On the contrary he simply said the road was clear except the lorry.

Without any evidence to prove, he stated that they incurred Shs.6,000 towards funeral expenses and produced a receipt for Shs.550 from the mortuary. Of course, the court would presume payment of Shs.100 towards the Police abstract and Shs.20 for Death Certificate. He said the deceased paid Shs.1000 to the parents. No proof of payment of school fees alleged to have been paid by the deceased was produced.

Second witness was Nazreth Munyasia. He was working with the deceased in the said business. While he was harvesting sand at the river, the deceased was knocked by a motor vehicle which reversed with speed. The driver, according to him was in a hurry to get the sand before other lorries. He did not say where the deceased was and what he was doing at the time he was alleged to have been hit, nor did he say how many other lorries were present. I say so because PW.1 said that the road was clear except the lorry in question. He further said that the deceased was down behind the motor vehicle. If he was, what was he doing there and how was the driver expected to see him, even if he was reversing in speed?

He said the deceased died instantly.

This is the evidence before the court. Considering the evidence and documents produced, except that the deceased died as a result of a fatal accident, I am unable to find how the accident occurred and due to whose negligence.

Even though, the court may be sympathetic to the death of a young man, I cannot in all fairness find that the accident occurred due to negligence of the Defendant/or his driver.

I shall thus dismiss the plaint.

In the event I am wrong in arriving at my finding as aforesaid, I expected to make observations on the damages the court would have given if the Plaint was allowed, I would have awarded damages under Fatal Accident adopting a multiplier of 24 years and multiplicand at Shs.1000 (which the PW.1 said the deceased was paying to his parents), on the basis of 50% contribution of the deceased.

I shall give Shs.5,000 for funeral expenses including Shs.550 mortuary charges and Police abstract and Death Certificate, because the same is not strictly proved. I shall though assume that there must be

expenses on funeral.

I shall also consider the fact that the death was instant and that he was 26 years of age.

Thus I would have given following award.

Under Fatal Accident Act,

Loss of dependency Shs.244,000

Funeral Expenses 5,000

249,000

Less 50% **124,500**

Under Law Reform Act,

Loss of Expectancy Shs.60,000

Pain and suffering 50% 10,000

70,000

Less 50% 35,000

35,000

The Defendant would have paid cost and interest thereon. But my order as aforesaid is that the Plaintiff is dismissed with no order as to costs.

Dated and signed at Nairobi, this 18th day of September, 2008.

K.H. RAWAL

JUDGE

18.9.08