



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 64 of 2006

VERONICA KAPTICH & OBADIAH

KIPKURUI (Both suing as the legal Representatives

of the Estate of MARK KANGOGO YATOR (DECEASED..... PLAINTIFFS

VERSUS

H. YOUNG & CO. LTD.....1ST DEFENDANT

WILSON CHELOKOI.....2ND DEFENDANT

JUDGMENT

This is a fatal injury claim. The facts of this case are fairly simple and straight forward. On 1st July 2005, Mark Kangogo Yator (the deceased) was, with his younger brother, Daniel Yator, PW3, travelling in his car registration number KAJ 929 Z along Eldoret/Eldama Ravine road from his farm to his home. The deceased was driving the car and they were going in the general direction of Eldama Ravine from Eldoret direction. At a place called Sawiti along Eldoret/Eldama Ravine Road, there was a collision between the deceased's said vehicle and the first defendant's lorry registration number KAS 155 G and the deceased was killed instantly. PW3 was injured in the accident and was rushed to Eldama Ravine General Hospital where he was admitted for three days.

This suit has been filed by the deceased's widow, Veronicah C. Kaptich and Obdiah Kipkurui the legal representatives of the deceased. They attribute the cause of the accident to the negligence of the second defendant as the driver, servant and/or agent of the first defendant and claim both general and special damages under the Law Reform and Fatal Accidents Acts as well as the value of the deceased's motor vehicle which was a write off. The defendants on their part deny the plaintiffs' claim and contend that the accident was solely caused or substantially contributed to by the negligence of the deceased.

From these contentions it is clear that both liability and quantum are at issue. I would like to deal first with the issue of liability.

The evidence in this case was taken by the Honourable Justice Musinga who has since been transferred to Kisii High Court. I am therefore called upon to write judgment on the basis of the evidence on record under **Order 17 Rule 10** of the **Civil Procedure Rules**.

On the issue of liability, the plaintiff relies on the evidence of the deceased's said brother, Daniel Yator, PW3. The second defendant did not testify in this case. The defendants rely mainly on the evidence of

the Police Officer, Chief Inspector Christopher Muloli, PW4, who investigated the accident.

PW3 testified that as they were descending towards Eldama Ravine they saw the first defendant's lorry being driven in a zig zag manner and at a high speed. The deceased who was driving at about 70 KPH slowed down to about 20 KPH. Although the road was wet, visibility was clear. The defendant's vehicle did not slow down and it swerved to their side of the road and collided with the deceased's vehicle killing the deceased instantly. PW3 was rushed to Eldama Ravine District Hospital by a good Samaritan.

On his part, Chief Inspector Muloli, PW4, said that on being informed of the accident, he rushed to the scene. The road was sloping towards Eldama Ravine and there was a bend as well as guard rails on both sides of the road. He observed that the lorry driver had braked and there were visible skid marks behind the lorry stretching to a distance of 19 metres. He did not observe any skid marks made by the deceased's vehicle. The point of impact, according to him, was about 0.5 metres from the edge of the road on the left side as one faces Eldoret. In his view the deceased must have lost control and veered to the second defendant's side of the road and collided with the lorry. He therefore blamed the deceased for the accident. He refuted PW3's evidence that the lorry was moved from the point of impact to where he found it and said that there was no evidence to support that allegation.

I have anxiously considered this evidence. It is common ground that the first defendant's lorry was carrying sand and was climbing a hill. Although we are not told how steep that hill was, having skidded for a distance of 19 metres as found by PW4, I agree with PW3 that it was being driven at a very high speed. With no skid marks behind the deceased's vehicle I find and hold that the deceased did not slow down as PW3 claimed. In the circumstances I find both drivers equally to blame for the accident.

On the issue of quantum the plaintiffs claim funeral expenses of Kshs.39,169/-, Kshs. 7,500/- being costs for obtaining letters of administration, Kshs.200/- being fees for police abstract report making a total of Kshs.46,869/-. The deceased's widow, PW1, produced receipts for all these claims. I therefore find the special damages of Kshs.46,869/- proved. Clement Wasike, PW5, said that he assessed the pre-accident value of the deceased's vehicle at Kshs.210,000/- and the salvage at Kshs.40,000/-. That leaves a net value for Kshs.170,000/-. The defendants did not produce any valuation report or other evidence to challenge that valuation. In the circumstances I find the material damage claim of Shs.170,000/- being the net value of the deceased's vehicle proved.

The plaintiffs also claim damages for pain and suffering and loss of expectation of life as well as damages for loss of dependency. It is not in dispute that the deceased died instantly. For pain and suffering and loss of expectation of life I award Kshs.20,000/- and Kshs.100,000/- respectively.

In his submissions, counsel for the plaintiffs suggested a multiplier of 20 years. On his part counsel for the defendants suggested one of 5 years. The deceased was a young man aged 31 years old at the time of his death. If he was in the public service he had a whole 24 years to work. He was, however, employed by a private company and were it not for his untimely death, he could have worked upto the age of 60 years. Taking all these factors into account and the accelerated payment I find the multiplier of 15 years reasonable.

Immediately prior to his death the deceased was employed by Colas East Africa Ltd as a Technical Sales Representative. PW1 produced the deceased's letter of appointment, Exhibit 4, which confirms that. She also produced his pay slip for July 2005, Exhibit 5, which gives the deceased's gross salary as Kshs.64,885/- per month.

The deceased was married with two young children, Janet Chepkosgei born in 2001 and Faith Cherobon born in 2003. His widow, PW1, testified that the deceased used to support her and their said children. Being the first born in their family, the deceased also used to support his siblings and his mother who is a widow. In the circumstances I find that the deceased's family depended on him and applying the said multiplier of 15 years, their loss of dependency works to Kshs.7,786,200/- (64,885 x 15 x 12 x 2/3).

I therefore enter judgment for the Plaintiffs in the sum of Kshs.4,063,034.50 made out as follows:-

Special damages = Kshs. 49,869.00

Value of lost car = Kshs. 170,000.00

Pain and suffering = Kshs. 20,000.00

Loss of expectation of life = Kshs. 100,000.00

Loss of dependency $(64,885 \times 15 \times 12 \times 2/3)$ = Kshs. 7,786,200.00

Total = Kshs. 8,126,069.00

Less 50% contribution = Kshs. 4,063,034.50

Net amount payable = Kshs. 4,063,034.50

The Plaintiff shall also have the costs of this case based on the net award plus interest on both the principal sum and costs at court rates.

DATED and delivered this 13th day of November, 2008.

D. K. MARAGA

JUDGE