



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

Civil Case 739 of 2004

1. Running down cause
2. Pedestrian male adult aged 29 years old in 2003
3. Tractor –trailer collision with pedestrian
4. Injuries:

Fatal

5. Liability : 90% against defendant – vicariously
10% against the plaintiff

6. Quantum:

I: Law Reform Act Cap. 26 Laws of Kenya

Pain and suffering – Nil

b) Loss of expectation of life Ksh.70,000/-

c) Lost years

Ksh.3000/- x 12 x 20 Ksh.720,000/-

II: Fatal Accident Act

a) Loss of dependancy

Nil – Taken into account

III: Special Damages

a) Not particularized - withdrawn

7. Case law

8. Non referred to by advocate

9. Court:

a) Kemfro Africa Ltd v Lubia & Antoehr (1987) KLR 27

10. Advocates

O. Ogessa for Ogessa & Co. Advocates for the plaintiff

K. Theuri for Julia Kariuki & Co. Advocates for the defendant

MARGRET NJERI MAGUA.....PLAINTIFF

VERSUS

WAMONI MWANGI.....DEFENDANT

JUDGMENT

I: BACKGROUND

1: Margaret Njeri Magua is the legal representative of the estate of James Kangethe Macua. The relationship between her and the deceased was that of mother and son.

2. I must commend the honesty of the advocate who filed suit and Margaret (the plaintiff herein) as the death certificate had the ages of the deceased at 23 years old. Both the advocate and the plaintiff pleaded and stated in evidence that the deceased was born in 1974 and was therefore 29 years old at the time of death. The age reflected on the death certificate is therefore an error on the face of the record.

3. James Kangethe Macua met his untimely death on the 15 September 2003 when he was run down by a tractor/trailer owned by the defendant one Wamoni Mwangi along the Ngecha/Wangige stage road.

4. The issue between the parties that was contentious was that of liability:-

- i) Who was to blame for the accident? (Issue No.4)
- ii) Is the doctrine of volenti non fit injura applicable? (issue No.5)
- iii) Is the principle of res Ipsa Loquito applicable (Issue No.6)

II: LIABILITY

5. Both the parties called evidence in the case. This is commendable as the evidence produce to court is clear. The plaintiff called two eye witnesses PW2. Boniface Nganga Wamae and PW3 John Wainaina Kamau.

6. PW2 stated that on the material day of 15.9.03 he was ready to cross a road when he saw a tractor/trailer come down from the Kikuyu area and knock down a person . He went to the tractor and found the person under the tractor. At the scene of the accident he had actually seen three Nissan matatu vehicle to one side of the road. The tractor came at a high speed and over took the three Nissans. The tractor knocked the pedestrian from the side as he emerged out of the road from his left to cross to his right.

7. PW3 likewise witnesses the accident. There was a traffic jam. The tractor/trailer was driven at a high speed and in the process of over taking without reducing his speed knocked the deceased. The

tractor over took and collided with Kangethe when he had already crossed.

8. The defence called driver of the tractor one Christopher Kariuki Kamau (DW1) and his witnesses Patrick Muthee Kimani (DW2). The two work as sewerage exhauster and had the task of removing solid waste from pit sewage. Christopher Kariuki Kamau was the driver of the tractor. He had been driving for the last 10 years. Patrick Muthee Kimani was the attendant who would do the work of emptying the solid waste. To this end the tractor had a trailer that carried the solid waste.

9. On the material day in question DW2 – Patrick Muthee Kimani, the attendant was seated on the mudguard of the tractor as he had often and always done. DW1 – Christopher Kariuki Kamau the driver of the tractor stated that there was a traffic jam through the area they were going through. They heard screams for people to stop when they did they saw the deceased underneath trailer. Prior to this they had never seen the deceased emerge from the road. Both the driver and attendant (on advice of an old man who had beckoned them) ran away. They reported the matter to the police the following day as they had gone to the nearest police near Dagoretti and were referred to the correct police station to go to.

10. The defence case is that DW1 was never charged in a criminal/traffic court of law and as such is not to be blamed for the said accident. The negligence herein was attributed to the deceased. The plaintiff on the other hand maintains that her son was run down due to the negligence of the defendants driver and or agent.

A: Finding on Liability

11. A person who is driving a vehicle is under a duty of care to other road users. The vehicle is as a lethal weapon and due care is required by the driver who is in control. The evidence to court is that the driver was over speeding. It was a market day through the little township. The traffic was heavy and most certainly the public vehicle (matatu) had obstructed by parking on the left of the road. The defendants attempted to cross them by overtaking all the three vehicles at once. The driver never saw the plaintiffs son and had to be stopped by members of public when the trailer was said to have struck the deceased.

12. The deceased emerged from the side of the road when the trailer is said to have knocked him. That he was crossing from left to right of the road and the impact occurred to the right.

The evidence that has emerged is that the deceased had in fact already crossed the road when the collision occurred to the right side of the road.

13. The doctrine of volenti nor fit injura does not apply herein. The deceased did not volunteer to be knocked.

14. Res Ipsa loquor, “or things speak for itself” is applicable on the facts.

15. The driver was indeed negligence as he was over speeding and overtook three vehicles without proper look out other road user. On the other hand the deceased having emerged from the road ought to have been cautious before he crossed the road. Whilst he emerged from the side of the road the impact is said to be on the road and not to the side. The young man was found underneath the trailer when it came to a stop.

16. The police failed in their duty by not taking down a sketch plan and opening a file in this matter. Where a fatal accident that has occurred a traffic police file should be opened. If there is evidence a charge would be drawn up and case taken to court. If there is no evidence an inquest file is required to be opened in order to preserve the evidence.

17. The fact that the driver was never charged with any traffic court case is not proof of his not being negligence. It is only proof of the failure on the part of the police to clearly document the occurrence of an accident and place it for scrutiny before a court of law either by way of inquest or by way of a charge.

18. I hereby find that the defendant's driver was negligent and caused the said fatal injuries to the deceased. I would though find that the deceased be held to have contributed to the said accident at 10%. The defendant would be held at 90% negligence in liability vicariously for the acts of his agent and or servant.

III: Quantum

19. A) Law Reform Act Cap.26 Laws of Kenya.

a) Pain and suffering

Death was instant

I make no award under this claim

b) Loss of expectation of life

The deceased was age 29 years old at the time of death. I would award a conventional sum of Ksh.70,000/-.

C) Lost years

The mother of the deceased stated that her son was running a small kiosk business. PW3 actually knew him as one selling at the kiosk as he was his custom. No income was disclosed but there was evidence he worked (PW 1 and PW3). I would give a normal wage of Ksh.3000/-. As to the multiplier the parties had agreed that this be 20 years. The deceased had no family nor children. He was a bachelor and appears to have been survived by his mother, the plaintiff herein and administratrix to his estate. That the minimum wage would have been more than 3,000/- taken into account the rates.

I would award $Ksh.3,000/- \times 20 \times 12 = Ksh.720,000/-$ subject to apportionment.

B) Fatal Accidents Act Cap.32 Laws of Kenya

20. The plaintiff is both an administratrix of the deceased estate and the claimant on the issue of dependency. The deceased's mother cannot claim twice as this would be double enrichment. Further if per chance, the court comes up with a claim it must take into account the claim under the Law Reform.

21. In this case there were no other dependants the deceased and I would make no award see the case Law of Kemfro Africa Ltd v Lubia & Another (1987) KLR 27.

C) Special Damages

22. Prior to the start of the trial the plaintiff withdrew this claim and abandoned the same. The plaintiff did not disclose in the pleading that actual costs of expenses incurred and this was not supported by any proof or evidence. The claim being withdrawn no award is made.

23. I accordingly enter judgment for the plaintiff on the proved claim.

24. In summary

24.1 Pedestrian male adult aged 29 years old in 2003

24.2 Tractor trailer collision with pedestrian

24.3 Injuries – Fatal

24.4 Liability

90% against the defendant, vicariously

10% against the plaintiff

24.5. Quantum

I: Law Reform Act Cap 26 Laws of Kenya

a) Pain and suffering Nil

b) Loss of expectation of life Ksh.70,000/-

b) Lost years

Ksh.3,000/- x 12 x 20 years Ksh.720,000/-

II: Fatal Accident Act Cap 32 Laws of Kenya Nil – taken into account

III: Special Damages

Not particularized

Withdrawn Nil

Total Ksh.790,000/-

Less 10%

Contributory negligence Ksh. 79,000/-

Ksh.711,000/-

25. I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment.

Dated this 30th day of January 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

O. Ogesa for Ogesa & Co. Advocate for plaintiff

K. Theuri for Julia Kariuki & Co. Advocates for the defendant