



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
Civil Case 8 of 2004

JANE KANINI JOSPHAT.....PLAINTIFF

VERSUS

CYRUS MURIUKI.....DEFENDANT

JUDGMENT

The plaintiff is an administrator of the estate of Silas Mbuba Njagi deceased who died in a road accident.

She gave evidence at the trial but she was not present when the death occurred. She got information from chief by letter. Later she was accompanied by deceased's brother to Runyenjes Police Station. At the station she saw the vehicle which hit her husband. She was also shown her husband's bicycle. She was told the vehicle belonged to one Cyrus Muriuki. Her husband was employed by Councillor J. Nyaga who gave a letter of appointment (exhibit 1). She also exhibited a grant of letters of administration Exhibit 2 and Police Abstract exhibit 3. She paid Shs.50/= for death certificate. She said that in addition to the salary he earned as farm Manager Shs.10,000/= he also earned income from his farming activities. He earned 20,000/= from coffee. She added that herself and her two children depended wholly on the deceased. On cross-examination she said that the deceased left the land but without money to work on it she cannot earn much income. In good years the husband could earn Shs.20,000/= twice a year from the farm but by the time of his death they used to earn 3,000/- to 4,000/-. She however did not have records of their earnings from the farm. Husband used to bring home per month end about Shs.6000-7000/= per month. On the day of accident the plaintiff said that her husband was traveling from their home to his place of work on a bicycle. He was carrying porridge and he was not drinking beer.

PW2 was the Councillor who had employed the deceased as his Tea Farm Manager. His salary was Shs.10,000/= plus 1000/= house allowance. The Councilor has now become the Mayor of Embu Municipality. He admitted that he gave out the letter at the request of PW1 after the death who explained that the letter was required. He concluded by saying that the relationship between him and the deceased was cordial. The defendant gave evidence. He used to work as Executive Secretary and now he is in private business in Nairobi after voluntary retirement. In the year 2001 he was a branch Executive Secretary and member of K.N.U.T (Teachers Association) Motor vehicle KAC 924J was owned by the branch and assigned to him for his use in employment.

On 12/3/2001 in the afternoon he was traveling to Nairobi where he was taking part in the organization of the burial of one of their officer. He was traveling with Beatrice Gikunda in the vehicle. He was driving the vehicle with Beatrice sitting on Co-drivers seat. They were traveling on Meru/Chuka/Nairobi Road. After crossing Thuchi River there was a market and bumps were placed on the road. He passed

and saw ahead the road was clear and weather was sunny. He could see 300 metres ahead. He looked and could see only one cyclist a head of him traveling on the same direction on the pedestrian part of the road. There were not many people on the right as he traveled on the road on the left side. He was traveling at speed of 80-85 K.P.H. and he was about to overtake the cyclist when all of a sudden the cyclist swerved on to the road onto his lane. He swerved to the same side and then he heard a bang on the front left, Wheel of the tyre was right in the middle of the road. Then as he was maneuvering the wheel got off. He realized he was driving with 3 wheels. Then the vehicle rolled until it stopped on the left side of a steep valley by left side of road. He got out of the vehicle with the help of two boys. He found he was injured on the back. He was taken to the hospital and later he was informed that the cyclist had died. It looked as if the deceased was carrying a jerry can. **“I do not know if he was drunk”** he said. Also that the deceased contributed to this accident on cross-examination he said the cyclist was driving normally and he was the only person on the road. The passenger in the vehicle also gave evidence how she saw the cyclist swerve suddenly across the road and how the driver swerved to the right to avoid him. The cyclist was hit by front left side of the car. Then the car lost control and rolled off the road to the shamba. On cross examination she said the cyclist was hit off the road and he was carrying a jerry can at the back of the bicycle. As it will be noted only the Defendant and his witness described the manner in which the accident happened. The cyclist died in the accident on the same day and there was no one else who witnessed the accident. However there is on record sufficient evidence to enable the court to determine the suit.

On the issue of liability the defendant denied in general terms the averments contained in paragraph 4 of the plaint and put the plaintiff to strict proof. Paragraph 4 of the plaint had pleaded **“the defendant his driver, servant and or agent so negligently drove, managed and/or controlled the motor vehicle.....”** At the trial the plaintiff produced a police Abstract (without objection) which showed that the vehicle KAC 924 J was owned by Mr. Cyrus Muriuki (defendant) who was driving it at the material time. The defendant submits that failing the production of certificate of ownership by the plaintiff to prove the ownership of the vehicle the suit should be dismissed. He relies on the Court of Appeal decision in **Appeal No. 192/1996** in which the defendant had denied the ownership of the vehicle. The Judges of Appeal said it was incumbent on the plaintiff to place before the court a certificate of search signed by Registrar of motor vehicles showing the registered owner of the vehicle. The plaintiff relied on the authority of **High Court at Nyeri HCC Civil Appeal No. 34/2002 Samuel Mukunya Kaunge vs John Mwegi Kamuru** where Hon. Judge Okwengu was inclined to take a police Abstract as the best evidence of ownership of an accident vehicle. In this case the defendant was driving the vehicle when the accident occurred. He had complete management and control. He testified the vehicle belonged to another body which had employed him. He did not produce any documents to rebut the plaintiff's evidence contained in the Police Abstract motor vehicles.

On the issue of liability therefore the defendant explained to court how it happened. He had noticed the cyclist riding on the same direction. They were both traveling on the left side of the road towards direction of Nairobi. The cyclist was traveling normally. He testified to the manner the accident occurred. It is for the court to determine whether he was negligent or not. It is not relevant whose vehicle it was he was driving. He is the party named as defendant in this case. It is therefore clear that the plaintiff's case cannot fail because she has not produced the certificate of ownership from the Registrar of the motor vehicles road. At some distance when the defendant was traveling at about speed of 80 – 85 K.p.h something mysterious happened. The defendant said that he suddenly saw the cyclist enter onto the road and the cyclist was hit by the front left side of his vehicle. He swerved to the right, the same direction the cyclist was moving and as he was maneuvering the vehicle he noticed he was driving on three (3) tyres instead of 4. He does not explain how this came about. Then the vehicle rolled down the steep side of a shamba (garden) according to DW2 and that is where he was helped by good Samaritan and taken to the hospital. The only conclusion that can be reached here is that the defendant was driving fast. When his front left wheel got off the vehicle and his vehicle was disabled. He lost control and the accident occurred hitting the cyclist who was on his right side off the road and the vehicle rolled down the left side of the road unto the valley. The defendant tried to say that the cyclist had a jerry can on the back of the bicycle but he did not know what was contained in it. The cyclist's wife PW1 said that her husband was carrying porridge in the can. There is no evidence to the contrary.

From the account above and the evidence given by Defendant and his witness, I find that the Defendant had had sufficient opportunity to avoid the accident. He failed to hoot or warn the cyclist and for reasons he failed to explain to court how his vehicle lost the front left wheel which caused the vehicle to roll on the left side of the road. The conclusion to be reached is therefore that he was negligent and is liable for causing the accident on 100% basis. I find that the cyclist (deceased) was not negligence as pleaded by the defendant. He was not drunk. He was not riding the bicycle in a zigzag manner. The highway was not busy; no warning was given by the defendant. He did not give Defendant opportunity to avoid the accident. Infact the Defendant had seen him ridding his bicycle in a normal manner off the road. I therefore find no contributory negligence on the part of the cyclist.

On the issue of damages, I find special damages for certificate of death pleaded but only Shs.50/= was paid not 90/- as printed on the form. Police Abstract exhibited was obtained at the cost of Shs.100/=as printed on the form and pleaded. Regarding the funeral expenses the amount involved is not disclosed in the pleading and no evidence was led as to this claim. I therefore find the same unpleaded and therefore not allowed.

On the issue of loss of expectation of life under the Law Reform Act this court awards shs.100,000/=. For pain and suffering the deceased died on the same day as indicated in the death certificate and therefore only a normal sum is awardable. I award Shs.5000/= under this item. The Plaintiff testified that herself and her two children depended on the deceased for their upkeep. She said that the husband was employed on 1/7/2000 by PW2, a politician and farmer to manage his tea farm and he earned Shs.10,000/= per month with house allowance. The employer gave evidence to that effect and produced letter of appointment exhibit 1.

There is no evidence that the deceased was earning any income from employment prior to month of July 2000. And then the salary ceased upon his death on 5/3/2001. There is no evidence that this employment would have continued for any length of time. It is to be noted that the plaintiff pleaded that the deceased earned Shs.120,000/= per annum. This was according to her evidence that he earned 10,000/= per month. The claim on this item is for a period of six years from the date of death. In addition the plaintiff said the deceased was a farmer and had an income of about 20,000/=. The court notes that the grant which is exhibited as No. 2 the deceased owned 4 properties which were ordered to be inherited by the plaintiff and her two children Madrine Gatweri and Rose Mwendu. The Defendant cross examined the plaintiff on the issue of the children. She said she had their birth certificates at home. I believe her she is not a person who would have given false information on this issue. In addition the plaintiff said that her husband deceased used to bring home Shs.6,000-7,000/= which she used for labour, and farm expenses like fertilizer and expenses of children. She testified that she spent 1000/= for herself and the children.

Taking into account of the evidence available on this item the funds available for family use from the salary of the deceased was Shs.1000/= per month and from her pleading the deceased would have continued in employment for 6 years which is reasonable considering the official retiring age is 55 years. Therefore the dependency can be calculated thus:-

1000 x 12 x 6 yielding Shs.72,000/=. The total damages awarded are as follows:-

Loss of Expectation of life - Shs.100,000/=

Pain and Suffering - Shs. 5,000/=

Loss of dependency - Shs. 72,000/=

Special damages - Shs. 150/=

Total - **17,7150/=**

Judgment is entered for the plaintiff in the said sum of Shs.177,150/= plus interest at court rates from date of Judgment until payment in full. The plaintiff shall also have costs of this suit to be taxed under

subordinate court scale.

Dated this 23rd January, 2007.

J. N. KHAMINWA

JUDGE

23/1/2007

Khaminwa –Judge

Njue – Clerk

Judgment delivered in open court in presence of Mr. Momanyi.

J. N. KHAMINWA

JUDGE