



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Case 382 of 2001

LOICE WANGUI MACHARIA (*suing as the representative*)

of the estate of JOSEPH MAINA NDERITU (DECEASED).....PLAINTIFF

VERSUS

HUSSEIN DALACHA.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGMENT

The plaintiff Loice Wangui Macharia (*suing as the legal representative of the estate of the late Joseph Maina Nderitu*) instituted this suit against the 1st and 2nd defendants being the driver and the Attorney General on behalf of the Department of the Defence, the registered owner of motor vehicle 40 KA 62 Mercedes Lorry which was being driven at the material time by the 1st defendant.

The plaintiff's case is that on the 18th November 2000, the deceased was lawfully driving his motor vehicle registration number KAA 915Z Toyota Corolla along Nakuru-Eldoret road, near Ngata area, when the 1st defendant negligently and recklessly drove the lorry and caused it to collide with the deceased's vehicle, and thereby occasioned the deceased fatal injuries. The plaintiff being the widow of the deceased obtained the letters of administration and the death certificate of the deceased which shows that as at the time of his death he was aged 38 years. The cause of death was indicated as cardiopulmonary arrest due to multiple injuries due to a road traffic accident. The plaintiff also obtained a police abstract form which showed the accident did occur on the 18th November 2000 at 9.00 p.m. involving the two motor vehicles but the matter was pending investigations. The plaintiff further averred that as at the time of the deceased's death he was earning Kshs 6,000/= per month and he was the sole bread winner and supporter of his following children; Peter Macharia – 14 years, Mary Wanjiru – 13 years, Dorcas Wangare – 11 years, John Nderitu – 7 years and Jones Gathica – 3 years. The plaintiff blamed the defendants for the accident and sought compensation for general and special damages. The plaintiff produced receipts for Kshs 4,560/= paid to Kenya Broadcasting Corporation for the death announcement of her deceased husband. She also paid Kshs 5,000/= towing charges and Kshs 4,250/= to the War Memorial Hospital as mortuary fees. The plaintiff's case was supported by the evidence of Julius Njeru Mwangi. According to Julius, he was driving behind the deceased on the material day along Nakuru-Eldoret road. He kept seeing the parking lights of the vehicle which was in front of him. After sometime he did not see the lights but he saw the headlights of an on-coming vehicle which had shifted to the left lane. On reaching near, he saw the Saloon car had collided with the Army Lorry on the left side of the road. At first he was afraid to get out of his vehicle but after he saw some people alright from the lorry he gathered courage and he with other good Samaritans helped to recover three bodies from the saloon car which was in front of him being registration No. KAA 915 Z. One passenger was rescued from the Saloon car and was taken to the hospital by a good Samaritan. Julius left the scene and drove to a

nearby pub. He shared the information about the accident with the other patrons who were able to recognize the Saloon car as belonging to Maina. They decided to visit the homestead of Maina to verify whether it was his vehicle that was involved in an accident. When they did not find the vehicle and Maina at home they decided not to break the bad news to the widow. According to Julius the accident was caused by the Army lorry which was driven on the wrong lane of the road.

On the part of the defendants, they denied the plaintiff's claim in total. The 1st defendant gave evidence and so was **Morris Luvende** who was traveling as a passenger with the 1st defendant at the material time when the accident occurred. The 1st defendant testified that on the fateful night at about 9.00 p.m or thereabout he was driving the army lorry towards Nakuru along Eldoret-nakuru road and as he was going down the incline at around Ngata area when motor vehicle registration No. KAA 915Z was trying to overtake a trailer. The defendants testified that it was raining and thus he was driving at a reasonable slow speed and it is the Toyota Corolla that was driven negligently and carelessly. After the accident, the defendant with Morris Luvende also an army officer helped to remove the injured persons from the Toyota Saloon. Three persons were dead and the injured passenger was helped to the hospital by Morris Luvende. The defendant remained on the scene to wait for the police. The evidence of the defendant was corroborated in all material respect by that of Morris Luvende.

Both counsel for the plaintiff filed submissions, on the part of the plaintiff counsel submitted that both the defendants should be found liable for causing the accident while relying on the evidence of Julius an eye witness. On quantum, counsel urged the court to award Kshs 80,000/= for loss of expectation of life and Kshs 1,080,000/= for loss of dependency taking into account that the deceased used to earn Kshs 9,000/= per month and using the multiplier of 15 years. Counsel relied on previous decisions of this court in **Nakuru HCCC No. 229 of 2004 Loise Wairimu Mwangi & Anor vs. Joseph Wambue Kamau & Anor., Nakuru HCCC No. 1 of 2002 Rachel Chepkemai Cheruiyot vs. Jatinder Singh Ranauta & Anor and Nakuru HCCC No. 149 of 2003 Ann Njoki Njenga vs. Umoja Floor Mills & Anor.**

Counsel for the defendant submitted that the plaintiff failed to prove the claim against the defendants. The evidence of Julius who was the only eye witness was not cogent or credible. He merely stated that he was driving behind the Toyota Corolla and was seeing the parking lights but after sometimes he did not see the parking lights when he saw the headlights of the lorry. According to the counsel for the defendant, Julius did not witness the accident. Secondly he did not report the incident to the police nor did he record a statement even after witnessing a fatal accident where three persons perished on the spot. Thirdly in a case of this nature the plaintiff should have produced the sketch maps by the police who investigated the accident. Failure to do so is fatal to the plaintiff's case which counsel urged the court to consider for dismissal.

The first issue to determine in this dispute is whether the defendants are liable and whether the plaintiff proved her case to the required standard. There is no dispute that the accident occurred between the deceased's vehicle and the Army lorry which was driven by the 1st defendant. The evidence of PW2 was discounted by that of the defendants. It was held in the case of **Nandwa v. Kenya Kazi Limited** that:

“3. In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant's evidence provides some answer adequate to displace that inference.”

Further issue to determine is whether the evidence of Julius is totally discounted and dislodged by the evidence of the 1st defendant and his passenger. It is noteworthy that both 1st defendant and his colleague are both Army officers and their evidence was also not supported by an independent witness. Although Julius was driving behind the deceased and may not have seen the cause of collision, even if this court were to believe that that the deceased was overtaking at the time when the accident occurred, the 1st defendant who was in control of the lorry should have tried to avoid the accident either by swerving or

applying the brakes. Moreover the impact of the collision which resulted into the death of three passengers on the spot must have been a heavy impact which also implies that the 1st defendant was probably driving at a high speed. In this regard I find that the defendant also, to some extent contributed to this accident. I would apportion the higher responsibility to the deceased who was overtaking without due regard to on-coming vehicles. Liability is hereby apportioned – Deceased 60% and the defendants 40%.

On the issue of quantum there is no dispute that the deceased was aged 38 years at the time of the death. He was survived by a widow and children who depended on him. The deceased was earning Kshs 6,000/= from the former employment. Counsel asked this court to adopt the multiplier of 15 years and taking into account the age of the deceased I adopt that multiplier of 15 years. In my view the deceased would have continued to be in active employment upto the age of 55 or even beyond.

The Court of Appeal held in the case of **Davinty –Vs- Haji & Another [2004] 2 KLR that;**

*“The principle on which damages for lost years under the **Law Reform Act** are assessed are admirably articulated by **Lord Scarman in Gannel Vs Wilson [1981] I ALL E.R 578 at page 593 paragraphs g – j** thus:*

“The problem in these cases which has troubled the Judges since the decision in pickets case, has been the calentation of annual loss before applying the multiplier (i.e the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in the house of picketts case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest was reasonable likely to achieve subtle mathematics calculations, based as they must on events or contingencies for a life which he will not live, are out of place, the Judge must make the best estimate based on known facts and his prospects at the time of death.”

It is also conventionally agreed that the deceased would spend two thirds of his salary towards the maintenance of his family and I therefore compute the loss of dependency as:

$$\text{Kshs } 6,000 \times 12 \times 15 \times \frac{2}{3} = \text{Kshs } 720,000/=$$

The deceased’s death was instantaneous. I will therefore go with the submission by counsel for the plaintiff that he should be awarded Kshs 20,000/= under this heading. Counsel also suggested a sum of Kshs 80,000/= for loss of expectation of life. This also appears to be a conventional sum that is adopted in several decisions including the ones quoted above. The plaintiff was also able to prove special damages for Kshs 13,760/= which I hereby award.

In the result judgment is hereby entered for the plaintiff as follows;

- (a) Damages for loss of dependency Kshs 720,000/=,
- (b) Loss of expectation of life Kshs 80,000/=,
- (c) Pain and suffering Kshs 20,000/=,
- (d) Special damages Kshs 13,760/= .

Total Kshs 833,760/=

Less 60% contribution **Kshs 333,504/=**

Judgment for the plaintiff for Kshs 333,504 with costs.

Judgment read and signed on 9th day of November, 2007

M. KOOME

JUDGE