



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 656 OF 2002**

FRANCIS NJOROGE NJONJO.....1ST PLAINTIFF

DAMARIS WAMBUI NGIGE.....2ND PLAINTIFF

*(Both suing as joint administrators of the estate
of THOMAS KIMANI NJOROGE-DECEASED)*

VERSUS

IRENE MUROKI KARIUKI.....1ST DEFENDANT

PAUL MWAURA GITHIRI.....2ND DEFENDANT

GEOFFREY NJUGUNA GACHURE.....3RD DEFENDANT

JOEL MWAURA KAGUAI.....4TH DEFENDANT

**SIMON KIUNA GITHIRE.....4TH
DEFENDANT**

JOSEPH THIONGO MWANGI.....5TH DEFENDANT

RAHAM ABDUL ROBILE.....6TH DEFENDANT

KENYA HORTICULTURAL EXPORTERS

**(1977) LIMITED.....8TH
DEFENDANT**

**KENZANDA COMPANY LIMITED.....9TH
DEFENDANT**

J U D G M E N T

This is a case where Defendants seemed at the beginning of hearing, as if they had decided to keep away perhaps to delay the matter, but when they learned that hearing was proceeding as scheduled, some trickled into the court to participate. On the first day the court and Plaintiff's Counsel M/s Oburu had to

spend some time waiting and looking for Mr. Ligunya the 8th Defendant's Counsel who was said to be for a mention in the Court of Appeal only for us to learn he had not in fact been there. In the end hearing started with none of the Defendant's in appearance and it was not until half way in the evidence of PW1 when Mr. Ligunya walked in, without the 8th Defendant, apologetically stating he had taken his child to school and wanted to join in the proceedings from where we were. I permitted him to participate and he stayed on until close of the hearing that day with the evidence of PW4.

On the 2nd hearing date taken by consent before me, Mr. Ligunya accompanied by the 8th Defendant came to the proceedings together with Mrs. Ngala accompanied by the 6th Defendant. She said she represented the 3rd and 6th Defendants and was ready to join the proceedings from where we had reached and proceed further with the hearing. I granted her request and she was therefore present when PW5 gave evidence before the Plaintiff's case was closed moving to the defence case where 6th and 8th Defendants gave their respective evidence to close the hearing.

While at this stage, let me make a few remarks concerning the Plaintiff's capacity to institute these proceedings. I do so because I learn that the 1st, 2nd, 3rd, 6th and 8th Defendants have each denied that the Plaintiffs have capacity to institute these proceedings. I happened to have asked for a certificate of confirmation of grant of letters of administration at the beginning when I was told none was available but I did not think that its absence was of any consequence until the stand taken by the above identified five defendants was drawn to my attention.

The Plaintiffs have averred that they have brought this suit as administrators of the estate of the Deceased on behalf of his dependants under the Fatal Accidents Act as well as for the benefit of his Estate under the Law Reform Act. By section 2 of the Law Reform Act, the cause of action for the deceased's wrongful death devolve to his estate. Subsection (1) of section 2 states:

“Subject to provisions of this section, on death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or as the case may be for the benefit of his estate.”

True that implies the suit may be brought by executors or administrators so appointed under the laws of Succession Act, Cap. 160 Laws of Kenya as personal representatives of the deceased (**and not as the legal representatives of the Estate**). That should be in accordance with the decision in the case of **TROUSTICK UNION INTERNATIONAL –VS- JANE MBEYA & ANOTHER C.A. NO. 145 OF 1993 AND OUGO –VS- OTIENO, CASE C.A. NO. 31 OF 1987**. The Law of Succession Act uses the terms ***“personal Representative of a deceased person.”***

The document required in that respect is a full grant of probate or a full grant of letters of administration. I use the word “full” to distinguish that grant from others like a ***“limited grant”*** or ***“grant of letters of administration ad colligenda bona”*** which I talked about in **NYERI HCCC NO. 209 OF 2000 JOYCE MUMBI MUGI** (administratrix of the estate of **CELESTINE MUGI MWAWEGI – (deceased) –VS- THE CO-OPERATIVE BANK OF KENYA & OTHERS**. With due respect, it appears to me from what Mrs. Ngala is saying in the instant case that she has not got me right in Nyeri HCCC 209 of 2000. What I was against in that case was reliance upon a limited grant. I was against reliance upon those temporary grants which do not give the holder power to distribute the estate of a deceased person like it would do to a holder of a full grant issued under section 70 and confirmable under section 71 of the law of Succession Act, as P. Exhibit 3 was, thereby conferring upon the Personal representative (the holder) the powers under section 82 and imposing upon the same personal representative the duties under section 83 of the Laws of Succession Act. I have no quarrel with that as that is the document required and for the purpose of a suit, it is not necessary to have it confirmed as it is more convenient when so used before confirmation. That is because once a person has been given a full grant of probate on a full grant of administration, one of his functions under sections 82 and 83 aforesaid is to collect assets in the estate of the deceased before distribution of the estate during confirmation of the grant.

The Grant of Letters of Administration in P. Exhibit 3 in this suit is therefore sufficient as that is the full grant I talked about in Nyeri HCCC 209 of 2000 and therefore Plaintiffs in this suit have the legal capacity to bring this suit. I am not however saying there should be no confirmation of the document as that confirmation is, a must, in order to distribute the estate. It is during the confirmation proceedings that the estate of a deceased person is legally distributed.

The position therefore is that the two Plaintiffs, as co-administrators of the Estate of the late Thomas Njoroge (deceased), brought this suit against nine Defendants seeking compensation for the damages and loss occasioned to his Estate under the Law Reform Act (Cap. 26) as well as his dependants under the Fatal Accidents Act (Cap.32) as set out in their Amended Plaint dated 30th October 2004 as a result of his death following a multiple motor vehicle accident on 16th September 2001. Three motor vehicles were involved in the said accident and they were registration numbers KAH 241R (the 1st matatu); KAM 094A (the 2nd matatu) and KAH 390J (the Canter).

The 1st Plaintiff is the father of the deceased while the 2nd Plaintiff is the widow of the deceased.

The 4th Defendant was the driver of the 1st matatu while the 1st Defendant has been sued as the vehicles actual and/or beneficial owner and the 7th Defendant as the vehicles registered owner.

The 5th Defendant was the driver of the 2nd matatu while the 2nd Defendant has been sued as the vehicle's actual and/or beneficial owner and the 9th Defendant as its registered owner.

The 6th Defendant was the driver of the Canter while the 3rd Defendant has been sued as the actual and/or beneficial owner and the 8th Defendant as the vehicle's registered owner.

The 1st and 4th Defendants filed a joint defence dated 19th July 2005, but they did not appear during the hearing of this suit.

The 3rd and 6th Defendants also filed a joint defence – an Amended Defence dated 4th November 2004. As stated earlier they appeared during the hearing and defended themselves.

The 8th Defendant filed a defence dated 16th December 2004 and has also appeared during the hearing.

The 2nd, 5th, 7th and 9th Defendants do not seem to have filed any defence and during the hearing they did not appear.

I was informed that on 15th December, 2006 interlocutory judgment was entered against the 5th, 7th and 9th Defendants in default of appearance. I have not been told why no such judgment has been entered against the 2nd Defendant.

Closely concerning the accident, undisputed evidence as at the trial is that the accident involved the aforementioned three motor vehicles at the time the deceased Thomas Kimani Njoroge was a fare paying passenger in one of the vehicles – the 2nd matatu. As a result of that accident, the deceased and other people suffered fatal injuries causing the death of three of them on the spot and the death of six more, who included Thomas Kimani Njoroge, later while they were being attended to at hospitals. Thomas Kimani Njoroge died when he had been taken to Kenyatta National Hospital.

There is no dispute that at the time of the accident along Waiyaki Way at about 6.50 a.m. on 16th September, 2001 the 4th Defendant was the driver of the 1st matatu, the 5th Defendant the driver of the 2nd matatu and the 6th Defendant the driver of the Canter.

There is no dispute that the 1st Defendant was the actual and/or beneficial owner of the 1st matatu and

that the 7th Defendant was that vehicle's registered owner.

There is no dispute that the 2nd Defendant was the actual and/or beneficial owner of the 2nd matatu while the 9th Defendant was the registered owner.

There is no dispute that the 3rd Defendant was the actual and/or beneficial owner of the Canter but there has been dispute as to whether the 8th Defendant was the registered owner. That dispute, in my view, must be resolved in favour of the Plaintiffs because evidence before the Court is that though there may be a valid and honoured sell agreement between the 3rd Defendant and the 8th Defendant concerning that motor vehicle, legal ownership still remains with the 8th Defendant as the 8th Defendant is still the registered owner. Its evidence that it did not think transfer of the motor vehicle from its name to the name of the 3rd Defendant was necessary does not remove the fact of legal ownership of that motor vehicle from the 8th Defendant.

As already stated earlier, this was an accident which took place when the deceased Thomas Kimani Njoroge was a fare paying passenger in the 2nd matatu. As a passenger, the deceased cannot be held liable and indeed no allegations of contributory negligence has been made against him. The question is whether proof of the multiple vehicle collision in the accident was in and of itself proof that one or all the drivers involved was or were negligence.

That question calls for an answer and among the people from whom the answer is expected are the three drivers of the collision motor vehicles. In this case, the deceased victim cannot be expected to give evidence to say what took place. Two of the drivers have each chosen not to come to court to give evidence. They are the driver of the 1st matatu who is the 4th Defendant, and the driver of the 2nd matatu who is the 5th Defendant. The third driver – the 6th Defendant – has given evidence which enables this court draw a distinction between him and the other two drivers. In fact, not only his evidence, but also the evidence about him is more distinct because apart from his own evidence, other witnesses like PW4 and PW5 talked about him to the effect that he was charged and prosecuted in Traffic Case No.17533 of 2001. He was convicted and sentenced to pay fine – which he paid but was subsequently refunded following success in his appeal where a retrial was ordered and the relevant retrial case has been filed.

In her submissions concerning the 6th Defendant, M/s Oburu has relied on the evidence of PW5, a Police Constable Joseph Mutungi who produced copy of the Police Abstract and Occurrence Book from Parklands Police Station concerning that accident. They were P Exhibit 15 and P Exhibits 16 and 17. PW5 was not the investigating officer and was not attached to Parklands Police Station during the time of the accident. His evidence was therefore based on those three documents he was given to produce in the court and the Plaintiff's Counsel has pointed out that the documents included information that the Investigating Officer found the 6th Defendant responsible for causing the accident that was why the 6th Defendant faced charges of causing death by dangerous driving.

While the evidence relating to the prosecution and conviction as well as sentence of the 6th Defendant was brought before me during the hearing of this case, the evidence relating to that Defendant's appeal including the outcome of that appeal and the subsequent institution of a retrial, was not brought before me, except through the oral evidence of the 6th Defendant in his defence before me. But the Plaintiffs through cross examination of 6th Defendant and subsequent submissions now concede the appeal was there in which the 6th Defendant's conviction was reversed.

Proceedings, P. Exhibit 14, in the Traffic Case were produced by the Plaintiff as conclusive evidence to prove negligence against the 6th Defendant; but now that those proceedings were set aside for a new trial to take place, the proceedings in P. Exhibit 14 are proceedings which cannot be relied upon to find negligence against the 6th Defendant and prior belief by the investigating officer that the 6th Defendant was responsible for the accident and the resulting charge against the 6th Defendant do not make the Plaintiff's case against the 6th Defendant any better.

Further, it cannot be denied that the only evidence in this suit which sheds some light on the arrest was the evidence of the 6th Defendant himself who told the court he was traveling from North Kinangop to Nairobi having started the journey at 3.00 a.m. carrying sacks of potatoes to deliver to “marikiti” in Nairobi. Along Waiyaki way there was a bus stage after which there run an acceleration lane of about 40 metres used by motor vehicles as leaving the stage to accelerate, check and safely enter back the main highway.

The 6th Defendant said that as he was driving along the main highway he could see a passenger at the end of the acceleration lane being picked by motor vehicle KAH 241R ahead of motor vehicle KAM 094A. As soon as the passenger was picked, motor vehicle KAM 094A, aiming to overtake KAH 241R to get the next passenger ahead, suddenly entered the main road without careful checking. By that time the 6th Defendant’s canter was only three metres to KAM 094A the point where entry to the main road was. Although the 6th Defendant was driving at a reasonable speed of between 50 and 60 km per hour, the distance was too short for him to avoid hitting motor vehicle KAM 094A. He had hooted, flashed and applied emergency brakes to no avail. When his motor vehicle hit KAM 094A, the matatu in turn hit the next matatu KAH 241R and both matatus rolled. The 6th Defendant managed to stop his motor vehicle slightly ahead and came out. Unfortunately he met hostile onlookers who threw stones at him baying for his blood. Fearing for his life, he went back to the Canter and drove off to Kabete Police Station where he reported the accident and was permitted to take potatoes to “marikiti” before returning to the scene where he found no accident vehicle and no police officers, but he later ended up at Parklands Police Station where the two matatus were. He would not know the people who were in each matatu or how many injured or how serious the injuries were he would not know. But subsequently the police charged him and prosecuted him in Traffic Case No. 17533 of 2001 aforesaid.

From that evidence, the two matatus were competing for passengers without due regard to other road users. The 6th Defendant is blaming the matatu drivers to the effect that they were the ones to blame, especially the driver of KAM 094A, and not him, for the accident.

As stated before, this court has not had the benefit of evidence of what happened at the scene from any other witness. The court has the evidence of the 6th Defendant only and as such that evidence is not challenged and even the police who visited the scene and handled the case up to the filing of Traffic Case No.17533/2001, having drawn the relevant sketch plan, were never ever in my court. How then do I find the 6th Defendant negligent and therefore liable in this suit even on the balance of probabilities? That takes me to page 4 of the Plaintiff’s written submissions and middle of the second paragraph marked 3.1 where the following is stated:

“The approach the courts take in cases such as this i.e. a multiple car collision is that proof of a collision in and of itself is proof that one or all the drivers the vehicles was/were negligent – see Baker v Marektharborough Industrial Co-operative Society Ltd. (1958)1 WLR 1472, C.A. and the authorities following it summarized in Bingham and Berryman’s Motor Claims Case, 10th edition, at pages 31-33. This applicable legal principle is stated with characteristic clarity by Denning L J (as he then was) in Baker v Marketharborough Industrial Co-operatove Society Ltd (1958)1 WLR 1472 at page 1476:

---- Every day, proof of collision is held to be sufficient to call on the two defendants for an answer. Never do they both escape liability. One or the other is held to blame. Sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesistatingly hold that both were to blame.

They would not escape liability because the Court had nothing by which to draw any distinction between them. So, also if they are dead and cannot give evidence, the result must be the same. In the absence of any evidence enabling the Court to draw a distinction between them, they must be held both to blame and equally to blame.”

Using the same approach in this suit the position is that the 6th Defendant having come forward and stated the defence he has as shown above, this Court has been able to draw a distinction between him on the one

hand, and the other two drivers the 4th and 5th Defendants on the other so that in the circumstances, the 4th and 5th Defendants “**must be held both to blame and equally to blame**” while the 6th Defendant is not, and I must make it clear that what I am saying here should have no bearing in the pending Criminal retrial where better evidence is expected with police officers who handled the case, and have not been availed before me, giving evidence so that what the 6th Defendant has said here unchallenged may be challenged in the Traffic Case, may be, with different results. Here to-day, I am talking about the evidence as it is before me. That is the evidence on the basis of which I write this judgment as the law requires me to do.

The 6th Defendant having stated his defence the way he did, he did not have to go further to call independent testimony to support him because what he had done had sufficiently shifted the burden of proof from him to the Plaintiffs who had now to disprove what the 6th Defendant had said. The Plaintiffs did not succeed in doing so either through evidence on record or through cross-examination or both. I have already made remarks about the finding of the investigating officer (the so called independent source) that the 6th Defendant was responsible for the accident. I may add that such a finding serves no useful purpose unless in the end it sustains a conviction, if need be, up to the Appellate end; for it should not be forgotten that it is upon such premises that the prosecution files criminal, including traffic, cases in courts against accused persons and in the majority of cases the Prosecution fails in the end to establish or prove the alleged responsibility.

From the above therefore, I hold that the evidence before me in this case does not sustain the allegation of negligence against the 6th Defendant and therefore does not make him liable to pay the Plaintiffs what they are claiming in this suit. That being so, it follows that there is no sufficient evidence to find the 3rd Defendant and 8th Defendant vicariously negligent and therefore liable to pay what the Plaintiffs are claiming from them.

Concerning the three drivers as already stated earlier, it means that the 4th and 5th Defendants remain to blame from the evidence before me. They are equally to blame.

Interlocutory judgment is already entered against the 5th and 9th Defendants being the driver and registered owner respectively of the 2nd matatu. No interlocutory judgment has been entered against the 2nd Defendant the actual and/or beneficial owner of the 2nd matatu. He has not come before me to defend himself and therefore from the fact that the 5th Defendant has been found negligent and as a result liable to the Plaintiffs, the 2nd Defendant is vicariously liable just as the 9th Defendant is.

Concerning the 1st, 4th and 7th Defendants, interlocutory judgment has already been entered against the 7th Defendant. The 4th Defendant has already been found to be negligent and therefore liable. The 1st Defendant did not come to court to show why she should not be held vicariously liable. Accordingly the 1st, 4th and 7th Defendants are each liable to pay the Plaintiff's claim.

From the above and generally on the basis of the evidence before me, I am not satisfied the Plaintiffs have proved their case against the 3rd, 6th and 8th Defendants and do hereby dismiss the Plaintiff's case against the 3rd, 6th and 8th Defendants with costs to the said Defendants.

I am however satisfied the Plaintiffs have proved their case against the 1st, 2nd, 4th, 5th, 7th and 9th Defendants and I find them liable equally.

Coming to assessment of damages, the Plaintiffs are personal representatives of the Deceased having obtained a full grant of letters of administration to the Estate of the Deceased. They filed this suit as such for the Estate of the Deceased and for dependants of the deceased who include the two Plaintiffs themselves and others named as Anastasia Njambi Njoroge, Francis Njoroge Kimani Anastasia Njambi Kimani.

The Deceased is said to have been 27 years old still young and looking forward to along life with his

then young family. His life was therefore cruelly snatched in the tragic accident Damages for loss of expectation of life is clearly due under the Law Reform Act. I am told a conventional figure now stands at Kshs.150,000/= and I do hereby award the same.

For pain and suffering, the accident having taken place at 6.50 a.m. The Deceased died at about 1.00 p.m. same day from the injuries he had suffered. I do hereby award the sum of Kshs.80,000/=.

Under the Fatal Accidents Act, each Plaintiff claimed was getting Kshs.5,000/= from the Deceased monthly. The Deceased was employed by the Kenya Airways as a technician for 9 months on a contract of 2 years which was renewable at the discretion of Kenya Airways. His basic salary was Kshs.22,778/= per month. With extra working hours it is claimed the Deceased earned between Kshs.30,000/= and Kshs.40,000/= per month. Although the Plaintiff's counsel claims that the evidence with respect to the deceased's income was not challenged, counsel defending the 3rd and 6th Defendants says that evidence was hotly contested. The evidence was adduced on the first hearing day during the absence of the 3rd and 6th Defendants and their Advocate and the challenge must have been only through written submissions. While the Plaintiff's counsel urges this court to adopt a monthly multiplicand of Kshs.40,000/=, Counsel defending the 3rd and 6th Defendant urged the court to adopt a monthly multiplicand of Kshs.5,195/=.

The figure pleaded in the plaint was Kshs.50,000/=. Evidence brings it down to Kshs.22,778/= from which payslips deductions were taken with the allowances, the figures as been in exhibits P7 and P8 kept on fluctuating.

This was the first contract. Though renewable at the employer's discretion, there was no guarantee that contract was going to be renewed or it was not clear how many times it would be renewed and it is therefore difficult to say the same contract was going to be maintained until the Deceased was 55 years. There are many questions without answers. But in the circumstances I think I should adopt a multiplicand of Kshs.20,000/= per month and a multiplier of 20 years with the ratio to apply of 2/3.

The calculations therefore come to $20,000/= \times 12 \times 20 \times 2/3 = \text{Kshs.}3,200,000/=$ loss of dependency. Special damages undisputed at Kshs.71,349/=.

On the whole therefore judgment is hereby entered for the Plaintiffs against the 1st, 2nd, 4th, 5th, 7th and 9th Defendants severally and jointly in the total sum of Kshs.3,501,349/= being made up as follows:

(a) General damages Kshs.3,430,000/=

(b) Special damages Kshs.71,349/=

In addition, the six Defendants to pay costs of this suit plus interest to the Plaintiffs.

Dated this 13th day of December, 2007.

J.M. KHAMONI

JUDGE

Present:

M/s Oburu for the Plaintiff

Buoro Court Clerk

Mr. Kiiru comes in for Mrs. Ngala for the 3rd & 6th Defendant

Further Order

Upon application by M/s Oburu all Plaintiff Exhibits produced in original form be released to her.

J.M. KHAMONI

JUDGE