



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Civil Suit 404 of 1998**

**SOSPETER NDUNGU KAMAU (*Suing as the Legal***

***representative of his late Son*) ARTHUR NDERITU NDUNGU ..... PLAINTIFF**

**VERSUS**

**CHARLES MAGETO ..... 1<sup>ST</sup> DEFENDANT**

**DOUGLAS OCHWANG ONACHI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Sospeter Ndungu Kamau** [suing as the personal legal representative of the estate of Arthur Nderitu Ndungu] instituted this suit against **Charles Mageto** the 1<sup>st</sup> defendant and the registered owner of motor vehicle No.KAH 540L and DOUNGALS OCHWANG ONACHI the 2<sup>nd</sup> defendant and driver of the said motor vehicle. The claim arose as a result of a road traffic accident that occurred on 4<sup>th</sup> May, 1997 along Naivasha/Nairobi road. The deceased was traveling in motor vehicle Registration No.KAH 091C when an accident occurred involving several vehicles. The deceased died on the spot.

Evidence in respect of the plaintiff's claim was led by a total of three witnesses. The plaintiff testified that his son the deceased herein, had boarded motor vehicle registration No.KAH 091C in Nakuru with an intention of traveling to Thika, but he never reached his destination as the matatu was involved in an accident and the deceased died instantly.

According to PW1, he testified that he learnt about the accident over the radio. He visited the Naivasha Police Station and found out from the records, that his son the deceased was among those who died in the accident. He proceeded to the mortuary where he identified the body of his son. He buried the deceased and obtained the death certificate which he produced as an exhibit.

The plaintiff also obtained the letters of administration in respect of the deceased estate and a police abstract form which shows that the deceased was among the 24 people who died as a result of the multiple accidents that involved about eight other vehicles. The deceased was working as a Public Health Officer with the Ministry of Health at the time of his death, and he was earning Kshs.6, 341.10 per month. The plaintiff also produced the pay slips for the month of November, 1996. The plaintiff testified that the deceased was assisting him as he used to give him kshs.3000/- every month. The deceased was not married as at the time of his death.

The plaintiff also relied on the evidence of **Joshua Mwangi Gonad PW2** who was traveling in the same motor vehicle KAH 091C on the 4<sup>th</sup> May, 1997 when the accident occurred.

According to PW2 this matatu left Nakuru at about 2.00 p.m. and on reaching Naivasha a lorry registration No.KAH 540L which was traveling from Nairobi left its lane and came to where the matatu was and knocked it off the road. PW2 sustained several injuries as a result of this accident. He later visited the Naivasha police station and obtained the details of the lorry that caused the accident. He said that although he suffered shock after the accident he could still recall how the accident occurred and that the lorry was driven carelessly. Police Constable **Paul Mwangi PW3** gave evidence in respect of the police file regarding this accident that took place on 4<sup>th</sup> May, 1997 along Naivasha/Nairobi Road which he said involved a total of 9 vehicles. According to the occurrence Book motor vehicle registration No.KAH 540L lost its brakes. It was lorry carrying maize and as a result collided with several other vehicles which were traveling on the opposite direction including a matatu KAH 091C. The driver of the lorry KAH 540L was charged with the offence of causing death by dangerous driving because there were 33 people who died as a result of this accident. But the driver one Douglas Ochwang Onachi was acquitted under Section 215 CPC. PW3 confirmed that **Arthur Nderitu Ndungu** the deceased was among the passengers who were in the matatu and one of those who died.

On the part of the defence the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed a statement of defence in which negligence was denied. However the defendants pleaded in their defence that the collision occurred due to failure of the brake system of the defendant's motor vehicle which suddenly and without warning failed to operate thereby causing the accident.

The defendant did not offer any evidence at the hearing but counsel for the defendants submitted that the plaintiff did not prove that the deceased was a passenger in motor vehicle KAH 091C. Counsel for the defendant submitted that the evidence of PW2 who was an eye witness cannot be relied on because he suffered shock after the accident and could not recall the events leading to the accident. Counsel also invited the court to consider that the 2<sup>nd</sup> defendant was acquitted of the charges of causing death by dangerous driving and on a balance of a probability the plaintiff has not established his case to the required standard.

On the issue of quantum the defendant proposed that this court should adopt a multiplier of 20 years and apply a dependency ratio of 1/3 since the deceased was not married. On the issue of pain and suffering, counsel proposed a ward of kshs.10.000/- since the deceased died the same day.

Counsel put forward the decision of the case **of Maina Kaniaru & Another vs. Josephat Muriuki Wangombe Civil Appeal No.14 of 1989.**

On the part of the plaintiff, learned counsel Mr. Gekonga submitted that the plaintiff proved his case on the required standard through the evidence of PW1, PW 2 and PW 3. The pleadings were amended on 24th November, 2004 and it is clear that the driver of lorry registration KAH 540L lost control and knocked several vehicles among them KAH 091L in which the deceased was traveling. PW1 was an eye witness of the accident while PW3 was a police officer who produced the police file regarding this accident. The 2<sup>nd</sup> defendant who was the driver of the M/v Reg.KAL540L was charged with the offence of dangerous driving. Moreover by the defendant's defence, in particular, paragraph 4, it is admitted that the accident occurred as a result of failure of brakes. The defendants did not offer any evidence regarding the failure of brakes and there is no explanation why the brakes failed unless the vehicle was not properly serviced. Brakes do not just fail and in any event, under section 107 of the Evidence Act, whoever desires any court to give a judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. If the defendants desired the court to rely on the facts that the brakes failed they should have adduced evidence in that regard. In view of the fact that no such evidence was adduced, Counsel invited the court to find that the defendants were 100% liable for the accident.

On quantum it was admitted that the deceased was aged 24 years old as at the time of the accident he was earning Kshs.6,341.10/= as at the time of his death. There are prospects that if he lived, he could have furthered his career and he could have worked up to the age of 55 and it was proposed that the court should adopt a multiplier of 30 years. The parents of the deceased depended on him and counsel urged the court to award kshs.100, 000/- for pain and suffering and kshs.80, 000/- for the loss of expectation of life.

Arising from the above summary of evidence, the issues for determination are principally the twin issues of liability and quantum.

The evidence by the plaintiff that the deceased was lawfully traveling in M/V KAH 091C on 4<sup>th</sup> May, 1997 which was involved in an accident caused by the 2<sup>nd</sup> defendant who was driving lorry Reg.No.KAH 540L was supported by the evidence of PW2 and PW3. From the police records and the pleadings and even the evidence of PW2 vehicle Reg.KAH 540L lost brakes and collided with KAH 091C among other vehicles. There was no evidence to controvert the plaintiff's evidence and the particulars of negligence as pleaded were supported by the evidence adduced in support of the plaintiff's case.

I am satisfied that the accident was caused by the defendant's vehicle which was driven by the 2<sup>nd</sup> defendant.

When considering the issue of liability there are two elements to take into consideration in assessment of liability namely: Causation and blameworthiness. [See the case of **Karanja vs. Marere 1983 KLR page 142.**]

On the issue of quantum the deceased was aged 24 years old. He was employed and earning a salary of kshs.6,341.10/. The plaintiff obtained the requisite letters of administration before filing the present suit. He brought this suit on his behalf as the father of the deceased. In his evidence, the plaintiff said that, he depended on the deceased who used to give him 3,000/- shillings every month. Thus the plaintiff can be described as a dependant as envisaged under section 4 of Fatal Accidents Act. In the case of **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & Another 1982-88 Vol KAR** the Court of Appeal held as follows:

*'The Financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased and the expense of his/her education are lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, the younger brothers and sisters of the deceased as the deceased matured physically and materially, are extinguished now, almost all assistance of this kind would in the conditions of Kenya*

*olly enormous in substance. So much as to that the loss carried by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the time is the assessment of a fair award in the circumstances of any one case.'*

**In this case therefore I find that the deceased would have worked up to the age of 55 years and it is reasonable in the circumstances to adopt a multiplier of 30 years. It is also reasonable to consider that the deceased would have used 1/3 of his salary to support the plaintiff. Thus the general damages should be;  $6,341 \times 30 \times 12 \times 1/3 = 760920/=$ .**

**As regards the claim for the loss of expectation of life, both counsels were in agreement that Kshs.80, 000/= should be awarded and this being a conventional sum, I award the same.**

**On pain and suffering, the deceased died the same day, I hereby award Kshs.30, 000/= under that heading.**

**The following is the judgment of the court:**

### **On liability**

Liability is hereby apportioned to the defendants 100% jointly and severally.

### **On quantum**

The plaintiff is awarded Kshs.760, 920/- as general damages, Kshs.80, 000/- for the loss of expectation of

life and Kshs.30, 000/= for pain and suffering.

**Total** Kshs.870, 920/=.

The plaintiff shall also have the costs of this suit.

It is so ordered.

Judgment delivered this 23rd day of March, 2006.

M. KOOME

JUDGE