



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 62 of 2003

**JANE WAIRIMU MAINA (LEGAL ADMINISTRATOR OF THE ESTATE OF
EPHANTUS MAINA)**
PLAINTIFF

VERSUS

PETER GITHINJI KAHINDI
WILLIAM M. MATHUNDU
DEFENDANTS

J U D G M E N T

Jane Wairimu Maina (hereinafter referred to as the Plaintiff) has brought this suit on her own behalf and on behalf of the estate of the late Ephantus Maina Waithaka (hereinafter referred to as the deceased). The plaintiff claims general and special damages under the Law Reform Act and the Fatal Accidents Act from Peter Githinji Kahindi (hereinafter referred to as the 1st Defendant) and William M. Muthundu (hereinafter referred to as the second Defendant) arising from an accident involving the 2nd Defendant's motor vehicle Registration No. KAD 910Q which was being driven by the 1st Defendant. The Plaintiff contends that as a result of the accident which was caused by the negligence of the 1st Defendant the deceased who was lawfully traveling in the 2nd Defendant's motor vehicle sustained fatal injuries and subsequently died.

The plaintiff who is the deceased's widow and administrator of his estate was the only witness who testified. She did not witness the accident but got to learn of it and found the deceased admitted in hospital. The deceased succumbed to his injuries 15 days later. The Plaintiff produced among other documents a police abstract report of the accident identifying motor vehicle KAD 910Q as the accident vehicle and 1st Defendant as the Driver. She also produced a certificate form the Registrar of motor vehicle showing that the 2nd Defendant was the registered owner of the motor vehicle. She further produced a copy of proceedings in Nyeri CMCC No. 30 of 2001 showing that the 1st Defendant was charged and convicted for causing death by dangerous driving arising from the accident subject of this suit. The plaintiff blamed the Defendants for the accident and urged the court to hold them fully liable.

The defendants filed a joint defence in which they denied the plaintiff's claim. The Defendants denied that she was neither the widow nor the legal administrator of the deceased's estate. It was further denied that 2nd Defendant was the registered owner of motor vehicle KAD 910Q or that the Defendants were

negligent. In the alternative it was pleaded that if an accident did arise then the same was caused by unavoidable circumstances and was inevitable.

At the hearing of the suit the Defendants opted to call no evidence. The defence counsel has however submitted that the plaintiff failed to prove liability as no eye-witness was called to give an account of how the accident occurred and there was therefore no evidence to prove the particulars of negligence alleged against the Defendants. In support of his contention the advocate relied on the following authorities:-

- **CA No. 252 of 1998 – Mary Ayo Wanyama & Others And Nairobi City Council**
- **HCCC 858 of 1988 – Lucy Muthoni Munene Versus Kenneth Muchange & Kenya Bus Service Ltd.**

In both cases the plaintiff's suit was dismissed for lack of evidence as the plaintiff who was the only witness failed to call any evidence in regard to how the accident occurred and there was therefore no evidence in support of the alleged particulars of negligence.

In this case the plaintiff relied on the proceedings in Nyeri CMC's case No. 30 of 2001 in which the 1st Defendant was tried and convicted for causing the death of the deceased by dangerous driving.

Section 47A of the Evidence Act states as follows:- ***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

In the case of **Robinson v/s Oluoch [1971] EA 376** the court of appeal considering section 47A of the Evidence Act stated as follows:=-

“The respondent to this appeal was convicted by a competent court of careless driving in connection with the accident the subject of this suit. Careless driving necessarily connotes some degree of negligence and we think, without deciding the point that in those circumstances it may not be open to the Respondent to deny that his driving in relation to the accident was negligent.”

In the case of **Queens Cleaners & Dyers Ltd v/s East Africa Community and others [1972] EA 229**, Trevelyan J considering Section 47A of the Evidence Act, applied the earlier case of **Robinson v/s Oluoch [1971] EA 376** and stated as follows:-

“To establish a claim in negligence simpliciter the degree thereof is immaterial for if you are negligent in the smallest degree it is enough to fix you with liability and there is no problem, applying section 47 A the conviction spells out negligence and that concludes the matter. But where contributory negligence is concerned, it is different, for the court must investigate whether one or other or both of the parties were at fault so as to apportion the damage according to the relative importance of their acts in causing the damage and their relative blame worthiness. What Section 47 A does is to make it impossible to hold that the person convicted was not negligent at all for the conviction is conclusive evidence that he was, i.e. the court can find that his blame worthiness was small enough, it cannot find that he had none..”

I entirely concur with those sentiments. In this case the 1st Defendant's conviction provided conclusive evidence that the 1st Defendant was to a certain extent negligent. No contributory negligence having been pleaded against the deceased and no evidence having been adduced by the Defendant to show that the accident was inevitable there was sufficient evidence on a balance of probability to prove that the accident was caused by the negligence of the 1st defendant.

In my view therefore this case is distinguishable from the cases cited by the defence counsel. The

Defendant chose to offer no evidence and the negligence established through the evidence regarding his conviction was therefore not challenged. I am satisfied that there was sufficient evidence that the accident was caused by the negligence of the 1st Defendant and I therefore find 1st Defendant solely to blame for this accident. I find that the 2nd Defendant was the owner of the motor vehicle KAD 910Q is vicariously liable for this accident.

I have considered all the authorities cited by the parties advocate in relation to quantum. As concerns damages for loss of dependancy under the Fatal accidents Act the deceased was 49 years old at the time of his death. I would concur with the defence counsel that a multiplier of 6 years would be appropriate given the accepted retirement age in the civil service which currently stands at 55 years. I would further adopt a dependency ratio of $\frac{2}{3}$ using the deceased's proven income of 12,342/=. The damages for loss of dependency would therefore work out as follows:-

$$6 \times \frac{2}{3} \times 12,342 \times 12 = 592,416/=.$$

It is evident that the deceased died 15 days after the accident. There is no doubt that he suffered serious injuries and was partially paralysed. No doubt he suffered a lot of pain and anguish. A nominal figure of 10,000/= as proposed by the defence counsel would not serve justice. A sum of Kshs.100,000/= would in my view be appropriate for pain and suffering. I would also award a sum of Kshs.100,000/= in respect of loss of expectation of life.

Finally I would allow special damages claimed of Kshs.117,610/= as appropriate receipts were produced in proof of the same.

The upshot of the above is that I give judgment in favour of the plaintiff as against the two Defendants jointly and severally as follows:-

General damages:

Loss of Dependancy – 592,416/=

Pain and Suffering – 100,000/=

Loss of life expectancy – 100,000/=

Kshs.792,416/=

Special damages Kshs.117,610/=

I further award costs and interest on the special damages from the date of filing suit and general damages from the date of this judgment.

Dated signed and delivered this 18th October 2006.

H. M. OKWENGU

JUDGE