



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT 1457 OF 2000

ERNEST DIENI ALWANYI.....1ST PLAINTIFF

KIPHINA SHIYENZI OTHIAMBO.....2ND PLAINTIFF

VERSUS

ALDUCHIRA INVESTMENT LIMITED.....DEFENDANT

JUDGMENT

The first Plaintiff sued for the injuries he sustained in a traffic accident and the 2nd Plaintiff who is the widow and personal representative of one Peter Makaka Alwanyi sues for damages arising out of the death of her husband arising out of the same accident.

The accident in which the 1st Plaintiff claims he was injured and the deceased was killed is alleged to have taken place on the Gilgil Naivasha Road when it is alleged they were being carelessly and negligently driven in motor vehicle No. KAB 540 D by the Defendant's driver, servant or authorized agent. It is alleged the Defendant was the owner of the said vehicle and is vicariously liable for the said accident

. Particulars of negligence are set out as well as of the injuries suffered by the 1st Plaintiff and particulars pursuant to the Fatal Accidents Act in respect of the deceased. Particulars of special damages are also given.

The Defence filed admits that the Defendant was the owner of the motor vehicle as alleged in paragraph 3 of the Plaintiff but that same was being driven by its driver servant as agent.

The fact of the accident is admitted but not that the Defendant's driver, servant or agents were negligent.

The Defence alleges that the accident was caused by a vehicle registration number SOM 55285 and sets out particulars of negligence of the driver of that vehicle. It is further alleged that the driver of that vehicle was convicted of causing death by dangerous driving and of driving a defective motor vehicle.

The issues before the court were: -

- (1) Was the Defendant's driver guilty of negligence as claimed;
- (2) Was the driver of vehicle No .SOM 55285 guilty of negligence as claimed;
- (3) As a result of the negligence of the Defendant did the Plaintiffs suffer loss and damage and if so

how much;

The 2nd Defendant gave evidence that she was the wife of the deceased who was killed in a motor vehicle accident at Gilgil. She produced Letters of Administration to her husband's estate in her favour issued on the 30.1.1995. At the time of his death the deceased was 38 years of age. She did not know his salary but gave her Shs.3000/= per month for herself and the children.

The 1st Plaintiff gave evidence that on the 24.2.1993 he and his brother both in Nairobi bought tickets for a bus called the Obuya Express, the number being KAB 540 D. They reached the Toll Station at Gilgil. The bus driver was driving fast when he saw a lorry with a trailer coming from the direction of Nakuru. The bus ran into the trailer. The time was about 8 p.m. and he was seated in the third row from the back. The lights inside the bus were off. After the accident it was difficult to get out of the bus because it had been damaged. Some people broke the glass in the rear emergency door. He was unconscious and woke up in Nakuru Hospital. His brother the deceased was sitting at the front of the bus and was killed in the accident. He produced a burial permit and stated he incurred expenses of Shs.28,000/= on the burial.

He produced a death certificate for his brother's death. He produced a medical report from Dr. Otiato: setting out his injuries.

In cross-examination P.W.2 stated that the lorry was to blame but the bus was driving very fast.

The lorry and bus stopped on the center of the road. The lorry was coming from the opposite direction on its correct side of the road swerved a bit. He suffered bruises to his face, knee and chest. He produced a receipt for Shs.5000/= from the doctor.

The 1st Plaintiff called Dr. Zephania Kamau who had attended him on the 27.9.1993. The witness found bruises on the 1st Plaintiff's forehead and left leg as well as soft tissue injuries. He was treated at the Provincial Hospital Nakuru and a private clinic. He charged 5000/= for the attendance and 1000/= for cost attendance. The 1st Plaintiff also produced a medical report from Dr. Otiato who on his prognosis stated that the 1st Plaintiff suffered pain and discomfort and was not able to undertake any physical injury for tree cutting. He is now limited by left sided chest pains from straining on that side.

In his submission Mr. Bw'omote submitted the claims of the Plaintiff were bad for misjoinder. Although two suits should have been filed no prejudice has been called to the Defence as the accident in which the 1st Plaintiff's husband was killed and the 2nd Plaintiff was injured arise out of the same accident. The only person inconvenienced if at all was this court

The defendant disputed liability and Mr. Bw'omote relied on two cases. ***Alfred Machira & Another versus Abdi HCCC No.711 of 1993*** was a case in which the Plaintiff in that case sued the lorry driver of, of I presume vehicle No. SOM 55285, as it is not referred to in the Judgment, and that the accident involving that vehicle and the bus was the fault of the Defendant. The Defendant did not appear and the learned Judge found the Defendant liable. The Judge could find no contributory negligence but as the Defendant did not appear there was no evidence on which he could have done so.

In ***Capell Aketi Okwalo versus Mohamed Suleman & Another No. HCCC No. 795 of 1998*** in which the Plaintiff sued the Defendant including the Defendant in this case, for negligence arising out of the same accident, which is the subject matter of this case for the death of her husband who was traveling in this bus. In her Judgment Lady Justice Ondeyo had this to say of the claim that the owner of the bus was negligent

“Although in the amended plaint at paragraph 7(a) the Plaintiff accuses the third defendant (that is the owner of the bus) of negligence. The Plaintiff made no attempt to adduce any evidence to prove negligence against the 3rd Defendant or his agent”

The Defendant did not call any evidence in this case and relied on these authorities. The Defendant submits that the Plaintiff failed to prove negligence on the part of the Defendant.

The onus of proving negligence falls fairly and squarely on the shoulders of the Plaintiffs.

In support of the allegation of negligence against the Defendant the 1st Plaintiff gave evidence the salient features of which I have set out above. In cross-examination he stated the lorry was to blame but the bus was driving very fast. There is no doubt that the impact of the two vehicles caused substantial damage to the bus as 17 people were killed and the 1st Plaintiff had difficulty in getting out of the bus. There must have been great force in the impact indicating that the accident happened when the two vehicles were traveling at a considerable speed. Amongst the particulars of negligence there is an averment that the bus was driving too fast in the circumstance.

Although I accept that the lorry was the primary cause of the accident had the bus been traveling at a slower speed it is likely that the accident, if it happened at all, would have been less serious.

In the result I find that the driver of the bus was negligent to a certain degree. I therefore hold the Defendant liable. I also find that the 1st Plaintiff was injured in the accident and that the 2nd Plaintiff's husband was killed in it.

The 1st Plaintiff has produced evidence of his injuries, which are in the nature of soft tissue injuries and I award sum of Shs.100,000/= plus special as claimed in the sum of shs.1600/= for the police abstract and medical report.

The 2nd Plaintiff gave evidence that her husband gave her Shs.3000/= per month. She had not known what his salary was. I accept the 2nd Plaintiff's evidence that she was given this sum by her husband. However part would be for his own upkeep. He was 38 at the time of the accident and I find a multiplier of 10 reasonable. I therefore award $\text{Shs.3000} \times 12 \times 10 \times \frac{2}{3} = \text{shs.240,000/=}$.

The 1st Plaintiff claimed shs.20,110=00 by way of special damages. There was only one police abstract, which I have allowed for. I consider that Shs.20,000/= is not reasonable for funeral expenses. P.W.1 stated he had incurred shs.28000/= in this respect. As however the expenditure was not incurred by the 1st Plaintiff I disallow this claim. She may have Kshs.10 for the burial certificate.

The 2nd Plaintiff produced a Limited Grant of Administration issued on the 30.1.1995 prior to the filing of the suit. In respect of Law Reform damages I award a sum of Shs.75000/=.

In the result I give Judgment for the sums awarded and costs to the Plaintiff. Including sum of Shs.5000/= for witness's expenses for the doctor. Interest will accrue on the specials from the date of filing of the plaint at court rates and from the date of this Judgment on the damages awarded at the court rates.

Dated and delivered at Nairobi this 20th day of June, 2005

P.J. RANSLEY

JUDGE