



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 613 of 2001

FLORENCE KANIARU Suing as the

Administratrix of the estate of the Late

WALTER KANIARU PLAINTIFF

VERSUS

DOMINIC MUTETI NDAMBUKI 1ST DEFENDANT

H. YOUNG & COMPANY (E.A.) LTD 2ND DEFENDANT

JUDGMENT

1: BACKGROUND

1. The fateful day of the 18.4.98, Christopher Maina Muchemi (PW2) a conductor so engaged in a public service vehicles as a tout was calling to passengers to board the vehicle he was with. He suddenly saw a lorry motor vehicle being driven in such a high speed. He had an impact and turned around to see a man being thrown in the air and land to the ground. The lorry vehicle attempted to run away but the other served vehicles surrounded it so as it would not go away. To Christopher's mind the driver of the lorry was in a hurry and as a result was over speeding causing the said accident. Christopher assisted in taking the man to hospital. The injured man was Walter Kaniaru. He filed suit on the 17.9.01 through his wife and next of friend Florence Kaniaru. She transferred him to Aga Khan hospital whilst there, Walter was not able to speak. He passed away on the 23 September 2001. Florence took letters of grant intestate on the 7.10.2002 and was duly substituted in this suit as the legal representative of her late husband who died at the age of 73 years old. He was aged 70 years at the time of the accident.

2. The defendants herein Domic Muteti Ndambuki - the authorized driver of the said lorry vehicle belonging to M/s H. Young & Company (E.A) Ltd (defendant 1 and 2 respectively filed) defence and questioned the plaintiffs locus in bringing this suit to court.

They claimed in the alternative that the deceased was infact negligent and had dashed onto the said road without giving the driver an opportunity to avoid the collision. That he was unlikely in an emetic and haphazard manner.

I: LOCUS

3. The issues before the court is whether the plaintiff had locus to bring this suit. The plaintiff produced letters of grant intestate issued to her by the High Court in Nairobi on 7.10.02. The effect is that she has locus to bring this suit as the legal representative of the said estate of the deceased. She earlier had within

authority to act as next of friend of the deceased whilst he was alive.

II: LIABILITY

4. The issue No.4 is whether the deceased substantially contributed to the said accident by his own neglect and conduct. The matters before this court in evidence is that the defendant's lorry was over speeding. In the process then the deceased fell in the air. I have no other indication from the defendant that the deceased was negligent as per their particulars of negligence. I find herein that the person to take great care to other is the driver in a motor vehicle. They are the one who should ensure that the vehicle is driven with due care to other pedestrian and road user.

5. In these circumstances I find that the defendant No.1 is liable for this accident at 100% jointly with the 2nd defendant, being vicariously liable.

II: QUANTUM

A: General Damages

(a) Law Reform Act

i) Pain and suffering

There is evidence that the accident occurred on the 18.4.98 and death was on 23.9.01. The advocate for the defence tried to impress this court that the injuries the plaintiff sustained may perhaps be not related to this case. There was no doctor report.

The time from when the accident occurred till death and the evidence from the plaintiff that from the time of accident the deceased had been to hospital till his death. I would accept that he was in pain and the cause of death as per death certificate being brain damage/hemorrhage. I was not referred to any case law but I would find Ksh.500,000/- reasonable for pain suffering and loss of amenities.

ii) Loss of expectation of life.

The deceased was said to be a sales man. I do not see any letter from the employer or reference letter to dispute that he in fact is the one who was engaged in a work of salesman. I may believe that indeed even at 70 years old one may be a salesman but a simple letter of confirmation from his principal would have suffice. I would reject this claim.

b) Fatal Accidents Act

The claim under this act is for dependency. Those named as dependency are the deceased's children who are aged all over 32 years old to 48 years old when the suit was filed. I note that the fatal accident act says that there be indeed dependency by a spouse, parents and children. For children who depend on their parents it must be demonstrated.

In this case the children were married. I would reject this claim as not having been proved.

c) Special Damages

Special Damages must not only be pleaded but particularized. In this case the bundle of the special damages claim was for Ksh.1,135,507.70. I was surprised when the advocate for the plaintiff arrived with a bundle of receipts to court and complained they were too many. What requires to be done is that each claim for medical services must be particularized i.e. The hospital bed, the medicines, the nurses care, the doctors bills etc.

One cannot give a lump sum figure and pray to be paid. Further the plaintiffs stated that she indeed did

not pay the bill but got assistance elsewhere including her church.

There has been no proof at all of the payments of any of the services under the special damages claim put see:-

Ouma v Nairobi City Council 1976 KLR 297

5. I hereby enter judgment on the proved claims.

6. In summary

6.1. Motor vehicle lorry pedestrian collision

6.2 Pedestrian male adult aged 70 years in 1998

6.3. Liability 100% against 1st and 2nd defendant

6.4. a) Pain and suffering and loss of amenities Ksh.500,000/-

b) Loss of expectation of life Ksh. 70,000/-

c) Special Damages - Nil Not proved

d) Loss of earning - Nil Not proved

e) Cost of day case Nil Nil not proved

Ksh.570,000/-

I award costs of this suit to the plaintiff. I award interest not from the date of filing suit but from this judgment date.

Dated this 14th day of July 2005 at Nairobi.

M.A. ANG'AWA

JUDGE

Kirundi & Co. Advocates for the plaintiff

Wangai Nyuthe & Co. Advocates for the defendant