



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Suit 239 of 1998**

**LUCY NJOKI CHEGE (Suing as the personal & legal
representative of the Estate of
FRANCIS KARA WAINAINA (DECEASED)
.....PLAINTIFF**

VERSUS

JAMES MACHARIA KUNGU T/A

**MARSH TRANSPORTERS.....
.....1ST DEFENDANT**

**JAMES MBOTE NDIRANGU.....
....2ND DEFENDANT**

JUDGMENT

The Plaintiff is the legal representative of the estate of Francis Kara Wainaina (deceased). He brought this action for the benefit of the dependants of the deceased under the Fatal Accidents Act and for the benefit of the deceased's estate under the Law Reform Act.

He pleaded that on or about the 10th day of April, 1997, the deceased was lawfully travelling in the first Defendant's motor vehicle registration number KAD 948U in the course of his employment as a turn boy when the second Defendant as the authorised driver of the said motor vehicle drove the same negligently and caused it to overturn thereby fatally injuring the deceased. The accident occurred along Nairobi-Mombasa Highway at Kambu bridge.

The plaintiff set out the particulars of negligence on the part of the second Defendant and also stated that the suit was filed primarily for the benefit of the deceased's son, David Wainaina who was 3 years old. The Plaintiff further averred that at the time of his death, the deceased was 31 years of age and enjoyed good health and was earning Kshs.3,000/- per month and had prospects of a higher income.

As special damages, the Plaintiff claimed the following:-

- (a) Police Abstract.....Kshs. 100/-
- (b) Death Certificate.....Kshs. 50/-
- (c) Transport.....Kshs. 3,690/-

(d) Coffin.....Kshs. 9,500/- Total Kshs.13,340/-

In his defence, the first Defendant admitted that an accident occurred on 10/4/97 involving his motor vehicle registration number KAD 948V but denied that the deceased was a passenger therein or that he was his employee. He further stated that if the deceased was travelling in the said motor vehicle, then he was an unauthorised agent without the consent of the first Defendant. The first Defendant further averred that the deceased and the second defendant were on a frolic of their own and therefore the carriage of the deceased in the said motor vehicle was not for the purpose or benefit of the first Defendant.

On the day of the hearing, the defendants did not attend court neither did the first Defendant's advocate, Mr. Lawrence Mwangi, whose firm was served with a hearing notice on 30th March, 2004 clearly stating that the matter would be heard on 18/10/2004. The hearing notice was served upon the said advocate in person and he stamped and signed the reverse side of the same in acknowledgment of service.

During the hearing, the deceased's brother, Benson Muchai Wainaina testified. He had obtained a Limited Grant of Administration authorising him to prosecute the suit since the deceased's widow, Lucy Njoki who, together with the deceased's father, Wainaina Thathini Muchai were the administrators of the estate of the deceased had passed away while the suit was still pending in court.

No effort was made to explain how the said accident occurred. The court was not told whether there was a collision between any motor vehicles or not or whether it was a self involving accident. The nature of the road at the scene of the accident was not described. The particulars of negligence as stated in the plaint were not proved at all. The Plaintiff may not have known exactly how the accident occurred but he could at least have called the area police officers who must have visited the scene of the accident and carried out investigations to testify and perhaps produce the police file.

A claim based on the tort of negligence must strictly be proved before a court of law can hold a party to be liable. Perhaps the only exception would be where the Plaintiff is relying on the doctrine of "res ipsa loquitur". But even then, the Plaintiff has a duty to explain that the accident occurred in circumstances in which an accident should not have occurred thereby discharging, in the absence of any explanation by the Defendant, the burden of showing negligence on the part of the person who caused the accident. This was well stated by Sir Charles Newbold, P. in **EMBU PUBLIC ROAD SERVICES LTD VS RIIMI [1968] E. A. 22;**

"The Plaintiff, in those circumstances, does not have to show any specific negligence, he merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only reasonable inference, that the only reason for the accident must therefore be the negligence of the Defendant."

The plaintiff therefore failed to prove his case on a balance of probabilities and consequently I hereby dismiss the same. If the plaintiff had succeeded in proving his case I would have proceeded to assess damages as hereunder.

Loss of Expectation of Life:

The awards under this heading have been varying from Kshs.80,000/- to Kshs.120,000/-. In this matter I would have awarded Kshs.100,000/-.

Pain & Suffering:

The Court was told that the deceased died on the spot and so I would have awarded Kshs.10,000/-.

Under the Fatal Accidents Act, the Plaintiff's counsel submitted that the deceased was working as a Turn-boy, earning a monthly salary of Kshs.2000/-.

However, no evidence to that effect was produced. The plaintiff merely said that after the accident he

talked to the first Defendant and he confirmed that he had employed the deceased as a turn-boy.

No birth certificate for the deceased's alleged child was produced neither was the child shown to court. Dependency must be proved and I find that the whole claim of loss of dependency was not proved and I would also have dismissed it.

The specials were also not proved and I would equally have disallowed the same. All in all, the Plaintiff's case is dismissed but with no order as to costs since the Defendant did not attend court.

DATED, SIGNED & DELIVERED at Nakuru this 13th day of July, 2005.

DANIEL MUSINGA

JUDGE

13/7/2005