



- 1) Running Down Cause
- 2) Cyclist –Motor vehicle accident
- 3) Male adult aged 39 years old in 1996

4) Injuries:-

Fatal

5) Liability:-

50% against the plaintiff

50% against the defendant

6) Quantum:

1) Law Reform Act

i) Pain and suffering Nil

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

iii) Lost years

agreed 4,737/- say

4,700/-x 15 x 12 x 2/3 Ksh.564,000/-

II) Fatal Accidents Act

i) Loss of dependency

taken into account

III) Special Damages -

Total	not pleaded Ksh.634,000/-
Less 50%	<u>Ksh.317.000/</u>
Total	Ksh.317,000/-7)

Case law

Court: Kemfro African Ltd t/a Meru express v A.M. Lubia

(1982 –88) IKAR 727

8) Advocates:

S.K.M. Wandaka Advocate for the plaintiff

R.C. Ajiambo Advocate for defendant

**REPUBLIC OF KENYA**

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

**CIVIL CASE 2005 OF 1999**

**MARGARET WANGUI KIOKO ..... PLAINTIFF**

**VERSUS**

**MUUS KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

The suit before me is one in Tort involving a road traffic accident between a cyclist and a motor vehicle lorry.

Margret Wangui Kioko sues on behalf of herself and the estate of Philip Kioko Mulwa, her late husband, for the wrongful death he sustained and caused as the result of the negligence of the defendants driver and or agent.

The defendant entered appearance and denied the claim. Their defence was that it was the deceased who was negligent; one serious allegation made against that negligence of the deceased is that he was under the influence of alcohol.

The parties agreed on the issues for determination by this court.

The issues both agreed to that were not disputed was:-

“1) That an accident occurred on the 2.11.996 between the late Philip

Kioko Mulwa and motor vehicle Reg. KAB 159K owned by the defendant. They also agreed: -

2) That vehicle registration KAB 159K was being driven by the

driver servant and or agent of the defendant.”

**A: LIABILITY**

The issues in dispute concerns liability namely issue 1,2,3 and 4 that reads:-

1) Whether, he plaintiff was negligent or careless in the way he rode his bicycle?

2) Whether the driver servant or agent of the defendant was negligent in the manner he drove and managed the vehicle Reg. Number KAB 159K?

3) Whether the late Philip Kioko Mulwa caused the accident or contributed to the accident?

4) Whether the late Philip Kioko Muwla was cycling under the influence of alcohol?

Each party called two witnesses.

The plaintiffs case is that (through her witness PW2) the deceased was cycling. He was walking on foot and the deceased was ahead of him on the material day and place. The deceased crossed the road and went to cycle on his correct side of the road. A lorry belonging to the defendant and driven by its driver PW1, went by. In the process it brushed the deceased when it was trying to miss a pot hole. The deceased was knocked and fell down. The lorry passed on some distance before being stopped. The lorry/driver later took the deceased to hospital.

The defendant on the other hand through its driver PW1 stated that he was not trying to avoid a pot hole. There was the cyclist who had cut in front of him. He swerved his vehicle to the right. He tried to avoid a head on collision with an on coming vehicle. He swerved back to his correct lane. He then heard a noise. This indeed was a knock from the back of the vehicle that was an accident between the deceased and the lorry. He stopped and took the deceased to hospital. He admitted that indeed he had not at first been aware that he had knocked down the deceased.

He then produced a police abstract through DW2, the personnel officer in the defendants company. This police abstract blamed the accident to the deceased. It stated that the deceased was under the influence of alcohol.

The plaintiff had also produced her own police abstract that did not have this information. The case was pending under investigation. The abstract report was in fact an earlier report.

#### Who is to be blamed for this accident?

From the evidence before court, the plaintiff was ridding a bicycle. He rode it across the road before continuing on his correct side. The defendant DW1 – driver claimed he swerved out of the way to avoid knocking the deceased. An oncoming vehicle came and he swerved to his correct lane. The plaintiffs witness said the lorry brushed the deceased causing him to fall. The impact of the fall sustained him fatal injuries.

The defendant on the other hand was at first not aware of the accident. Nonetheless his lorry did collided with the deceased. This is what he concluded when he heard the sound.

The allegation that the deceased was under an influence of alcohol should have been supported by a report of whoever made that allegation. This is evidence that has not been tested on oath. To prove it a medical report of this fact required to be given.

If perchance it may have been true that the deceased was alcoholic, the advocate for plaintiff argued that it was not possible for an alcoholic person to effectively ride a bicycle. I would agree with him on this point.

The defendant has a duty of care to other road user. On seeing the bicycle rider he should have slowed down and exercised utmost care. If it is true another on coming vehicle was coming, then such care even more to be maintained.

The plaintiffs late deceased husband was also under a duty of care to be cautious at all times when ridding the bicycle.

I would in the instance compute liability between the parties at the ratio of 50% to 50%. The defendant being vicariously liable. I now look at the quantum:

## II: QUANTUM

The only claim the plaintiff prayed for is that of general damages under the Law Reform Act and the Fatal Accidents Act. This was not specifically so pleaded but is required to be so done.

Nonetheless the quantum is issue 5 and 6. I wish to begin with issue No.6 as it goes into jurisdiction.

### i) Issue No.6

#### Whether the plaintiff has capacity to sue?

The plaintiff produced to court limited grants of letters of administration ad colligenda bona issued to her on the 26.11.98. This is therefore sufficient evidence that she indeed has locus in this matter.

### ii) Issue No.5

Whether the Estate of the late Philip Kioko Muwla has suffered loss and damage?

#### A: Law Reform Act

##### i) Pain and suffering

I have no evidence that plaintiff was alive when he was in the deceased vehicle. What the death certificate discloses is that the death occurred at Kiandutu. I would not make award under this claim. The cause of accident was a head injury due to brain hemorrhage.

##### ii) Loss of expectation of life

I would award Ksh.70,000/- under this head.

##### iii) Lost years

The deceased was a textile designer. His basic salary was Ksh.4,737/- as agreed by the parties.

He was aged 39 years at the time of death. If he was a civil servant he would have worked up to the age of 55 years. I would take 15 years as a reasonable multiplier in the circumstances. Thus 4,737/- say 4,700/- x 15 x 12 x 2/3 = Ksh.564,000/-.

#### B: Fatal Accidents Act.

##### i) Loss of dependency

The plaintiff is the administratrix in this suit. She is also a beneficiary under this act. The law requires that she cannot claim under both acts as she would be double claiming.

See the case of:

Kemfro African Ltd t/a Meru Express services

V

A.M. Lubia

(1982 – 88) I KAR 727

The two heads of damage have to be taken into account.

I would agree with the defence that under the Fatal Accidents Act the beneficiaries must be particularized. The plaintiff states the deceased had 4 children. The plaint disclosed no particulars of these children.

I make no award under this head.

### C) Special Damages

There has been no claim for Special Damages that has been pleaded. None was asked for and none is hereby awarded.

### **Obiter dictum**

I would note that the plaint was poorly drafted.

I hope that this would not occur again.

I enter judgment for the plaintiff on the proved claim.

### In summary

1) Cyclist male adult aged 39 years in 1996

2) Injuries:- Fatal

3) Liability:-

50% against the plaintiff

50% against the defendant.

4) Quantum:

#### A: Law Reform Act

i) Pain and suffering Nil

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

iii) Lost years

$Ksh.4700/- \times 15 \times 12 \times 2/3 = Ksh.564,000/-$

#### B) Fatal accident Act

i) Loss of dependency taken into account

#### C) Special Damages

Not pleaded Nil

Total Ksh.634,000/-

Less 50% Ksh.317,000/

Total                    Ksh.317,000/-

I award the costs of this suit to the plaintiff. I award interest from the date of this judgment.

Dated this 18th day of February, 2004 at Nairobi.

**M.A. ANG'AWA**

**JUDGE**

Kinuthia Wandaka & Co. Advocates for the plaintiff

B.M. Muite & Co. Advocates for the defendant