



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1224 OF 1993

NANCY WAIRIMU WARUI & ANOTHER PLAINTIFFS

VERSUS

**THE BOARD OF GOVERNORS CHINGA GIRLS HIGH SCHOOL
& ANOTHER DEFENDANTS**

JUDGMENT

The cause of action, in this running down matter, arose on the 10th of August 1991. This suit was filed in court on the 1st of March 1993. The reasons that this matter has taken a considerable time to be completed are various.

A) Reasons for the delay of finalization of this suit

i) An interlocutory judgment was entered against the defendant which was never been challenged. The parties attempted to settle this matter on the 19th April 1994 and 19th May 1994 but no settlement was reached. (Togbor J, as he then was)

ii) The defendant was not served with a hearing notice 13th October 1994 (Ringera J). The suit was adjourned.

iii) The hearing commenced before Ringera J on 14th November, 1995. He heard the evidence of the plaintiff and adjourned the matter as the plaintiff wished to call one more witness

iv) Ringera J was no longer attached to the high court. The parties seem to have taken no action to proceed with this case before another judge as provided under Order 17 r 10 Civil Procedure Rules.

When it did come before Mbitio J on 2nd December, 1997 and later Amin J on 22nd November, 2000 the suit was stood over generally.

v) A year later a hearing date was taken for 14th June 2001. The parties failed to attend court. The suit was dismissed. Ang'awa J. vi) A year later, an application to reinstate the suit was made. This application was granted on the grounds that the dismissal had been caused by a former advocate of the firm representing the plaintiffs.

The suit proceeded for hearing on 14th to 17th March, 2004.

B) Locus

The parties addressed me on whether the defendants had any locus before this court to be legally sued.

The 1st defendant is the Board of Governors Chinga Girls High School. The 2nd defendant is one Gichui Gakuo an employee of the 1st defendant.

M/s Board of Governors of Chinga Girls had been declared a Board of Governors by the minister under Sec 10 (2) of the Education Act Cap 211 to be a body corporate.

This section 10(2) reads:-

“(2) The minister may, by order declare a Board of Governors to be a body corporate under the name of the Board of Governors of the school or schools and the board shall have perpetual succession and a common seal with power to hold both movable and immovable property, and may in its corporate name sue and be sued.”

This therefore means that where the Minister of education names a Board of Governors in the schedule of the act, they indeed have the power to be a corporate entity and sue and be sued. The 1st defendants are listed under the groups of schools specified in the second schedule page 37 as read with para 3(3) of the Education (Board of Governors order) LN 34/77.

The 2nd defendant Gichui Gakio since the inception of this suit had never been served with the summons to enter appearance nor the plaint.

The affidavit of service was effected on the 21st October, 1993 on the 1st defendant only. The Attorney served much later entered appeared for the 1st defendant, only.

There was no service according to the “return of service” (as they were then called) dated 21st October, 1993 and filed on 11th November, 1993 upon the 2nd defendant.

The advocate for the plaintiff states that the 2nd defendant is deceased but was unaware of the actual date.

I shall take it that the suit against the 2nd defendant had abated. I now look at the issue of liability.

B) Liability

On the 28th December, 1993 the principal deputy registrar entered an interlocutory judgment against the 1st defendant for failure to enter appearance and presumably file defence. The effect of this judgment which is permitted under Order 9a r 5 Civil Procedure Rules is that judgment against defendant is at 100%. They are vicariously liable in this suit for the acts of its agent and or servant.

Briefly, the background of this suit was that the deceased owned a motor vehicle. As he was driving the same on 10th August, 1991 along the Muranga/Kiriaini road a vehicle which was owned by the 1st defendant was so negligently driven that it caused a collision. The deceased died on sustaining fatal injuries.

I hereby confirm that liability is at 100%.

B) Quantum

i) Law Reform Act

The plaintiff appeared to court and produced letters of administration intestate dated the 14th of October 1992. This confirms that the plaintiff had locus to file this suit on the 1st March, 1993.

I now look at the claims of the head of damage.

a) Pain and suffering

None of the witnesses were at the scene of the accident to confirm how long the deceased was alive after the accident. As there has been no evidence led as to this I make no award. b) Loss of expectation of life

The deceased was an average man. He owned his own business, drove his own vehicle and had a bright future to look to.

I would allow a conventional sum for the loss of expectation of life at Kshs 70,000/- to be awarded.

(ii) The Fatal Accidents /Act.

a) Loss of dependency.

The deceased was a family man. He had a wife – widow – the plaintiff No 1 herein and three children. The 2nd plaintiff is the mother to the deceased. They all claim to have been dependant on the deceased.

I. Multiplier:-

The deceased was aged 32 years at the time of his death. He would had another useful working life of at least 23 years if he had been a civil servant or say 20 years.

II. Multiplicand.

In the trial before Ringera J the security produced audited accounts for the year 1990 signed by the deceased. This account reflects the full expenditure and profits made in the deceased's businesses. The net profit per annum being almost Kshs 400,877.50. The working capital per month for the business was about 67,000/-.

The auditors did claim that no income tax was being paid and should actually be provided for.

I am in agreement that this document is adequate proof to show the deceased was a businessman. I would provide for a multiplicand at Kshs 30,000/- being the net profit per month.

Therefore $Kshs\ 30,000/- \times 20 \times 12 \times \frac{2}{3rd} = 4,800,000/-$.

The law requires that the apportionment of this sum be given and that a discount for early marriage and lump sum payment be made. I actually discount this figure by Kshs 300,000/-.

The balance of Kshs 4,500,000/- is hereby apportioned as follows:-

- 1) Mary Wairimu Warui – widow Kshs 2.5 million
- 2) Irene Warui Meni – mother to deceased Kshs 500,000/-
- 3) Irene Wacere Warui – daughter Kshs 500,000/-
- 4) Edwin E. Meni Warui – son Kshs 500,000/-

Kshs 4,500,000/-

The sum for the minor will now not be invested as they may have attained the majority age.

I wish to comment that the plaintiff No 1 is both an administratrix and a dependant. I had not provided for lost years claim as this would normally be taken into account. iii) Special Damages

a) Funeral expenses nil not proved.

The same is dismissed.

b) Police abstract nil not proved.

The same is dismissed.

c) Material loss claim

Loss of a motor vehicle

The plaintiff produced an assessor's report and log book that confirmed that the deceased owned a motor vehicle registration No. KTF 617 Toyota Saloon.

The vehicle pre-accident value was Kshs 38,000/-

The salvage being Kshs 7,000/-

A sum of Kshs.31,000/-

is the sum due to the plaintiff under the claim for "such other relief as this court deems fit."

I hereby note that the assessors' report was prepared extremely professional with all the items that had been damaged in the vehicle duly priced. The costs of repairing the vehicle was uneconomical.

I hereby award the plaintiff the amount claimed and enter judgment accordingly. In summary

- 1) Driver male adult aged 32 years in 1991
- 2) Motor vehicle accident between two vehicles
- 3) Injuries

Haemothorax due to multiple fractures – Fatal

- 4) Liability 100% against the defendant No 1.

Interlocutory Judgment by principal deputy registrar 28th December, 1992.

Suit against 2nd defendant abated

- 5) Quantum

I: Law Reform Act.

- a) Pain and suffering NIL
- b) Loss of expectation of life Ksh. 70,000/-
- c) Lost years taken into account

II Fatal Accidents Act -

a) Loss of dependency

Ksh 30,000/- x 20 x 12 x 2/3 Ksh.4.800,000/-

Discounted Kshs 300,000/-

Total Ksh.4,500.000/-

subject to apportionment.

III Special Damages

a) Funeral expenses Nil not proved

b) Police Abstract fee Nil not proved. c) Material loss claim

Motor vehicle loss.

a) Pre-accident value Kshs 38,000/-

less salvage Kshs 7,000/-

Total Ksh. 31,000/-

Ksh. 4.601.000/-

I award the costs of this suit to the plaintiff. I award interest on General Damages from the date of this judgment. Interest on special damages from the date of filing suit.

Dated this 31st day of March, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Waweru Gatonye & Co. Advocates for the plaintiff

Board of Governors Chinga Girls High – The defendant