



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 43 OF 2002

**1.FLORENCE
KAVUTHA MALUSI**

**2.MUTHII MALUSI
(suing as
Administrator of the
Estate of**

**JEREMIAH NYAMU
MUSYOKA
(Deceased)**

.....
.PLAINTIFFS

=VERSUS=

**TRANSAMI (KENYA)
LTD.....**

.....
DEFENDANT

J U D G M E N T

In this case the Plaintiffs are two, widow and brother of the deceased Jeremiah Nyamu Musyoka.

On or about 15/5/1999 the deceased was lawfully driving motor vehicle registration Number KJL 709 along airport road and at Notco Container Depot (Apollo) on the said road another vehicle regulation Number KAH 297P/ZA6956 suddenly without stopping entered the said main road from a yard by the roadside and thereby collided with the deceased motor vehicle KJL 709 causing the deceased fatal injuries. The Death Certificate exhibit 5 shows that the death occurred on the same date and it was caused by multiple injuries due to road traffic accident. The Plaintiffs claim special and general damages from the Defendant under Fatal Accidents Act on behalf of the survivors and under Law Reform Act for the benefit of his estate.

The Plaintiffs plead in support of the case that the Defendant driver of the Defendant's vehicle KAH 297P/ZA6956 was arrested, charged and found guilty and imprisoned for a period of 4 years.

The Defendant filed a defence and denied the claim and alleged negligence of the deceased.

At the trial both parties were represented. The widow gave evidence. She said that her family used to reside on the same road at Customs house. When the accident occurred she was called by neighbors, a 3 minutes walk to the scene of accident. The time was 12.30 a.m. She described the scene as she saw it on

her arrival. Both vehicles were facing opposite sides. The vehicle with the trailer was blocking the road from end to the Airport. The deceased was driving a Volkswagen Beetle No. KAJ 707 which she found had entered under the trailer. It was on the left side facing the airport. She examined the Volkswagen and found her husband lying inside with blood on his head. She touched him and found his body warm but he was dead. The police came and found her there. Later the body of deceased was taken to Pandya Hospital where it was pronounced dead. She later went to Police and made a statement.

She produced Police Abstract. She produced salary slip and confirmed that husband was working with Kenya Revenue Authority since 1996 to-date of his death. He died at the age of 37 years.

Evidence to support special damages claim was produced.

Exhibits 9 - 350/-

5 - 50/-

6 - 5,000/-

7 - 5,000/-

10 - 6,250/-

11 - 1,010/-

12 - 100/-

8 - 22,100/- mortuary fees

13 - 20,000/-

She insisted that she used to receive Kshs.30,000/- for housekeeping per month. Evidence was also given by Insp. Ali Goni now in-charge of Traffic Investigations in Mombasa. He produced Police File and was questioned on the contents thereof. There was a witness PW.3 who was sitting in court until he was called by Plaintiff's counsel. He said he was a photographer by profession and on that night at about 11.00 p.m. he was at Apollo Bar when he heard a noise. Himself and others went to the road to see the cause. He arrived to see the accident had already occurred. He described the scene. I do not think that what he said was influenced by what he heard while in court waiting to give evidence. However, court is preferable always for counsel to keep his witnesses outside the court during the hearing.

On the side of Defendant there was a witness one Elisha Tanyo who said he was with the deceased on that night. He testified that he was actually traveling in the car when the accident occurred.

He said: "I heard Joshua tell Jeremiah there is a car in front. I heard a bang and all was dark. It was so sudden before I could know what was happening we were enveloped in darkness."

After the accident he passed off and later saw the vehicle after leaving the hospital.

The Defendant's driver was also called to give evidence. He confirmed that he was jailed and was not successful on appeal.

It is to be noted that by the time of this trial the driver had thought out the accident several times. He denied seeing the vehicle VW before he entered into the road and says that he only saw a torch light before hearing noise. What is clear is that the deceased was traveling to his home to collect some money to take to Makupa Police Station to obtain the release on bond of another person. He was sober. He was not just driving aimlessly. Therefore he was alert.

However, the Defendant's driver drove suddenly from a side yard on the left side of the road into the main road. The Defendant's driver was hauling a 40ft container. The deceased rammed into the side of the vehicle. He was suddenly alerted by a passenger that there was a vehicle in front and at that time he could not have avoided the accident. It is to be noted that the Defendant's vehicle was across the road. The evidence indicates that there was no street lighting at that spot. I have confirmed the evidence given on the position the vehicles were found after the accident. I am convinced that the Defendant's driver had noticed the approaching vehicle and miscalculated the distance and thereby moved his trailer into and across the main road intending to be on his right of the road, that is on left side driving from the Airport towards town. As it is he did not make it and instead obstructed the deceased vehicle. There was no light because the trailer was facing the sideways without light. I find that the Defendant's driver was negligence in entering into the main road with a vehicle with trailer without ensuring that he could cross-over before deceased vehicle had passed. It is a rule of Traffic that vehicles entering into the main road must wait and give way to traffic on the main road. I therefore find the Defendant's driver liable on 100% basis.

Regarding the quantum the Plaintiffs claim special damage in the sum of Kshs.77,120/-. I have examined the receipts regarding funeral expenses and transportation of the body and mourners I find the items to be genuine and reasonable and I allow the amount claimed being Kshs.77,120/-.

Regarding the issue of dependency the deceased was aged 37 years according to Death Certificate Exhibit 5. He was working for the Government. First since 1983 in Customs Department and in 1996 with Kenya Revenue Authority who were his employer at the time of his death. His April 1999 salary slip shows his gross salary as Kshs.10,942/-. It is also shown that he had several deductions including Sacco loans.

There was allegation that he had a side business at the Port in the name of Kikoro Ship Contractors. However, no evidence of the income he received from that business is shown. The assertion of the wife that she received Kshs.30,000/- per month to run the home affairs is not supported by either oral evidence or documentary evidence. She did say she had her own business but she did not elaborate. The court therefore has to operate on the deceased known income from the employment. Counsel suggests multiplier of 12 which I consider reasonable as he would have reached a retiring age under Government regulations. He had 3 children and a wife. His take home salary for April was Kshs.3,283.10. However, the deductions seem to relate to Sacco loans and Co-operative shares which must have been incurred for the benefit of the family. Without any further evidence I am inclined to take the rate of $\frac{2}{3}$ as the amount he must have spent for the benefit of his family and that is the dependency loss

. This head of loss of dependency is therefore to be calculated thus:- $12 \times \frac{2}{3} \times 12 \times 10,942$ (gross pay) = 1,049,532/-. No evidence was led regarding the deceased father's dependency. Only the widow and the three children.

On the item of pain and suffering the death occurred at the scene and only a normal sum can be awarded. I allow Kshs.10,000/- on this item.

On the loss of expectation of life a sum of Kshs.100,000/- will be adequate. The deceased was a young man leading a quiet life of a clerk. Could have been expected to attain at least the retiring age. Considering all the material laid before the court and the authorities relied upon by both parties I am satisfied that the awards made as above are adequate to compensate the Plaintiffs:-

Under Fatal Accidents Act the award is Kshs.1,049,532/-

Under Law Reform Act Kshs. 110,000/-

Special Damages Kshs. 77,120/-

Total

Kshs.1,236,652/-

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Judgment is therefore entered for Plaintiff against the Defendant in the sum of Kshs.1,236,652/- together with costs and interest.

Dated at Mombasa this 12thday of March, 2004.

JOYCE KHAMINWA

J U D G E

12/3/2004

Khaminwa, J.

Mr. Chege – Court Clerk

Mr. Ochwa

Mr. Nyalwala

Judgment read in their presence in open court.

JOYCE KHAMINWA

J U D G E

Mr. Nyalwale:- I require 30 days to consider my clients instructions.

Mr. Ochwa:- I give undertaking before expiration of 30 days from to-day.

JOYCE KHAMINWA

J U D G E

Mr. Nyalwala :- I apply for a copy of proceedings – certified.

Court:- Let the same be supplied.

JOYCE KHAMINWA

J U D G E