



TORT/Contract

- 2) Industrial accident/owner occupier
- 3) Male adult aged 30 years old in 1991
- 4) Accident: Fall into an empty lift shaft

Lift cage absent

5) Injuries: Fatal

5) Liability:-

100% against the 1st defendant and he 3rd defendant jointly and severally
100% against the 1st and 3rd defendant. This is for 2nd defendant against 3rd
defendant.

6) Quantum:

a) Law Reform act – Nil

Lack of locus – No grant of letters of representation.

b) Fatal Accidents Act

i) Loss of dependency

Ksh.2,400/- x 20 x 12 x 2/3 = Ksh.384,000/-

Subject to apportionment.

c) Special Damages - Nil not proved

d) Other relief - Nil

Possible award - Ksh.500,000/-

- Ksh.380,000/-

Fatal accidents Act

a) Radjalrisen M. Khemaneyv v Lachabai Murudhar
1958 EA 268 (Principles in which damages are assessed)

Locus

b) Rose Kahenzani uchuwo v James Mururu & Another
Hccc 5337/91, Ringera,J.

Touristic Union International v Jane Mbeyu

Nairobi CA 145/90

Visitor

c) Wheat v E. Lacon Company Ltd (1966) 1 ALL ER 582
Multiplier

d) Ali Senfuka Kibirge v Crossline Ltd

Hack 1406/96, Jive. Juma

Serastine Katiki Musili v.Samuel Maina Marai & Another

Hccc 3384/98, J.V. Juma

Text books

a) Halsbury Laws of England

4th Edition

Para 19 who is an occupier

Clerk and Lindsell on tort

Para 7 – 192

DR. ALOYS B. AYAKO & ANOTHER PLAINTIFF

VERSUS

KENYA AIRPORT AUTHORITY & 2 OTHERS. DEFENDANT

JUDGMENT

A) PRELIMINARIES

On the 10th of February 2003 Githinji J (as he then was) consolidated two suits Hccc.3774/92 and Hccc 3760/92. For ease of reference the parties were referred in the trial as follows.

1) Dr. Alloys B. Ayako 1st Plaintiff

2) Benta Sangara 2nd plaintiff

(Suing as the administrator/administratrix of Lawrence Sangara Maina (deceased)

(M/s Onyancha Bw'omote & Orora Advocates)

Versus

1) Otis Elevator Co. Ltd. 1st defendant No.1 (M/s Hamilton, Harrison & Mathews) 2) Nas Airport Sources Ltd. Defendant No.2 (M/s A.F. Gross Advocates)

3) Kenya Airport Authorities Defendant No.3 (Hccc 3760/92)

(M/s Archer & Wilcock Advocates)

It is appropriate to state at this stage that Kenya Airport Authorities (3rd defendant) were originally enjoined as parties in Hccc 3774/91 as defendants. They successfully applied that their case against them be struck out on the grounds that their suit was filed outside the Limitation period as provided for under section 34 of the Kenya Airport Authorities Act, namely that a suit against the authority ought to be filed within twelve (12) months. Ole Keiwua J (as he then was) duly struck out the suit against the authority.

The authority though had been sued by the Nas Airport services (defendant No.2) in a separate suit.

The parties by consent had the two suits consolidated. The effect being the liability between the 2nd and 3rd defendants being determined but argued, the 3rd defendant's advocates, should not extend to the plaintiff.

B) FACTS OF THE CASE

Lawrence Sangana Maina (deceased) was a waiter employed by the Nas Airport Services (2nd defendant). He was on duty on the fateful night of the 30th of June 1991 at the Jomo Kenyatta International Airport when he fell through an empty lift and met his death.

Nas Airport services have a Restaurant for guest on the 5th floor.

On the 4th floor they have a canteen for staff. Both these premises and others around the airport are leased from the Kenya Airport Authorities.

The 5th floor restaurant has a passenger lift (which is not subject of this suit) that leads to Simba

restaurant.

At the back, there is a passenger lift/goods lift which is operated between the ground floor, the 4th floor and the 5th floor. The staff and goods to be delivered use this lift that appears not to be accessed by the 2nd defendant's customers. The lift never stopped on the 2nd and 3rd floors as the lift was programmed to serve only the ground floor, the 4th floor and the 5th floor. The lift was fairly old. It was in fact a manual lift meaning that the doors would slide open normally from the cage of the lift and a separate door at the respective floor, similar to the lift at the Jogoo house meant for the V.I.P.'s.

All the lifts including this manual lift (the subject of this judgment) were installed and maintained by M/s East African Elevators Ltd known as Otis Elevators Co. Ltd the 1st defendant herein. They entered into a contract in which the 1st defendant was responsible for maintaining the said lift.

The lift was said to have been subsequently stopped and was out of use. The cage was suspended on the 5th floor. The 4th floor had no cage.

It seems that the deceased was alone. He left the canteen into an area outside the lift. The lift doors allegedly said to have been locked was found open. The deceased was found at the bottom of the lift shaft where he apparently fell through the empty space to his death below.

His brother and widow sued the three defendants in negligence as the legal representative of the deceased's estate.

The suit against the 1st defendant as the defendant who was assigned to maintain the said lift.

The suit against the 2nd defendant as the employer who is said to owe a duty of care to provide a safe working environment for the deceased.

The suit against the 3rd defendant by the 2nd defendant for failing to maintain a suitable and accessible lift.

The three defendants entered appearance and filed three separate defences largely blaming the deceased for not taking precaution in stepping into an empty lift.

Who then is liable for this accident?

C) LIABILITY

There was a contract for over ten years in existence between Otis Elevator Co. Ltd and 1st defendant and the Kenyatta Airport Authority through the then Ministry of Transport and Communications, Aerodromes Department. The contract of 1982 that has been produced specifies clearly what conditions required in the contract. Namely;

The 1st defendant:-

Would maintain the elevator equipments using qualified trained "Men" directly employed and supervised by them.

In doing so the men would use all reasonable care to maintain the elevator equipment in proper and safe operating condition

They would regularly and systematically examine the equipment in accordance with Otis Regulations."

The 1st defendant also agreed inter alia to:

“Renew all wire ropes

To examine periodically all safety drives and governors and make customary annual safety tests.”

They nonetheless excluded from their contract inter alia “all electric mails leading to current breaches of power and light.”

(The contract document did not appear to be signed and or sealed.)

The defendant No.1 claim in evidence that they were not liable for the accident that occurred on the grounds that the defendant had been stopped from operating due to the defects found. After the accident, the lift was inspected by D.W. 1 and a factory inspector. D.W.1 stated he saw no fault with the door to the lift that had to be opened, (when a lift is not in operation) by a key. In his opinion the door cannot in anyway open unless it was forced open, a screwdriver used or a key specifically used for the lift is used. He tendered an inspection report in evidence that clearly reflected the lift had:-

- i) No proper maintenance to the interlocks on the bad gates and was shorted out.
- ii) Other gate fastening were not maintained and some locks removed
- iii) The suspension rope or chains were not properly maintained, and badly worn out
- iv) The breakers should be slipped. The electrical equipment had faults where “all the main fuses of [the] main circuit breaks [had] been by passed with wires and one holder [was] completely burnt out. The whole circuit breakers should be replaced. The ropes should be replaced. The landing gates 3,2 and 1 floor had been shorted out with wires and some had no mechanical inter lock.

They were termed to be dangerous and required repairs.

The generator bricks and central car light was hanging dangerously.”

This report that was produced by consent and without calling the maker thereof, one Gabriel K. Wachua, was as a result of inspection of 28.7.91.

D.W.1 stated that the inspection had been carried out after the accident occurred.

The argument put forward was that the main cause of the accident was due to some electrical current power that was defective. This was not the responsibility of the 1st defendant but that of the 3rd defendant.

It is true that there are areas that the 1st defendant is responsible for and other areas the 3rd defendant would be responsible for. For instance, the lift and all its working would be the 1st defendants responsibility Where items are outside their ambit the 1st defendant would be responsible.

For instance:-

The five fighting equipment, main fuses board socket outlets in the machine room area

Are the responsibility of the landlord – the Kenya Airports Authority whilst

The replacement of badly worn out ropes, landing gates, Generator bushes, dangerously handing out wires, Leaking machines Are the responsibility of the 1st defendant – Otis

Elevators.

To my mind the attempt to shift the blame to the 3rd defendant wholly does not lie. Yes, the 3rd defendants are owners of the building and leases the same out. They are responsible to maintain their part of the contract as much as the first defendant.

If it is time that the lift indeed had stopped and was not allowed to be used there has been no evidence before the court that a notice warning all that the lift had been stopped and was "0,0,0" i.e. "out of order". It is quite often that such signs are placed on lift doors to warn would be users of the condition of the lifts being unserviceable.

The third defendant on the other hand had a duty to maintain the electrical area that may have been outside the area involving the 1st defendant. All in all it seems that the 1st defendant had always been under its own supervision. The 1st defendant did not supervise them.

They indeed were the experts. Nonetheless, every six months a report from the factory inspector was meant to have been undertaken. I doubt if much attention had been paid to these report or if it had been, much precautions taken to safeguard users from the lift.

The blame on the 2nd defendant was on the grounds that the lift belonged to them and was under their exclusive use. It is clear relying on the occupier's liability that the 2nd defendant was but a tenant in the building. In relying on the case law of:-

Wheat v E. Lacom Co. Ltd

(1966) 1 ALL ER 582

It laid out the principle that where a landlord let out a premise to a tenant he was regarded as parting with all control over the said premises, but where a landlord lets out floors or flats in a building to tenants he was regarded as retaining control over the common staircase or roof or some other parts."

The landlord was regarded to be:-

"Under a duty in respect of those retained parts to all persons coming lawfully on to the premises."

Where the owner of the premises only licensed a tenant to occupy the premises or tenants the owner has a light to do repairs. A visitor who falls on the stairs that are defective and injures themselves, the owner is liable to pay damages

"Where a contractor is on site the owner was in control. The duty of care laid with the contractor."

In this case, the 2nd defendant had leased the premises from the 3rd defendant. There was indeed a duty of care by the 3rd defendant to ensure that the common areas are maintained to its utmost level. It is therefore the 3rd defendant as the persons in control of the premises who are liable in damages and not the second defendant.

What of the plaintiff late husband. Was he negligent in any way?

I do not accept the defence put forward that the deceased was negligent in "stepping into an empty lift." Most people would as a matter of a course step into a lift the minute it opens. This is the reasons why mirrors are placed in lifts so you would see yourself as you enter thus confirming the cage is in place. There was no evidence of any mirror.

I find that the argument that the deceased himself forced the door opened by use of a key must be

supported by factual evidence. Was there, for instance, a screwdriver or special key next to his body or in his pockets. No such evidence was led before me.

I think the plaintiff is correct to rely on the doctrine of Res Ipsa Loquitur. This is where no evidence or any witness saw the deceased enter and fall in the empty lift shaft but the fact that he was found four floors down, dead on the ground meant that the circumstances spoke for itself. The court is permitted to infer that he got to the ground floor by stepping through the lift doors and fell to the bottom. The plaintiff thereafter does not require to prove anything more than this. I also do not find that the deceased was a visitor. He was not a trespasser but had every right to be on the said premises as a lawful employee of the 2nd defendant. He was at the time of accident on duty.

I find that liability has been proved in favour of the plaintiff at 100% and against the 1st and 3rd defendant at 100% jointly and severally. I find that the 2nd defendant was not liable for the accident. Judgment is entered in favour of the 2nd defendant against the 3rd defendant. There be taken into account limitation of action between the defendant No.3 and the plaintiff.

I now look at the issue of quantum.

B) QUANTUM.

a) Law Reform Act

The plaintiff holds no grants of letters at the time of this suit being filed. I believe the law on this is very clear. There is the:-

Tourist Union International

v

Jane Mbeyu.

Nbi CA 45/90

Case that has established there must be grant of letters first taken out before a claim under the Law Reform act is filed I was also referred to the case of: -

Rose Kahenzain Uchiwo

v

James Mururu & Another

Hccc 5337/91, Ringera

Where this point was also discussed. I would in effect find that no award can be claimed or made under the Law Reform Act. The same be and is hereby dismissed.

I wish to say that an amended claim filed simultaneously with fresh grant of letters of administration or representation would not cure the defect. A fresh suit ought to have been filed.

b) The Fatal Accidents Act

The widow of the deceased as a dependant is entitled to make claim under the Fatal Accidents Act if within six months there are no administrators or legal representative. The dependants are stated to be the widow and three daughters, as per the original claim. When the claim was amended this included a third but different daughter which aspect I will deal with in due course.

In the case law of:

Radhakrishen M Khemancery

V

Mrs. Lachabal Mulidhar (1958) EA 268

It lays down the principles in which damages under the Fatal Accidents Act are to be assessed. I shall accordingly be guided by this case law.

Namely, it requires a calculation of the multiplier; the number of years deceased would have worked, the multiplicand, the salary earned and the dependency ratio.

i) Multiplier

The deceased, as pleaded in the plaint, is said to be 30 years old. Other documents reflect that he was 28 years old at the time of death. As a party is bound by their pleadings I take the years of the deceased age to have been 30 years. If he was a civil servant, he would have worked to the age of 55 years. In order to allow for any eventualities such as early retirement, I would find 20 years to be adequate. This was supported by two authorities given by Juma, J. They are brief authorities on the case law involving road traffic accidents of :-

Ali Sefuka Kibirege

vs

Cross line Ltd Hccc 1406/96, Juma J

Secatsue Kahaki Misuti

v

Samuel Maina Munene & Anothe

r Hccc No.33 84/94. Juma J.

The deceased in both cases were aged 28 years old. An amount of 20 years as multiplier was given.

ii) **Multiplicand**

There is evidence that the deceased was lawfully employed with the 2nd defendant. He earned Ksh.2,880/- together with other allowance. He was entitled to tips, which is not reflected. It was recommended to this court that Ksh.2,400/- be the multiplicand.

I see this as a reasonable figure and do hereby adopt it.

Thus $\text{Ksh.2,400/-} \times 20 \times 12 \times \frac{2}{3} = \text{Ksh.384,000/-}$

This gives me a total of Ksh.380,000/-.

The advocate for the 2nd and 3rd defendant made suggestion that the sum of Ksh.149,310/- paid by the 2nd defendant be taken into account.

Under the workman's compensation there is indeed the provision that payments made be

taken into account.

iii) The appointment of Ksh.380,000/-

The law requires I apportion this figure amongst the defendants. I have in fact 4 defendants. The last been on Vero Moraa was been 13 months after the death of the deceased on the 18.2.92. She is certainly not the deceased child. The plaintiff No.2 did not lead evidence under customary law that she was inherited as a wife and any child born belongs to the deceased as this evidence is lacking I do not include her in the list of dependants.

Another child Jarbit Moraa was named in the old original plaint but not in the amended current plaint. This is duly noted that she is not entitled to any claim having not been pleaded in the plaint as a dependant.

My possible apportionment would have been:-

- a) Benta K. Sangana widow Ksh.100,000/-
- b) Irene Kwaboka – daughter born 1986 Ksh.140,000/-
- c) Gladys Kemto – daughter born 1990 Ksh .140,000/-

Ksh.380,000/-

Any possible investment would be for Gladys made in an interest earning account in the names of the administrators and the registrar High Court of Kenya.

C) Special Damages

I make no award the same having not been proved.

D) Any other relief

I have a claim under this head. I believe it is not available to dependents where there is no letters of representation.

I do not make award under two this head.

My possible award would have been under the exemplary damages of Ksh.500,000/-.

The claim is dismissed.

In Summary

- 1) Tort/Contract
- 2) Industrial accident/owner occupier
- 3) Male adult aged 30 years old in 1991
- 4) Accident: Fall into an empty lift shaft
Lift cage absent
- 5) Injuries: Fatal

6) Liability:-

100% in favour of the plaintiff and against the 1st and 3rd defendant jointly and severally.

100% against the 1st and 3rd defendant. This is in favour of the 2nd plaintiff against the 3rd defendant.

There be taken into account

Limitation of action between the plaintiff and 3rd defendant 7) Quantum:

i) Law Reform Act Nil (Lack of locus. No grant of letters of representation)

b) Fatal accidents Act Loss of Ksh.2,400/- x 20 x 24 x 2/3=Ksh384,000/- Less discounted Ksh. 4,000/-

8) c) Special Damages Nil

d) Any other relief Nil

Possible award

Exemplary damages Ksh.500,000/-

The payments made under Workman's Compensation be taken into account.

I award the costs of this suit to the plaintiff.

I award interest on General Damages from the date of this suit.

Dated this 21st day of July 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Onyancha Bw'omote & Co. Advocates for the 1st and 2nd plaintiff

Hamilton Harrison Mathews Advocates for the 1st defendant

A.F. Gross & Co. Advocates for the 2nd defendant

Archer & Wilcock Advocates for the 3rd defendant