REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 75 OF 1997

JULIUS MUNGUTI MAWEU ……………………………PLAINTIFF

VERSUS

KENYA HORTICULTURAL EXPORTERS …… DEFENDANTS

J U D G E M E N T

The plaintiff Julius Munguti Maweu filed this case against the Kenya Horticultural exporters Limited in his capacity as the administrator of the Estate of Laban Kioko Munguti on behalf of the estate Laban Kioko Munguti and the dependant Loise Mutave Maweu brought under the law reforms Act and the fatal Accidents Acts. It is averred in paragraph 3 of the plaint that on or about the 10th October, 1995 the said Laban Kioko Munguti deceased was lawfully traveling in motor vehicle registration No. KXZ 424 driven by the defendants agent/servant when the said driver/agent, servant so negligently controlled and or managed the said vehicle that he permitted the same to over turn as a result of which the deceased who was in good health and a teacher/farmer/businessman sustained serious bodily injuries as a result of which he died and his estate has been put to loss and damage. The particulars of negligence are set out. In consequence thereof the plaintiff seeks both special and general damages, costs of the suit and any other relief that the court may deem fit to grant.

The defendants filed a defence averring that they do not admit that the deceased was a lawful passenger in the said vehicle number KXZ 424 and puts the plaintiff to strict proof. Further and in the alternative and without prejudice to the foregoing the defendant contents that if the said accident occured which is not admitted then the same was caused by one dominic Mbithi Maundu who was driving the said vehicle at the material time whilst on a frolic of his own and was carrying the deceased and two other passengers who were all friends for the said deceased, denied that the said dominic Mbithi Maundu was driving the said vehicle as an authorized agent or servant of the defendant and does not admit that the said Dominic Mbithi Maundu was driving the vehicle during the course or pursuant to his employment, that the said Maundu acted as an agent or servant of the passenger afore said and for whose negligence the passengers are liable further and in the alternative and without prejudice to the foregoing the defendant avers that the said accident was caused and or contributed to by the grossly negligent driving of the said M/V number KXZ 424 by the said Dominc Mbithi Maundu against whom the defendant is invoking 3rd party proceedings. The particular of negligence attributed to the driver are set out in paragraph 5 of the defence, denied that the plaintiff has a locus standi to pursue the action under the law reform Act on behalf of the Estate of the deceased as the plaintiff is not a duly appointed administrator to the estate of the deceased and puts the plaintiff to strict proof, denied allegations against it as contained in paragraph 3 to 5 inclusive of the plaint, particulars of negligence of the defendant excluding particulars of negligence on the part of the driver foresaid, particulars pursuant to statute and particulars of special damages and put the plaintiff to strict proof on the basis of the foregoing prayed for the suit to be dismissed with costs. No reply to the defence was filed.

The defendant applied and obtained leave to issue 3rd party proceedings on 23.10.1998 but there is no evidence that the same was served and directions taken in respect of the same. Thereafter an amended plaint was allowed by consent of the parties on 21/.9.2000 introducing particulars in pursuance to statute being a pleading that the action is brought on behalf of the estate of the deceased and the only dependant who is the mother of the deceased. Four witnesses gave evidence for the plaintiff being PW1 Julius Munguti Maweu the one who filed the action, PW 2 Loise Mutave the only dependant, PW 3 Augustine Mutuku Maundu and PW 4 cpl Peter Mwikya. The defence offered no evidence.

The sum total of the plaintiffs evidence is that PW 1 the plaintiff is the elder brother of the deceased and a son of PW 2 who is also the mother of the deceased she has a medical problem and she PW 2 together with the rest of the family members authorized PW 1 to take out the grant of representation exhibit 1 and then file the case on behalf of the estate of the deceased and on behalf of the mother who is the only dependant.

Both PW 1 and PW2 were not at the scene and they just learned of the accident afterwards. PW 1 obtained an abstract exhibit 4 which listed the deceased as a fatal victim. The death certificate exhibit 2 also shows that the deceased was aged 34 years a teacher by occupation and he died due to cardio pulmonary arrest due to extra mural haematoma due to head injury. The plaintiff further complied with the law by issuing a statutory notice exhibited. PW 1 further produced exhibit 6(a)(b) showing that the deceased had been promoted to job group L with effect from 15.6.1994. The payslip for September 1995 shows that the gross salary was 11,160.00 with house allowance of 2,515.00 and medical allowance of Kshs.660.00 making gross salary to 14,335.00. There were deductions shown on the payslip bringing the net income to Kshs.8,106.00.

When cross-examined PW 1 confirmed that the mother PW 2 was the only dependant of the deceased who was not married. In cross examination PW 2 produced documents to show that she has a psychiatrist problem and so it was right for PW 1 to take out proceedings on her behalf her husband having died in 1997.

PW 3 is the key witness to this case. He was a passenger in the said vehicle when him the deceased and one Mr. Mbithi decided to go for a tour in the park. 4 kilometers to Mutito Andei on their way back they had an accident. All PW 3 knows is that the driver was speeding and failed to negotiate a corner and then the vehicle rolled and he PW 3 sustained slight injuries and he was treated at the local clinic and Agakhan hospital. The deceased died on the sport. He blames speed for the cause of the accident PW 3 was a friend of Mbithi. He is aware the vehicle was owned by the defendant company. They made an agreement on 9th to go sight seeing. He is aware Mbithi worked for the defendant company as a farm manager. He agrees that the accident was on Moi day on a holiday and Mbithi was not working. He agrees they did not hire the vehicle from the defendant. He did not ask if the manager had authority to use the vehicle for his own purposes. It is his evidence that if the manager had no authority to use the vehicle they would not have used it to the park to go sight seeing. He did not also ask if the driver had a cover for them.

PW 4 received the accident report on 10.10.1999 by KWS personnel. In response they proceeded to the scene and found the deceased already lying dead while PW 3 had been injured. He was not able to establish the cause of the accident and no one was charged in connection with that accident. In his cross examination he stated that an inquest was held and the file ordered closed because the accident was due to a tyre burst. That the driver wrote a statement to the effect that him and the two passengers went for a game drive in the park. That the accident was due to a near side off tyre burst due to loose sand on the road side.

At the close of the whole case both counsels filed written submissions the. Points raised by the plaintiffs counsel.

1. The evidence of PW1, 3 and 4 go to show that there was an accident on 10.10.1995 involving motor vehicle registration number KXZ 424 and the deceased was a passenger in the said vehicle which was being driven by one dominic Mbithi an employee of the defendant.

2. That the deceased was a lawful passenger because the evidence of PW 3 is that the deceased and PW 3 boarded the said vehicle with the express permission of the driver Dominic.

3. That there is no dispute that one Dominic Mbithi was an employee of the defendant as a manager in Mutitu Andei area and had a free hand to use motor vehicle registration number KXZ 424 even for his personal purposes. The defendant offered no evidence and so they pleaded a no. case to answer.

The defendant has not adduced evidence to show the scope of employment of the said Dominic neither is there evidence to show that he was not an authorized driver. There is evidence on record to show that the deceased was in the vehicle which over turned due to high speed. They also rely on the case of Geoffrey chege Nuthu versus Anvarali and Brothers Nakuru CA 68/1997 where it is stated that the law is that so long as the drivers act is committed by him in the course of duty even if he is acting deliberately, wantonly negligently or criminally or even if the act is committed contrary to his general instructions the master is liable. Further the defendant filed a 3rd party notice dated 9th day of June, 1997 seeking to be indemnified by the said driver Dominic but for un explained reasons no directions were taken in respect of the same neither was it pursued and so the defendant remains the only defendant and it cannot escape liability.

4. The plaintiff produced a grant of representation issued in Machakos HCCC P&A 99/96 naming the plaintiff as the administrator and PW2's evidence goes to buttress this and so the plaintiff has locus standi to file the action.

On the basis of the foregoing counsel urged this court to find the defendant 100% liable to compensate the loss of the deceased. On quantum counsel urged the court to award 60,000/= for loss of expectation of life. On lost years counsel submitted that before he died teachers were under pay rise and the deceased would be earning Kshs.20,000.00 which should be adopted as the multiplicant. That the deceased was aged 34 years and he was to retire at the age of 55 years and so he lost 21 years of service which this court should adopt as the multiplier which would give 3,360,000.00. counsel also suggested a figure of Kshs.20,000.00 for pain and suffering before death and Kshs.720,000.00 under the fatal accidents act total Kshs.4,160,000.00.

The defendants on the other hand raised the following points in submission.:-

1. That plaintiff has not proved her case which should be dismissed because the fact of the deceased and his co. passengers going for a pleasure trip into the park was confirmed by PW 4 the police officer who read the statement of Dominic Mbithi.

2. Further the plaintiff did not sue the defendants driver so that vivacious liability could be established because the defendant has denied liability through the defence. The defence is that the said Dominic Mbithi Maundu was on a frolic of his own when the accident took place. The defendants driver was not an authorized driver at all and the trip that he made was not for the benefit of the employer but was for his own pleasure and the defendant did not at all benefit in the trip., They rely on the authorities cited.

3. That in this case the plaintiff has a remedy against the driver of the defendant who was not within his course of employment and had a pleasure drive with his friends who included the deceased. The plaintiff has no remedy against the defendant.

The fact that the defendant had given the motor vehicle for use is not sufficient to fix liability on the defendant because what the driver was doing was for his personal or private interest which had nothing to do with the company. It was a pleasure trip or drive which had nothing to do with the employer in that regard counsel urged the court not to consider the issue of general damages as the plaintiff failed to file proper pleadings.

In the alternative that should the court hold otherwise on liability then the counsel suggested the court to

take 8,106.00 as the net salary, use a multiplier of 5 years as the deceased would have married and help to the mother diminished and then apply 1/3 ratio which would give 162,120.00 as general damages. On specials that there was no proof for the claim of 35,000.00 and it should be disallowed.

The defence referred the court to the case of Nakuru Automobile House Ltd. Verus Nasiruddin Ziqudin Mombasa CA No. 63 of 1986 where at page 4 line 12 from the bottom it is observed after quoting from the case of Omrod versus Gross vile motor services (1955) 2 AER 753 that in that case it was held by the house of lords that in order to fix liability on the owner of a car for the negligence of its driver it is necessary to show either that the driver was the owners servant or that at the material time the driver was acting on the owners behalf as his agent. To establish the agency relationship it is necessary to show that the driver was using the car at the owners request, express or implied or on his instructions and was doing so in performance of a task or duty delegated to him by the owner.

The case of Ryce Motors Ltd. Cost agency versus Elias Muoki Mombasa CA no. 119/1995 where at page 3 of the said judgement line three from the top it is stated that there are umpteen authorities of this court to say that special damages must not only be specifically pleaded but must be strictly proved. On the courts assessment of the evidence herein on liability the first issue that the court has to deal with is the competence of the suit. No doubt it was filed by a brother of the deceased who was not a dependant of the deceased. He said and pleaded that the action was brought on behalf of the mother of the deceased who had a medical complication which was proved in evidence as the said mother gave evidence as PW 2. In a avertedly her age was not given both in the amended plaint and in evidence. Defence agreed with the documents and so it is the finding of this court that on the basis of medical in capacitation it was proper for the plaintiff to sue on behalf of his mother. The grant is dated 14.10.1996 while the initial plaint was filed on 6. 5.1997. Though not dated it was not objected to and it remained on the record till amended. The amended plaint is dated 26.1.2000 and filed on 8.2.2000 and upon the approval of the amendment by the court that related back to the time the action was filed thus curing any defect in the initial plaint though minor. Having been filed after the grant had been obtained the plaintiff had locus standi to present the action both on behalf of the estate of the deceased and on behalf of the dependant for the reasons given.

As regards who is to bear blame for the causation of the accident it is clear that the undisputed facts are that one Dominic Mbithi Maundu was an employee of the defendant as a farm manager.

2. The accident vehicle belonged to the defendant.

3. The deceased was a friend of Maundu Dominic Mbithi.

4. The accident was on a holiday and the party just drove into the park and then came back. They had just gone for sight seeing.

5. There is no dispute that Dominic Mbithi Maundu was not sued as a party herein. 6. The employer was sued instead on the basis that the driver Dominic Maundu was the agent servant and an employee of the defendant.

In view of the above facts the plaintiffs contention and that of his counsel is that the defendant is liable to make good the damage done by the loss of the deceased.

The defence have countered that by saying that the sight seeing journey was not undertaken on behalf of the employer, that Dominic was on a frolic of his own and his actions cannot bind the master. It was pleaded so in the defence. However it has to be borne in mind that a pleading is not a piece of evidence. It was remarked by counsel for the plaintiff that failure to give evidence on the part of the defence and the said driver amounts to no case to answer on their part. It was pleaded that the deceased was not a lawful passenger. In order for that plea to hold it was necessary for the defence to adduce evidence to show the following:-

(a) The circumstances under which the said Dominic Mbithi Maundu was allocated the said motor

vehicle for use. It was necessary to show that the allocation of the said vehicle was limited to official use only and not for personal use.

(b) It was also necessary to show that the said Dominic Mbithi was prohibited from allowing into the said vehicle for use by any other person other than himself.

(c) It was also necessary to show that members of the public were fore warned against entering the said vehicle and making use of the same without express or implied authority from the employer who is the defendant.

In the absence of evidence to that effect the only reasonable and logical conclusion to be made by this court is that the defendant had authorized the said Dominic to have use of the vehicle both for official and personal use. This is supported by the fact that the defendant for un explained reasons abandoned 3rd party proceedings against the said driver.Permission for personal use included inviting in of his friends into the said vehicle once invited in both the employer who had permitted his employee to have personal use of the vehicle and the said employee assumed the duty of care over those passengers to ensure their safe conduct while in the said vehicle and where this is not done liability attaches to both the employee and employer and the principle of vicarious liability is called into play. It is the finding of this court that the defendants failure to call evidence and failure to pursue the 3rd party proceedings was fatal to its defence. I therefore find liability established as against the employer and employee.

As regards the actual causation of the accident the evidence is that there was a tyre burst and then the vehicle rolled. PW 3 added speeding and failure to negotiate a corner properly. It was incubent upon the driver Dominic to drive the vehicle in such away so as to be able to negotiate the said corner safely and be able to bring the vehicle to a stand still safely after a tyre burst. This court takes Judicial notice of the fact that not all tyre bursts result in occurrence of accidents. It was therefore negligent on the part of the said Dominic that he failed to negotiate the corner properly and their occurred an accident for which he is responsible and through him the employer. For the reasons given I find that liability has been established at 100% as against the defendant.

Having established liability I now come to the assessment of damages.

The first head of damages is the specials of Kshs.35,100.00 no receipt was produced to confirm that figure and no submissions made on the same by the plaintiffs counsel rightly so because it had not been proved to the satisfaction of the requirements of the law. The same is disallowed. As regards general damages there is a claim for loss of expectation of life and the plaintiffs counsel asked for 60,000/= and the same is allowed.

As for pain and suffering it is on record that the deceased died on the sport and so he must have suffered pain for a short time before death and so I allow Kshs.10,000.00 under this head.

Counsel for the plaintiff submitted for both lost years and loss of dependency. Awarding both would amount to double compensation.

The trend of the court is to award only one head and that is the loss of dependancy. Further more the plaint pleaded for damages under three heads only.

(a) Special

(b) Under the law reform act.

(c) Under the fatal accidents act.

There was no claim for damages for lost. Years.

On loss of dependancy it is correctly submitted by the defence that the deceased would have married and

would have spent money on his family. No evidence was adduced to show that he could not have been obligated to look after his own family as well. However the court does not agree that support for the dependant mother would have diminished after marriage. As per the principle in the case of sheikh Mushtaq Hassan versus Nathan Mwangi Kamau and 5 other (1982-1988) 1 KAR 946 a childs financial support to the parents is readily given, accepted, expected and life long. Marriage does not obliterate it though it may be reduced. However herein it has to be noted that the deceased was not married. The court was not informed that he had entered into financial developments for his benefit which would have affected flow of financial support to his mother. In the absence of such evidence the court takes it that the deceased spent most of his finances on the dependant. The plaintiffs counsel suggested a ratio of 2/3 rds while the defence suggested a ration of 1/3 rd whether a ratio is applied or a percentage the key consideration here is that the court has to take cognizance of the amount that the deceased spent on himself and what he spent on his family. Herein it was just the deceased and his dependant mother and the court makes a finding of ½ as the ration to be applied as being appropriate.

As regards the amount to be used as the working figure counsel for the plaintiff submitted that as per exhibit 6(a)(b) the deceaseds salary was going to be raised to 20,000.00. The courts reaction to that is that that had not yet been implemented and so the only proper document to be considered by this court is the last payslip which is exhibit 3. The gross salary is shown as Kshs.14,335.00 less statutory deductions of W.C.P.S of Kshs.223.00, paye of Kshs.1,306.00, health Kshs.240.00 and service charge of Kshs.100.00 total deductions amount to Kshs.1,869.00. The other deductions relating to cooperative society dues were of benefit to the deceased and so they will not be considered as a negative deduction to his earnings. When deducted from the gross figure the balance is Kshs.12,466.00 which will be the working figure

As regards the choice of a multiplier it is clear that the deceased was aged 34 years and being a teacher and wishing to pursue his carrier to the end he would have retired at the age of 55 years. He therefore lost 21 years of working life. The plaintiffs counsel suggested a multiplier of 21 years while the defence suggested 5 years. In the circumstances of this case this court has no alternative but to apply the common practice of the courts whereby the principle that choice of a multiplier is a matter of good common sense on the part of the court seized of the matter is to be applied. In doing so the court also has to consider the fact that the deceased could have died from natural causes or he could have left employment for other green pastures else where. In this courts opinion a multiplier of 18 years is reasonable. Loss of dependency would work out as Kshs.12,466.00x12x18x1/2 which comes to kshs.1,346,328.00 which I allow.

I therefore enter judgement in favour of the plaintiff against the defendant on the following terms.

1. (a) Loss of expectations of life Kshs.60,000.00

(b) Pain and suffering before death Kshs.10,000.00

(c) Loss of Dependancy Kshs.1,346,328.00

Total Kshs.1,416,328.00 with interest at court rates from the date

of judgement till payment in full.

2. Costs of the suit.

Dated, read and delivered at Machakos this ……………………day of ………………..,2003.

R. NAMBUYE

JUDGE