



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2068 of 1998

KELLEN WANJERI KIMANI..... PLAINTIFF

VERSUS

WAWERU MACHARIA..... DEFENDANT

JUDGMENT

This indeed is a most tragic case. It is a running down case whereby Kimani Chege (now deceased) was involved in an accident as a pedestrian.

From the evidence before the court the facts of the case are as follows. On the 11th day of July 1997 at 3.00 p.m. Dominic Masaku Nyamai, (PW2) an eye witness in this case stated that he was waiting along Jogoo road when he spotted Kimani Chege whom he knew before as his landlord. He greeted him and they exchanged pleasantries. Then Kimani Chege told him that he was from the Makadara law courts and was heading to the industrial area prisons. Kimani Chege then crossed the Jogoo road and stood at an island. There were buses and public service vehicles on the other side of the road as you would head towards town.

A white Peugeot pick up came at a high speed from the outer side and knocked Kimani Chege. He fell onto the road. The pick up vehicle stopped. Kimani Chege had sustained injuries to his leg, arm and head. He was carried and placed onto the back of the pick up. Dominic accompanied him to Kenyatta National Hospital. At the time Dominic was unemployed and was thus looking for a job. He therefore gave no reasons why on arrival at the hospital he did not stay with Kimani Chege. He instead left him at the casualty and went away.

Kimani Chege was admitted to the Kenyatta National Hospital casualty number 41303/97. He indeed had no money for his treatment. He was admitted for a period of almost one month.

What occurred at the casualty department of the Kenyatta National Hospital was indeed interesting. The driver who knocked down Kimani Chege had no driving licence. He recorded his details as Harrison Irungu ID Card 7183524, P.O. Box 8342, Nairobi. He then recorded that he was a good Samaritan who brought Kimani Chege to hospital. The registration of his vehicle being KTR 240.

The police had received a call of the accident. When they visited the scene they found no one. When they visited the hospital they found Kimani Chege still alive. They had received information that the vehicle that knocked down the victim was registration KTR997. The police began to investigate and trace the driver of the vehicle. They discovered that all the information given was false. Namely the ID card holder was non-existent, the box number was non-existent. All they had was the vehicle registration number KTR997. This did not match with the registration KTR 240 later altered to read figure 997. That is, KTR

240 - 997.

The police traced the motor vehicle KTR 997 to one Waweru Macharia as the registered owner. Waweru Macharia was then charged with the offence of Causing Death by Dangerous Driving contrary to section 46 of the Traffic Act Cap. 403, Failing to Report an Accident, contrary to section 73 (b) of the Traffic Act. Cap. 403 Laws of Kenya

as tried and acquitted on the grounds that the prosecution were unable to establish that Waweru Macharia was indeed the very driver who actually caused the accidents.

The identity of the motor vehicle was also doubtful.

Before the finalisation of the lower court case, the plaintiff had filed a suit against Waweru Macharia. This is normal as in many instances, due to the Limitation of actions expiring, it would always be cautious to file suit as not to be caught up with the time limited

The parties had agreed on issues to be determined by the court, namely,

"1 Whether the said accident was caused by the negligence of the defendant?

2) Whether the deceased contributed to the cause of the accident?

3) Whether damages are payable and if so how much? 3) Whether the plaintiff has locus standi to instruct

these proceedings? 5) Who would be condemned to pay cost of suit?" To my mind these issues appear in order but after the lower court trial the issues should have added the question for determination:-

a) "Was Waweru Macharia the driver who caused the accident?"

b) Was the vehicle that caused the accident vehicle registration No. KTR 997?

c) Was the vehicle registration No. KTR 997 registered in the name of Waweru Macharia?"

I believe that these additional issues are and would have been important to the court for determination. (See Order 14 r 5 CPR). I would now look at the issues for determination.

1) JURISDICTION

Issue No.4 deals with the issue of jurisdiction. Namely, does Kellen Wanjeri Kimani the plaintiff herein have locus standi to institute these proceedings. In evidence, she indeed produced limited grant of letters of administration ad colligenda bona under section 67 (1) of the Law of Succession Act dated the 19.3.98. This suit was filed on 3.6.98. She is therefore the legal representative of the estate of Kimani Chege and has locus to bring this suit.

2) LIABILITY

The question of liability is dealt with in issues 1 and 2.

From the evidence before court I found that the deceased Kimani Chege was on the material day, standing to cross the Jogoo road. That a vehicle coming at a high speed indeed did knock him down causing him bodily harm. Thereafter Kimani Chege succumbed to his injuries and died almost a month later.

This accident was caused by the negligent of the driver who drove the vehicle in question. The defendant has maintained all along that it is not him. That his vehicle at all times was indeed parked outside and his alibi was that he was not at the scene of the accident.

The eye witness, Dominic, told the lower court that the vehicle registration No. was KTR 937. In this court, he said it was actually KTR 997. If this was so, the search of the copy of records of motor vehicle should have been produced to court. I find that this was not done both in the lower court and in this court. It further means that the registered owner had not been established. This fact though was not an issue between the parties. The defendant indeed said and implied had the motor vehicle KTR 997 belonged to him but was in fact never involved in an accident as stated by the parties.

The other witnesses said that the deceased Kimani Chege had informed them of the vehicle registration KTR 997 as that which ran him down.

I believe the police should have made further investigation together with Dominic (PW2) the eye witness herein. That Dominic prior to the lower court trial should have been made to undergo an identification parade to identify the defendant as the same person who took him to hospital.

To my mind all the plaintiff in this civil suit required to do was to produce the proof of ownership of the vehicle. The evidence though both in the lower court and here is overwhelming that the records keeping at the hospital was doubtful. The minute a driver had no licence then it required that he be detained. This was not so done with the driver who took the deceased to hospital.

In this case I would find an accident did indeed occur. The driver who caused the accident was negligent and had been speeding therefore knocking down Kimani Chege.

The question arises as to whether that person was the defendant. I would find this doubtful and would find that the defendant may not have caused the accident.

I would dismiss this suit on the question of liability. If perchance the plaintiff had been successful on the issue of identity of the defendant and the vehicle being registration KTR 997, I would have awarded liability at 100% against the driver and the owner jointly and severally. The driver would have been to blame for this accident with the deceased making no contribution to the accident.

The issue on liability stands dismissed.

3) QUANTUM

Issue 3 - deals with the aspect of quantum. As the issue of liability is dismissed the law requires that I compute what my award would have been, if per chance, the plaintiff was indeed successful in her case.

The claim before this court under the Law Reform Act and the Fatal Accidents Act.

1) Law Reform Act

a) Pain and suffering

When the deceased Kimani Chege was admitted to hospital on the 11.7.97 he was found with the following injuries.

- 1) Fracture of the left fibula and tibia
- 2) Fracture of the right leg bones
- 3) Associated wounds on the right ankle
- 4) Right lung consolidated from hand
- 5) Congested blood in the brain — right bone- Injury to the head.

Kimani Chege talked with his relatives whilst in hospital and at the time was mentally active. He then succumbed to these injuries on the 8.8.97 when he died. It is uncertain whether the cause of death was partially to be blamed on the hospital for not draining the blood from the brain area, in time.

I would find that the injuries indeed were sustained.

The advocate for the plaintiff and defendant relied on no case law. I would rely on my decision of the case on brain injury of:-

Omondi Nyerere Ambaka v Nyakwegata Bus Service

Hccc 415/92 unreported, Nairobi

Where an award of Ksh.500, 000/- was made for brain injury.

In this case the deceased suffered multiple injuries also. I would have awarded a fair sum of Ksh.500, 000/- for the head of damage of pain and suffering.

i) Loss of expectation of life.

The deceased is said to be a farmer and a civil servant. He has good prospects before him. I would have awarded Ksh.70, 000/- for the head of loss of expectation of life.

ii) Lost years

The deceased was a farmer. I have no proof that he was a civil servant.

If he was, he would have 5 years to retirement. As a farmer he may have worked longer. I would take 5 years as a multiplier. I would agree that he earned Ksh. 10,468/- say Ksh. 10,000/- per annum from his farming and not Ksh.21, 000/- as pleaded. I would also agree that a sum of Ksh.600,000/-, that is Ksh. 10,000/- x 5 x 12 = Ksh.600,000/- would be adequate under this head.

iii) Fatal Accidents Act

The plaintiff produced the deceased's income as a farmer. She also produced a bank statement of the year 2000 showing the income the deceased had. This income though was being earned 3 years after the death of the deceased. I cannot see what she has indeed lost as she is collecting the income, the accounts are in both her name and that of the deceased. I hereby reject this claim.

The dependency if proved would have been restricted to the plaintiff. The ages of the children had not been disclosed but in her evidence she only mentioned 3 to 4 children. 3 were minors at the time of the deceased death but no birth certificate had been produced.

I would not have made any award under this claim.

II) Special Damages

The claim for Ksh.54,000/- has not been supported by any documentary evidence to prove the same. I find that this had not been proved and accordingly would not have made any award.

In Summary

1) Pedestrian male adult aged 50 years old in 1997

2) Injuries:

- 11.7.97 a) Fracture left fibula and tibia
b) Fracture of right leg bone
c) Associated injuries on the right ankle
d) Injury to the lung
e) Injury to the head

8.8.97 f) Demise - Fatal

3) Liability - Nil

4) Possible Quantum

a) Law Reform Act

i) Pain and suffering Ksh.500, 000/-

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

iii) Lost years
Ksh.10, 000/- x 5 x 12 Ksh.600, 000/-

b) Fatal Accidents Act

Loss of dependency

c) Special Damages

Total Nil

Nil Kshs.1, 170,000/-

This suit stands dismissed.

I award the cost of this suit to the defendant. Dated this 3rd day of December, 2003 at Nairobi.

MA ANG'AWA

JUDGE

Muraguri & Muraguri Advocates for the plaintiff Kaai Mugambi & Co. Advocates for the defendant