REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1644 OF 1995

BEATRICE CHABARI ……..…….. PLAINTIFF

VERSUS

CHINTU ENGINEERING WORKS …… DEFENDANT

1. Running Down Cause

2. Male Adult aged 37 years old in 1993

3. Passenger – motor vehicle accident

4. Injuries

5. Liability

(i) against the 1st defendant – nil

(ii) against the 2nd defendant – nil

6. Positile Quantum

1. General Damages

(a) Law Reform Act – absconded

(i) Pain and suffering – nil

(ii) Loss of expectation of life – nil

(b) Fatal Accident Act

(i) Loss of dependency 5,600 x 15 x 12 x 213 –

Kshs.672,000/= discounted Kshs.72,000/=

(c) Special Damages – Nil : Absconded

7. Case Law Referred to:

(a) Mohamed Hassan Sugari & Bakali Maalim Kalua unreported HCCC 4759/91 Ang'awa, J

(b) Domitella A Osoro & Another vs Francis O. Arari HCCC 231/00 Mbito, J

(c) CMC Motor group Ltd vs Stauros Rousalis & Another (Kwach, Akiwumi & Tunoi JJA)

JUDGMENT

According to a plaint filed on the 26th day of May 1995 at this High Court of Kenya at Nairobi, the passenger in motor vehicle registration number KZQ 447, one Nazario Njoka Njaka sustained fatal injuries when the said vehicle was driven so negligently that it overturned along Waiyaki way. The accident is alleged to have occurred at 1.20 a.m. in the morning.

The widow of Nazario Njoka Njaka, Beatrice Muthoni Chabari sued M/s Chintu Engineering Works Ltd. as the 1st defendant herein as the owner of the said motor vehicle and one John Maina Mutua (the 2nd defendant herein) the driver and employee of the Limited Liability Company.

The issue arose as to whether the deceased was a lawful traveler in the 1st defendant's motor vehicle? This was an authorized passenger.

The two issues touch on liability.

A. **Liability**

Mr. Arivin Raikuda Ilia owns a shop at Sarit Centre known in the name and style of Chintu Engineering Works Ltd. He stated that he had indeed employed John Maina Mutua the 2nd defendant herein as a technical Engineer. To facilitate his employment with the company he produced the said 2nd defendant with a motor vehicle registration No. KZQ 447 a pick up. At the time the 2nd defendant was employed he signed on the 1.1.93 an agreement on the use of company vehicle stating:-

"It is hereby agreed and understood by the employer and employee that where a company vehicle is produced for use outside working hours such use is restricted to the following purposes and not more: -

1) carriage of the employee from the employee's residence to the office and vice versa.

2) Any other official use designed in writing by a superior officer.

At no time will co mpany vehicle be used to transport any other persons (including members of the employee's family other than employees. If the employee uses company vehicle in contravention of this agreement, he will be doing so at his own risk as its consequence.

The com pany reserve the right to take disciplinary action if such a breach is discovered".

Signed	***Signed***
Arvin K Raikudalla	John M Mutua
Director	Staff

(emphasis my own)

Sometime in 1993 he learnt that the motor vehicle provided to the 2nd defendant was involved in a motor vehicle accident outside the normal office hours. The motor vehicle was a "write off".

The witness came to this court to state that neither his company or himself as proprietor is liable for the said accident. That liability should be liable by the 2nd defendant wholly.

The reasons for this is that the 2nd defendant was permitted to drive the vehicle only to his residence and had in order that he would not be late for work. The things the 2nd defendant took was therefore unauthorized.

It seems that from this evidence the 1st defendant denies liability as the 2nd defendant had gone on his own frolic. Their advocate had indeed issued a notice under order 1 r 21 Civil Procedure Rules whereby they claimed indemnity from the 2nd defendant.

The 1st defendant relied on the case law of CMC Motors Groups Ltd. vs Stavros Rousalis and another CA 231/00 (Kwach, Akiwumi (as he then was) Tunoi JJA).

Whereby, the 1st respondent had taken a motor vehicle for repairs/service at the appellants garage. One of the appellants staff took the vehicle (after a test drive was done) to his home for church. He came out after lunch and found the vehicle had gone. The 1st respondent sued the appellant for the loss of his vehicle. Then that judge gave judgment to the 1st respondent. On appeal the court of appeal held that the action of the employee was indeed outside his master houses. The court relied on the case of Joel v Morrion (1834)6 C&P 501. Parke B held at Pg 503.

> ***"If he was going o ut of his way, against his master uplied commands when driving on his masters business, the master will not be liable.***

The arguments there the appellants were liable was rejected on the grounds that the employee was on his own frolic.

In the same time the 1st defendants witness state he too should not be made liable for any accident as the 2nd defendant was indeed on his own frolic.

The deceased was unknown to him. He was not his employee and therefore was an authorized passenger. The 1st defendant in essence sort for the suit to be dismissed against them.

The plaintiff made no submission on this part and did not address this court on the third issue as to whether the 1st defendant directed the 2nd defendant to use the motor vehicle and transport other persons, nor did he address this court on whether the motor vehicle was being used for the benefit of the 1st defendant.

I find that the motor vehicle was not used for the benefit of the 1st defendant; that there is no evidence before court to show that the deceased was an authorized passenger duly driven by the 2nd defendant and that the 1st defendant is not liable for the damages of the estate of the deceased.

I would accordingly dismiss the suit against the 1st defendant. I am now left to determine the liability between the plaintiff and the 2nd defendant what the plaintiff was bound to establish under the agreed issue No.7 and 8 was:-

> ***"the 2 nd defendant negligence in driving the 1 st defendant motor vehicle that he caused the accident to occur? Did the deceased continue to take the accident if so what percentage?***

The plaintiff, the widow of the deceased attended court and stated that her husband had died in a road accident. She was not at the scene of the accident at the said time the accident occurred. She called no independent evidence to come to court. An attempt to do so was indeed given to her. Her witness (whose name was never disclosed) never appeared to court. It was doubtful that there was indeed any witness at all according to the advocate for the 2nd defendant. The advocate further submitted that the deceased was an army officer – (see the death certificate) (and payslips). It was therefore difficult to understand what he was doing in the said vehicle as a passenger.

I find that the issue of liability against the 2nd defendant has not been established. I have further no evidence as to whether the deceased contained to the accident. It would be difficult for him to do so as a

passenger.

I wish to now address myself to issue No.10 of 1. Its they are related:-

> ***"whether this suit is competent in law? Whether the plaintiff has locus standi to bring the suit under the Fatal Accidents Act V the Law Reform Act".***

The plaintiff at the start of the trial through her advocate abandoned the claim under the Law Reform Act. I believe off the record the reasons being that the grant of letters of administration intestate was taken out after the suit had already been filed.

The claim that was therefore being relied on was that under the Fatal Accidents Act.

Under this said act as a widow to the deceased the plaintiff law make a claim under Section 7 of the said act without necessarily being a holder of grants of letters of representation as required by the case law of TOU ARSTICK UNION INTERNATIONAL V & ANOTHER vs MRS. JANE MBENGAU & ANOTHER CA 145/90. Unfortunately in this case the plaintiff failed to establish liability against the 2nd defendant. The case against the 1st defendant being duly dismissed.

B. **Quantum**

If the plaintiff had established her case the possible award would have been as follows:-

The deceased, she said was working for the army. He earned a salary of Kshs.5,760/= per month.

At the time of death he was aged 37 years old. The parties agreed that a multiplicand of Kshs.5,600/= was acceptable.

The advocate for the 1st defendant recommended a multiplier of 15 years.

The claim she agreed to liased on the multiplier given in the case law of Domtella & Osor & Another vs Francis O. Arai HCCC 3009/98 where a multiplier of 20 years was given.

This for a claim under the Fatal Accident Act Kshs.5,600/= x 15x12x2/3 – Kshs.672,000/= should be awarded.

The advocate for the 2nd defendant prayed for a multiplier of 10 years as being sufficient. No basis was in fact relied on, on how he came to this amount.

I would find that a multiplier of 15 years would have suffice on the grounds that those in the armed forces at times had to retire earlier.

I would therefore have amended Kshs. in under this head.

I am required to discount this amount which I hereby do by Kshs.72,000/= its personal for his own payment.

The plaintiff has sufficiently proved dependency on her part and the children who are four in number. The law requires I appoint this amount which I would have done as follows:-

Beatrice Muthoni - Widow - Kshs.120,000/=

Rael Kagendo - daughter (b.1973) - Kshs.120,000/=

Easther Kangai - daughter (b.1980) - Kshs..120,000/=

Marini Mutendi - daughter (b.1983) - Kshs.120,000/=

Denis Mwenda - Male (b.1991) - Kshs.120,000/=

- Kshs.600,000/=

M.A. ANG'AWA

31.7.2000

The amount due to the minor children would have been ordered to be interested in an interest earning account until they attained the age of majority. The allowance would have been in the joint names of the widow Beatrice Muthoni and the Registrar of the High Court of Kenya, Nairobi.

In special damages – the plaintiff abandoned this claim at the start of the trial.

1. Running Down Cause

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6. Positile Quantum

2. General Damages

(a) Law Reform Act – absconded

(iv) Pain and suffering – nil

(v) Loss of expectation of life – nil

(b) Fatal Accident Act

(ii) Loss of dependency 5,600 x 15 x 12 x 213 –

Kshs.672,000/=

Less discounted Kshs. 72,000/=

Total cash Kshs.600,000/=

(c) Special Damages – Nil : Absconded

Total possible award Kshs.600,000/=.

I accordingly dismiss this suit with costs to the 1st and 2nd defendant.

Dated this 31st day of July 2002 at Nairobi.

M.A ANG'AWA

JUDGE

31.7.00

31st July 2002

Coram : Hon. Lady Justice Ang'awa

Court Clerk – Maina/Odhiambo

B.M. Ochoi advocate for the plaintiff – present

L.M. Kambuni advocate for the 1st defendant – present

T.K.K Mbaabu advocate for the defendant – present

Judgment read and delivered in open court and signed by Judge of the High Court Nairobi.

Dated at Nairobi this 31st day of July 2002.

Signed: HON. JUSTICE ANG'AWA