



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 586 OF 2001

REUBEN MUSAU KIVAI PLAINTIFF

VERSUS

**SECURICOR SECURITY SERVICES
(K) LIMITED & ANOTHER DEFENDANTS**

J U D G E M E N T

The dates for hearing for this Running Down suit was taken by the parties, by consent. On the day fixed for hearing only the plaintiff attended. The defendant and their advocates were absent. The suit proceeded ex parte under Order 96 r 3(a) Civil Procedure Rules whereby this court was satisfied that the defendants having due notice of this hearing and failing to attend court is permitted to proceed.

The plaintiff is the administrator of the deceased estate. He brings the claim under the Law Reform and the Fatal Accidents Act for the wrongful death of the deceased who is also his brother.

According to an eye witness PW2, he lived with the deceased.

On the material day of 4.6.99 he spotted the deceased across the enterprise road – a vehicle belonging to the Securicor Security Company came at a high speed. The road had potholes in it. The vehicle trying to avoid the potholes got off the road and drove into the foot path. In the process of doing this it knocked the deceased and the deceased was thrown up into the air. He was rushed to the Kenyatta National Hospital where he died several hours later. The plaintiff sued the 1st defendant M/s Securicor Security Service (K) Limited as the owner of the vehicle and the 2nd defendant M/s Kenneth Wandera Onyango as the driver of the said vehicle. The defendants filed a first defence in which they admitted an accident did occur but that they were not at all negligent. I shall first deal with the issue of liability as outlined in Issue No. 3 and 4 of the agreed issues. Was the accident herein as a result of the sole negligence of the 2nd defendant as averred and pleaded in the plaint and reply to defence or was it caused wholly by the negligence of the deceased as averred and particularized in the defence? Was the accident inevitable?

The defendants in their defence stated that the deceased was negligent as he stepped out onto the road as a result he was run over. No witness attended court to state this. The plaintiff's witness on the other hand stated that the deceased was on the footpath. The driver was trying to avoid the potholes on the road. As a result the vehicle swerved to the path of the deceased and knocked him up into the air. The impact thereby causing him his injuries. The plaintiff has to establish negligence on the part of the defendants. I find that as a fact roads in Kenya are not well maintained. It is common to see vehicles drive off the road to avoid potholes. When such vehicles do so contrary to the traffic rules they take a risk. They nonetheless owe a duty of care to pedestrians who have a right on the foot pavements to be there.

I find in this case that negligence on liability has been established and the two defendants are thereon liable jointly and severally at 100%. The 1st defendant as the employer to the 2nd defendant is vicariously liable.

B. Quantum

Issue No.5 Did the deceased sustain fatal injuries? The plaintiff produced a death certificate whereby the deceased is said to have died. I would add that as a result of the said accident the deceased did sustain fatal injuries.

C. Status of the Plaintiff

The parties raise the issue of the status of the plaintiff and his capacity to sue Issue No. 1

Is the plaintiff male adult of sound mind and the personal representative and dependent of the deceased Jackson Mulinge Kivai?

Issue No.6

Did the deceased enjoy good health and did he lead a happy and vigorous life prior to his death?

Issue No.7

Have the plaintiff the deceased's dependants and his estate suffered loss and expense as pleaded in the plaint?

Issue No.8

Does the plaintiff have right/cause of action to sue on behalf of the estate of the deceased? Issue No.2

On whose behalf does the plaintiff bring this suit? I believe the basic determination the parties require to be done is that of the basis of the plaintiff. The plaintiff produced to this court Grant of Letters of Administration intestate dated the 20.11.2000. The suit was filed on 10.4.01. The grant is full grant and as such gives them locus in which to file this suit. I now turn to claims made under the two acts

(a) Law Reform Act

(i) pain and suffering.

There is evidence to show that the deceased accident occurred along the Enterprise Road. The death certificate identifies the place of death as Industrial Area (Enterprise road). The plaintiff's witness stated that the deceased died at Kenyatta National Hospital. The cause of death was described as Head injury due to brain hemorrhage. I have no evidence that the plaintiff died in hospital save what the witness PW2 has said orally. I disallow this claim.

(ii) Loss of expectation of Life

The deceased is said to be youthful – and an elder brother to the plaintiff. He has prospect of a good life. I would allow an award of Kshs.70,000/= for loss of expectation of life.

(iii) Lost years

The deceased was a bachelor. He was employed with the Nairobi City Council at a salary grade of 18. His basic salary being 4,360 per month. The advocate recommended a sum of Kshs.2,300.- as multiplicate and a multiplier of 25 years. I would note that taking into account the said economic conditions a multiplier of 20 years would be adequate. $2,300 \times 20 \times 12 = \text{Kshs.}552,000/=$ I would award this lost years to the estate.

B. Fatal Accident Act

The plaintiff is not a dependant of the deceased. He is related to the deceased as a brother. He was an adult at the time the deceased died. The deceased further is said to have had three sisters as dependants. None of the said sisters had their birth certificate executed to court to show they are liable. I further find that one sister is declined as "brother of the deceased" I would find that the list produced before court and as pleaded in the plaint does not qualify the named persons as dependants. The fatal accidents act Section 4 describes dependants as follows:-

"Every action brought by nature of the provisions of this act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused [and shall.....be brought by and in the name of the execution or adm inistrators of the person deceased]....."

The dependants named herein do not fall under the legislation of the fatal accident act. I would therefore dismiss this claim as not having been established.

(c) Special damages

The plaintiff stated this was paid through donations. The claim though was not proved and accordingly dismissed in summary.

1. Running Down action.
2. Male adult aged 30 years old in 1999.
3. Pedestrian/motor vehicle accident
4. Injuries : fatal
5. Liability 100%
6. Quantu

A. Law Reform Act

- a. Pain and suffering - Nil
- b. Loss of expectation of life Kshs.70,000/=
- c. Lost years Kshs.552,000 (2,300 x 20 x 12)

b. Fatal accidents act

- loss of dependency – Nil
- c. Special damages – Nil

Total – Kshs.559,000/=

I award costs to the plaintiff. I award interest on general damages from the date of this suit.

Dated this 16th day of July, 2002 at Nairobi.

M. A ANG'AWA

JUDGE

15.7.2002