



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 1299 OF 1998**

**ELIJAH OLE KOOL .....PLAINTIFF**

**- V E R S U S -**

**GEORGE IKONYA THUO ..... DEFENDANT**

**J U D G M E N T**

On 13th April, 1997, James Lesingo Ole Kool (hereinafter referred to as “the Deceased”) was travelling in a friend’s car from Nairobi to Nakuru. With him was his wife and their infant child. The car was being driven by the Deceased’s friend. At a point known as Kimende on the Nairobi – Nakuru Road their car was involved in a head on collision with a lorry. The Deceased’s child died at the scene of the accident. His friend was rushed to hospital but also passed away. The Deceased and his wife were also injured in the accident. According to the Death Certificate the Deceased passed away on 10th October, 1997 as a result of cardiorespiratory arrest due to tuberculosis due to immunosuppression with brain abscess. Before his death, he was employed as a Policeman earning a net salary of K.shs. 5,527.25. The Plaintiff, who is the Deceased’s father, brings this suit on his behalf and that of other dependants and for the benefit of the Deceased’s estate under the Fatal Accidents Act (Cap. 32) and the Law Reform (Miscellaneous Provisions) Act (Cap 26).

A total of eight witnesses were called at the hearing. The Plaintiff called five witnesses. Three of these witnesses gave a first-hand account of the accident. Mrs. Nancy Lesingo was called as the second witness for the Plaintiff. She is the widow of the Deceased. On the day of the accident, she was one of the passengers in the car that collided with the Defendant’s lorry. She witnessed the events leading to the accident although she lost consciousness after that. Although there is no doubt that she is interested in this case directly, having lost her child and husband and having been injured herself in the accident, Mrs. Lesingo impressed me as a candid witness without mercenary ambitions. She is a naïve young woman and this is evident from the fact that she did not legally contest her father-in-law’s move to take out letters of administration over her husband’s estate. She complained about that action at cross-examination but that was all. Her evidence was consistent with that of the other eye witness. Those other eye witnesses were ordinary men going about their usual business. They are independent witnesses who have no interest at all in this matter. These two men, Gideon Njuguna Mungai and Joseph Ngigi Buru, are decent men.

They put aside their plans and rushed to the accident scene to help the injured. They happened to be at the scene of the accident by chance. Mr. Mungai is also a good citizen. He surrendered the pistol in the possession of the Deceased to the relevant authorities in a civil manner. Although he did not produce witness summons to show that he had been bonded to attend at the hearing of this suit as he alleged, I was still impressed by this witness and I do not think that he was motivated by any reward or promise of reward for his testimony which in any event was corroborated by the other witnesses. In summary, these

three main witnesses were at the scene of the accident and they saw for themselves what happened. Their evidence was consistent that the Defendant's lorry was trying to overtake another when the accident occurred. Their testimony was corroborated by another witness, Mr. Peter Martin Oluoch. Mr. Oluoch was driving by the accident scene. He stopped to help transport the injured to hospital. His testimony was that the lorry was in the middle of the road and timber was scattered all over the road. The car in which the Deceased was traveling in was pushed off the road on its side. Under these circumstances, Mr. Oluoch was forced to go off the road on his left side in order to go past the accident scene.

The situation described by Mr. Oluoch was as follows: The car in which the Deceased was traveling in must have been pushed off the road by the Defendant's lorry which had left its lawful path. Mr. Oluoch also impressed me as a credible and independent witness. I accept his testimony as any honest account of what he saw as he drove by the accident scene. The Defence called a total of three witnesses. Of these, only one had a first-hand account of the accident and that was none other than the driver of the Defendant's lorry. It also happens that this witness is the Defendant's brother. In his testimony, Mr. Naftali Kamau Thuo said that he was with two other people in the lorry at the time of the accident. The Defendant and this witness did not impress me at all. Their evidence was, as expected, lopsided and they were not candid at all. The Defendant even had the audacity to deny that he was the owner of the lorry involved in the accident yet it turned out that he was. Although this court cannot decide for a party how to conduct his case, it remains curious why the Defendant chose to call only his brother as a witness and not the other two persons who were with him. The Defendant himself arrived at the accident scene later. He did not offer any useful testimony and there is no doubt he was concerned more about his lorry and timber than any other thing at that time.

He only remembered the injured after the vehicles had been towed away. The final defence witness was Mr. David Mutuku, a police officer at Lari Police in the Department of traffic. This witness had nothing to say than produce the police investigation file. He admitted that he was not familiar with the statements recorded as he was not the one who had carried out the investigation. He did not understand anything about the file that would help this court. That aside, I have looked at the statements given by the Plaintiff's witnesses and they are consistent with their testimony at trial. The Deceased first recorded a statement in which he blamed the driver of the car in which he was traveling in and later recorded another one blaming the Defendant's driver. The inconsistency in the Deceased's statement will never be explained for the obvious reason that he will never come here as a witness. However, the evidence of the other witnesses, especially the independent ones leads me to conclude on a balance of probability that this accident was caused by the Defendant's driver trying to overtake another vehicle. I must also say that the police investigation file was not very helpful without further explanation which the witness who produced it was unable to give.

In written submissions filed by the Defendant's Advocate, it was urged that the Defendant had given evidence which discharged him from the presumption under section 119 of the Evidence Act. That section provides as follows:-

***“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of a particular case.”*** RINGERA, J. ***in Raphael Mwaniki Kiboi V. Joseph Njogu Kinyua NAIROBI H.C.C.C. NO. 3974 of 1988*** said as follows in relation to collisions of two motor vehicles:-

***“I am entitled under section 119 of the Kenya Evidence Act to presume as a likely fact that when two motor vehicles collide on a highway they do so in consequence of the negligence of either one or both of the drivers thereof. I make that presumption here. The third Defendant has however given evidence which rebuts the presumption against him. I am in the premises impelled to find as I do that the collision complained of was wholly caused by the negligence of the 1st Defendant. The 2nd Defendant is vicariously liable. That disposes of the issue of liability.”***

Assuming for a moment that negligence is presumed against the Defendant can it be said that he

has “given evidence which rebuts the presumption (of negligence) against him”? The foregoing record speaks for itself. The Defendant has not rebutted that presumption, if any. On the contrary, I am satisfied on a balance of probability that, in fact, it was the defendant’s driver who was negligent. The Defendant’s counsel also argued that it was the Plaintiff’s responsibility to join the owner of the car in which the Deceased was travelling. There was no authority cited in support of this contention which in my view has no legal basis. There is no obligation on any one to sue all persons liable to him. A Plaintiff retains the freedom to conduct his case as he deems fit and this includes the right to decide whether he will sue all persons liable to him or one or some of them only. I hope this settles the question of liability at least as it concerns the occurrence of the accident.

There is however another matter. The Deceased passed away six months almost to the day after the date of the accident. The Defendant’s argument is that it had not been proved that the accident was the direct cause of the Deceased’s death. This argument relates to the law of causation. When will an act or omission be said to be the cause of the Plaintiff’s injuries? A defendant will only be held liable for negligence if his act or omission is either the sole effective cause of the Plaintiff’s injury or the act or omission is so connected with it as to be a cause materially contributing to it. The first case will rarely raise contentions.

The question becomes difficult to decide in the second case. When is an act or omission so connected with an injury as to be a cause materially contributing to it? This matter was considered in detail in Stanley V. Gypsum Mines Ltd. [1953] A.C. 663, H.L. In that case, two miners of equal status, S, a breaker, and D., a borer, worked in the Respondent’s gypsum mine and were employed by them, neither being in charge of the other. At their working place they found indications that the roof was dangerous and might fall and told the foreman, who instructed them to fetch it down, which they understood as including the corollary that they were not to do ordinary work under the roof until it had been made safe. After he had left them they tried unsuccessfully to get the roof down and then, by a joint decision, abandoned the effort and proceeded with their normal work. The roof fell and S. was killed. The trial Judge found that the actions of both men were causes of the death, through failure to obey the foreman and to report the fact to him and through the joint decision to continue to work under the roof: He also found that the foreman was justified in leaving them to carry out the order, for which they were competent, and that there was no lack of proper supervision.

Accordingly he gave judgment for S’s widow in an action brought by her against the Respondents as the employers of D., for one half of the amount which she would have been awarded if S. had not been also responsible for his own death. This decision was reversed by the Court of Appeal holding that any negligence or breach of the regulations by D. did not cause or contribute to the death of S., the real cause of which was his own negligence and breach of statutory duty. The House of Lords overruled the Court of Appeal. LORD REID said as follows at pp 680 – 682:-

***“There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations, and both ought to have known quite well that it was dangerous for Stapley to enter the stope. The present action against the respondents is chiefly based on Dale’s fault having contributed to the accident and on the respondents being responsible for it, the defence of common employment being no longer available. So it is necessary to consider what would have happened if Dale had done his duty. It was his duty either to try a pinch bar or to start boring holes for the shot -firer, and on the evidence I think that it is highly probable that, if he had insisted on doing that instead of agreeing with Stapley to neglect their orders and the regulations, Stapley would not have stood out against him or tried to resume his ordinary work. Stapley had nothing to gain from his disobedience, and if he had not found Dale in agreement with him it appears to me unlikely that he would have persisted.***

***But if he had persisted and thereby prevented Dale from carrying out his orders – because Dale could not have worked at the roof if Stapley had persisted in going below it – then it was Dale’s duty to go for the foreman, as he, Dale, could not give orders to Stapley. We do not know how soon the roof fell or how long it would have taken Dale to find and bring***

*the foreman, but it is at least quite likely that the foreman would have arrived in time to prevent the accident. If Dale's failure did contribute to the accident, then I do not see on what ground the respondents can escape liability in respect of that failure. In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant cannot succeed. But if it was caused partly by his own fault and partly by the fault of Dale, then the appellant can rely on the Law Reform (Contributory Negligence) Act, 1945. To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. "A jury would not have profited by a direction "couched in the language of logicians, and expounding theories "of causation, with or without the aid of Latin maxims": Grant v. Sun shipping Co. Ltd., [1948] A.C. 549, 564; [1948] 2 All E.R. 238) per Lord du Parcq.*

*The question must be determined by applying common sense to the fact of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident.*

*I doubt whether any test can be applied generally. It may often be dangerous to apply to this kind of case tests which have been used in traffic accidents by land or sea, but in this case I think it useful to adopt phrases from Lord Birkenhead's speech in Admiralty Commissioners v. Volute (Owners), ([1922] 1 A.C. 129, 144, 145) and to ask was Dale's fault "so much mixed up with the state of things "brought about" by Stapley that "in the ordinary plain common "sense of the business" it must be regarded as having contributed to the accident. I can only say that I think it was and that there was no "sufficient separation of time, place or circumstance" between them to justify its being excluded, Dale's fault was one of omission rather than commission, and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view of the probabilities in this case, and I think that it must lead to the conclusion that Dale's fault ought to be regarded as having contributed to the accident."*

Although the Plaintiff may be able to trace even a consequential connexion between an injury and the negligence of the Defendant, the law does necessarily attach liability to the Defendant who has been negligent. In **Walker v. Goe** [1859], 4 H. & N. 350, it was held that there can be no liability unless the damage is the "proximate" result of the negligence. It, therefore, remains upon the Plaintiff to prove both that the Defendant was negligent and that his negligence caused or materially contributed to the damage (see **Graig v. Gragaw Corpn.** [1919] 35 T.L.R. 214, at p. 215 per LORD BUCKMASTER). The Learned Authors of Volume 28 of HALSBURYS LAWS OF ENGLAND (3rd Edition) say as follows at page 28:

*- "Negligence is an effective cause of an injury which either is intended, or, judged broadly on common principles, is a direct consequence. When negligence has been established, liability follows for all the consequences which are in fact the direct outcome of it, whether or not the damage is a consequence that might reasonably be foreseen."*

In other words, causation is a matter of fact to be determined by common sense principles. LORD WRIGHT said as follows in **Yorkshire Dale S.S. Co. Ltd. V. Minister of War Transport** [1942] A.C. 691, H.L. at p. 706:-

**“.....the choice of the real or efficient cause from out of the whole complex of the facts must be made by applying common sense standards. Causation is to be understood as a man in the street, and not as either the scientist or the metaphysician, would understand it.**

” As LORD DENNING said in **Davies v. Swan Motor Co. (Swansea) Ltd.** [1949] 2 C.B. 291 at p. 321; “the efficiency of causes does not depend on their proximity in point of time.” It is enough that the cause forms part of a chain of events which has in fact led to the injury. What cause will be effective? The Learned Authors of HALSBURYS Supra at p. 28 say as follows:-

**“In the absence of intervention by voluntary human action the original act is to be regarded as a cause of the injury, provided that its effect is still actively continuing and has not been superceded by some independent natural cause.....If in fact the defendant’s neglect of a proper precaution has caused the injury, the court will not enter into hypothetical inquiry to establish whether the Plaintiff’s injury must necessarily have happened with or without the defendant’s negligence.”**

In other words, the defendant’s negligent act or omission is the cause of the Plaintiff’s injury unless it is shown that there was some voluntary responsible human intervention in the chain of events between the original negligent act or omission and the Plaintiff’s injury: The inquiry will be whether the injury can be treated as flowing directly or substantially from the negligence. In **The Oropesa** [1943] 1 All E.R. 211 at 213 LORD WRIGHT said as follows:-

**“Certain well -known formulae are invoked, such as that the chain of causation was broken and there was a novus actus interveniens . These phrases, sanctified as they are by standing authority, only mean that there was not such a direct relationship between the act of negligence and the injury that the one can be treated as flowing directly from the other.”**

In a general sense, the defendant remains liable for all results which follow in the ordinary course of things of which reasonable human conduct by those sustaining the injury is a part. It remains upon the Defendant to show that some other action or omission other than his own caused the injury.

Now, the question is whether the Defendant’s negligence, as already established, caused the death of the Deceased.

The Plaintiff and the Deceased’s wife testified on the Deceased’s condition after the accident until he passed away. The uncontroverted evidence is that the Deceased sustained internal injuries in the head. The Deceased’s wife told the court, and this was also not challenged, that after the accident, her husband was paralysed and bedridden before he was hospitalized at the Kenyatta National Hospital where he died while awaiting special treatment. There is no evidence whatsoever that some other cause came into play after the accident which may have caused or hastened the Deceased’s death. In the ordinary course of things, the evidence as a whole leads me to a conclusion that the Deceased died as a result of the negligent acts of the Defendant and/or his driver. In this regard the case of **Anne Wangui Obwogi v. Lawrence John Aburi** NAIROBI Civil Appeal No. 46 of 1997 (unreported) (OMOLO, LAKHA & PALL, JJ.A) relied on by the Defendant is distinguishable since in that case it was found that the chain of causation had been broken by intervention of the acts of a third party. In this case, there is no evidence whatsoever of a third action or that the Deceased acted unreasonably at any point, either act which may have caused or hastened his death.

Having determined the Defendant’s liability, the next question relates to the quantum of damages payable for the loss suffered by the Deceased’s estate and his dependants. Before going into this question, it is curious that the Deceased’s wife has two children who were never named as dependants on the plaint. Were these children of the Deceased? If not, were they being maintained by him? These questions remain unanswered. However, this state of affairs is afforded some explanation by what transpired at the hearing. Why did the Deceased’s father deny the Deceased’s wife the chance to take out the letters of administration? Although I was never called upon to make an opinion on this point, I am,

however, compelled to make the following observations: Section 66 of the Law of succession Act clearly gives the surviving spouse first preference to take out letters of administration above all other persons. The Plaintiff in the present case, therefore, went out of line in preventing the Deceased's wife from taking out the letters of administration over the estate of the Deceased. The Deceased's wife is a lay person who is not fully aware of her rights and the Plaintiff is probably a father-in-law who cannot hesitate to take advantage of that fact. The Deceased's family appear to have nothing to do with his wife.

Although the Plaintiff said in his testimony that he still considered the Deceased's wife as "our daughter-in-law". I still do not understand why "they" have left her and her children without support. That aside, I am doubtful whether the Plaintiff and his wife were being supported by the Deceased. The Deceased's wife said that the Deceased did not support the Plaintiff: That the Deceased used his income on his family's expenses – by this I understand himself, his wife and children. If I may repeat myself, I must say that I found the Deceased's wife to be a candid woman without mercenary ambitions atleast in this matter. Her testimony on this point is supported by the following facts. The Plaintiff admits that he did not always receive support from the Deceased. The Plaintiff also told this court that he is a priest earning K.shs. 12,000/= per month and that his wife is a retired Civil Servant on pension. The Plaintiff's income alone is more that double the Deceased's net income. It is very unlikely, and I should say unfair, that the Deceased actually gave his parents K.shs. 2,000/= per month and lived with his wife and children at a paltry K.shs. 3,525.25. It must be noted that this court was never told whether the Deceased had any other income apart from his earnings from his employment and anyway it does not appear so since this matter was important to the Plaintiff's case but no evidence was led on it. It may be that the Deceased gave some money to his parents once in a while, as most children do, but to say that they were his dependants in the circumstances of this case is quite another matter.

The available evidence does not show this at all. All said and done, I agree with the Defendant's Advocates that it is only the Deceased's wife who is a dependant in this suit. Without determining the question I think that the children mentioned earlier would have qualified as dependants had they been included as such in the Plaint. Since they were not, they must now be disregarded.

Now what is the appropriate quantum in this case? It has already been seen that the Deceased's monthly net income was K.shs. 5,527.25. This is the figure to be employed as a multiplicand and not K.shs. 10,030/= which was the gross salary as suggested by the Plaintiff's Advocates. It is also not in dispute that the Deceased was aged 32 years at the time of his death. Without citing any authority, the Defendant's Advocates argued that a multiplier of 15 years was reasonable in the circumstances of this case. The Plaintiff's Advocates cited two cases, these were

: (a) **Helen Muhonya Maina v. Peter Kianji Gituka** NAIROBI

H.C.C.C. No. 37723 of 1990 (unreported) (RINGERA, J.); and

(b) **Pauline Kulola Mwadime v. Duncan Mwikamba** NAIROBI

H.C.C.C. 2774 of 1992 (unreported) (MWERA, J.)

In the first case (a) above, the Deceased was aged 36 years at the time of his death. In the second case (b) above, the Deceased was aged 35 years at the time of his death. In both cases, the court applied a multiplier of 20 years. I on my part agree with the Plaintiff's Advocates that a multiplier of 20 years is also reasonable in the circumstances of this case. I will also adopt the usual dependency rate of 2/3. The sum to be awarded under the head of loss of dependency will, therefore, work out as follows in K.shs:  $5,527.25 \times 20 \times 12 \times 2/3 = 884,360/=$

The Deceased was in pain for about six months before he died. The Defendant suggests that an award of K.shs. 100,000/= would be reasonable under the head for pain and suffering. I have looked at the case of **Henry Gichoki Wachira v. Nairobi Bus Union Ltd** NAIROBI H.C.C.C. No. 2558 of 1992 (unreported) (MWERA, J.) and I am satisfied that the amount suggested by the Defendant under this head is reasonable. In that case, the deceased died after three months of the accident. The court assessed

