



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 344 OF 1994**

**NZULA KIMATU.....PLAINTIFF**

**VERSUS**

**MITAU KYENDW.....1 ST DEFENDANT**

**GEDION MUTUA MUSYIMI.....2 ND DEFENDANT**

**10 Coram: J. W. Mwera J.**

**Muli Advocate for Plaintiff**

**Mararo Advocate for Defendants**

**C.C. Muli**

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

The initial plaint was filed here on 16.8.94. It was amended on 25.8.94. The two plaintiffs, widows and legal representatives of the late Kimatu Linge sued the defendants jointly and severally in damages. It was pleaded that on 17.11.93, the 2nd defendant drove the 1st defendant's motor vehicle reg. No. KAC 103 N so negligently at Kyua market that it swerved from the road to a point where Linge was standing and there fatally knocked him down. The suit was brought under the Law Reform and Fatal Accidents Acts. Initially there was ex parte hearing which ended in a judgement dated 10.4.97. It was however set aside and hearing de novo took place.

Nzula (P.W.1 1st plaintiff) testified that when they got word of Linge's death they put in place all necessary moves about his burial and later the filing of this case. That together with her co-wife (2nd Plaintiff) they got a grant to administer Linge's estate (Exh.P.1). They also procured his death certificate (Exh.P2) followed by a police abstract (Exh.P3). She also produced a membership card held by the deceased which showed that he was a trader in carvings and that he belonged to Akamba Handcrafts Co-operative Society (Exh.P4). That whenever the deceased returned from a business trip, he would have as much as Sh.20,000/= of which he gave Sh.6,000/= to P.W.1 to provide for their 5 children. That the deceased also assisted his parents. On his death all this financial support naturally ceased. The 1st plaintiff did not have birth certificates for 5 children and she could not avail evidence of his income in absence of bank statements or books of account. She only guessed his income. She did not exhibit the deceased's trading license either. That the deceased who lived in Mombasa every month brought cash home to support his family and parents. He also gave Sh.6000/= per month to the 2nd plaintiff.

The 2nd plaintiff (P.W.2) seemed to confirm that the deceased used to give her Sh.6000/= per month. She spent it on herself and their two children. P.W.2 had no receipts for burial expenses which she put at

Sh 20,000/=. That the deceased who lived at Mombasa had come home and was waiting for a bus at Kyua when he was knocked down.

Mukulia Nguli (P.W.7) testified that he witnessed the accident in which Linge, whom he knew, died. That as the two stood at Kyua bus stage and Linge was about to board the bus that had stopped, a motor vehicle came from Machakos direction heading towards Kitui. That it left its lane and side to Kitui, came where P.W.2 and the deceased were loading carvings behind the Machakos – bound bus, and hit Linge. He died on the spot. That the offending motor vehicle was Reg. KAC 103 N and it hit Linge as he stood at the bus stage. First P.W.2 ran off; he came back to get the details of the offending pick-up. Mutua Musyimi was the driver, and Mitau Kyendwa, its owner.

That the deceased stood behind the bus ensuring that all his carvings had been loaded in the bus he was about to board towards Machakos. That the pick-up came on the side where the bus was, hit the deceased and went further to the left of the bus without damaging the bus. That the pick up had arrived from Machakos direction at a high speed. That closed plaintiff's case.

Mitau Kyendwa (1st defendant – D.W.1) then testified that on 17.11.93 he was in his pick-up KAC 103 N being driven by Musyimi from Machakos to Kitui. It was at about 6 p.m. when they got to Kyua market. That there was a bus which had stopped on the road. D.W.1's driver slowed down to 30 KPH but then a man emerged from the rear of the bus and was knocked down as he made to load his luggage in the rear of the bus. That the emergence was sudden. D.W.1 denied that his driver left his side of the road to go and knock down the deceased on the other side. That after the collision his pick up stopped on the spot. That they were going towards Kitui while the bus which had stopped on the left was coming from that direction. That the bus had stopped in a lay-by (bus stage) and no other motor vehicles were passing.

Gideon Mutua Musyimi (D.W.2) repeated more or less what his employer D.W.1 had said about arriving at Kyua market from Machakos direction and finding a bus from Kitui direction. It stopped on the opposite side. That as D.W.2 moved passed the bus, a man emerged suddenly from behind it carrying wood carvings. He got into the road. They came into contact with the motor vehicle D.W.2 was driving and the impact knocked the deceased down; he fell on his chest. D.W.2 stopped right there and went to see; he noticed that the man had died. They called the police. When they came the dead man was taken and the 2 motor vehicles were moved to Machakos Police Station. His motor was inspected and released to him. He was later charged with careless driving in a traffic court but he was acquitted. That D.W.2 was driving slowly; his way was clear but the deceased suddenly emerged from behind the bus into the road. That the bus had stopped in the road and D.W.2's motor vehicle did not leave its path to go and fatally knock the deceased down. It was at about 8 p.m. and his headlights were on. That the impact was between the pick up and the load of carvings the deceased carried – not direct with him. That the fell behind the bus because he had not quite gotten into D.W.2's path.

Mutemi Kawaki (D.W.3) was also in the 1st defendant's pick-up. The time was about 8 p.m. At Kyua market they came across a bus that had stopped facing Machakos from Kitui. There was room for the pick up to pass. But as it did so a load/faggot of wood projected in the road from behind the bus. It came into contact with the pick-up. On impact its carrier fell down. The load turned out to be wood carvings. They had scattered on the road. Police were called; they took measurements and removed the dead man from the scene. The 2 motor vehicles were taken to Machakos Police Station. D.W.3 said that he sat in the cabin of the pick-up and saw all that took place. The motor vehicles head lamps were damaged in contacting the wooden luggage. D.W.3 added that the bus had stopped where other motor vehicles stop on that road. The deceased fell behind the bus, as it made to move off.

The plaintiffs side had pleaded that the 2nd defendant (D.W.2) drove the said pick-up at an excessive speed in the circumstances and did not notice the presence of the deceased on the road at that time and place. That the 2nd defendant failed to keep proper control of his pick up and he did not stop swerve, slow down or in any way 10 avoid the accident. The defence denied that the accident took place or it was due to the 2nd defendant's negligent driving. Injury, death or any loss and damage was similarly denied and the plaintiffs were put to strict proof of their claim.

In the submission, the plaintiff's side went over the pleadings and evidence and urged this court to find the defendants liable. That the 2nd defendant drove the motor vehicle in the negligent manner as pleaded, causing the accident in which Linge died. He had been standing at a safe distance behind the bus overseeing the loading of his wares into the bus. It was submitted that the deceased did not contribute to the accident either, much as this was not pleaded in defence.

On quantum this court was told that both plaintiffs got a total of Sh.12,000/= from the deceased's earnings to support themselves and their children. So loss of dependency worked at Sh.1.8 M, the deceased having died aged 37 years, over a multiple of 15.

Further that funeral expenses came to Sh.20150/- as proved plus Sh.100/= for the police abstract.

The court heard that under the Law Reform Act Sh. 80,000/= he spared for loss of expectation of life.

The defence side similarly went over the pleadings and evidence concluding that the deceased was the author of his misfortune when he emerged suddenly from the rear of the bus carrying wood carvings that came into contact with the 1st defendant's motor vehicle. The case of PATRICK KIMAU VS. NDURUMO CIVIL APPEAL NO. 254/98 was cited to back up this stand. That a pedestrian owes other road users a duty to move about the road with care.

It was further submitted that the 2 plaintiffs had failed to prove income of the deceased or their dependency on it. But Sh.70,000/= for loss of expectation of life was considered appropriate under the Law Reform Act.

Beginning with whether the defendants were liable or not, this court was disinclined to find so. Nguli (P.W.3) claimed that he was present and he saw the defendant's motor vehicle moving at a high speed veer. That it veered from its side of the road as one headed to Kitui and came to fatally knock down the deceased, who was standing at a bus stage on the way to Machakos – i.e on the opposite side of the road.

On the part of the defendants, 3 witnesses told this court that the 2nd defendant drove at the scene at some 30-40 KPH having noticed the bus that had stopped on the other side. That his way was clear but as he drove passed the bus the deceased emerged from the rear of the bus carrying wood carvings. They suddenly got into the road and got in contact with the 1st defendant's front part. That impact sent the deceased falling on his chest dead.

The defence told the court that police arrived to take measurements and move the deceased's body. That D.W.2 was charged with careless driving and acquitted. Nguli (P.W.3) did not record a statement with the police about what he claimed that he witnessed. He instead went to report to the deceased's family. Did he actually witness the accident? Why did he not report it to the police? Quite probably he did not testify in the traffic court against the 2nd defendant either. But in the circumstances had a police file with sketch plan along with lower court traffic proceedings been produced here the issue of liability could have been easier to resolve. But as things stand, this court is unable to agree that the 2nd defendant's negligent driving caused the death of Linge and this suit is dismissed with costs. Had liability been proved against the defendants, damages would have issued 20 under the Law Reform Act in the manner of this court. Similarly due provision would have been made under the Fatal Accidents despite the plaintiffs not exactly proving income or that they got Sh.6000/= each per month. The court would have endeavoured and done its best in such circumstances. In sum the suit is dismissed with costs.

**Judgement accordingly.**

**Delivered on 11th July 2001.**

**J. W. MWERA**

**JUDGE**