



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1301 OF 1998

STEPHEN MURIMI KIBUCHI ----- PLAINTIFF

VERSUS

A.M. SUNKAR ----- DEFENDANT

JUDGMENT

The plaintiff in this case is described as one Stephen Murimi Kibuchi. He sues one A.M. Sunkar as the owner of a bus in which his brother one David Kibuchi Kinyua was traveling in, He notified the court in his evidence that on the 30.3.96 an accident occurred whereby his brother was injured. He was not present at the time of the accident but came to know of it later. His brother returned to their rural home after two days. Three months later he the deceased brother died. The plaintiff attributed the said accident to the defendant.

He filed suit through his advocate claiming that the defendant was negligent. He asked for General damages under the Law Reform Act Cap.26 and the Fatal Accidents Act Cap.32. He also prayed for Special damages.

No other witnesses was called to give evidence.

The advocate for the defendant prayed that the suit be dismissed as there has been no evidence called to prove liability. The evidence of the plaintiff is entirely that of hearsay. The accident occur don 30.3.96. There was no proof that this occurred as a result of the accident in question.

In the defence the advocate admitted hat they made a “without prejudice” statement that the vehicle had experienced a failure to its break system. The accident was therefore inevitable. One witness was called to give evidence on behalf of the defence.

There ware seven agreed issues before me which I would answer them as follows:-

1) Is the plaintiff the brother and personal representative of the estate of the late David Kibuchi Kinyua (deceased)? Stephen Muri Kibuchi has been described as the plaintiff in this case. The plaint should have in fact been headed as follows:-

Stephen Murimi Kibuchi (suing as the legal representative of the estate of David Kibuchi Kinyua (deceased).

The plaintiff produced to this court exhibit P1 being Limited grant of Letters of administration ad colligenda issued on 7.5.99 by he resident Magistrates court Kiambu.

According to the Law of Succession act Cap.160 rule 36(3) of the probate and administration rules, the resident Magistrates court has no powers to issue Limited grant ad colligenda Bona. By LN223/92 it is only the High court at Mombasa, Nairobi, Kisumu, Nakuru and later Nyeri who have powers to issue Limited grant ad colligenda Bona. What the plaintiff should have applied for is letters of Limited Grant ad Litem (see the case of P & A 1731/2000 in the Matter of the estate of Morarji Bhanji Dhanak (Deceased)).

As it stands the plaintiff is not the legal representative of the deceased estate.

In the event that he is, issue No.2,3 and 4 can be answered as follows:-

There has been no evidence before the court that the Nissan Bus Reg. KAA 542J was owed by the defendant. That the deceased a lawful fare paying passenger in the said bus. There is also no evidence of negligence on the part of the defendant.

What the plaintiff stated in court is that his brother was involved in an accident. He was not present. After two days his brother returned home to the rural area. He then died a few months later.

The plaintiff should have called an eye witness to the accident and or even the police officer who investigate the accident. If there was a subordinate court case against the defendant, the proceeding of the said lower court would have been produced as proof on liability and negligence (See Section 34 of the evidence act).

I have unfortunately only the plaintiff's evidence who confirms that he did not witness the accident.

Further as this was a bus accident, here ought to have been representative suit. On the issue of liability, I hold that liability has not been proved.

On issue No.5

As to whether the deceased dependents and his estate suffered loss and damage?

The plaintiff reflected that the parents of the deceased never dependant on him.

When the plaintiff came to give evidence he disclosed that the mother of the deceased had since died. This fact appears not to be in the knowledge of the advocate otherwise he would have amended his plaintiff. The father who was alive did not attend court to testify.

The plaintiff gave oral information that Ksh.3,500/- was being paid to his parents by the plaintiff. There is no indication how this figure came to be. If the deceased was unmarried, if the deceased was earning ksh.4,700/-, a sum of Ksh.3,500/- per month seems to be on the higher side to pay to his parents. He could have only be left with Ksh.1,200/-. This is before tax on other contribution being made.

Issue No.6

Is the defendant liable under the Fatal accident act and the Law Reform Act to pay damages to the deceased's dependants and his estate?

In his opening address the advocate for the plaintiff stated he relied on the doctrines of Res Ipsa Loquitor. Unfortunately he did not plead this. As stated earlier he did not call evidence to support the claims. I would find that the defendant is not liable under the fatal accidents act and the Law Reform act.

I am required by law to compute what award I would have given if the case had been proved.

Under the Law Reform act if evidence had been deduced of the injuries sustained by the deceased and a constant medical report up to the time of death showing that the cause of death did occur as a result of the

accident my award would have been as follows:-

General damages

Pain and suffering Ksh.50,000/-

Loss of expectation of life Ksh.60,000/-

Fatal Accidents 10 x 1,000 x 12 Ksh.120,000/-

To be paid to the father.

Special Damages Nil

There was no receipt produced in support of the Special damages.

I hereby dismiss this claim as not having been proved.

Total Ksh.230,000/-

I dismiss the plaitniuff suit as not having been proved beyond a balance of probability. I award costs to the defendant.

Dated this 18th day of January 2000 at Nairobi.

M.A. ANG'AWA

JUDGE