



**Fatal accident
Pedestrian**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.1668 OF 1997

JOSEPH KIKONGO MADOLIO PLAINTIFF

VERSUS

CHARLES PETER MUGO 1ST DEFENDANT

KENYA BUS SERVICES LTD. 2ND DEFENDANT

JUDGMENT

Three witnesses gave evidence in this suit. The plaintiff, Joseph Kikongo Madolio, the husband of the deceased. Charles Peter Mugo the 1st defendant and driver of a Kenya Bus Reg. No.KTR 405; Stephen Mbecha, Meshak. DW2 the bus conductor of the said vehicle.

The evidence before the court is that the deceased Miriam Mbone Kikongo, sustained injuries on her left arm and chest along Juja road. She was brought to the bus driver by the defendant No.1 and left there. The members of the public claimed that he DW1 was the one who ran over her. DW1 claimed that he took her straight to the hospital.

This though was not exactly the story given by his witness DW2 and the plaintiff PW1. The deceased on being put on the bus - the members of public alleging that DW1 ran over her (They in fact smashed the side widow). The driver drove to the police station.

It is there that the plaintiff found the vehicle together with his wife seated inside. She was still alive. She told him that the bus ran over her. Her exact words being "I am dying because of the stage coach". The vehicle was driven to the Kenyatta Hospital. There the deceased was x-rayed and admitted to hospital. She died in the evening. DW1 denied he ran over her. He in fact stated that he was acting as a good Samaritan. Nonetheless he did admit that his motor vehicle bus was taken for inspection thereafter to see if it had any pre- accident defects involving the said accident. Though he stated that a matatu yellow in colour may have been involved in the accident and not him, the conductor stated he saw a dark green matatu. He in fact was in the bus and saw the commotion of members of he public come in.

DW1 informed the court that Juja road was crowded and the traffic heavy. He was going at a slow pace. He went to stop at a "lay by". There he allowed passengers to alight and board. Before reaching this "lay by" he in fact noticed the deceased who was jumping to go and board the matatu. That matatu was in fact crowded.

The plaintiff produced a police abstract report that confirmed the accident. This involved the plaintiff. Also produced was the original Death certificate.

On the issue of liability the advocate for the plaintiff submitted that this should be apportioned 50%:50% ratio as it is not quite clear who of the two contributed to the negligence. The advocate for the defence stated the claim on liability should be dismissed as not having been proved.

(The defence had filed on the 11.9.97 denied the allegation of negligence or that it was caused at all. In fact that the accident was caused by the negligence of the deceased.

Particulars of negligence on the part of the deceased is failing to keep any or proper look out, failing to have any or sufficient regard for her safety. Failing to heed the presence of the defendants motor vehicle; carelessly cross the road. Failure to take adequate measures to prevent the said accident.).

I find that the two drivers gave contradicting evidence as to his actions after the accident. He did not contribute. The police cannot arrest you if you have been a good Samaritan as he claims to be. It is therefore noted that the defendant did cause the accident from the circumstances of the case.

As to the issue of quantum, both advocates agreed that under the Law Reform Act, the head of damages of loss of expectation of life - a conventional sum of ksh.60,000/- is normally awarded by the courts. The advocates for the plaintiff prayed that Ksh.100,000/- be awarded.

I hold that for this head of damages Ksh.60,000/- be and is hereby awarded.

As to the head of damages for pain and suffering the advocate for the defendants pray for ksh.5,000/-. I believe this figure up to a sum of Ksh.10,000/- is a conventional sum that the courts award sudden death. The deceased in this case died almost 12 hours later. She most certainly was in grate pain considering that she sat in the bus waiting for the driver to finish writing his statement at the police station.

I would award here Ksh.100,000/-

As to the claim under the Fatal Accident Act - the plaintiff states that he is in full time employment with Labyn contracts. He earns Ksh.9,200 per month. He informed the court that he was a machine operator.

Nonetheless he did know his wife was a fish monger for the last 11 years. She earned more from this fish and would support the family.

I believe in Kenya Women contribute tremendously towards the income of the family. Nonetheless it is the duty of the man to support and provide for the wife. The plaintiff most certainly was not dependent on the deceased.

Further to prove income, this must be done strictly. The deceased seemed to work in the informal sector. No records having been kept. In the absence of this the plaintiff should have called a co-worker or business colleague who has been generally dealing with the plaintiff for 11 years in the sale of fish. If a brief account from such a person would have been documented it would assist in determining the income.

I have been given two authorities by the advocate for the defendant. Both decision of Mwera J. I am not bound by them but on reading them, I would agree with the points they bring out.

This is the case of:-

Hannah Wanjiku Kamau V. Kaher Sigh & Another

Hccc 783/1992

Victoria Ngendo V J.K. Njoroge

Hccc 1438/89

Where the Hon. Judge held in order to prove damages under the Fatal Accidents act such as to incur - this must be strictly proved.

I hold that this was not done. I hereby dismiss this head of damages.

As to Special Damages, the same principles follows. Namely that this head of damages must be pleaded and strictly proved.

The plaintiff pleaded.

Police abstract Ksh. 100/-

Post-mortem report Ksh. 100/-

Fees for letter of administration Ksh.15,300/-

Funeral Expenses Ksh. 45,173/-

The plaintiff failed to produce any documentary evidence by way of receipts to prove the above items. All he had for the funeral expenses were notes. He did admit that contributions were made towards this as a result he himself spent little or nothing. The other items were never mentioned or spoken off in evidence in brief. The same is and is hereby dismissed.

I therefore enter judgement for the plaintiff for liability at 50%.

I award General Damages for pain suffering Ksh.100,000/-

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

Total Ksh.160,000/-

Less total Ksh. 80,000/-

Special Damages Nil

Fatal Accident Act Nil

I award interest on Ksh.80,000/- from the date of this judgement.

Dated this 22nd day of February, 2000 at Nairobi.

M.A. ANG'AWA

JUDGE