



**REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 1566 OF 1997**

KANGUTUU MBITHII PLAINTIFF

VERSUS

HENKEL KENYA LIMITED & ANOTHER DEFENDANT

JUDGMENT

Kanguttu Mbuthi is the father of Peter Illa Kangutuu (now deceased). He is also the plaintiff in this case who sues the 1st defendant, a limited liability company and owner of motor vehicle reg. KAE 641T and sues the 2nd defendant as the driver of the said motor vehicle.

The evidence before me according to PW2, a brother to Peter ilia Kanguttu, is as follows:-

Peter was walking in front of him along the road in question. A vehicle came at an extremely high speed and in a zig zag manner. It knocked the deceased, Peter, who then died of his injuries. PW2 attributed the negligence of the said accident upon the driver of the said vehicle.

DW1, the 2nd defendant in this case stated that he was in the moving traffic. It was a little after 7.00 a.m. There were three lanes going towards one direction. He was travelling along the Muranga road towards the Ruaraka area. At the Muranga road just after the City Park and at a drift he suddenly saw an object fall on his windscreen and to the ground. It turned out to be the deceased. DW2 stated he was travelling slowly, say 50 Kph. That on other side were vehicles. That he noticed a vehicle in front and to one side trying to avoid something. It is then that the deceased was knocked.

The defence denied negligence. The defence stated that the deceased was the author of his own misfortune. That the defendant No. 2 was not over speeding due to the heavy traffic.

I shall now endeavour to answer the statement of issues as agreed by both parties.

The plaintiff has proved in this case that he is the legal representative of the deceased's estate. He holds the letters of administration duly produced as an exhibit during the trial.

The issue of ownership of the motor vehicle KAE 641F arose. I believe the reasons being that in the first Plaintiff it was amended to read KAF 641F. The plaintiff is bound to prove to this court the issues before the court (see order 17 r.2(1) CPR). In this instance no proof of ownership was tendered by the plaintiff. This would have been easily done by doing a search with the Registrar of motor vehicles. The said Registrar would issue a certificate to verify the owner of the said vehicle. This was not done. I would hold that proof of ownership was not established by the plaintiff of the defendant.

Issues 3 and 4 deal with the negligence of the 2nd defendant and or the deceased respectively.

I have heard the evidence from both side and hold that the evidence of PW2 is not credible. He stated that the vehicle was travelling in a zig zag manner and at a high speed. In order to prove this, the plaintiff ought to have called the police officer who was at the scene and took measurements of skid marks and points of impact of the accident.

I find that this expert witness was not called. The other aspect was for the plaintiff to produce the Traffic court case if any to court under section 34 of the Evidence Act. This was never done nor established by the plaintiff.

What I have before me is the evidence of PW2 and DW1. Who was at the fault in the said accident? I hold that the plaintiff was not able to prove negligence on the part of the defendants. I find it difficult to apportion negligence amongst the parties.

I would therefore hold that the plaintiff has not established negligence in this case. I would therefore dismiss it.

If in the event the plaintiff had established his case, I would be required to compute the applicable quantum. This has been difficult as the plaintiff produced no documentary proof of the age of the deceased and his wages.

Mr. Muli for the plaintiff has asked that I take “judicial notice” of the age and wages earned. This be computed at 31 years and Ksh.10,000/- respectively. Under section 60 of the Evidence Act it defines what is taken as judicial notice. Most certainly age and wages do not follow under this category.

What the plaintiff should have done is produce the birth certificate of his son. Most people use the death certificate which is not always accurate. Others use a baptism certificate. I believe even an elder who would have come to testify when the deceased was born a brief would have sufficed dependency on the circumstances.

As to the wages earned, it seems that Ksh.10,000/- was mentioned. Nonetheless it was proved that only Ksh.5000/- was given to the plaintiff. It was also proved by the plaintiff in cross examination that the deceased was only working for one month in Nairobi. This therefore meant his wage was difficult to ascertain. The plaintiff would have called a co-workmate or to give the necessary evidence.

A minimum wage of Ksh.2,000/- x 20 years x 12 = Ksh.480,000/- although the plaintiff was praying for Ksh.300,000/- has calculation of Ksh.5,000/- x 20 x 12 come to Ksh.1.200,000/- and not Ksh.300,000/-.

Nonetheless I decline to make any award on the heading under Fatal Accident Act on the grounds of lack of proof.

As to the last issue - the deceased did sustain loss and damage to his estate. Under the law reform I would have awarded loss of expectant of life at Ksh.100,000/-. He would have had a total award of Ksh.580,000/-. As the plaintiff was the only dependant this amount would have been give to him. As there has been no proof sufficient to make an award I hereby dismiss this suit with costs to the defendants.

Dated this 28th day of March, 2000 at Nairobi.

M.A. ANG’AWA

JUDGE