



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KISUMU
Civil Suit 194 of 1998

KASONGO MINDOTI (SUING as the Personal Representative

and Administrator of the Estate of JOHN WAFULA MINDOTI).....PLAINTIFF

VERSUS

CHANNEL AGRICULTURAL CONSTRUCTION..... DEFENDANT

JUDGMENT

The plaintiff herein Kasongo Mindoti has sued the Defendant herein for both general and special damages arising out of an accident which took place on 18th October, 1996 along Butere – Sabatia road resulting in the death of John Wafula Mindoti. The claim has been filed under the provisions of the Fatal Accident’s Act, and under the provisions of the Law Reform Act.

PW1 the plaintiff herein testified in court and said that the deceased was his younger brother. He said that on 18th October, 1996 in the evening he received news about the death of his brother. He said the deceased had been driving a tractor registration number KAE 526D make Massay Ferguson which was involved in the said accident killing the deceased on the spot.

He said that funeral arrangements were made for the burial of the deceased and he incurred the sum of shs. 52,200/- as funeral expenses.

Subsequently he went to Butere Police Station where he was given a police Abstract report which was produced in court as P3 and paid for it shs. 100/= and given receipt No. 479331 which he produced as exhibit P4. He later applied to the High Court in Kisumu for letters of Administration to the Estate of the deceased and was granted the letters of Administration on 3rd April, 1998 and he produced the grant of letters as exhibit P2.

The plaintiff further stated that he spent the sum of shs. 8,805 on applying for the letters of administration and he produced two reports he was given on the said amount as exhibit P6(a) and (b).

The plaintiff further testified and said that the deceased was aged 27 years at the time of his death and he applied for and obtained the certificate of death and he applied for and obtained Certificate of death No. 307256 which he produced in Court as exhibit P1 and paid for it. Shs. 90 and was issued with receipt No. BH 066309 which he produced in Court as exhibit P5.

The plaintiff further told the court that the deceased as the youngest son in the family used to maintain their mother from his salary of shs. 4,000/= and from since the death of the deceased the burden has now shifted to him.

In cross-examination the plaintiff said that he did not know what caused the accident and that he had given information that there were no safety measures and there was no cabin in the tractor. Further that he had no receipts to support the claim on funeral expenses of shs. 52,000/=. Nor proof that the deceased was earning the sum of shs. 4000/= PW2 Moses Maikuba testified in Court and said that he is a primary school teacher. That on 18th October, 1996 at about 5 a.m. He was going to his place of work than he saw a tractor ahead of him. The said tractor had its lights on and was being driven at a normal speed. He said that there was noise from the tractor which made him concerned. He then heard somebody yelling and on looking back saw somebody jump up and the tractor fell on its side.

PW2 further said that on going to check at the place where the tractor had fallen he saw that the driver had fallen between the tractor and the trailer and had been pinned down by the trailer.

He said after about 10 minutes some young men came and he explained to them what had happened. They then youngmen left and told him that the tractor belonged to a company and the owner were coming.

He further said tractor came and he tried to stop the first one to no avail. The second tractor came by and he stopped it. The second tractor stopped. He explained to the occupants what had happened and they tried to lift the trailer but were unsuccessful.

PW2 said he later left after noting registration Number of the tractor as KAE 526D. Further said that the tractor had no cabin; there were no safety bells and the bonnet was loose. He further said that if the deceased had had a safety belt he could not have jumped. He further testified that the road had some small potholes. In cross examination PW2 said that he saw the way the driver was seated on the tractor. That where the tractor fell there were no corners and that there was a gentle slope. He further said that the tractor was travelling downwards the descending slope the tractor was travelling downwards the descending slope.

He said the tractor fell on the left side as you face Sabatia, and that he did not know what caused the accident.

He said that when he heard the shout he looked back and saw the driver in mid air but did not fall ahead but fell between the trailer and the tractor. That although he is not a driver himself, the tractor was not at high speed.

PW3 Corporal Caleb Shango No. 36982 testified in Court and said that he is attached to Butere Police Station. That on 18th October, 1996 at about 6 a.m. a Company Manager of a transport company which transports Sugar cane made a report that there was an accident along Sabatia trading Centre at Khumsalaba area. That the said accident involved a tractor registration Number KAE 526D. He said that the traffic personnel from the said station were dispatched to the scene after the report had been booked and late a police abstract report was prepared and he produced the said police abstract report as Exhibit P3. He also said that a file was prepared in respect of the said accident and he produced the same as exhibit P7. He further said that he saw the tractor that was involved in the accident at the police station and the same had no cabin.

In cross-examination PW3 said that he did not visit the scene of the accident and that he did not know how the accident occurred. He said that Exhibit P... does not show to whom the tractor belongs. He said further that the recommendation of Charles Ouma in Exhibit P7 was that the matter be disposed off by way of inquest as the accident was self involving. He further said that it was possible the roughness of the road could have made the deceased to lose control of the tractor. He further stated that the report does not say the tractor was defective.

PW4 Khoda Muronge testified in Court and said that the deceased was her son. That at the time of his death he was working at Mumias where he was driving a tractor. She said that the deceased used to assist her in all ways. That he could sometimes give her shs. 3,000/- or shs. 2000/- per month. She also said that she was taking care of the children of her deceased as their mother had ran away. She further said that the deceased was a good son and had carried out a lot of developments.

On cross-examination she said that she knew PW1 who is her son. She further said that she did not know how much the deceased was earning.

For the defendant Mr. EPAINITO OKOYO APOÑO (DW1) was called to testify. He said that he is the workshop manager of Channan Agricultural Contractor who are the defendants herein in this case. That he has worked with the said company for the last six years. He said that he was not aware that the company owned the tractor registration Number KAE 526D. He said he was not aware that the tractor had been involved in an accident and further that he had no information as to the said tractor.

On being cross-examined DW1 said that in the written statement of defence the denial therein is that the accident did not take place. That there is no denial of ownership of the tractor.

There is no doubt that an accident took place on 18th October, 1996 involving the tractor which was being driven by the deceased and that accident resulted in the death of the deceased. PW2 clearly stated in Court that before he left the scene he noted the registration number of the tractor as KAE 526D. This tractor was later towed to or taken to Butere Police Station where the accident had been reported PW3 said that he saw the same at the said station.

PW2 also said he witnesses the said accident as when he heard the shout behind him he saw the driver in mid air and he fell between the tractor and the trailer. The trailer pinned the deceased down and he died on the spot.

Exhibit P3 shows that the said accident involved the deceased and a tractor registration No. KAE 526D.

The plaintiff blames the defendant on the said accident on the grounds that the defendant failed to avail to the deceased safety catchel's in the tractor. That there was no protective cabin or safety belt which could have prevented the deceased from falling off from the tractor and ending up from being pinned down by the trailer.

In the plaint the Plaintiff has narrated the particulars of negligence stating that the defendants failed to provide safe and secure system of work and or failing to provide the deceased with a covered tractor to ensure his safety while in the cause of his employment and or failing to take any or any reasonable precautions to ensure the deceased's safety while at work.

The defendant denies the particulars of negligence in the defence and shifts the blame on the deceased.

Whereas the defendant has denied that the deceased was their employee, it did not deny in the defence filed in Court that the tractor registration Number KAE 526D was theirs. However in a dramatic turn of events DW1 testified in Court and said that the tractor did not belong to the defendant so he had no information about it.

I do not know what the defence wanted to achieve by that averment. In exhibit P7 it is clearly shown by the contents therein that HARJINDER SINGH who was the transport manager with Channan Agricultural Construction Company reported the accident to the Police

Station and was later charged with the traffic offence of permitting the said tractor to be used on public road without a road fund Licence. He was fined shs. 1,500/- on each count.

I cannot therefore believe the defence witness assertion that the tractor did not belong to the defendant.

As the said tractor belonged to the defendant, the next question is whether the defendant was negligent in not providing the deceased a covered tractor.

There is evidence on record from PW2 and PW3 that the tractor had no cabin. Mr. Gichaba has submitted that there is no evidence to show how a covered tractor could have prevented the accident from occurring.

That may well be so but had those catches been available, it could have prevented the deceased from being tossed off from the tractor and falling between the tractor and the trailer.

I quite agree with Mr. Njoga that the defendant's failure to supply a cabin and the safety belt on the said tractor constituted an act of negligence in which the defendant would be held liable.

PW2's testimony remained uncontroverted. He said that tractor was being driven at a slow speed. The defendant did not call evidence to controvert this assertion and hence its shifting the blame on the deceased is misplaced.

In the case ANASTASIA NYANJUI GIKONYO VS. SALIM MOHAMED AND ANOTHER (Nakuru H.C.C.C. No. 421 of 1996 Mr. Justice Rimita stated that: "the defendant have filed no defence and there is no appearance in their part. The plaintiff's version of what took place therefore remains uncontroverted."

Although a defence was filed in this case, the Witness who was called by the defendant did not touch on how the accident occurred. The testimony of PW2 therefore on what he saw at the time of the accident must be believed.

Mr. Gichaba had also taken issue on the question of employment and the proof of ownership of the tractor by the plaintiffs, I think if Mr. Gichaba had taken into account the contents of exhibit P7 he would have seen that there was enough material therein showing that the deceased was employed by Defendant as a tractor driver and the tractor belonged to the Defendant. In the case of THURARURA KARAUURI VS. AGNES CHECHE at the Court of Appeal at Nyeri (Civil Appeal NO. 192 of 1996) the Court of Appeal then said "As the defendant denied ownership, it was incumbent on the plaintiffs to place before the Judge a Certificate of search signed by the Registrar of Motor vehicles showing the registered owner of the lorry".

That is the correct position in Law. However the Defendant did not in its defence deny the ownership of the tractor. That issue was only raised at the trial.

In any case as I said earlier on the contents of exhibit 7 clearly shows that the tractor belongs to the defendant.

It is therefore my considered view that the plaintiffs has proved his case on the balance of probabilities and the defendant must be held to be wholly responsible for the negligence which resulted in the death of the deceased. I held that the Defendant is 100% liable.

Having made a finding on liability I must now turn my attention whether the damages can be awarded now under the provisions of the Fatal Accident's Act.

There is sufficient evidence on record that the plaintiff obtained the Letters of Administration before filing the suit.

The deceased was employed as a driver. It is alleged that he was earning the sum of shs. 4,000/-. That would be a reasonable amount a tractor driver could be earning in the 1996. He was aged 27 years old and could have worked for another 28 years.

He was supporting his mother who would have depended on him for the remainder of her life.

The deceased died on the spot and the plaintiff must have spent some money on funeral expenses.

The special damages I would award the sum of shs. 8,995/- being the amount proved plus the sum of shs. 25,000/- being the funeral expenses making a total of shs. 33,995/-.

For loss of expectation of life I award the sum of shs. 100,000/- and for pain and suffering I award the sum of shs. 20,000/-.

The mother of the deceased was wholly dependant on him. I would take it the dependency ratio was 2/3 and a multiplicand of shs. 4,000/-. I also take into consideration the deceased station in life and take a multiplier of 25 years.

The dependency therefore would work out as follows = shs. 4,000 x 25 x 2/3 x 12 = 800,000/=. The total awards which I enter judgment for the plaintiff comes to shs. 953,995/- with costs and interest.

DATED and Delivered this 5th day of June, 2000

(P. K. K. ARAP BIRECH)

JUDGE