



Jemurgor (Suing as an Administrator and Legal Representative of the Estate of Christopher Kiptanui Lagat - Deceased) v Palm Oil Transporters Limited (Civil Case 126 of 2017) [2024] KEHC 12343 (KLR) (Civ) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 126 OF 2017

JN MULWA, J

OCTOBER 15, 2024

BETWEEN

JOYCE JEMURGOR (SUING AS AN ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF CHRISTOPHER KIPTANUI LAGAT - DECEASED) PLAINTIFF

AND

PALM OIL TRANSPORTERS LIMITED DEFENDANT

JUDGMENT

1. At all material times to this suit and particularly on 1/11/2016 Christopher Kiptanui Langat (deceased) was the owner and driver of his motor vehicle registration No. KAX 857B while the defendant was the owner of motor vehicle registration No. KAW 675L/ZE 4372 Trailer/Truck. The two vehicles were being driven along the Eldoret –Nakuru Highway when they collided leading to the deceased sustaining fatal injuries.
2. The plaintiff is the widow of the deceased. She obtained Letters of Administration of the deceased's Estate vide High Court Probate & Succession cause No. 4 of 2017 at Eldoret on 18/02/2017 and thereafter filed this suit by a Plaint dated 5/06/2017 seeking compensation for the loss of her husband and loss to his estate in general damages under the *Law Reform Act* and *Fatal accidents Act* as well as special damages from the defendant who at the material times was the registered owner of the trailer and which vehicle was being driven by its authorized driver, one Tommas Kiarie.
3. The plaintiff faulted and blamed the driver of the trailer for negligence and carelessness for the fatal accident as hereunder;

Particulars of Negligence



- 1) Driving the subject motor vehicle carelessly and without any or any proper look out and adherence to the road traffic rules and the Highway code.
 - 2) Driving at an excessive speed in the circumstances
 - 3) Improper overtaking of other vehicles on the road.
 - 4) Failure to break, stop and/or swerve appropriately as to avoid the accident.
4. By the above the plaintiff holds the defendant vicariously liable for negligence of its driver that caused the death of the deceased and thereby the deceased estate suffered loss and damage.

Particulars under the *Law Reform Act*

- i. He deceased died at the age of 37 years. He was a healthy strong hard working male adult who was energetic and a bundle of joy to his wife and the children. The deceased's estate has suffered damage in terms of loss of the deceased's life and the years he would have lived worked and earned and provided comfort and warmth to his family.
 - ii. The deceased died while being rushed to hospital. He suffered pain and agony before his death. The estate seeks compensation for the pain and suffering.
 - iii. Funeral expenses.
 - a) Particulars under the *Fatal Accidents Act*
 - i. At the time of his death, the deceased was aged 37 years and was a practicing Engineer by profession and a partner at Crest Group Limited an Engineering Firm where he earned net monthly earnings of Kshs. 250,000/- at the minimum. The family was wholly dependent on the deceased and has lost his vital dependency in terms of the earnings with which he maintained and provided for them.
 - ii. The deceased was in good health and strength. He was the breadwinner and provider of his family. He left behind the following dependents.
 - a) Joyce Jemurgor - wife
 - b) Kelvin Kipkemboi - son, aged 10 years
 - c) Shanice Jepkoech Lagat - Daughter aged 4 years.
 - iii. As a result of the death of the deceased, the family has lost this vital support and dependency.
5. In its statement of defence dated 15/09/2017, the defendant denies ownership of the accident vehicle (trailer) and the occurrence of the accident and all particulars thereto in its entirety, and particularly that its driver was to blame and puts the plaintiff to strict proof.
6. In the alternative, the defendant stated that if the accident did occur then the deceased was solely liable in negligence that claimed his life and states the particulars of the deceased's negligence and carelessness as follows;
- a) Driving at an excessive speed in the circumstances
 - b) Failing to adhere and or observe the hooting and signals of the motor vehicle registration number KAW 675L and trailer number ZE 4272 thereby causing the accident.



- c) Failing to observe the laid down Traffic Rules and Highway Code.
 - d) Failing to swerve, apply brakes, stop and/or control motor vehicle registration number KAZ 857B so as to avoid the accident.
 - e) Willfully and knowingly exposing himself to reasonably foreseeable risks of harm and injury, which the deceased knew and or ought to have known.
 - f) Failing to exercise proper skills and knowledge required of a competent driver
 - g) Causing the accident.
7. The defendant further denied all particulars stated under the Law Reform Act and the Fatal Accidents Act, and lastly denied having been served with a demand notice prior to filing of the suit. It prays for dismissal of the suit with costs.

Plaintiff's Case and Evidence

8. The plaintiff filed the following documents in support of her case. They were produced by consent of both parties before the court.
- i. Death certificate of the deceased
 - ii. Motor vehicle search certificate for motor vehicle Registration No. KAX 857 B and motor vehicle KAW 675L Mercedes Benz/trailer both as at 22/11/2016.
 - iii. Post mortem report of the deceased
 - iv. Police abstract dated 19/12/2016.
 - v. Burial permit dated 3/11/2016
 - vi. Limited grant of letters of Administration Ad Litem dated 28/02/2017.
 - vii. Deceased's copy of Bachelors of Science (Mechanical Engineering) degree certificate – University of Nairobi dated 7/05/2004.
 - viii. Certificate of Registration of deceased from Engineering Registration Board.
 - ix. Copy of Certificate of incorporation of Crest Group Limited dated 13/05/2008 (and memorandum of Articles of Association of the Company, as well as KRA Pin.
 - x. Copy of letter of search from the Registrar of Companies dated 23/04/2010.
 - xi. Deceased copy of his Bank account at Co-operative bank- statement dated 4/01/2017.
 - xii. Birth Certificate of deceased's two children dated 28/07/2015 and 22/10/2014 respectively.
 - xiii. Copy of Demand letter dated 10/03/2017.
 - xiv. Plaintiff's witness statement dated 5/06/2017
9. PW1 was the plaintiff. She testified that she was the wife of the deceased and by Letters of Administration Ad Litem issued by the court on 28/2/2017 the administrator of his estate. It was her testimony that together with the deceased, they had two children named above.
- She produced the bundle of documents comprising the documents stated above and her witness statement which were adopted as her evidence in chief.



10. On cross-examination by counsel for the defendant, PW1 testified that she did not witness the accident but confirmed that the deceased was driving his vehicle registration no. KAX 857B on the fateful day, 1/11/2016 when the accident occurred involving a trailer registration No. KAW 675L/ZE 4272 as shown in the police abstract.

She referred to the Post mortem report to state that the deceased died instantly.

11. The plaintiff relying on the police abstract testified that she did not know which of the two vehicles was blamed as police investigations were pending and denied a suggestion by the defence that the deceased was driving under influence of alcohol as he had slept at his house and the accident was in the morning about 5.30am when he had gone to collect some materials.
12. PW1 testified further that the deceased was an Engineer and a businessperson, as well as a partner in Crest Group Ltd referring to documents No. 16, 17 and 18 showing his Degree certificate in Mechanical Engineering and certificate of registration to the Board of Engineers. She added that the deceased used to earn an average of Kshs. 250,000/= monthly and produced the company bank account at Cooperative Bank showing deposits and withdrawals from the said company account. She further with his income, he used to support his young children and herself.

PW2 was Richard Kimeli Kosgei. He relied on his witness statement dated 16/05/2020. He testified that he was a taxi driver at the time and that he witnessed the occurrence of the accident. It was his testimony on cross-examination that he was riding behind the trailer, that the point of impact was on the lane towards Nakuru and that the deceased's vehicle was on its right lane, that it was a head on collision with the head of trailer o In his opinion, the trailer's driver was to blame for the accident.

Defendant's Case and Evidence

13. DW1 was the driver of the truck, one Tommas Kiarie. He confirmed having been an employee of the defendant as its driver for over ten years. He adopted his handwritten witness statement that was signed but not dated.
14. It was his evidence that the accident occurred about 5.00am within the right lane as he drove from Eldoret towards Nakuru. He denied that his vehicle was driven carelessly and that before the accident, his speed was around 30KPH. He further stated that the deceased's vehicle was coming from a petrol station into the road and drove into his lane and was hit by his vehicle on its right lane.
15. On re-examination, DW1 testified that the accident was on his lane towards Eldoret while the deceased was on the lane towards Nakuru direction.
16. DW2 was PC Mohammed Siti attached to Eldoret Police Station. He testified that the trailer was being driven from Nakuru towards Eldoret and that the Subaru vehicle (deceased's) was being driven from Eldoret-Nakuru direction (opposite direction.) He produced the Police abstract and the vehicle inspection report as D. Exhibit No. 2 and 3. He stated that he was not the investigating officer and did not have the investigation report or sketch maps from the scene of accident.

Issues for Determination

17. Both parties filed submissions on the above issues.
 - a) Liability – which party was to blame for the early morning accident on the 1/11/2016.
 - b) Quantum of damages – whether the plaintiff is entitled to the prayers sought.
 - c) Who bears costs of the suit.



Analysis and Determination

18. The plaintiff by its submissions dated 2/11/2023 upon analysis of the totality of evidence concludes that as no sufficient evidence was adduced on which party was liable for the accident, that both drivers ought to be held equally liable, citing the cases of Hussein Omar Darah V. Lento Agencies [2006] eKLR. Julius Bundi Ringera v. Joseph Thurania Rukaria & Another [2019] eKLR.

19. For the defendant, its submissions are dated 3/11/2023.

DW1 being the driver of the trailer blamed the deceased who was the driver of his vehicle stating that he emerged from a petrol station into the main road on his lane and admitted that the deceased's vehicle was hit by his trailer on its right lane.

20. DW2 was a Police Officer from Eldoret Police Station. He was not the Investigating Officer. He did not visit the accident scene. All he produced was the police abstract confirming the occurrence of the accident between the two vehicles on the material date and time. A look at the police abstract shows no results of the investigation as the same was still pending. He did not produce any investigation report nor the sketch maps that could have assisted the court by showing the point of impact.

By the above, this court finds no credible evidence that can assist the court to determine which of the two vehicles were to blame for the fatal accident.

21. No proof was tendered that indeed the two vehicles collided head-on. The court in Baker V. Market Marborough Industrial Cooperative Society Ltd [1953] 1WLR 1497 Lord Denning observed that:-

“Everyday proof of collusion is held to be sufficient to call on the defendants for an answer. Never do they both escape liability. One or the other is held to blame and sometimes both”

22. Visram J. (as he then was) in Amalgamated Sawmills Ltd v. Stephen Mwutinguru Hcc. No. 75 of 2005 rendered that:-

“...the burden of proof of any fact or allegation is on the plaintiff and a casual link between someone's negligence and his injury and that evidence adduced must on a balance of probability connect the two.”

See also the case of Trust Bank Limited V. Paramount Universal Bank Limited for the same holding.

23. In the same breath, in Kiema Muthingu v. Kenya Cargo Handling Services Ltd [1991] 2 the court pronounced itself that:-

“There can be no liability without fault and plaintiff must prove some negligence on the part of the defendant where the claim is based on negligence”

Considering that the collision of the two vehicles is not in dispute as indeed confirmed by the defendant's driver and as demonstrated by the police abstract, what is not clear is which of the vehicles is to blame for the causation of the accident. PW2 evidence cannot assist the court. From his evidence, it is doubtful that he was an eyewitness. The driver of the truck admitted that his vehicle hit the deceased's vehicle as it entered his lane from a petrol station. The court notes that the alleged eyewitness did not state that there was a petrol station from which the deceased entered the main road to the Nakuru Eldoret road where the truck hit the subaru vehicle. This kind of evidence in my considered view creates reasonable doubt in the court's mind as to the truth of the two witnesses who testified on the manner of the occurrence of the accident vehicle.



24. This is so because no investigation report on the accident was produced to the court. The defendant's DW1 (driver) did not tell the court of any evasive action he took to avoid the collision. Further, none of the witnesses spoke of a petrol station near the accident scene or at all.
25. It is therefore doubtful to the court's mind that the deceased's vehicle had pulled into the main road from a petrol station without belabouring further. It is the court's finding that there is no evidence that can persuade the court of which vehicle caused the fatal accident – in line with the case of Hussein Omar Farah (supra) Baker vs. Market Manborough Industrial Cooperative Society (supra) and applied in this court in Brian Muchiri Waihenya Vs. Jubilee Hauliers Ltd & others [2017] eKLR and Kiema Muthungu v. Kenya Cargo Handling Services (supra).
26. The totality of evidence adduced by DW1 and PW2 an alleged eye witness in my view is not sufficient to absolve any of the drivers from blame. I find the two drivers to have contributed to the accident and therefore hold both equally to blame.

Quantum of Damages

27. The deceased died on the spot, a fact not disputed. He was 37 years old, an Engineer by profession and a partner in an Engineering firm in the name Crest Group Limited with 50% shareholding and a fully registered Engineer with the Engineers Board. Documents to prove the above are undisputed. They are listed at paragraph 8 of this judgment and were admitted in evidence by consent of counsel.

The only issue that was not proved was his alleged income that the plaintiff stated to have been about Kshs. 250,000/= per month. The deceased left behind his wife (plaintiff) and two young children as his dependants, their birth certificates having been admitted. The claim for compensation is both under the Law Reform Act and the Fatal Accidents Act.

Damages under the Law Reform Act

28. The court has considered the plaintiff's proposal of Kshs. 200,000/= in respect of Pain and suffering as opposed to the defendant's proposal of Kshs. 20,000/=.
29. In the cases of Acceler Global Logistics V. Gladys Nasambu Waswa & Another [2020] eKLR and Sidi Kazungu Gohu & Another v. Fatuma Abdi Mohammed & Another [2021] eKLR an average of Kshs. 50,000/= to Kshs. 100,000/= under the sub-head were awarded.

In Joseph Gatone Karanja vs. Michael Ouma Okutoyi & Brigita [2022] eKLR, the Court of Appeal adopted a sum of Kshs. 150,000/= for loss of expectation of life for a 39 year old deceased in 2022 likewise for loss of expectation of life, the court awarded average amounts from Kshs. 50,000/= to Kshs. 200,000/=.

While assessing damages under this sub-head, the court is minded that money cannot renew or bring back a lost life. The awards must therefore be reasonable and fair as observed in the case A. A N. V Justus Gisairo Nderera & Another [2010] eKLR. Upon consideration, the court awards the plaintiff Kshs. 80,000/= for pain and suffering and Kshs. 150,000/= for loss of expectation of life.

Damages under the Fatal Accidents Act.

30. Damages under this Act shall be for the benefit of the deceased's dependants in this case his wife and children as stated under Section 4 (1) of the Fatal Accidents Act. As stated above, the deceased's income is not clear; the bank statements provided for the partnership of the deceased's Engineering firm show an average of Kshs. 150,000/= per month for the deposits therein.



31. In such circumstances, the court shall revert to Public Service salaries notably ministry of works in 2016 when the deceased died for guidance in respect of professionals like accountants lawyers Engineers and doctors.

The court has looked at Public service salary scales for Engineers as at 2016. They fall within job group “L” to “P” as basic salary being between Kshs. 50,000/= to Kshs. 120,000/= per month.

32. These figures are basic without considering grades, experience and other considerations. It is to be considered that the deceased was in private sector and in the court’s view, the income must have been much higher considering that under the Engineers Board, Engineers are paid by the hour day and value of projects they undertake among other considerations.

33. An income for purposes of this sub-head in the court’s view would be in the region of over Kshs. 200,000/=month. The court shall therefore adopt an income of Kshs. 150,000/= per month in this case as a fair and reasonable income for purposes of computing loss of dependency.

34. On multiplier, the court shall consider the age of the deceased at date of his death, which is undisputed as 37 years. He had a long working life in private sector, beyond the government retirement age of 60 years. He would have worked well beyond 70 years, thus over 33 years of productive work life save for the uncertainties of life itself.

35. To that end, being guided by decisions rendered by the superior courts among them VZL & another V. Christine Agunja Omoga [2014] eKLR, where a multiplier of 20 years was adopted for a 37 years old accountant; Sidi Kazungu Gohu [supra], where the deceased was 34 years and the court’ adoption of 24years. As multiplier. In Melbrimo Investment Co. Ltd (supra), for 35 years old deceased, a multiplier of 20 years was adopted for a casual labourer.

36. The court shall also consider the risks associated with the deceased’s work taking into account if a job carries heavy risks the working life may be shortened. There was no evidence of ill health of the deceased that would have shortened his working life save for servitudes of live.

37. Upon the above considerations, the court finds a multiplier of 25 years to be reasonable in the circumstances.

38. On multiplicand, it is undisputed that the deceased left behind dependants who relied on him for their upkeep. Dependency ratio of 2/3 will be adopted by this court. Loss of dependency is therefore worked out follows;

$$50,000 \times 12 \times 25 \times 2/3 = 30,000,000/=$$

$$\text{Less } 50\% = 15,000,000/=$$

Special Damages

39. There can be no dispute that the deceased was buried as evidenced by the burial permit. The family expended damages in the burial preparations. Though trite that special damages ought to be pleaded and strictly proved, there is sufficient jurisprudence from our courts that burial expenses ought not be strictly proved.

In the plaint dated 5/06/2017, the plaintiff stated that she would provide the same during the trial. That was not done, but that did not change the fact that the family expended money on the burial expenses.

40. In Civil Appeal No. 063 of 2023 Rottger V. Dusa & Another (suing on behalf of the Estate of Wilson Baya Thoya (deceased) [2023] eKLR the court rendered that it ought not turn a blind eye to the fact



that expenses are incurred and further that a court will award such damages where no receipts are availed.

The case of Alice O. Alikwe V Akamba Public Road Services [2013] eKLR was cited wherein funeral expenses were awarded without prove; as well as in the Court of Appeal case of Fish Kenya Limited vs. Kenya Power & Lightning Company Ltd [2016] eKLR where it loosened strict proof of special damages in respect of funeral expenses. The rationale was also applied in the case of Lucy Wambui Kihoro (suing as personal Representative of the deceased Douglas Kinyua v. Elizabeth Njeri Obuong [2015] eKLR.

41. The court is therefore persuaded to grant a modest fair and reasonable award of Kshs. 100,000/= for funeral expenses.
42. On costs of the suit, liability having been assessed at a 50:50 ratio to each of the parties it would be appropriate that each party bears its own costs of the suit.

Disposition.

43. ...
 - a. Liability is apportioned at 50:50 ratio between the Plaintiff and the Defendant.
 - b) Damages for pain and suffering - Kshs. 80,000/=
 - c) Damages for loss of
Expectation of life - Kshs. 150,000/=
 - d) Damages for loss of dependency – Kshs.30, 000,000/=
 - e) Special damages – Kshs. 100,000/=
 - TOTAL Less 50% Kshs. 15,165,000/=
 - f) Each party shall bear own costs of the suit.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

JANET MULWA

JUDGE

