REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1216 OF 2000

PETER MACHARIA ELIJAH

(Suing as the administrator of the estate of

KENNETH KINYUNGU MACHARIA-Deceased)..PLAINTIFF

-VERSUS-

SAJ ENTERPRISES LIMITED (Nee SAJ ENTERPRISES......................DEFENDANT

JUDGMENT

1. The plaintiff herein, being the administrator of the estate of Kenneth Kinyungu Macharia *("the deceased")* instituted a suit against the defendant by way of the plaint dated 31st July, 2000 in which he sought for general damages under the Fatal Accidents Act and the Law Reform Act, special damages in the sum of Kshs.200,101/ plus costs of the suit and interest thereon.

2. The plaintiff pleaded in his plaint that sometime on or about the 4th of August, 1997 while the deceased was lawfully walking on the side of the road along Old Airport Road near Transami, motor vehicle registration number KAG 788S ("*the subject motor* vehicle") being at all material times registered in the name of the defendant and being negligently driven by its driver, veered off the road and knocked down the deceased, fatally injuring him. The particulars of negligence were set out under paragraph 4 of the plaint and the doctrine of *res ipsa loquitur* was equally relied upon.

3. It was also pleaded that at the time of his death, the deceased was a young and robust 25-year old man who had only recently completed his university education, earning a Bachelor of Arts degree in May, 1997 and that he was under the employment of Group 4 Security working as a management trainee with good prospects of being appointed Senior Manager in a few years to come.

4. Upon service of summons, the defendant entered appearance and filed its statement of defence on 27th September, 2000 to deny the claim.

5. More specifically, the defendant denied the occurrence of the accident, pleading in the alternative that if the accident truly occurred, then negligence should be attributed solely or substantially to the deceased, the particulars of which were set out in the defence.

6. The plaintiff namely Peter Macharia Elijah who was the father to the deceased is indicated as having passed away during pendency of the suit. Consequently, Phyllis Wanjiru Macharia and David Kamau Macharia applied for and were granted limited letters of administration ad litem for purposes of taking over the conduct of the suit and thereafter applied to have the plaintiff's name substituted with their respective names for purposes of the suit vide the Notice of Motion dated 18th November, 2011.

7. It is apparent from the record that the aforementioned application was granted by the court on 16th February, 2011. It therefore follows that the abovementioned persons' names ought to have subsequently been applied; it would appear this was not done.

8. When the matter proceeded for hearing, the plaintiff's case was supported by the evidence of five (5) witnesses while the defendant closed its case without calling any evidence.

9. David Kamau Macharia who testified as PW1 adopted his signed witness statement and stated that a total of Kshs.174,911/ went into catering for the funeral expenses. The witness also clarified that he is one of the administrators who applied for substitution of his late father, Peter Macharia Elijah.

10. During cross examination, PW1 admitted that he was not at the scene of the accident hence he could not explain the manner in which it occurred.

11. He further stated that his brother, the deceased, was neither married nor had children, adding that he only managed to adduce receipts in support of the claim for special damages to the extent of Kshs.25,000/.

12. Phyllis Wanjiru Macharia, the second administrator in her evidence as PW2 similarly adopted her witness statement, largely restated the testimony of PW1 save to add during cross examination that leading up to his death, the deceased had only worked for two (2) days.

13. PW3 (Charity Wangari Macharia), PW4 (Silas Njoroge Macharia) and PW5 (Stephen Macharia) like their counterparts, adopted their respectively signed witness statements which echoed the testimonies of the witnesses who preceded them.

14. At the close of the hearing, the parties filed and exchanged written submissions. I have considered the evidence on record, the rival written submissions and the authorities relied upon. It is clear that the twin issues for determination are to do with liability and quantum.

15. On liability, the plaintiff submitted that his evidence remained uncontroverted by the defendant at the trial, hence this court should not hesitate to find the defendant wholly liable, citing the cases of **Motex Knitwear Limited v Gopitex Knitwear Mills Limited [2009] eKLR and Interchemie E. A. Limited v Nakuru Veterinary Centre Limited [2001] eKLR** where the respective courts were in agreement with the preposition that in the absence of any evidence by a defendant, a plaintiff's case is deemed unchallenged.

16. On its part, the defendant contended that the plaintiff has not discharged the burden of proof in the case since he did not call any eyewitness to testify as to the occurrence of the accident, neither did he call the investigating officer to ascertain the cause of the accident and to clarify the question as to who was to blame for the same.

17. The defendant stood its ground that it is the plaintiff who bears the burden of proof pursuant to the provisions of Section 107 of the Evidence Act and it therefore fell upon him to prove the existence of the facts pleaded so as to entitle him to a favourable judgment.

18. In line with the above, the defendant referred this court to the case of **Karugi & another v Kabiya & 3 others [1983] eKLR** where the Court of Appeal held that:

> ***"The burden on the plaintiff to prove his case remains the same, though it is true that, where the matter is not defended, or, as here, validly defended that burden may become easier to discharge."***

19. It was similarly the defendant's argument that the plaintiff did not prove the particulars of negligence against it since it remains unclear how the accident came about. In this sense, the defendant borrowed heavily from the case of **Joseph Njuguna v Cyrus Njathi [1999] eKLR** where the High Court rendered that it is the duty of a plaintiff to demonstrate that the driver of the vehicle in question was negligent leading up to the accident. The court went on to reason that whereas a police abstract was produced in that suit, the same gave no indication of negligence on the part of the driver.

20. The defendant went ahead to argue that should this court disagree with its position, then it would be proper in the circumstances of this case to apportion blame between the parties in equal ratios. The cases of **Moses Wetangula & another v Eunice Titika Rengetiang [2018] eKLR** and **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** were cited among others, in which liability was apportioned in the ratio of 50:50 in the absence of clear evidence on blameworthiness.

21. As the defendant correctly put it, the provisions of **Section 107** of the **Evidence Act, Cap.80 Laws of Kenya** are clear that a party is bound to prove the existence of the facts pleaded if he or she desires the entry of judgment in his or her favour.

22. In the present instance therefore, the duty lay with the plaintiff to prove the occurrence of the accident and having done so, to prove that the accident was indeed the result of negligence on the part of the defendant.

23. It is apparent that the accident did in fact occur. The police abstract constituted on page 27 of the plaintiff's list and bundle of documents clearly records that the accident took place on the date and at the place indicated in the plaint and that the said accident involved the subject motor vehicle belonging to the defendant, and the deceased.

24. It is noted that the defendant has in no way challenged the contents of the police abstract, which in the absence of contrary evidence, is deemed to be conclusive proof of ownership. Such was the reasoning in **Samuel Mukunya Kamunge v John Mwangi Kamuru [2005] eKLR** thus:

> ***"…I find a police abstract report having been produced showing the Respondent as the owner of motor vehicle KAH 264A… and the Respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that motor vehicle KAH 264A was owned by the Respondent."***

25. In view of the foregoing, I have no doubt in my mind that the plaintiff was able to show that the accident did occur. I am equally satisfied that the plaintiff has proved on a balance of probabilities that the defendant is the registered owner of the subject motor vehicle.

26. The other issue which is related to the above issue is the question as to whether there is proof of negligence on the part of the defendant and if so, whether there is proof of contributory negligence on the part of the deceased.

27. It is noted that neither of the witnesses who testified in support of the plaintiff's case were present at the scene of the accident when it occurred. It is noted that the plaintiff pleaded the *res ipsa loquitur* doctrine which is taken to act as a the exception to the rule that a party must prove negligence by way of evidence.

28. The above doctrine was aptly captured in the case of **Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR** with reference to a number of authorities, among them are the East African Court of Appeal's decision in **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22** that:

> ***"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant."***

29. The East African Court went on to reason thus:

> ***"The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control."***

30. In considering the circumstances of this case and being persuaded by the above reasoning, I am of the view that the plaintiff in pleading *res ipsa loquitur* discharged the burden of proof and it therefore fell upon the defendant to disprove the claim for negligence.

31. The defendant did not call for any witness let alone the driver who was in control of the subject motor vehicle on the material day. It therefore follows that the defendant made no efforts to prove that the plaintiff's claim was misplaced.

32. The defendant; though claiming that the deceased contributed to the accident; did not tender any evidence to that effect.

33. Consequently, I am satisfied that the plaintiff proved negligence on the part of the defendant to the required standard of a balance of probabilities. I thus find the defendant 100% vicariously liable for the accident.

34. On quantum, the suit was brought under the Law Reform Act and the Fatal Accidents Act, both of which cater for general damages. The plaintiff also sought for special damages in the sum of Kshs.200,101/.

(i) General damages

(a) Loss of expectation of life

35. Under this head, it was the plaintiff's submission that an award of Kshs.100,000/ would be suitable. The plaintiff urged for an additional award of Kshs.2,500,000/ as damages for loss of life.

36. On its part, the defendant did not challenge the proposed sum of Kshs.100,000/ but carefully submitted that there was no basis for the plaintiff to claim the additional sum of Kshs.2,500,000/.

37. The court has awarded on this head a award conventional sums of Kshs.100,000/ and I am inclined to award a similar amount.

38. However, I concur with the defendant that there is really no foundation on which the plaintiff can claim the additional sums sought and I will not grant the same.

(b) Lost years

39. In respect to damages for lost years, the plaintiff urged this court to use a multiplier of 40 years, placing reliance on the case of **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] eKLR** where a multiplier of 20 years was applied in the instance of a deceased person aged 36 years, The Plaintiff also relied on the case of **Hyder Nthenya Musili & another v China Wu Yi Limited & another [2017] eKLR** in which the court applied a multiplier of 28 years for a 32-year old deceased person.

40. It was also the plaintiff's submission that since the deceased was at the time of his death the main breadwinner in his family, earning a salary of Kshs.13,800/ it would be proper to apply a multiplicand of Kshs.13,800/ and a ratio of 2/3 to be tabulated as follows:

> 13,800 x 2/3 x 40 x 12 = Kshs.4,415,999.20/

41. The defendant contested the proposed multiplier, urging this court to consider the vicissitudes of life and instead apply a multiplier of 20 years.

42. The Defendant is of the submission that dependency was not proved so as to warrant a ratio of 2/3, quoting the judicial authorities of **Multiple Hauliers Co.Limited V David Lusa [2012] eKLR** and **James Matata & 2 others v Kenya Power Limited [2018] eKLR** in which the respective courts were in agreement that the persons listed as dependants under Section 4(1) of the Fatal Accidents Act are the parents, children and spouse of the deceased.

43. The defendant submitted that should this court be inclined to apply a dependency ratio, then 1/3 would constitute a more appropriate

ratio.

44. The multiplicand proposed by the plaintiff was not disputed by the defendant, who tabulated the award as follows:

13,800 x 12 x 20 x 1/3 = Kshs.1,104,000/

45. On the subject of the multiplier, a copy of the certificate of death attached to the plaintiff's list and bundle of documents indicated that the deceased was aged 28 years.

46. However, the plaintiff's pleadings and other relevant documents attached to the bundle indicate that the deceased was aged 25 years at the time of death.

47. In my view, a majority of the plaintiff's authorities cited in this regard do not offer comparable multipliers since the ages of the deceased persons in those cases are not similar to the age of the deceased in this instance. The defendant on its part did not cite any comparable authorities in this regard.

48. I have considered the case of **F M M & another v Joseph Njuguna Kuria & another [2016] eKLR** in which the court used a multiplier of 23 years in the case of a 26-year old deceased young man and the other case of **Mary Wanjiru Maina (Suing as Administrator Ad Litem of the Estate of the late Jane Wanjiru Maina v Lilian W. Macharia & another [2019] eKLR** where the court applied a multiplier of 20 years for a deceased of similar age to the deceased herein.

49. Being guided by the comparable awards mentioned hereinabove, I would apply a multiplier of 20 years to be a reasonable multiplier.

50. In respect to the multiplicand, I have looked at a copy of the deceased's letter of appointment dated 30th July, 1997 forming part of the plaintiff's bundle of documents.

51. The letter of appointment confirms that the deceased was assigned the position of management trainee and that he was set to earn a basic salary of Kshs.12,000/ plus 15% house salary totaling Kshs.13,800/.

52. In the absence of any evidence to indicate whether the deceased's salary would be subject to any statutory deductions so as to ascertain what his net income would have been, I am persuaded that the deceased's total salary of Kshs.13,800/ would constitute a suitable multiplicand.

53. This leads me to the dependency ratio which is crucial. As the evidence indicates, the deceased had just two (2) days prior to his death landed a job opportunity in Nairobi. There is no question that he would therefore have spent a large portion of his salary on his personal expenses.

54. It is clear from the evidence tendered that the deceased did not have a family of his own. Moreover, it was the common evidence of the plaintiff's witnesses that both the deceased's parents are now deceased and the deceased's siblings cannot be taken to constitute dependants within the definition conferred by **Section 4(1)** of the **Fatal Accidents Act**.

55. Further to the above, the plaintiff did not tender any evidence to show that the deceased supported any of his siblings. I am not convinced that dependency was proved.

56. In the premises, I am not persuaded to grant any award under this head.

(ii) Special damages

57. Under this head, the plaintiff argued that the claim for special damages had both been pleaded and proved and should therefore be awarded.

58. The defendant took on a different view in submitting that only the sum of Kshs.65,064.20/ was proved.

59. It is trite law that special damages ought to be both specifically pleaded and strictly proved.

60. I have looked at the plaintiff's list and bundle of documents and I have come to the conclusion that only the sum of Kshs.20,699/ was proved. This is the sum to be awarded.

61. Accordingly, I hereby enter judgment in favour of the plaintiff as against the defendant follows:

(i) *General damages*

(a) *Loss of expectation of life* *Kshs.100,000/*

(b) *Lost years* *NIL*

(ii) *Special damages* *Kshs. 20,699/*

TOTAL ***Kshs.120,699/***

62. Costs of the suit are awarded to the plaintiff. The plaintiff shall also have interest on special damages at court rates from the date of filing the suit and interest on general damages at court rates from the date of judgment until payment in full.

Dated, signed and delivered at Nairobi this 15th day of January, 2020.

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J.K. SERGON

JUDGE

In the present of:

………………………………. for the Plaintiff

………………………………. for the Defendant