



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 256 OF 2010

BENARD NJENGA GACHAMARU 1ST PLAINTIFF

CATHERINE MUKAMI NJENGA 2ND PLAINTIFF

(Suing as the personal representatives of the estate of

Beatrice Wamaitha Njenga-Deceased)

VERSUS

MOHAMED ELIAS 1ST DEFENDANT

SAMSON MARITA 2ND DEFENDANT

GEORGE MOSETI 3RD DEFENDANT

JUDGMENT

1. *Bernard Njenga Gachamaru* and *Catherine Mukami Njenga*, the parents of the late *Beatrice Wamaitha Njenga* instituted suit against the three defendants herein on their behalf and on behalf of the deceased's estate in their capacity as the legal representatives of the deceased's estate pursuant to limited letters of administration issued to them on 25th June 2009. They prayed for both general and special damages under the *Law Reform Act* and the *Fatal Accidents Act* together with costs and interest.

2. The 1st defendant, *Mohamed Elias* was sued in his capacity as the registered owner of motor vehicle registration number KAZ 654G (the subject vehicle) while the 2nd defendant, *Samson Marita* was sued as the owner or beneficial owner of the same vehicle. The 3rd defendant, *George Mosei Mogwambo* was sued as the driver of the subject vehicle at the material time.

3. The plaintiffs' claim arose from a road traffic accident which occurred on 1st February 2008 involving the subject vehicle in which the deceased was travelling as a lawful passenger. In their plaint dated 4th March 2010, the plaintiffs pleaded that the 3rd defendant recklessly drove the vehicle and caused it to roll several times occasioning the deceased fatal injuries.

4. On being served with summons, the three defendants filed a joint statement of defence dated 3rd March 2011 in which they denied liability *in toto*. In the alternative, they pleaded that if the accident occurred, it was solely or substantially contributed to by the negligence of the deceased.

5. The court record discloses that on 14th October 2011, the defendants filed a Notice of Motion seeking that this case be selected as a test suit so that the determination of liability in the case would apply to six other suits which had been filed in various Magistrates' Courts by different plaintiffs who claimed to have been involved in the same accident. The said suits were identified as CMCC No. 181 of 2008 – Keroka; CMCC No. 179 of 2009 – Kisii; CMCC No. 458 of 2009 – Kisii; CMCC No. 116 of 2009 – Sotik and CMCC No. 708 of 2010 – Sotik. The application also sought stay of proceedings in those cases pending determination of this suit. The court record further shows that the application was heard and allowed by *Hon. Mwera J* (as he then was) on 19th April 2011.

6. At the hearing, the plaintiffs called two witnesses in support of their case but the defendants despite being granted ample time and opportunity failed to offer any evidence to support their defence.

7. The 1st plaintiff testified as PW 1. He stated that his late daughter used to work as a shop assistant at Tuskys Supermarket, Kisii Branch; that on 1st February 2008, the deceased was travelling as a fare paying passenger in the subject vehicle when the accident which resulted in her death occurred.

He did not witness the accident but was informed about it and what had happened to his daughter by the deceased's workmate who had been a passenger in the same vehicle. He later obtained a police abstract from Sotik Police Station dated 25th April 2008 (Exhibit 11).

8. PW 1 in addition testified that the deceased was 26 years old at the time she lost her life and was survived by a son who was then in standard one but who he had managed to educate upto secondary school level. He produced payslips from Tuskys Supermarket to prove the deceased's income prior to her death (Exhibit 1 a, b and c).

9. In his further evidence, PW 1 claimed that he used to receive financial support from the deceased in the form of KShs.5,000 per month while the 2nd plaintiff used to receive KShs.3,000 per month. The deceased also used to pay school fees for her young son. He produced in evidence a death certificate (Exhibit 7) and a post mortem report (Exhibit 8) as well as receipts to prove the expenditure the deceased's estate incurred in meeting her medical and funeral expenses (Exhibits 3, 4 and 5).

He also produced a copy of records from the Registrar of Motor Vehicles which showed that as at 4th September 2009, the 1st defendant was the registered owner of the subject vehicle.

10. On his part, PW 2, *Peter Nyakundi* testified that he was a passenger in the subject vehicle on 1st February 2008; that together with the deceased, he was travelling from Nairobi to Kisii. He recalled that for most of the journey, the driver was driving well but on reaching Kaplong, he started overspeeding and on reaching Sotik, he hit a pothole on the road after which he lost control of the vehicle. The vehicle overturned and rolled several times off the road. As a result of the accident, he sustained injuries on the legs and head but two other passengers, a female and a male lost their lives. He informed the court that he was the plaintiff in Sotik Civil Case No. 119 of 2009 which was among the series of cases in which the current suit was selected as a test suit.

11. As noted earlier, the defendants did not adduce any evidence in support of their defence. They failed to produce their purported witnesses even after the court granted them several adjournments.

12. After the close of hearing, the parties filed written submissions. Those of the plaintiffs were filed on 12th November 2019 while those of the defendants were filed on 30th January 2020.

13. After considering the pleadings, the evidence on record alongside the written submissions filed on behalf of the parties and all the authorities cited, I find that the twin issues for my determination are whether the plaintiffs have established liability against the defendants and if so, quantum of damages.

14. On liability, the plaintiffs submitted that they had proved both by oral and documentary evidence that an accident occurred on the fateful day involving the subject vehicle which was owned by the 1st defendant; that the deceased was a passenger in the said vehicle and that she lost her life as a result of injuries sustained in the accident; that the accident occurred due to the negligence of the 3rd defendant. The plaintiffs further submitted that as their evidence was not controverted by the defendants, the defendants should be held 100% liable.

15. The defendants on their part submitted that the plaintiffs' suit ought to be dismissed as the plaintiffs had failed to adduce evidence to discharge their burden of proof; that though the police abstract produced by PW 1 confirmed occurrence of the accident, the evidence on record did not establish that the accident was caused by the negligence of any of the defendants; that there cannot be liability without fault. For this proposition, the defendants relied on several authorities including those of *Evans Muthaiti Ndira V Father Rino Meneghello & Another, [2004] eKLR* and *Statpack Industries V James Mbithi Munyao, NRB CA NO. 152 of 2003*.

16. The defendants advanced the view that in the event the court was inclined to hold the defendants liable, liability should be apportioned between the defendants and the deceased at 50:50.

17. After considering the oral and documentary evidence placed before me, I am satisfied that an accident took place on the material date involving the subject vehicle in which both the deceased and PW 2 were being conveyed as passengers; that the deceased's death was caused by the injuries sustained in the accident.

18. Whereas PW 1 did not witness the accident and his evidence is therefore not directly material to the issue of causation, PW 2 who was a passenger in the subject vehicle was an eye witness to the accident. He testified that when the accident occurred, the vehicle's driver was overspeeding and that is why he failed to see and avoid hitting a pothole on the road and lost control of the vehicle thereafter.

19. It is pertinent to note that PW 2's testimony was not shaken in cross examination by the defendants. He ruled out any possibility of external factors having contributed to the occurrence of the accident as suggested by the defendants and maintained that though the accident occurred during the post election violence period, there was no violence that day in the area in which the accident occurred. As stated earlier, the defendants did not offer any evidence which means that PW 2's evidence regarding how the accident occurred remained uncontroverted by any evidence to the contrary.

20. I have looked at the copy of records issued by the Registrar of Motor Vehicles (Exhibit 12). It confirms that the 1st defendant was the registered owner of the subject motor vehicle as at 6th September 2009. The police abstract (Exhibit 11) confirms that the 3rd defendant was the driver of the vehicle when the accident occurred. It also shows that the 2nd defendant was indicated as the owner of the vehicle at the time.

21. It is worth noting that the defendants did not challenge the contents of the police abstract either by way of evidence or during cross examination.

The law is that a police abstract can be used to prove ownership of a motor vehicle unless the evidence contained therein was rebutted by evidence to the contrary. This was the position taken by the Court of Appeal in Wellington Nganga Muthiora V Akamba Public Road Services Ltd & Another, [2010] eKLR as referenced in the case of Lochab Transport (K) Limited & Another V Daniel Kariuki Gichuki, [2016] eKLR where the court stated thus:

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”

22. In view of the foregoing and as the defendants did not dispute the evidence of ownership of the vehicle as indicated in the copy of records or the police abstract, I find that the plaintiffs have proved on a balance of probabilities that the 1st and 2nd defendants were at the material time either the registered and/or beneficial owners of the subject vehicle and that the 3rd defendant was its driver.

23. Given the evidence of PW 2 which I have no reason to doubt given that it was not controverted by any evidence to the contrary, I have no hesitation in finding that the accident in which the deceased sustained fatal injuries was caused by the negligence of the 3rd defendant who was overspeeding without taking into account the state of the road and the safety of his passengers. The fact that he was unable to control the vehicle upon hitting a pothole and the vehicle had to overturn and roll several times is clear evidence of negligence on his part.

24. It is not disputed that the deceased was a passenger in the said vehicle. In this context, I find the defendants' submissions that liability should be apportioned between them and the deceased preposterous to say the least. As a passenger, it is obvious that the deceased could not have contributed to the occurrence of the accident in any way.

25. Having found as I have above, I find that as the 3rd defendant must have been driving the subject vehicle as an agent of the owners of the vehicle, I find the 3rd defendant directly liable and the 1st and 2nd defendants vicariously liable for the negligence of the 3rd defendant.

In the premises, I enter judgment on liability in favour of the plaintiffs against the defendants jointly and severally at 100%.

26. On quantum, the plaintiffs have prayed for special and general damages under both the *Law Reform Act* and the *Fatal Accidents Act*. I will start with the damages payable under the *Law Reform Act* which are awarded for pain and suffering; lost years as well as special damages for funeral and related expenses.

27. Under pain and suffering, the plaintiffs proposed a sum of KShs.200,000 arguing that the deceased suffered excruciating pain before death since she died while undergoing treatment. On their part, the defendants proposed a sum of KShs.10,000 noting that the deceased died on the same day of the accident.

28. As correctly pointed out by both parties in their submissions, damages under this head are meant to compensate the deceased's estate for the pain and suffering the deceased endured before death. It is not contested that though the deceased passed away on the same day of the accident, she did not die on the spot. There is evidence that before she succumbed to her injuries, she underwent some surgical procedure. She must have experienced considerable pain and suffering for the time that doctors struggled to save her life. I find a sum of KShs.50,000 reasonable in the circumstances of this case and the same is hereby awarded.

29. On loss of expectation of life, the courts over the years have been awarding conventional amounts of KShs.100,000 considering that more often than not, the beneficiaries of a deceased's estate are the same people who benefit from an award for loss of dependency under the *Fatal Accidents Act* and there is therefore need to avoid the possibility of double compensation. As noted by Justice Mativo in David Kahuruka Gitau & Another V Nancy Anne Wathithi Gitau & Another HCC Civil Appeal No. 43 of 2013, the first time the award of KShs. 100,000 was made under this head was in 1986 by Justice Apaloo, then a judge of the Court of Appeal. This was 34 years ago. Considering inflationary trends and the fact that the deceased was only 26 years old at the time of her demise and would probably have lived to her full potential, I find the award of KShs.200,000 proposed by the plaintiff's reasonable in this case and the same is hereby awarded.

30. Turning to the claim for damages for loss of dependency, I wish to point out at the outset that dependency or the extent thereof is a question of fact which must be established by evidence in each case.

In this case, PW 1's undisputed evidence shows that the deceased was survived by her two parents and one child. She was responsible for her son's livelihood and also used to support her parents' financial needs by sending them around KShs.8,000 per month.

31. The plaintiffs in their submissions urged the court to note that the deceased was 26 years old at the time of her death and adopt a multiplier of 30 years, a multiplicand of KShs.24,252 which was her gross salary and a dependency ratio of $\frac{2}{3}$ in calculating damages for loss of dependency.

32. The defendants on their part submitted that the plaintiffs had failed to prove the deceased's income at the time of her demise and that the court should adopt the wage of a general worker as stipulated in the *Regulation of Wages (Agricultural Industry Amendment Order of 2009)*. They suggested a multiplier of 24 years and a dependency ratio of $\frac{2}{3}$.

33. On my part, considering the deceased's age at the time of her death, she probably would have worked for over 34 years had her life not been cut short by the negligence of the 3rd defendant taking into account that she was working in the private sector which was not subject to

the mandatory retirement age of 60 years. However, given the vagaries and vicissitudes of life, I find a multiplier of 28 years reasonable in the circumstances of this case and I am persuaded to adopt the same.

34. Regarding the multiplicand, the plaintiffs pleaded that the deceased had a monthly net income of KShs.15,739 which they proved by production of her payslip from Tusky's Mattresses Limited for the month of January 2008. The defendants' submissions that the plaintiffs had failed to discharge their burden of proving the deceased's income at the time of her death and that therefore the court should adopt the wage of a general worker is with respect, totally misplaced.

35. Had the plaintiffs not pleaded the aforesaid amount, I would have calculated the multiplicand by taking the deceased's gross salary of KShs.24,252 less her statutory deductions in the form of PAYE, NHIF and NSSF amounting to KShs.2,513 which would have left a sum of KShs.21,739 as the applicable multiplicand. But since parties are bound by their pleadings, I will adopt the multiplicand pleaded by the plaintiffs.

36. Both parties are agreed that the court should use a dependency ratio of 2/3. In the circumstances, damages for loss of dependency will work out as follows:

$$\text{KShs.15,739} \times 12 \times 28 \times \frac{2}{3} = 3,525,536.$$

In assessing the above damages for loss of dependency, I have taken into account the conventional sum I have already awarded the deceased's estate for lost years.

37. The defendants relying on *inter alia*, the authorities of *Maina Kaniaru V Josephat Muriuki, CA NO. 14 of 1989* and *Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2, [1987] KLR 30*, submitted that to avoid double compensation of the deceased's dependants, damages awarded for loss of expectation of life should be deducted from the award for loss of dependency.

38. In response to these submissions, I will do no more than to reproduce *Section 2 (5)* of the *Law Reform Act* (the Act) which provides as follows:

“The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).”

39. The above provision clearly specifies that the rights conferred for the benefit of deceased persons' estates under the Act shall be in addition to and not in derogation of any rights conferred on dependants of the deceased under the Fatal Accidents Act (*emphasis added*). This means that beneficiaries of an estate who also happen to be dependants of a deceased person can seek and obtain damages under both the Act and the *Fatal Accidents Act* for the same death.

40. *Section 4(2)* of the *Fatal Accidents Act* provides for what should not be taken into account when assessing damages for loss of dependency. The section does not state that any award made for the benefit of a deceased person's estate should be deducted from an award for loss of dependency. As held by the Court of Appeal in *Kemfro Africa Ltd T/A Meru Express Services V Lubia & Another, No. 2, [Supra]*, the trial court is not required to make a mathematical deduction of the amount awarded for lost years from the award granted for loss of dependency. All the trial court was required to do was to take into account the award when assessing damages under the *Fatal Accidents Act*.

41. Lastly, the plaintiffs pleaded special damages in the total sum of KShs.55,580 but only managed to prove KShs.12,590.

As special damages must not only be specifically pleaded but must also be strictly proved, I will award the plaintiffs the sum of KShs.12,590 which is the amount that was specifically pleaded and proved.

42. The upshot is that judgment is hereby entered in favour of the plaintiffs against the defendants jointly and severally as follows:

Liability	-	100%
(i) General damages for:		
(a) Pain and suffering	- KShs.	50,000
(b) Loss of expectation of life	- KShs.	200,000
(c) Loss of dependency	- KShs.	3,525,536
(ii) Special damages	- <u>KShs.</u>	<u>12,590</u>
Total	-	<u>KShs.3,788, 126</u>

43. The award of special damages will earn interest at court rates from the date of filing suit while the award of general damages will earn interest at the same rate from today's date until payment in full.

44. As costs follow the event, the plaintiffs are awarded costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of May 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Karuga for the plaintiffs

No appearance for the defendants

Ms Carol: Court Assistant