



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 14 OF 2017

EMMANUEL WAWOLE MOCHAWA (Suing as the Legal Administrator of the Estate of

VICTOR ELDAIMA MOCHAWA.....PLAINTIFF

VERSUS

HARUN KARIUKI KAMANDE.....DEFENDANT

JUDGMENT

1. By his **Plaint** dated the **27th March 2014**, the Plaintiff on behalf of the estate of the deceased pleads that on or about **22nd March 2013**, the deceased was a lawful passenger in the Defendant Motor Vehicle Registration Number **KBR 841J Toyota Probox (subject motor vehicle)** along **Mwingi – Garissa Road** at **Yakari** Area when the Defendant, his authorized driver, servant, agent and/or employee so carelessly drove and/or managed the subject motor vehicle causing the same to have an accident whereof the deceased sustained fatal injuries for which the Defendant is liable for loss and damages suffered by the estate and family of the deceased and the Plaintiff.

2. The particulars of negligence that were alleged against the second Defendant were:-

- a) Driving at a very excessive speed without regard to the nature of the road and available traffic.*
- b) Failing to exercise due care and skills in managing and/or controlling the Motor vehicle.*
- c) Driving without due care and attention thereby causing the accident.*
- d) Failing to apply brakes in sufficient time or at all to avoid the accident.*
- e) Failing to steer in a clear and proper cause.*

3. On those pleaded facts, the Plaintiff sought the following orders:

- a) General damages under Law Reform Act and Fatal Accident Act.*
- b) Special damages of Kshs.461,890/=*
- c) Costs.*
- d) Interest on (a) and (c)*

The Evidence adduced at Trial

4. Two witnesses testified in support of the Plaintiff's case **Emmanuel Mochawa Wawole**, the deceased's father, testified as **PW1** and **PC Daniel Mulinya** testified as **PW2**. For the defence, although a **Statement of Defence** was filed, no witness was called to prove that Defence.

5. **PW1** testified and stated that on **25th January 1,2013**, he was informed via a phone call, that his son had been involved in a fatal accident while being a passenger in the subject motor vehicle at **Bangal** on **Garissa Road**. The body of the deceased was preserved at **Garissa Hospital** and later at **Taveta Hospital Mortuary** while funeral arrangements were being undertaken. **PW1** further states that he incurred all

the expenses for transportation, preservation, feeding of the mourners and incurred legal fees expenses in filing the instant suit.

6. It was **PW1's** testimony that at the time of his demise, his son was aged **29 years**, and had worked for **six years** after leaving the **Kenya Medical Training College**, so that he had a promising career as a **Dental Technologist** since he ran a Dispensary from which he earned a monthly income of **Kshs.100,000/=**. **PW1** also stated that his son had a **son** aged **7 years** at the time of his demise and the deceased family was his dependents.

7. It is **PW1's** testimony that he was issued with a **Police Abstract** from the Police with regard to the said accident and upon conducting an **Official Search** of the subject motor vehicle, he established that the same belonged to the Defendant. He asked this Court for compensation for the loss of his son and the expenses incurred for funeral and Advocate fees and costs.

8. On cross-examination by **Ms. Kwaya**, **PW1** was referred to the **Limited Grant Ad Colligenda**, and he confirmed that it was indicated as **Ad Colligenda**. He further confirmed that although he did not provide a **Certificate of Registration**, the deceased had opened his own **Private Practice Clinic** and he had a book-in, which he used to record his daily collections. However, the said book was not produced in evidence. **PW1** also confirmed that he was not aware whether his son died on the spot or in the hospital.

9. In re-examination, **PW1** stated that he did not know what **Ad Colligenda** meant and that it is his Advocate who applied for the cases and the Court processed and issued the same.

10. **PW2** testified and stated that the accident occurred on **25th January, 2013** as evidenced in the Police File, and Police Abstract. **PW2** stated that the accident was fatal and the Investigation Officer recommended that the matter be referred to the Insurance for compensation since the driver of the subject motor vehicle had agreed to take full responsibility for the accident.

11. On cross-examination, **PW2** stated that he was not the Investigating Officer and he had nothing in writing to indicate that the Defendant driver agreed to take full responsibility for the accident. **PW2** further confirmed that the Defendant driver was never charged and that in the driver's statement it was indicated that the deceased never wore a seatbelt.

12. In re-examination, **PW2** stated that charges are only brought when the drivers do not admit responsibility and in this case, the driver admitted responsibility because the vehicle was comprehensively insured.

The Parties' Submissions in Support of their Respective Cases

13. The parties filed written submissions in support of their respective positions. The Plaintiff's submissions were filed on **14th October, 2019**, while the Defendant's submissions were filed on **25th November, 2019**.

14. **Ms. Momanyi**, Learned Counsel for the Plaintiff, submitted that the deceased was a passenger in the subject motor vehicles, and there is no evidence that was tendered by the defence to show that the deceased acted or failed to act in any way pointing to contributory negligence on his part. Therefore, the driver to the subject motor vehicle is solely to blame for the accident that led to the demise of the deceased.

15. On the issue of quantum, Counsel submitted that although the deceased was not married, he was survived by a child and his parents, and since he was in his own Private Practice, he would have worked and retired at **70 years**. Counsel therefore submitted that a **multiplier of 41 years** on the basis of $\frac{2}{3}$ expenditure to his dependents over his monthly income of **Kshs.100,000/=** would suffice.

16. **Ms. Mwangi**, the Learned Counsel for the Defendant submitted that the proper grant for instituting the present suit would have been a grant **Ad Litem**. Therefore, this suit ought to be dismissed for being instituted through a **Limited Grant Ad Colligenda**.

17. Counsel further submitted that the Plaintiff failed to prove his case against the Defendant as pleaded in the **Plaint**, reason being that no eye witness was availed to give evidence on the circumstance surrounding the accident. Also, it was submitted that the Police had nothing to prove that the Defendant driver admitted to being **100%** liable for the accident and that charges were never preferred against the Defendant driver.

18. On the issue of quantum, Counsel submitted that the Plaintiff was required to prove the deceased earning and that since the deceased worked in the volatile part of the country, a **multiplier of 10 years**. would be reasonable in the circumstances.

19. On the ratio of dependency, Counsel submitted that the ratio of $\frac{1}{3}$ ought to be adopted by this Court since the deceased was unmarried and his parents are of an advanced age.

Determination

20. At the onset, it is worth noting that even though a **Statement of Defence** was filed on behalf of the Defendant, no witness was called on his behalf. Therefore, no evidence was adduced in support of the Defence case. The Defence on record remained as a mere allegation. This is the position in law and was restated in the Court of Appeal case of **Edward Muriga through Stanley Muriga V Nathaniel D. Schulter Civil Appeal No.23 of 1997**, where the Court stated as follows:

“In this matter; apart from filing its statement of defence the Defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations. Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must

support the same by way of evidence.”

21. Similarly, in the case of Chrispine Otieno Caleb...Vs...Attorney General (2014)eKLR, where Justice G.V Odunga held that:

“Again in the case of Trust Bank Limited –vs- & 2 others Nairobi (Milimani) H.C.C.C. No. 1243 of 2001 the learned Judge citing the same decision stated that it is trite where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence by the Plaintiff against them is unconverted...”

22. This Court has carefully considered Plaintiff’s pleadings, evidence, and submissions for both parties. The Court has also considered the relevant law and jurisprudence on the key issues falling for determination. The key issues that have emerged for determination are namely:

a) Whether the Limited Grant of Letters of Administration

Ad Colligenda Bona empowered the Plaintiff to institute the present suit;

b) Whether the Defendant is to blame for the accident;

c) What damages are awardable?

a) Whether the Limited Grant of Letters of Administration Ad Colligenda Bona empowered the Plaintiff to institute the present suit?

23. This court proposes to start with this issue because it has the potential to summarily dispose of this suit in that if the **letters of administration ad colligenda bona** did not give the Plaintiff the power to institute the instant suit, then he does not have locus and his suit will be struck out without need for delving into the merits. However, if the court finds that the grant gives him the requisite locus, his suit will be determined on the merits.

24. A **Limited Grant**, as the name suggests, is limited to a specific purpose in relation to the estate of a deceased person. The basis of a Limited Grant is found in **Section 54** of the **Law of Succession Act**, which states that:-

“A court may, according to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.’

25. The grant *ad colligenda bona* is provided for under **Section 67** of the **Law of Succession Act** and **Rule 36** of the **Probate and Administration Rules**. The Latin verb “*colligere*” means to **collect**, bring together or assemble. As such, this form of grant is usually issued to collect the property of a deceased person where it is of a perishable nature, and where a regular Probate or Administration cannot be granted at once. The Court of Appeal in the case of Morjaria...Vs...Abdalla [1984] KLR 490, inter alia held:

i. The purpose of a Grant of Letters of Administration Ad Colligenda bona is to collect the property of the deceased person where it is of a perishable or precarious nature and where regular probate and administration cannot be granted at once.

ii. The appointment of a person as an administrator Ad Colligenda Bona in respect of the estate of a deceased person cannot include the right to take the place of the deceased for the purpose of instituting an action or appeal, especially where there is specific provision for that purpose in paragraph 14 of the Fifth Schedule to the Law of Succession Act.

26. This Court has had an opportunity to go through the **Limited Grant** of

Letters of Administration ad colligenda bona obtained by the Plaintiff in this matter. It is noteworthy that, on the face of the said Grant it is indicated as follows: ‘...limited to the purpose only of collecting and getting in and receiving the estate and doing such acts as may be necessary for the preservation of the estate, until further representation were granted by this Court.’

27. This Court finds that instituting a suit is not one of the special purposes indicated on the said Grant. Consequently, this Court finds and holds that the said Grant was specifically limited to collection and preservation of the deceased estate until further representation was granted. Their Lordships in the Morjaria...Vs...Abdalla case [supra] at page 497 stated as follows:-

“However, we do not think that the appointment of a person “Ad Colligenda bona” can possibly include the right to stand in the shoes of the deceased for the purpose of instituting an action, or, indeed, an appeal, especially where there is a specific provision, paragraph 14 of the fifth schedule, designed for this purpose. The Latin verb “Colligere” means to collect, bring together or assemble, and we are satisfied that this form of grant is only to be used for the purpose we have indicated and not for purpose of representation in a suit or in an Appeal.”

28. For purposes of instituting the suit, the Plaintiff required to have obtained an **Ad Litem Grant** under **paragraph 14** of the **Fifth Schedule** before commencement of a suit. The Plaintiff was not a Legal Representative of the estate of the deceased, having obtained a **Limited Grant of Letters of Administration Ad Colligenda Bona**. Such a Grant is only useful for collecting, getting in, and receiving the estate of the deceased that may require preservation from waste. The grant did not entitle the Plaintiff to file suit as a legal representative of the estate of the deceased.

29. Therefore, in the premises, this Court finds and holds that the Plaintiff lacked the capacity and/or locus to institute the present suit. Where a party has no *locus standi*, the Court cannot hear him/her and cannot grant any reliefs in his/her favour as the suit would virtually be *null* and *void abinitio* for want of a competent party. In the case of Alfred Njau & Others...Vs...City Council of Nairobi [1982-88]1KAR 229, the Court stated:-

“...to say a person has no cause of action is not necessarily tantamount to shutting the person out of the Court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth of listening to.”

30. Although the finding on whether or not the Plaintiff had the *locus standi* to institute the instant suit should have been sufficient to dispose of the suit. This Court will nonetheless consider the other issues just in case it could be wrong in its holding on the issue of *locus standi*.

b) Whether the Defendant was negligent

29. I will proceed to deal with the issue of liability. It is trite law that ‘**he who alleges must prove**’. Under Section 107 of the Evidence Act, it is provided that:-

“1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

30. In this case, the Plaintiffs gave evidence, which was not controverted. Although they were not eyewitnesses, nevertheless **PW1** and **PW2** availed documentary evidence seeking to prove their claims. At paragraph 9 of the Plaint, they also relied on the **doctrine of “Res ipsa loquitur”** by stating that:-

“The Plaintiffs shall also rely on the principals of Res ipsa loquitur so far as it is applicable to this case.”

31. **PW1** testified that the deceased was killed in an accident. He produced a **Police Abstract - Exhibit 3**, which is dated **22nd March, 2013** and shows as follows: the accident involved **Victor Elidaima Mochawa**; it occurred on **25th January, 2013**; it involved vehicle registration **No KBR 841J, Toyota Probox**, owned by **Harun Kariuki Kamande**; under persons injured, the name of the deceased is indicated and the nature of injury is indicated as fatal; in addition, the case was stated to have been referred to Insurance for compensation, although it was not indicated whether any person was to be charged.

32. From this exhibit, the following can be ascertained, subject to contrary evidence: the occurrence of the accident, the identities of the persons and vehicle involved, the dates of the accident, and the nature of the injury as a fatality. **PW1** also produced **Exhibit 5**, which was the **Death Certificate** of the deceased. It indicates the **date of death** as **25th January, 2013** and the **cause of death** as **“head injury due to Road Traffic Accident”**.

Doctrine of Res ipsa loquitur

33. This doctrine, translated directly, means **the thing speaks for itself**. Under the common law of negligence, the *res ipsa loquitur* doctrine indicates that a breach of a party's duty of care may be inferred or presumed from the events that occurred. In other words, the negligence is so obvious that you can tell that someone had a negligent hand in what happened. It is true that in the present case, there was no eyewitness of the accident. The **Police Abstract** however, shows that motor vehicle registration number **KBR 841J** owned by the Defendant was involved in a fatal accident with the deceased. In the pleadings, the Plaintiffs assert that the vehicle was owned and or negligently driven by the Defendant.

34. On the other hand, other than the Defendant's blanket denials in their defence, the only other evidence to be relied upon is that of the Plaintiff. It does not prove the negligent acts asserted. However, it can be inferred from the **Police Abstract** and under the **doctrine of res ipsa loquitur** that the Defendants' vehicle was responsible for the deceased's death. He did not die on account of anything but the accident. The Certificate of Death even contains such an assertion. In the absence of any other explanation, or evidence rebutting the same, the above doctrine does apply.

35. In other words, if one is responsible for or controls something, such as a property or vehicle that person is responsible for providing a reasonable amount of care to make sure that the vehicle or property is safe. When an accident happens, the question is whether the property owner breached his duty of care. However, with *res ipsa loquitur*, the breach is so apparent that there is a presumption of the breach of duty and the Plaintiff does not need to provide extensive evidence, if any, of the breach. Thus, the negligence speaks for itself.

36. In the case of Nandwa...Vs...Kenya Kazi Limited [1988] eKLR, the Court of Appeal (Gachuhi J. A. as he then was) cited a portion of the Judgment in the English case of Barkway ...Vs... South Wales Transport Company Limited [1956] 1 ALLER 392 at Page 393 B on the nature and application of the **doctrine of res ipsa loquitur** as follows:-

“The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but,

although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.”

37. In the upshot, this Court finds that the Plaintiff proved his case on balance of probabilities, and the Defendant is **100%** liable for the accident that resulted into the demise of the deceased.

c) What damages are awardable?

Damages under the Law Reform Act

i. Pain and Suffering

38. According to the **Death Certificate**, the deceased died on **25th January, 2013** after sustaining serious injury after the accident occurred. Under this head, this Court would have awarded **Kshs.10,000/=** for pain and suffering.

ii. Loss of expectation of life

39. The deceased passed away at the age of **29 years**. Surely, he had his whole life ahead of him. There are cases where people who died at **40 years** or more were awarded **Kshs.150,000** onwards. For example see the case of **Violet Jeptum Rahedi...Vs...Albert Kubai Mbogori [2013]eKLR**. Under this head, **Kshs.200,000/=** is appropriate.

Damages under the Fatal Accidents Act

i. Loss of dependency

40. It was the PW1's evidence that his son was a **Dental Technologist** who was running his own clinic in Garissa. **PW1** produced a **Diploma Certificate in Dental Technology** belonging to the deceased. It was further submitted that the deceased earned roughly between **Kshs.80,000/= to Kshs.150,000/=** from his clinic and banking slips showing various deposits into the deceased account were produced. Although no books of accounts or tax returns were tendered to give a fair view of the deceased's earnings, this Court cannot shut its eyes to the evidence tendered in court (**PEX 8**) which showed that in the month of **November, 2012** alone, the deceased deposited **Kshs.51,570/=** by **eight deposits**. In **December 2012**, he made **six deposits** of **Kshs.68,000/=** respectively. Certainly, that evidence cannot help this court ascertain what the deceased's income was. The court also takes note of the fact that in some of these one-man small businesses, people ordinarily do not keep books of accounts. A useful guide on application on the multiplier approach was given by Ringera, J. in the case of **Mwanzia...Vs...Ngalali Mutua & Kenya Bus Services (Msa) Ltd & Another**, which was quoted with approval in the case of **Albert Odawa...Vs...Gichimu Gichenji, NKU HCCA No.15 of 2003 [2007] eKLR**. The learned judge noted as follows:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

41. In the absence of evidence of clear earnings, it then follows that this is a proper case for making a global award. See for example in the cases of **Mary Khayesi Awalo & Another...Vs...Mwilu Malungu & Another, ELD HCCC No.19 of 1997 [1999] eKLR** and **Moses Mairua Muchiri...Vs...Cyrus Maina Macharia (Suing as the Personal Representative of the Estate of Mercy Nzula Maina(deceased) [2016]eKLR**.

42. Under this head, this Court would have awarded a global award of **Kshs.2,500,000/=** which is fair and appropriate. This award takes into account the age of the deceased at the time of his death and the fact that he was not married but had one child.

ii. Special damages

43. **PW1** testified that his son died in Garissa and the body was preserved at **Garissa Hospital** for two days before being transported to **Taita Taveta Hospital Mortuary** as funeral arrangement were being made and he was buried in **Taita Taveta**. **PW1** produced a bundle of receipts totaling **Kshs.433,000/=**. I have perused the receipts and they include, among others, payments to funeral transport services, and payments incurred in the ordinary course of making funeral arrangements. This Court is satisfied that the Plaintiff specifically proved his claim for special damages and so this Court would have awarded him the **Kshs.261,450/=** specifically claimed.

Conclusion and Final Orders

44. From the above analysis and having found that the Plaintiff lacked the *locus standi* in the suit, this suit is hereby struck out with direction that the Plaintiff be and is at liberty to file a fresh suit after obtaining a **Limited Grant Ad Litem**.

It is so ordered.

DATED and SIGNED at MOMBASA on this 5th day of October, 2020.

D. O. CHEPKWONY

JUDGE

DELIVERED at **MOMBASA** this **15th** day of **October, 2020**

P. J. OTIENO

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules, which requires that all Judgments and rulings be pronounced in open Court.