



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 386 OF 2012

TARAJI ABDULDER A. SALAMAH.....1ST PLAINTIFF

SANGCOPAN DIMAPORO AMALLYN.....2ND PLAINTIFF

RAZAZ FAHAD M. AL HARANDAH.....3RD PLAINTIFF

TAL ABDUL RAHAMAN M. AL HARANDAH.....4TH PLAINTIFF

WABEL ABDULRAHMAN M. AL HARANDAH....5TH PLAINTIFF

ABDULRAHMAN MOHAMMAD

S. AL HARANDAH.....6TH PLAINTIFF

(Suing on behalf as the administrator of the

estate of the late Rawan Abdulrahman M. Alharandah (deceased)

Versus

STEPHEN NDERITU.....1ST DEFENDANT

STANELY KANYA WAITHIRU.....2ND DEFENDANT

JUDGMENT

This suit arose out of a road traffic accident involving motor vehicle registration No. KBD 338k which took place on 13th August, 2009. The 1st to 5th Plaintiffs herein were passengers in the said motor vehicle which was owned by the 1st defendant and driven by the 2nd defendant at the time of the accident. It was pleaded in the plaint that the accident took place as a result of the negligence of the 2nd defendant in the way he drove the said motor vehicle.

The 1st defendant being the registered owner of the said motor vehicle would, subject to proof, be vicariously liable to the plaintiffs for the negligence of the 2nd defendant as driver, agent, and or employee.

There was evidence adduced through P.W. 2 that the motor vehicle was being used by the plaintiffs in the park when the accident took place. Another driver operating a different motor vehicle informed the 2nd defendant who was the driver of KBD 338K that one of the tyres had low pressure. The driver went out and checked the tyre and only said he will repair it but continued to drive on it. The tyre was not changed and the driver continued to drive speedily. The driver was asked by the plaintiffs to slow down but insisted on driving fast so that he could reach the gate before 7 p.m which was the closing time otherwise they could not be allowed to leave the park.

The driver drove fast and refused to slow down. The car then rolled and some Maasai people showed up, stopped another car which took the injured to hospital. It was at the clinic that P.W. 2 was informed that his sister had passed away. This witness testified that they had their safety belt on. He was not thrown out of the motor vehicle neither did he know the speed allowed in the national park.

The plaintiffs also called P.W. 3 PC Pallertol Rane a police officer then attached to Narok Police Station. He produced a police abstract showing the accident involving motor vehicle registration No. KBD 338 K that took place on 27th August, 2009 along Talek Keeko Rok Lodge within Maasai Mara National Park, and which was being driven by Stanley Kanya Waithiru. The abstract showed a charge of causing

death by dangerous driving had been registered against the driver. He produced the accident abstract in evidence. This officer was not the investigating officer, neither was he a witness in the lower court. He knew nothing about the accident and neither did he have the police file.

On that evidence, the plaintiffs closed their case. The defence was given an opportunity to call their witnesses but did not do so. The evidence of the plaintiffs on liability remains uncontroverted. They had the duty to prove their case on a balance of probability. They succeeded in doing so. I find, on the evidence, that liability has been established against both defendants jointly and severally.

The 2nd defendant displayed negligence by failing to replace the tyre that was low in pressure, despite being alerted about the same. He was also negligent in driving the said motor vehicle too fast that in the end resulted in the accident. That was reckless in the circumstances of the case. It has not been denied that he was the driver, agent and or employee of the 1st defendant who was the registered owner of the motor vehicle. Accordingly, the 1st defendant is vicariously liable for the negligence of the 2nd defendant.

Only the 4th and 6th plaintiff gave evidence in this trial while the rest could not make it to testify. The 4th plaintiff was one of the passengers in the said motor vehicle on the date of the accident while the 6th Plaintiff was the personal representative of one Rawan Abdulrahiman M. Alharandah who died as a result of that accident. The deceased was his daughter. The 4th plaintiff produced exhibit 1 a P3 Form and a medical report by Dr. Neeraj Krishnan showing the injuries he sustained. This was exhibit No. 3.

According to that medical report, he sustained what amounted to soft tissue injuries. After the accident he was airlifted to Saudi Arabia on the following day for further check-up. Comparable injuries attract comparable awards and going by the cited cases I make an award of Kshs. 150,000/= general damages for pain and suffering. The 4th plaintiff also produced receipts from Aga Khan University Hospital which appear at pages 92 to 96 of the bundle of documents filed on behalf of the plaintiffs amounting to Kshs. 63,858/= being doctors' fees of Ksh.30,000/= and hospital fees of Kshs. 33,858/=. These were pleaded in addition to Kshs. 100/= paid for the police abstract making a total of Kshs. 63,958/= special damages. I award this sum under special damages.

P.W. 1 Abdul Rahman Mohamad S. Alharandah was working for Saudi Airline as the manager covering Kenya, South Africa and Nigeria at the time of the accident. The 1st plaintiff was his wife, the 2nd plaintiff his second wife, 3rd plaintiff his nephew, 4th plaintiff his youngest son then, 5th plaintiff was his eldest son who was then in the university in Egypt and now a medical doctor (dentist) in the government of Saudi Arabia. The 6th plaintiff was his only daughter who died in the accident. He took out letters of administration in relation to her estate which he identified in the proceedings. This witness gave evidence how he received information about the accident while he was in South Africa and how eventually he travelled to Nairobi to attend to the injured.

At his instance, a medical aircraft was dispatched from South Arabia to evacuate them from Kenya because the plaintiff suffered serious injuries. They were all flown in to Jeddah where they were admitted into Saudi German Hospital.

It was his evidence that after the accident the injured were evacuated from Maasai Mara to Nairobi by Amref flying doctors services. He identified the documents in the bundle filed in court. He also paid the bills related to their hospitalization. The bills had been paid and so he refunded the same to Chaudhry Associate advocates. The body of his late daughter was prepared for transportation and burial at Jeddah, Saudi Arabia.

After a month in Jeddah, he returned to Kenya where he was taken to hospital due to the loss he had suffered. He spent most of his earnings on his family's up keep and education until the time he gave evidence. In an emotional recount, he told the court how the defendants and the insurance company did not bother about them and remained with flashes of his daughter's presence and death. He asked to be refunded the money he spent and the loss of his daughter's life.

It was his evidence that although Saudi Airlines paid the money on his behalf, this was deducted from him to refund the airline. The 1st, 2nd, 3rd and 5th plaintiffs could not attend the trial due to the cost involved and for reasons that this case had been adjourned twice before. The record bears testimony to this and also the fact that some negotiations were taking place to settle the matter which however collapsed along the way.

I have considered the evidence of the 6th plaintiff in relation to quantum of damages pleaded as special damages, and also general damages for the loss of his daughter. Special damages have to be specifically pleaded and strictly proved. The documents produced by the plaintiffs included all the receipts for the hospital and transportation of the injured plaintiff's alongside the deceased which have not been seriously contested by the defendants.

The total going by the submissions and supported by the receipts is Kshs. 978,955.40/=. In my judgment, this has been proved to the satisfaction of the court.

The late Rawan died at the age of 20 years and was then a college student who aspired to join a medical school like her elder brother, the 5th plaintiff herein. She was in good health but her life was cut short due to the negligence of the 2nd defendant.

On a balance of probability if the decease were to become a doctor, she would be earning Kshs. 132,750/= per month in Saudi Arabia. She would have worked for 55 years according to submission by counsel. Counsel has suggested a multiplier of 35 years and loss of dependency at 1/3 of her earnings.

Life is full of risks just like the risk the deceased encountered ending her life at the young age of 20 years. The submission that she would have earned the salary cited has not been contested. Whatever the case I shall assign a multiplier of 30 years in calculating lost years. She would have spent 2/3 of her salary on her parents and therefore damages for lost years and or loss of dependency would amount to Kshs.

$132,750 \times 12 \times 30 \times \frac{1}{2} = \text{Kshs. } 15,930,000/=$. I further award Kshs. 100,000/= loss of expectation of life, which however has to be taken into account against the loss of dependency leaving a balance of Kshs. 15,830,000/=.

The deceased must have suffered pain before her demise. She was pronounced dead on arrival at the hospital. It is not clear how far the hospital was from the scene of the accident. What is clear is that the deceased died a painful death following that accident. In my judgment I agree that a sum of Kshs. 200,000/= is reasonable in the circumstances of the case.

I have already observed that some of the plaintiffs did not give evidence and therefore what remains are just the pleadings on record which have not been supported by evidence. I make no awards in that regard.

In the end there shall be judgment for the 4th plaintiff in the sum of Kshs. 150,000/= general damages plus Kshs. 63,958/= special damages. In addition there shall be judgment in favour of the 6th plaintiff and for the estate of his late daughter in the sum of Kshs. 15,830,000/= for loss of dependency and or lost years, Kshs. 200,000/= pain and suffering Kshs. 978,955.40/= special damages, plus costs and interests at court rates.

Dated, signed and delivered at Nairobi this 10th Day of April, 2019.

A. MBOGHOLI MSAGHA

JUDGE