



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 917 OF 2006

BEATRICE ADHIAMBO NGIELA (suing as the Legal Representative of the

Estate of CAREY FRANCIS MANGA ODHIAMBO.....1ST PLAINTIFF

BARRACK AMOLLO (suing as the Legal Representatives of the Estate of

CAREY FRANCIS MANGA ODHIAMBO).....2ND PLAINTIFF

VERSUS

MEHUL KISHORCHAND SHAH.....1ST DEFENDANT

NIC BANK LIMITED.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. In their Complaint dated 29th May 2006 and filed on 25th August 2006, the Plaintiffs sought judgment against the Defendants jointly and severally for:-

- a. General Damages pursuant to the Law Reform Act Cap 26 and Fatal Accidents Act Cap 32 of the Laws of Kenya.**
- b. Special damages at Kshs 1,272,649.20.**
- c. Costs of this suit.**
- d. Interest on (a), (b) and (c) above at court rates.**

2. The Defendant filed its Statement of Defence dated 13th October 2006 on 26th October 2006. The 1st Defendant subsequently filed its Memorandum of Appearance and Defence both dated 8th June 2007 on 11th June 2007. The Plaintiffs' Reply to 1st (sic) Defence was dated 13th June 2007 and filed on 25th June 2007.

3. On 26th October 2007, the 2nd Defendant filed a Chamber Summons application dated 9th October 2007 seeking to have it struck off from the Complaint on the ground that it had been improperly joined to the suit and was not a necessary party to the effective and effectual determination of the suit herein. In his Ruling delivered on 20th September 2012, H.P.G Waweru J allowed the said application. However, the 2nd Defendant continued appearing in subsequent pleadings. The court therefore continued referring to Mehul Kishorchand Shah as the 1st Defendant herein.

4. The Plaintiffs' List of witnesses and List and Bundle of Documents were both dated 5th March 2013 and filed on 27th March 2013. The Plaintiffs' undated Supplementary List of Witnesses was filed on 8th November 2016. The Plaintiffs' filed their Witness Statements dated 17th November 2016 on even date.

5. Subsequently, on 6th March 2018, the Plaintiffs filed a Supplementary List of Documents dated 5th March 2018. The Amended Statement of Agreed Issues dated 5th March 2018 was also filed on 6th March 2018. Notably, the 1st Defendant did not file any documents as it was not calling any witness.

6. The Plaintiffs' Written Statements, List of Authorities and List of Exhibits were all dated 5th November 2018 and filed on 21st November 2018 while Defendants' Written Statements were dated 19th November 2018 and filed on 20th November 2018.

7. When the matter came before court on 23rd April 2019, both parties requested it to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

8. Parties filed a joint Statement of Appeal of Agreed Issues dated 15th January 2013 on 27th March 2013.

9. Subsequently, on 6th March 2018, pursuant to the directions of Mwongo J on 12th July 2017, the parties filed an Amendment Statement of Agreed Issues dated 27th February 2018.

1. Whether the Defendant is the registered owner and driver of motor vehicle registration number KAR 634M.

2. Whether the Plaintiffs were the Legal Representatives of the Estate of the deceased.

3. Whether an accident occurred on the 17th February 2005 involving the Defendant's motor vehicle KAR 634M and the deceased.

4. Whether the deceased was lawfully walking along the Zebra crossing when the accident occurred.

5. If so, was the accident caused by the negligence of the Defendant or the deceased?

6. If both parties were to blame, to what extent is each liable?

7. Whether a Demand and Notice of intention to sue was issued to the Defendant.

8. Whether a Statutory Notice under Cap 405 was served upon the Defendant's insurers.

9. What is the appropriate award under the Fatal Accidents Act and the Law Reform Act.

10. What is the appropriate order for costs.

10. In its opinion, broad issues this court discerned to have really been in contention were as follows:-

1. Whether or not the Defendant was liable for the injuries that were occasioned to Carey Francis Manga Odhiambo (deceased) by its Motor Vehicle Registration No KAR 634M;

2. If so, what is the quantum payable,

3. Who is to bear the costs of this suit.

11. The court thus found it prudent to deal with the said issues under the separate and distinct heads shown herein below.

I. LIABILITY

12. Both the Plaintiff (hereinafter referred to as "PW 1") and John Ouma Ogolla (hereinafter referred to as "PW 2") testified in support of the Plaintiffs' case. They adopted their respective Witness Statements as their Examination-in-Chief.

13. According to PW 2, on 17th February 2005 at about 5.00 pm, he was walking with Carey Francis Manga Odhiambo (hereinafter referred to as "the deceased") along Uhuru Highway, Nairobi. When they reached Uhuru Park/ Intercontinental Hotel zebra crossing along Uhuru Highway, they started crossing the road. However, a Motor Vehicle Registration No KAR 643N (hereinafter referred to as "the subject Motor Vehicle") that was being driven by the 1st Defendant at an excessive speed hit the deceased. PW 2 managed to jump back to the pavement to avoid being hit. He was three (3) steps behind the deceased at the material time.

14. Both PW 1 and PW 2 blamed the 1st Defendant solely for having caused the accident which occasioned the deceased's severe injuries and therefore looked to him for compensation.

15. During his Cross-examination, PW 2 stated that visibility was clear and reiterated that the deceased was three (3) steps ahead of him. He

was emphatic that he saw the deceased being hit by the subject Motor Vehicle that was speeding at the material time.

16. The Plaintiffs submitted that since the deceased was hit while crossing the road at a zebra crossing and the severity of the injuries he sustained was evidence of the 1st Defendant's driving at an excess speed, then the 1st Defendant ought to bear liability on a hundred (100%) per cent basis.

17. On its part, the 1st Defendant argued that PW 2 did not see when the said collision occurred and there was therefore no cogent evidence to assist the court on the occurrence of the accident. He thus urged this court to dismiss the suit. However, and on entirely without prejudice basis, he submitted that liability ought to be apportioned equally as neither the deceased (**sic**) nor the driver (**sic**) of the subject Motor Vehicle had tendered any evidence to the contrary.

18. Notably, the 1st Defendant did not call any witnesses to testify in this matter. To that extent, PW 2's evidence remained unrebutted and/or uncontroverted as regards how the accident occurred.

19. Having said so, it was clear from the Police Abstract Report that no charge was preferred against the 1st Defendant. In fact, the case was referred to the insurance. The Plaintiffs did not adduce any evidence to show the contrary. However, bearing in mind the very serious injuries the deceased sustained that led to his death and the election by the police not to charge the 1st Defendant herein, this court was persuaded to find that the deceased could not entirely escape liability at all.

20. It appeared to this court that the deceased had just stepped into the zebra crossing. This is because PW 2 was only three (3) steps behind him and he managed to jump back to the pavement. This pointed to the deceased not having exercised sufficient caution because from PW 2's evidence, the 1st Defendant was speeding at the time. The deceased was thus expected to exercise proper look out and not to ignore the folly of other road users. His severe injuries seemed to suggest that he was too close to the subject Motor Vehicle whose driver did not manage to apply brakes so as to avoid hitting him. The fact that he was on a zebra crossing did not mean that he was to be oblivious to reckless and careless drivers not obeying traffic rules of giving way to pedestrians using a zebra crossing.

21. In view of the fact that the 1st Defendant was driving a vehicle which could be equated to a lethal machine, the fact that he was driving at an excessive speed and the fact that he hit the deceased at a zebra crossing persuaded this court to apportion liability at 75%-25% against the Defendant and the deceased respectively.

II. QUANTUM

22. The deceased was rushed to Nairobi Hospital by a good Samaritan but at the request of PW 1, he was taken to Mater Hospital where the doctor recommended that he be admitted to the Intensive Care Unit (ICU). Unfortunately, there were no beds in ICU and he was transferred to Aga Khan Hospital where he was admitted to ICU.

23. Since the hospital bills were escalating, on 10th March 2005, the deceased was transferred to Kenyatta National Hospital (KNH) and admitted to the ICU and thereafter transferred to St Monicas's Hospital in Kisumu to receive nursing care. Unfortunately, he succumbed to his injuries on 24th May 2005.

24. At the time of his death, he was aged thirty eight (38) years and was employed at Skypath Aviation College Limited where he was earning a salary of Kshs 55,000/- per month. He enjoyed good health before he was involved in the accident. He left three (3) dependants, PW 1 and their two (2) children aged thirteen (13) and four (4) years.

25. AMREF, where PW 1 worked, paid a total sum of Kshs 1,241,611.40 for the expenses that were incurred by the deceased during his hospitalisation but which amount she said, was deducted from her salary as he was only entitled to Kshs 120,000/= in-patient cover under the AMREF's Medical Scheme. She submitted in evidence a statement from AMREF showing that it had made payment.

26. During her Cross –examination, PW 1 stated that the deceased died about four (4) months after the accident. She said that although the deceased was stable after the accident, he was not able to communicate after the surgery.

27. It was not in dispute that the Plaintiffs obtained a Limited Grant of Letters of Administration *Ad Litem* on 31st March 2006. It was not necessary to analyse this issue further. They were therefore entitled to bring their claims both under the Fatal Accidents Act Cap 26 (Laws of Kenya). This court considered the two (2) claims under distinct and separate heads.

A. FATAL ACCIDENTS ACT

i. INCOME

28. The 1st Defendant did not submit on what income this court should adopt. PW 1 submitted in evidence the deceased's pay slips for the months of December 2004 and January 2005. Both pay slips showed that the deceased earned a gross pay of Kshs 55,000/-. It was not clear to this court why the two (2) pay slips, which were one (1) month apart, showed different deductions of Tax charged and PAYE.

29. Notably, in the month of December 2004, the deceased's pay was given as Kshs 43,768/- while that of January 2005, the net pay was shown as Kshs 44,107.60. It appeared to this court that the net pay was on an upward trajectory. However, in the absence of any clarification on the discrepancy of the deceased's salary, this court adopted the sum of the net pay in the sum of Kshs 44,107.60, which, in any event, is what the Plaintiffs had also adopted.

ii. DEPENDENCY RATIO

30. The 1st Plaintiff adduced in evidence copies of her Certificate of Marriage and Birth Certificates of her two (2) children. The Plaintiffs proposed a dependency ration of 2/3. The 1st Defendant also urged this court to adopt a dependency ratio of 2/3.

31. As the dependency ratio of 2/3 was not contested, this court adopted the same.

iii. MULTIPLIER

32. As can be seen hereinabove, the deceased was aged thirty eight (38) years at the time of his death.

33. The Plaintiffs submitted that considering the retirement age of public officers, which they proposed to be seventy (70) years, a multiplier of thirty three (33) years was fair. On his part, the 1st Defendant proposed a multiplier of twelve (12) years.

34. None of the parties referred this court to specific authorities to support their positions. Be that as it may, bearing in mind the vagaries of life, this court found that a multiplier of eighteen (18) years would be fair and reasonable. The court arrived at this figure having taken into account that the retirement age for public officers, save for judges is sixty (60) years, while that of the private sector is higher and/or not specific. A person in private sector could work for many years depending on the contract with his employer.

35. In arriving at the said multiplier, this court had due regard to the case of **Bustrack Limited vs Wilfrida Achola Omondi & Another [2010] eKLR** where Okwengu J (as she then was) adopted a multiplier of seventeen (17) where the deceased was aged thirty eight (38) years at the time of his death.

36. In the case of **Jacquelyn Rita Wanjiru Nyange vs Daso Des Limited & Another [2002] eKLR**, Maraga Ag Judge (as he then was) adopted a multiplier of eighteen (18) where the deceased was aged thirty eight (38) years at the time of his death.

37. The computation for the claim for loss of dependency was therefore made up as follows:-

$$2/3 \times 44,107.60 \times 18 \times 12 \quad \text{Kshs } 6,351,494.40$$

B. LAW REFORM ACT

i. PAIN AND SUFFERING

38. The Plaintiffs submitted that the deceased suffered greatly while in hospital until he succumbed to his injuries. They proposed a sum of Kshs 1,200,000/= for pain and suffering.

39. They relied on the case of **Janet Njoki Kigo vs Daniel Karani Gichuki [2016] eKLR** where Aburili J held that:-

“The generally accepted principle is that very nominal damages will be awarded on the head of pain & suffering if death followed immediately after the accident. However, higher damages will be awarded if the pain and suffering was prolonged before death.”

40. The 1st Defendant proposed a sum of Kshs 10,000/= under this head and relied on the case of **HCCC No 41 of 1998 Mombasa- Patrick Jacob Ouma vs Tawfiq Bus Services (Company) Ltd.** A copy of the said decision was not attached to his Written Submissions.

41. It was of the view of this court that the figures proposed by the Plaintiffs and the 1st Defendant were both unrealistic. The figure proposed by the Plaintiff appeared exaggerated in line with the awards made by other courts. The figure proposed by the Defendant was way too low and the 1998 case he had relied upon was not relevant and a proper guide in making a determination in the year 2019

42. It was thus the view of this court that a sum of Kshs 200,000/= would be fair in the circumstances of the case as the deceased died almost three (3) months after the accident.

43. In arriving at this figure, this court had due regard to the case of **Jacque Lyn Rita Wanjiru Nyange vs Daso Des Ltd & Another (Supra)** where in 2004, D.K Maraga (Ag Judge) awarded a sum of Kshs 100,000/= for pain and suffering.

CC. LOSS OF EXPECTATION OF LIFE

44. The Plaintiff claimed a sum of Kshs 500,000/- under this head. On the other hand, the 1st Defendant urged the court to award a sum of Kshs 80,000/=.

45. Taking the inflationary trends into consideration, this court found a sum of Kshs 150,000/- to have been fair in the circumstances of the case.

46. In the case of **Moses Onyango Okech (suing as the legal representatives of the Estate of Boniface Omondi Onyango vs Ernie Campbell Co Ltd [2018] eKLR**, this very court determined that a sum of Kshs 150,000/- would be fair compensation under this head.

