



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CIVIL SUIT NO. 354 OF 2011**

**NDETO NZIOKA ISAVI** (Suing as legal representative of the estate  
of **KYUMA NDETO SINGI-Deceased**.....**PLAINTIFF**

**VERSUS**

**ABEDNEGO MUIWA JUMA**.....**1<sup>st</sup> DEFENDANT**

**GIDEON MUTUA JUMA**.....**2<sup>nd</sup> DEFENDANT**

**JUDGEMENT**

1. According to a plaint filed in this court on 25<sup>th</sup> November, 2011, and amended on 18<sup>th</sup> December, 2013, the plaintiff is the administrator of the estate of Kyuma Ndeto Singi - the deceased who was a fare paying passenger in a Motor Vehicle registration number KAH 863S registered in the names of the defendants and apparently owned by the 1<sup>st</sup> defendant and being driven by the 2<sup>nd</sup> Defendant. While he was travelling on 18.10.2010 along Wote-Machakos Road at a place called Kivutini, the defendants' vehicle ran over the deceased as a result of which deceased suffered fatal injuries and succumbed to them. The plaintiff blamed the 2<sup>nd</sup> defendant for the accident as a result of negligence as particularized in paragraph 4 of the plaint and pleaded vicarious liability. The deceased's personal representative pleaded *res ipsa loquitur* and claimed general damages and special damages as particularized in paragraph 5 of the plaint.

2. In their statement of defence, the defendants admitted ownership and the fact that the 2<sup>nd</sup> defendant was the driver. They denied that the deceased was lawfully travelling along the said road in the suit vehicle as a passenger. They denied being negligent and pleaded that the only passenger in the vehicle was the turn boy. The Defendants further denied that the suit vehicle ran over the deceased and that they caused the death of the deceased. The defendants pleaded that the vehicle was insured by blue shield insurance company ltd and an order was issued by the High Court on 2<sup>nd</sup> November, 2011 forbidding any action against the company. The defendants then prayed that the suit against them be dismissed.

3. During trial, the plaintiff testified together with four witnesses. The 1<sup>st</sup> defendant testified together with 2 witnesses and closed their case.

4. The witnesses on the issue of liability were the plaintiff and his 4 witnesses. PW 1 was No 64524 Sgt Mburu who is a police officer based at Makueni as the deputy base commander. He testified on the contents of the record of a police abstract dated 25.11.2010 in respect of Kyuma Ndeto Singi(deceased) who was a passenger of vehicle KAH 863S, Canter and on reaching Ivutini, an accident took place as a result of which investigations were carried out and a report was prepared vide IAR file number 54 of 2010 involving inquest number 2 of 2013 and that it was established that the deceased was a passenger aboard the canter and who attempted to alight while the vehicle was in motion and the rear tyre ran over him where upon he died on the spot. He testified that according to the investigations, it was established that the vehicle owner was Gideon Mwanzia Juma and the driver was Abednego Juma Mulwa. He then tendered the Police Abstract and the police file as exhibits.

5. Pw2 was Ndeto Nzioka Isavi who sought to adopt his witness statement filed on 25.11.2011 and testified that the deceased was his son and was killed by the 1<sup>st</sup> defendant's vehicle and that he incurred expenses. He testified that the deceased used to help him on the farm. He produced the bundle of receipts as exhibits.

6. Pw3 was Francis Kyalo Kimayu who testified that the deceased was his employee since 2007 and he was manning his hotel. He testified that he later promoted the deceased to be a manager and used to pay him Kshs 16,000/-. He testified that he received a call that the deceased was involved in an accident and he rushed to the scene and found the body of the deceased lying on the road while the subject vehicle was 20 metres away. He called the police who collected the body and took away the vehicle.

7. Pw4 was No 75515 Pc Francis Kitonga who testified that on 18.10.10 an accident occurred as per the police abstract. He tendered a sketch plan that was drawn on 18.10.10 and he deduced from the sketch plan that the driver of the suit vehicle may have stopped when he realized that the accident had taken place. On cross-examination, he testified that he was not the investigating officer but he had heard that the

deceased missed the rails and fell down, and further that lorries are not public service vehicles. He also testified that according to the sketch plan, the lorry was on its correct lane.

8. Pw5 was Mbindyo Mulei who testified that he was a mason and carpenter and that on 18.10.10 he together with other men had boarded the suit vehicle and the driver stopped so that he could alight but however the driver drove off before the deceased could alight and who fell down and the rear wheels of the vehicle ran over him and died on the spot. On cross-examination, he testified that the suit vehicle was a canter lorry and he had paid Kshs 50/= as bus fare. He denied that the deceased was running after the vehicle but that he and the deceased were aboard the vehicle. He testified that he was not working for the driver and that Lorries ferry goods and not passengers. The plaintiff closed their case and the defence proceeded to give their evidence.

9. DW1 was Gideon Mwanzia Juma who testified that he was the driver of the suit vehicle and that on 18.10.10 he left Kilala at 3.20 pm and on reaching Kivutini there were about 6 people standing near the road and he passed them and after about 30 metres, his rear wheels hit something and when he stopped to check, he realized that a person had been ran over. He testified that he did not carry the deceased or any other passenger or even charge 50/= as bus fare on anyone and it was his view that the deceased must have been among the persons he had seen standing near the road. He testified on cross-examination that he did not know how the deceased ended up being ran over and possibly he might have tried to board the vehicle while in motion and that he only used to ferry goods and not passengers.

10. Dw.2 was Abednego Muiwa Juma who testified that he is the owner of the suit vehicle and that he received a call that his vehicle had been involved in an accident and that he rushed to the scene and drove the vehicle to the police station but however Pw.5 was not at the scene. On cross-examination, he testified that he ferries goods and not passengers. He however maintained that the deceased was to blame.

11. Dw.3 was Matthew Mutua Makiti who testified that on 18.10.10 he was walking around Kivutini area when he saw a canter lorry moving slowly and a young man who was standing by the road ran after the canter attempting to board and he fell off and was ran over by the canter. On cross-examination, he testified that he saw the deceased standing on the left side of the road before the canter emerged and the canter did not stop at the stage. He testified on re-examination that the deceased was crashed by the rear wheels. The defence closed their case and submissions in respect of the matter were filed by both parties.

12. Counsel for the plaintiff filed submissions on 19<sup>th</sup> February, 2019 and counsel for the defendant filed submissions on 5<sup>th</sup> March, 2019. Learned Counsel Mwangi Chege and Co Advocates, framed the issues for determination to be that of liability and quantum. On the issue of liability, counsel submitted Pw4's evidence as corroborated by Pw.5 show that Dw.1 was negligent in failing to ensure that the deceased had fully alighted before driving off and thus from the sketch map, the point of impact was at a stage meaning that the suit vehicle had indeed stopped. On the issue of quantum, counsel submitted that the amount of Kshs 1,920,000/- ought to be awarded for the deceased was aged 32 years and with a multiplier of 25 at a dependency ratio of 1/3 considering the deceased was not married and earning Kshs 16,000/= per month and thus the amount of Kshs 1,620,000/- is the final figure. On loss of dependency, counsel proposed the global sum of Kshs 100,000/-, Kshs 10,000/- for pain and suffering and special damages of Kshs 27,995/-. Learned Counsel cited the case of **Hyder Nthenya Musili & Another v China Wu yi Limited & Another (2017) eKLR** in support of his case.

13. Learned Counsel for the defence Paul Kisonga and Co Advocates submitted on the issues of liability and quantum. On the issue of liability, Counsel submitted that the deceased's negligence was the cause of his death. He submitted that the evidence of Pw1 was expunged from the record, that Pw2, 3 and 4 confirmed that they never witnessed the accident; that Pw2, 3, 4 and 5 confirmed that the suit vehicle was a lorry that does not carry passengers and Pw5 the eye witness testified that the deceased alighted when the vehicle was on motion, however the testimony of Dw1 as corroborated by Dw3 confirm that the deceased was running after the lorry and he fell in a failed attempt to get hold of the side rails of the lorry. He submitted that the plaintiff did not prove his case on a balance of probabilities and could not rely on the doctrine of *res ipsa loquitur*. He cited the case of **Lilian Birir & Another v Ambrose Leamom (2016) eKLR**. On the issue of quantum, learned counsel submitted that if the plaintiff had proved his case, he would be awarded KShs 10,000/- as general damages for pain and suffering, Kshs 100,000/- as general damages for loss of expectation of life under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and Kshs 300,000/- for lost years under the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** for no proof of earning was tendered therefore the annual sum of Kshs 3,000/- by a multiplier of 25 and multiplicand of 1/3 for an unmarried person. Learned Counsel finally submitted that the plaintiff was not entitled to costs or interest.

14. The issues for determination are whether liability for negligence was proved in the circumstances and what quantum ought to be awarded. **Sections 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya** place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the plaintiff to prove liability on the balance of probabilities. It is undisputed that the deceased died after being ran over by the subject vehicle. Although, PW 4 did not investigate the accident, he produced the police abstract and a sketch map which confirmed the fact of the accident, the date it occurred, the place where the vehicle and the body were found as well as the point of impact. Pw.5 also produced evidence that established the fact that the deceased sustained injuries but however the cause of the accident ought to be weighed from the evidence of one eye witness of the plaintiff and the two eye witnesses of the defence.

15. The question then would be, "**whose version of the accident may the court rely on?**" Did the plaintiff establish negligence by establishing that an accident occurred. In other words, could the plaintiff rely on the doctrine of *res ipsa loquitur* to make the case that the defendant was liable? Did the failure by the plaintiff to plead damages under the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and the **Fatal Accidents Act (Chapter 32 of the Laws of Kenya)** affect the quantum the court may award? Did the failure of the defendant to plead contributory negligence or volenti not fit injuria affect his reliance on the same despite presenting evidence to the same?

16. In the case of **Barkway v South Wales Transport Company Limited [1956] 1 ALL ER 392, 393 B** the nature and application of the doctrine of *res ipsa loquitur* was stated 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.***

17. Pw.5 in his testimony stated that the vehicle did not allow the deceased to alight before it drove off and thus the deceased fell off. Dw1 and Dw3 testified that the deceased ran after the vehicle and fell in a failed attempt to cling onto the vehicle. The evidence of the two defence witnesses is more corroborated than that of the Pw5 and therefore on a balance of probabilities the deceased was the author of his death.

18. From the evidence of the Defence and the plaintiff it was clear that it was not part of Dw1's employment to carry passengers in the accident vehicle. He could only carry goods that were designated by the 1<sup>st</sup> defendant. The riding of the deceased was neither known nor authorized by the defendants as was clearly shown in the evidence of Dw1 and Dw2. No evidence was led to show that the deceased was an employee of the defendant. Dw1 in his testimony stated that he does not know why and how the deceased was injured and for arguments sake how he and another became passengers in the said vehicle.

19. In **Dorcas Wangithi Nderi v Samuel Kiburu Mwaura & Another**[2015] eKLR, the court observed that:

***The evidence of the plaintiff on the occurrence of the accident attributed negligence to the 2<sup>nd</sup> respondent in that he was over speeding and driving without due care and attention causing the vehicle to lose control. This evidence was not controverted since the defendant chose not to tender any evidence. The 2<sup>nd</sup> defendant was charged with a traffic offence. The plaintiff therefore proved negligence on the part of the 2<sup>nd</sup> respondent***

20. In this case, the police officer who was Pw4 testified that the accident is pending under investigation and therefore from the totality of evidence, I find and hold that the plaintiff failed to prove negligence against the defendant on the balance of probabilities, and further that the doctrine of *res ipsa loquitur* is not available to the plaintiff. The celebrated book **The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14:** echoes my sentiments thus:

***"The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose"***.

**It is clear from the Defendant's evidence that the deceased was among a group of persons waiting by the roadside who attempted to jump onto the vehicle but lost grip and fell. He was the author of his own misfortune.**

21. As regards the issue of quantum of damages, this court is mandated to determine the same even though the Plaintiff has not managed to prove his case on balance of probabilities. The deceased is noted to have died at the age of 23 years old and was at the time unmarried. His employer attempted to suggest that he used to pay him 16,000/= per month but there were no proof that he earned such a sum by way of payment vouchers, petty cash receipts or any document showing that he used to sign for any wages. In the premises, I find I have to resort to wage guidelines regulations regarding those performing unskilled work which is pegged at Kshs.4,065/= per month. Defence counsel proposed a multiplier of 25 years which I find reasonable due to high mortality rates in Sub Saharan Africa. As deceased was unmarried then a dependency ratio of 1/3 would have been reasonable and thus loss on dependency would have been worked out as  $4,065 \times 12 \times 25 \times (1/3) = \text{Kshs.406,500/=}$ . As the deceased had died instantly the sum of Kshs.10,000/= would have been appropriate as general damages for pain and suffering. On loss of expectation of life, the sum of Kshs.100,000/= would have been appropriate. Special damages of Kshs.27,995/= having been pleaded and proved by production of receipts would have been awarded. All these sums would of course have been effected by any contributory negligence if proved.

22. The upshot of the foregoing is that the Plaintiff's suit is found not proved on balance of probabilities. The suit is dismissed with costs to the Defendants.

Orders accordingly.

**Dated and Delivered at Machakos this 21<sup>st</sup> day of May 2019.**

**D.K. KEMEI**

**JUDGE**