REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 185 OF 1994

THEURI KIHIRA.....PLAINTIFF

-VS-

GERHARD MATTHIESSEN.....DEFENDANT

JUDGMENT

On 6 May 1994 the plaintiff instituted a suit against the defendant seeking both special and general damages.

The foundation of the suit is a road traffic accident which occurred on Nyeri-Mweiga Road on 25 May 1991; it involved a collision of the defendant's vehicle registered as number ICC 2K driven by the defendant himself at the time and the plaintiff's motor vehicle registration No. KVR 920 which was being driven by the plaintiff's son. The latter succumbed to the injuries he sustained a few days after the accident.

The plaintiff attributed the accident to the negligence of the defendant and so he sued for damages for the deceased's estate and also for the benefit of his dependants under the Law Reform Act, cap. 26 and Fatal Accidents Act, cap. 32 respectively.

The defendant opposed the plaintiff's claim and filed a statement of defence in that regard; in particular, he contested the plaintiff's capacity to sue doubting whether he had obtained the grant to represent the deceased's estate. He also averred that as a diplomatic agent, he enjoyed immunity and privileges and therefore the plaintiff's suit was not tenable.

In the alternative, the defendant contended that the collision between the two vehicles was as a result of the negligence of the deceased; accordingly, he denied liability for any claim against him not least, the claim for special and general damages.

Nothing much happened towards prosecution of the suit after the statement of defence. The skeleton record shows at some point in the year 2000, the plaintiff took issue with the Hon. Chief Justice on the delay in determination of his case. By a letter dated 3 January 2001, Juma, J. the then resident judge presiding over this court at Nyeri wrote to the Chief Justice detailing a chronology of events since the filing of the suit till 27 September 2000 when the plaintiff's then advocates are said to have filed an application for amendment of plaint. The learned judge concluded his letter by saying that the parties had not fixed the case for hearing and considering that there were pending applications for disposal, the suit could not be dismissed for want of prosecution.

There was a lull for another 10 years because the next action which I note from the record was, once again, a letter by the plaintiff dated 11 July 2011 addressed to the Chief Justice seeking his intervention in this case since the original court file could not be traced. By a letter dated 11 August 2011, the Deputy Registrar wrote to the Chief Justice confirming that indeed the court file could not be traced and that the only option available was for reconstruction of a skeleton record from copies of pleadings and other documents that the parties may have retained. The plaintiff was advised accordingly under a separate cover, in particular, vide a letter dated 14 September 2011.

Just as it was in the past, there was a long delay before any action was taken as it was not until 24 July 2017, almost seven years later, that the applicant filed a motion for a reconstruction of a skeleton court record. The application was heard and allowed on 4 October 2017.

It is apparent from these events that as much as the court had its share of the blame, particularly, in either misfiling or losing the plaintiff's file, the plaintiff himself was also inactive to large degree; in particular, he delayed in taking whatever action that was necessary to put back his case on track once he was informed that his file was missing. As soon as he got this information, he ought to have moved with speed for reconstruction of a skeleton file. I got to understand his apparent indolence when he finally appeared before me and explained his circumstances. To begin with, he disagreed with his advocates in the infancy stages of his suit; the record shows that a different firm of advocates took over the case from the previous one that filed: however, there is nothing on record that suggests that this subsequent firm of advocates took any substantive action towards prosecution and conclusion of the plaintiff's case. No wonder, the plaintiff eventually took the matters in his own hands and has since been acting in person. Apart from the representation challenges, the plaintiff is illiterate and elderly; his advanced age aside, he informed that for many years, he has been plagued by several illnesses. In the midst of all these challenges, he is financially handicapped. Simply put his situation has been dire and this, perhaps, explains why it took this long to have this matter set down for hearing.

The case was finally heard on 27 February 2019; it proceeded ex parte because the defendant did not appear despite having been served.

In his testimony, the plaintiff reiterated that the deceased whom he named as James Karugu Theuri was his first-born son and he died as a result of a road traffic accident involving his (the plaintiff's) vehicle and the defendant's vehicle. He produced a certificate of death showing that the deceased died at Kenyatta National Hospital on 30 May 1991 as a result of "massive hemothorax due to torn lung plus lived(sic) due to R.T.A." He also produced a police abstract showing that the accident happened at 9.06 AM at Nyeri-Mweiga Road and that involved motor-vehicles registered as 1CC 2K and KVR 920 being driven respectively by the defendant and the deceased.

The plaintiff testified further that he arrived at the accident scene as soon as it happened and in fact assisted in removing his son from the mangled vehicle. His home, so he testified, was close to the accident scene and this is why he managed to arrive at the scene of the accident in the nick of time. The deceased was initially taken to Nyeri Provincial Hospital where he was admitted to the intensive care unit but he was later transferred to Kenyatta National Hospital where he succumbed five days later.

The plaintiff produced a limited grant of letters of administration obtained from High Court Succession Cause No. 14 of 1994 showing that he was the deceased's personal representative.

He later issued a notice of intention to sue to the office of the Attorney General; the Attorney General in turn wrote to the Ministry of Foreign Affairs seeking for the instructions necessary for the response to the plaintiff's notice and subsequently to his claim; the plaintiff produced a copy of the letter dated 24 September 2015 copied to him.

The plaintiff also testified that there was an inquest into his son's death; this inquest was conducted in the Chief Magistrates Court at Nyeri as Inquest No. 32 of 1992. He produced the ruling of the court which showed that as many as ten witnesses, including the defendant, testified in that inquest; at the conclusion of the proceedings, the defendant was found to be liable for the accident.

The plaintiff's testimony on the deceased was that he was 32 years old at the time of his demise and that although he was single, the plaintiff and his family relied on him for upkeep because was the one running the plaintiff's public transport business which was the family's sole source of income. As a matter of fact, the deceased was in the course of this business, driving the plaintiff's passenger vehicle at the time of the accident. On average, the deceased would bring home Kshs.1000 per day. As a result of his death, the plaintiff lost this income and thus he was unable to maintain his family, which, according to his evidence was made up of himself, his wife and nine children some of whom had to drop out of school. And with that, the plaintiff rested his case.

Although the defendant did not testify, two issues raised in his statement of defence have to be determined as preliminary points; the first of these points is the plaintiff's capacity to sue. Although the defendant raised this issue in his pleadings, he did not follow it through; however, even if he did, the plaintiff has demonstrated to my satisfaction that he obtained a limited grant in High Court Civil Case No. 14 of 1994 to represent the deceased and recover whatever was due to his estate. The validity of this grant was not questioned and therefore the short answer to the defendant is that the plaintiff had the capacity to bring this suit on behalf of the deceased's estate.

The second issue raised by the plaintiff in his defence was that being a diplomatic agent, he enjoyed immunity and privileges the effect of which he was insulated from a civil action such as the present suit.

I briefly addressed this issue in my ruling of 21 September 2018 on a motion that sought to join German Embassy to this suit. In that ruling I noted as follows:

> ***It is not clear from the plaintiff's plaint whether at the time of the accident the defendant was on his official business as the employee of the German Embassy and by extension, the German Government, or was on a private or commercial mission outside his official business.***
>
> ***The defendant has himself contended in his statement of defence that "as a diplomatic agent he enjoys immunity and privileges and therefore the present suit is unmaintainable and is a nullity". (see paragraph 2 of the statement of defence dated 7th day of July, 1994).***
>
> ***There is no doubt and it is settled that a consulate officer of a sovereign state enjoys immunities and privileges from legal process in the host state. However, it is important to note that not every act of a sovereign is insulated by sovereign immunity; it may well be that that the immunity has been waived or the sovereign state has consented or submitted to the jurisdiction of the local courts in determination of particular disputes. It may also be that even though immunity exists a particular act is not among the category of acts that are immune to the local legal process. The point is, sovereign immunity is not always absolute. The circumstances of a particular case will dictate whether the immunity can be invoked.***

I need not say anything more on this issue save to cite the Court of Appeal decision in **Ministry of Defence of the Government of United Kingdom versus Joel Ndegwa (1983) eKLR** where it was held that there is no absolute sovereign immunity but that it is restrictive. The test, according to the court, is whether the foreign sovereign or government was acting in a governmental or private capacity; if the latter the doctrine will not accord protection. It is the nature of the action that counts.

The defendant may have been a foreign sovereign or a diplomatic agent as he claimed but in the absence of his testimony there was no proof that he was in the course of his official duties as such sovereign or agent at the time of the accident. Under section 107(1) of the Evidence Act, cap. 80, the burden was always on him to prove that that the immunity had not been waived; or that his country had not consented or submitted to the jurisdiction of the local courts in determination of such a dispute; or the road traffic accident was among the category of acts that are immune to the local legal process. None of these things were proved and without such proof it is more probable than not that he was driving in his private capacity and was not subject to any immunity from the legal process.

The next question for determination is that of liability. The plaintiff did not witness the accident and therefore could not provide any useful information as to who between his son and the defendant was liable for the accident. But he produced a ruling in an inquest whose subject was the deceased's death. In this ruling, the defendant was found to be solely responsible for the accident. The learned magistrate who presided over the inquest ruled as follows:

> ***I have considered all the evidence adduced at the hearing of this inquest. I find that the driver of motor vehicle registration number 1 CC 2K Mercedes-Benz one Gerhard Mathiesen was to blame for the accident involving his vehicle and motor vehicle registration number KVR 920 in which the deceased died. This is for the following reasons.***
>
> ***There is evidence by the prosecution witnesses who were in the vehicle driven by the deceased that P.W.10 was driving very fast.***
>
> ***P.W.10 hit the vehicle driven by the deceased on the drivers (sic) door and when the deceased (sic) vehicle was on its side of the road. The point of impact as testified by the investigation officer P.W. 5 inspector of police Veronica Mbogo was two feet from the edge of the road on the left side. This shows that P.W. 10 and had left his side of the road when he was at high speed to hit a vehicle which was on its side.***
>
> ***These facts shows (sic) that P.W.10 drove the vehicle in a manner that was dangerous to other road users. P.W.10 could be charged with the offence of causing death by dangerous driving contrary to section 46 of the Traffic Act. I however note that PW 10 is a diplomat and was driving a vehicle with diplomatic registration. He cannot therefore be charged in our courts due to diplomatic immunities.***
>
> ***I would therefore order that the inquest file be closed but this ruling should be served on the Attorney General for his notice in the event of any persons who were injured in the accident and relatives of the deceased filing any claims for damages.***
>
> ***Signed***
>
> ***L.W.Gitari***
>
> ***S.R.M***
>
> ***16.12.93***

It is apparent from this ruling that evidence regarding the occurrence of the accident was given in the inquest and based on that evidence the learned magistrate came to the conclusion that the defendant was solely responsible for the accident. She may have misdirected herself on the law regarding diplomatic immunity by declaring that the defendant could not be subjected to criminal process merely because he was a diplomat and that he was driving a diplomatic car. Sovereign immunity, as noted, is not absolute and if the defendant was on a private mission at the time of the accident, he should have been charged like any other offender. For avoidance of doubt Article 31(1) of the Vienna Convection on Diplomatic Relations provides:

> ***1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:***
>
> ***(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;***
>
> ***(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;***
>
> ***(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions. (Underlining added)***

For our purposes, it is the evidence of who was responsible for the accident that matters. I note that the defendant himself participated in the inquest and, no doubt, he must have had the opportunity to test the testimony of the rest of the witnesses who testified in the inquest.

Under section 34 of the Evidence Act, the evidence in the inquest is admissible in this case. That section reads:

> ***34. Admissibility of evidence given in previous proceedings***
>
> ***(1) Evidence given by a witness in a judicial proceeding is admissible in a subsequent judicial proceeding or at a later stage in the same proceeding, for the purpose of proving the facts which it states, in the following circumstances—***
>
> ***(a) where the witness is dead, or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or where his presence cannot be obtained without an amount of delay or expense which in the circumstances of the case the court considers unreasonable, and where, in the case of a subsequent proceeding—***
>
> ***(b) the proceeding is between the same parties or their representatives in interest; and***
>
> ***(c) the adverse party in the first proceeding had the right and opportunity to cross-examine; and***

(d) the questions in issue were substantially the same in the first as in the second proceeding.

(2) For the purposes of this section—

(a) the expression "judicial proceeding" shall be deemed to include any proceeding in which evidence is taken by a person authorized by law to take that evidence on oath; and

(b) a criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused.

The inquest was held more than twenty-six years ago and that being the case, it goes without saying, these witnesses who invariably would be the ideal witnesses in the present case may either be dead, or cannot be found, or their presence cannot be secured without delay or expense which in the circumstances would be unreasonable.

By its very nature an inquest is not a trial but as noted the defendant participated in the inquest whose subject was the cause of the death of the deceased; he had the right to cross-examine the witnesses and most importantly, the questions in issue here are substantially the same questions that were raised and addressed in the inquest.

Again, the inquest no doubt answers to the definition of what amounts to a "judicial proceeding" as the evidence on oath was taken by a magistrate.

In a nutshell, there is every reason to adopt in this suit the evidence given in the inquest and in doing so, it is inevitable that I have to come to the same conclusion as the learned magistrate that the defendant was solely responsible for the accident in which the deceased sustained what turned out to be fatal injuries.

The next question for interrogation is that of damages payable to the plaintiff. As noted earlier, the plaintiff sued for damages under both the Law Reform Act for the benefit of the deceased's estate and the Fatal Accidents Act for the benefit of his dependants. The damages under the former Act are those under heads of loss of earnings, pain and suffering and loss of expectation of life while the only head of damages under the latter Act is the loss of dependency. It is ideal at this point to address each of these heads.

(a) Loss of Dependency:

The manner of assessment of damages under the Fatal Accidents Act was succinctly put in **Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)** where Ringera J (as he then was) stated as follows: -

The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

In the present case the deceased was running what one would call a family transport business; he was operating a passenger transport vehicle which, according to the plaintiff earned the family a monthly net income of Kshs. 1000; however, there was no proof that the deceased generated such an amount of income or any income for that matter from the transport business. It would be speculative, at the very least, to assess the damages under this head based on the multiplier approach.

It does not necessarily follow that deceased did not earn and could not earn any income in future were it not for the accident. He must have earned some income except that it could not be ascertained to such an extent that it can be adopted, without any doubt, as the multiplier in calculation of earnings under this head. In **Jacob Ayiga Maruja & Another v Simeon Obayo, Civil Appeal No. 167 of 2002 [2005] eKLR** the Court of Appeal observed that: -

We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.

I suppose it is partly for this position by the Court of Appeal that a global sum would ordinarily be awarded under the head of loss of dependency where an income cannot be ascertained with precision. In **Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another** which was cited with approval in **Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR** Ringera, J. as he then was said of this issue: -

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.

The same principle was adopted in **Mary Khayesi Awalo & Another v Mwilu Malungu & Another ELD HCCC No. 19 of 1997 [1999]**

eKLR where Nambuye J., (as then was) stated that: -

> ***As regards the income of the deceased there are no bank statements showing his earnings. Both counsels(sic) have made an estimate of the same using no figures. In the courts opinion that will be mere conjuncture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.***

In **High Court Civil Appeal No. 72 of 2017 Eston Mwirigi Ndege & Another versus Paul kirimi Kithinji (2018 eKLR)** the deceased was aged 31 but with a wife and two children; the court (Mabeya, J) awarded a global sum of Kshs. 1,500,000/=; following the award in this decision the court in **High Court Civil Appeal No. 101 of 2014 David Magondi Senema & Another versus Joseph Saboo & Another (2019eKLR),** Ougo, J. awarded a global sum of Kshs. 1,200,000 for loss of dependency in a case where the deceased was 31 years old and was survived by a wife and four children.

Based on these decisions I would award the plaintiff a global sum of Kshs. 1,000,000/=, that in my humble opinion, represents a reasonable and modest award under the head of loss of dependency.

(b) Loss of expectation of life:

Ordinarily, damages under this head are to a great extent an estimate of the quality of the deceased's future. Perhaps it is for this reason that the award has been described as 'unreal' or 'arbitrary'; nonetheless, it is usually made in deserving cases. In **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88) 1KLR 727** Kneller, J.A., spoke of this award in the following terms:

> ***What has to be valued is the loss of the victims' prospective happiness which Viscount Simmonds in Benham versus Gambling (1941) AC 157 said 'might seem more suitable for discussion in an essay on Aristotelian ethics than in a judgment in a court of law' and because it is an unreal arbitrary award it usually is the current conventional sum…It was £200 in 1941 and £500 in 1968." (See page 730).***

The award is conventional in the sense that it is pegged on similar awards that have been made in the past. As noted, it is an award that is ordinarily made on the assumption that the deceased had the prospects of a happy life. In this country this award has always been in the region of between Kshs 100,000 and Kshs 150,000. For instance, in **HCCA No. 52 of 2001, Salim Golamali T/A Kalenjin Auto Hardware versus Lucas Nyongesa** an award of Kshs. 120,000/= was made under this head and in **Civil Appeal No. 144 of 1990 Kenya Breweries versus Ali Kahindi Saro** an award of Kshs 100,000/= was made. In **High Court Civil Appeal No. 15 of 2003, Albert Odawa versus Gichimu Gichenji** an award of Kshs 100,000/= was made in compensation for loss of expectation of life; and in **Nakuru High Court Civil Case No. 437 of 1996, Jackson Magata Kuritu versus Cheruiyot Keter** the sum of Kshs. 150,000/= was awarded.

The deceased lived a happy and healthy life; at least there was no evidence to the contrary. Based on the previous awards that have been made under this head I will make an award of Kshs. 150,000/=.

(c) Pain and suffering:

The deceased died five days after the accident. He was initially admitted at the Nyeri Provincial General Hospital and later transferred for more specialized treatment at Kenyatta National Hospital in Nairobi. The scanty information in the death certificate shows that he died of massive internal bleeding; he also sustained a torn lung and liver. There is no doubt that he must have experienced a lot of pain before he finally succumbed. Taking all these factors into consideration, I will make an award of Kshs. 100,000/= under this head.

(d) Special damages:

The plaintiff did not produce any receipts to prove special damages; it is trite that special damages must not only be pleaded but they must be proved as well. In the absence of proof, I will not make any award under this head.

In the final analysis the plaintiff is hereby awarded the total sum of Kshs. 1,250,000/= made up as follows:

(i) Loss of Dependency	1,000,000
(ii) Loss of expectation of life	150,000
(iii) Pain and suffering	100,000
Total	**1,250,000**

The plaintiff shall also have costs and interest calculated at court rates since the date of filing the suit. It is so ordered.

Dated, signed and delivered in open court this 19th day of July, 2019

Ngaah Jairus

JUDGE