



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAKURU**

**CIVIL SUIT NUMBER 38 OF 2006**

**REV. VICTOR OKULO INDIATSI.....PLAINTIFF/RESPONDENT**

**(Suing as the personal representative of**

**the Estate of MICHAEL SIMBILI INDIATSI (Deceased)**

**-VERSUS-**

**JOHN WAIHARO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**KENIA TOURS & SAFARIS.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**JUDGMENT**

**1. Background and pleadings**

The plaintiff instituted this suit in his capacity as the personal representative of the estate of Michael Simbili Indiatzi (deceased) who died following a road accident on the 16<sup>th</sup> August 2003 along Bondo-Kisumu road involving motor vehicle registration Number KAB 420L and registered in the names of the 2<sup>nd</sup> Defendant Kenia Tours and Safaris Limited. At the material times it was operating as a passenger *matatu* vehicle. The deceased was a lawful passenger therein with others when the vehicle is alleged to have hit potholes on the said road and/or had a tyre burst, lost control veered off the road and hit a big stone, upon which the deceased was thrown out causing serious injuries to him to which he succumbed.

2. The plaintiff obtained Letters of Administration vide **Nakuru High Court Probate and Administration Cause No. 368 of 2004 on the 28<sup>th</sup> July 2004** thus giving him *locus standi* to bring the suit. He is the uncle to the deceased.

Motor vehicle records obtained from the Registrar of Motor vehicles on the 14<sup>th</sup> July 2004 showed the registered owner as the 2<sup>nd</sup> Defendant at the date of the accident.

A police abstract issued from Bondo police station stated the driver as the 1<sup>st</sup> defendant. It also shows that the deceased was fatally injured.

3. **By a plaint dated 14<sup>th</sup> February 2006** and filed on the 15<sup>th</sup> February 2006 the plaintiff blamed the causation of the accident to the driver (1<sup>st</sup> defendant) and stated particulars of negligence as driving at a speed that was excessive in the circumstances, failing to swerve, apply brakes or control the said vehicle so as to avoid the accident, failing to heed to the condition of the road and failure to have due regard to the passengers in the vehicle and in particular the deceased. The 2<sup>nd</sup> defendant was sued as both driver and/or beneficial owner of the vehicle.

4. The plaintiff therefore sought compensation from both the defendants jointly and severally for special damages and general damages under the Law Reform Act (Cap 26) and the Fatal Accidents Act (Cap 32) Laws of Kenya, together interest costs.

5. The defendants filed separate statements of defence. **By his Amended Defence amended on the 4<sup>th</sup> May 2006 the 1<sup>st</sup> defendant**, denied having been the beneficial owner or the authorised driver of the vehicle and put the plaintiff to strict proof of all the claims including particulars of negligence.

6. **The 2<sup>nd</sup> defendants defence is dated 31<sup>st</sup> March 2006.** It denied ownership of the accident vehicle and the 1<sup>st</sup> defendant having been its authorised driver on the material date and stated that it had sold the accident vehicle to one James Mwangi Waitthaka by a sale agreement on the 19<sup>th</sup> March 1996 and parted with possession and control of the same, and that it would enjoin the said purchaser to the proceedings as the third party.

7. **The plaintiff's** case was urged through three witnesses.

**PW1** the plaintiff produced the Grant of Letters of Administration, Death Certificate, receipts to support special damages and copy of motor vehicle records as PExt 1-5.

His testimony was that the deceased was his nephew and was working in his parish as a casual labourer and was taking care of his grandfather named as beneficiary as his father had died and his mother had left him and got married to another person. He did not witness the accident but testified that the youth group from his church, including the deceased, had attended a Youth Conference at Kisumu and were on way back when the vehicle they had boarded was involved in the subject accident. It was his testimony that he sued the 2<sup>nd</sup> defendant upon receipt of the motor vehicle records from the Registrar of motor vehicles.

8. **PW2 Simon Kanyori Muriga and PW3 Rev. Stephen Ndonu**, a priest at Njabini accompanied the Youth Group from Nyahururu for the Youth Conference at Kisumu, and confirmed that the deceased was one of the youths. His evidence was that on way back on the 16<sup>th</sup> August 2003, they boarded the accident vehicle but on the way, as the vehicle was overspeeding on the potholed and rough road, it hit potholes, had a tyre burst, veered off the road and further hit a big stone whose impact threw out the passengers, including the deceased and one Kamenji, also a youth who died and the rest sustained serious injuries.

It was his evidence that before the accident, he called out and cautioned the driver to stop overspeeding.

9. The **investigating officer PW4** chief inspector Julius Mutembei produced the **police abstract – PExt 3 and the police file PExt 6** as well as the sketch plan of the scene of accident.

He confirmed that the deceased was passenger in the vehicle and that the driver (1<sup>st</sup> defendant) was to blame for the accident and was recommended to be charged but disappeared and never traced. He testified that from his investigations, he confirmed that the vehicle got a tyre burst, veered off the road and hit a rock.

10. **The 1<sup>st</sup> Defendant did not testify**, but participated in the proceedings by his Advocates on cross examination of the witnesses.

11. **For the 2<sup>nd</sup> defendant, DW1** Priscilla Wanza Kitua, a manager since 1991 with the 2<sup>nd</sup> defendant testified.

It was her testimony that she witnessed execution of sale agreement of the accident vehicle between the company and one James Mwangi Waithaka on the 18<sup>th</sup> March 1996. That the company released the log book and a transfer duly filled form dated 19<sup>th</sup> March 1996 to the purchaser, for him to fill and forward to the Registrar.

12. It was her evidence that it was a term of the agreement that upon full payment of the purchase price, all vehicle documents would be released to him and the purchaser would be responsible for all traffic offences.

She produced a letter dated 26<sup>th</sup> March 1996 addressed to the Registrar of vehicles – **PExt 3-** to inform him of the change of ownership.

On cross examination, the witness could not be sure or confirm that the letter was ever received by the Registrars, as she could not produce delivery book or any evidence of receipt.

13. The witness confirmed that at date of accident, the vehicle was still registered in the 2<sup>nd</sup> defendant's name and denied that the 1<sup>st</sup> defendant was its authorised driver.

Shown the Transfer of motor vehicle Form, (DExt 2) –DW1 confirmed that the purchaser did not sign it.

She also confirmed that the 2<sup>nd</sup> defendant did not enjoin the purchaser to the proceedings despite requesting its advocates to do so.

14. Upon closure of the case the parties advocates filed their submissions.

#### 15. **Issues for determination**

##### **(A) Liability**

(a) *Whether the 1<sup>st</sup> defendant was negligent in the manner and control of the accident vehicle.*

(b) *Ownership of the accident motor vehicle at date of accident.*

##### **(B) Quantum of damages**

#### 16. **Undisputed facts arising from the evidence**

(1) *That the accident motor vehicle registration No. KAB 420L was registered in the 2<sup>nd</sup> Defendant's names as at 16<sup>th</sup> August 2003-*

date of accident.

(2) That the 1<sup>st</sup> defendant was the driver of the said vehicle and that indeed the accident did occur.

(3) That the vehicle got a tyre burst, veered off the road and hit a stone (a rock) off the road.

(4) That the deceased was thrown out of the vehicle during the accident sustaining fatal injuries on the 16<sup>th</sup> August 2003, same day of accident.

(5) That the driver, 1<sup>st</sup> defendant was blamed for the cause of the accident by the investigating officer.

(6) That an alleged Transfer form for the vehicle to a 3<sup>rd</sup> party was not signed by the 3<sup>rd</sup> party, the alleged purchaser; nor was change of ownership registered by the Registrar.

(7) That the alleged purchaser of the accident vehicle was not enjoined to the proceedings by either party as a 3<sup>rd</sup> party.

(8) That special damages of Kshs.49,745/= being burial expenses were strictly proved by PExt 4 – receipts.

### **ANALYSIS OF EVIDENCE AND FINDINGS.**

#### **17. LIABILITY**

The deceased, having been a passenger had no control in the manner the accident vehicle was being driven.

Unless it is shown by credible evidence that he committed an act that contributed to the causation, he cannot be called upon to share the negligence.

In **Ben Menngesa –vs- Edith Makungu Lande (2013) e KLR** the court held that a passenger cannot be held liable unless it is shown that he acted in a manner that contributed to the accident. No such evidence was adduced as the 1<sup>st</sup> defendant failed to testify.

18. It is trite that submissions by Advocates or litigant cannot replace evidence - **Section 107-109 Evidence Act.**

As such, a party's pleadings that are not supported by evidence remain as such and of no probative or evidential value. In similar case, - **Robert Gitau Kanyiri –vs- Charles Kahiga & 2 Others – HCCC No. 22 of 2009**, the drivers defence was that he hit a pothole swerved to the right and the accident happened. The court found the driver to have been negligent. See also **PNM & Another –vs- Telkom Kenya Ltd & 2 Others (2015) e KLR** – a similar finding was reached.

19. In the present case, the driver (1<sup>st</sup> Defendant) did to show a probable cause that does not connote negligence on his part or any explanation consistent with absence of negligence. He did not testify.

#### **20. OWNERSHIP OF THE ACCIDENT MOTOR VEHICLE REGISTRATION NO. KAB 420L AS AT 16<sup>TH</sup> AUGUST 2003**

**Section 9(2) of the Traffic Act** places a duty upon the registered owner to forward the Transfer from duly filled by the parties to the Registrar within seven days and if the purchaser does not sign, the seller to pay the prescribed fees and obtain registration of the change.

That was not done a fact demonstrated by the Transfer form (DExt 3) that was not signed by the purchaser. It is evident that the 2<sup>nd</sup> defendant did not comply with the provisions of Sections 8 and 9 of the Traffic Act.

21. The Court of Appeal sitting at Nakuru in **Jared Magwaro Bundi –vs- Prima Rosa Flowers Ltd (2018) e KLR** rendered that **Section 8** recognises a registration book or Registrar's extract of ownership to a vehicle as *prima facie* evidence of title unless the contrary is proved on a balance of probability that the vehicle had been transferred but not registered to the transferor's names, and cited the case **Muhambi Koja -vs- Said Mbwana Abdi (2015) e KLR.**

22. In respect therefore, if prove is tendered of the transfer of the vehicle though not registered, the purchaser or transferee is deemed to be the beneficial owner, and a link must be thus established.

The investigating officer **PW4** produced the Police Abstract (PExt 3) and the police file (Ex 6). I have perused the police file. Therein is the 1<sup>st</sup> defendant's driving license, notice of intended prosecution issued to the driver, the investigation diary as well as the driver's statement (1<sup>st</sup> defendant).

23. The 1<sup>st</sup> defendant's statement was taken under inquiry by Police Inspector Eric Oduor on the 3<sup>rd</sup> September 2003 at Bondo Police Station.

He stated to have been **both the driver and owner of the vehicle KAB 420L at the date of accident, and the cause of the accident as a**

**tyre burst.**

That being the case, and this evidence tendered by the investigating officer having not been questioned or challenged, it will be safe to come to a finding that the 1<sup>st</sup> defendant was the beneficial owner of the vehicle upon his own admission.

24. The 2<sup>nd</sup> defendant is thus absorbed from vicarious liability despite its failures stated under paragraph 19 above. By the above the 1<sup>st</sup> defendant (driver) is liable both in negligence and consequential damages arising from the death of the deceased.

25. **DAMAGES**

**Special Damages**

In his plaint, a sum of Kshs.49,752/= is pleaded as special damages.

Both parties are agreeable that the above is proved by **PExt 4** – a bundle of receipts towards funeral expenses.

I allow the same.

26. **Damages under the Law Reform Act Cap 26 Laws of Kenya.**

(a) **Pain and suffering**

The deceased died on the same day of the accident.

Both parties agree to Kshs.10,000/= on his subhead. It is allowed.

(b) **Loss of expectation of life**

The deceased was a 23 years old single young man. The 1<sup>st</sup> defendant proposed an award of Kshs.70,000/= while the plaintiff proposed Kshs.100,000/=.

The award is upon the principle that the deceased had been deprived of normal expectation of life due negligence of a party.

I shall award Kshs.100,000/= regard to the decision in **Henry Waweru Karanja & Another –vs- Teresiah Nduta Kagiri**(suing as the legal representative of the estate of Francis Wainaina Nganga(deceased), among others).

27. **Damages under the Fatal Accidents Act, Cap 32) on Lost Years:**

The deceased was 23 years old and single. He was in good health. He was working and earning an income at the plaintiff's church parish (PW1 evidence) and uncle to the deceased.

The legal representative (PW1) and his grandfather are stated as the dependents of his estate. His father had died in 2015 and his mother had remarried and left him.

As submitted by the plaintiff, the legal representative took the place of the parent, standing as "*loco parentis*," meaning "in place of a parent." As defined in Black's Law Dictionary 12<sup>th</sup> Edition.

28. **Section 4(1) Fatal Accident Act** contemplates a dependant to mean deceased's spouse, children or parents, and ought to be named.

Does the plaintiff-PW1, the personal representative of the deceased estate qualify to be dependant/beneficiary under the Act?

29. In **Aphia Plus Western Kenya & Another –vs- Mary Kadege & Another (2015) e KLR**, the court found that the deceased's uncle was not a beneficiary under the Act.

From the evidence of **PW1** it is evident that the deceased used to work for him at a salary or wages. That in my view did not take the place of the deceased's parents, despite their situation as stated above.

This is deduced from his evidence that after the deceased's death, he (plaintiff) had to employ someone else for Kshs.7,000/= per month to undertake the tasks the deceased used to do for him. I therefore decline to find that the plaintiff was a dependant, and a beneficiary under the Act.

30. That leaves the **grandfather, Reuben Letale Simbili** as the sole dependant and beneficiary of the deceased's estate.

No evidence was tendered to what wages the deceased was earning. It cannot be assumed that he was earning Kshs.7,000/= as remotely implied by the uncle, PW1.

31. The 1<sup>st</sup> defendant submits that the income (wages) ought to be calculated under the Regulations of Wages 2003 guidelines, being Kshs.2,083/=.

I have looked at the guidelines under Legal Notice No.48 for the year 2003. The Basic minimum monthly wages for a general labourer was Kshs.3,600/=. I find it appropriate to adopt an income of Kshs.3,600/= per month.

**32. Multiplier and dependancy ratio (multiplicand)**

The deceased 23 years old was single, and healthy. He would have worked for 37 years to reach retirement age of 60 or more in non-formal enterprises.

The plaintiff proposes a multiplier of 25 years against dependancy ratio of 1/3 while the 1<sup>st</sup> defendant suggest a multiplier of 20 years against a ratio 1/3.

33. In **Obed Mutua Kinyili -vs- Wells Fargo & Another (2014) e KLR** for a 23 years old deceased, the court applied a multiplier of 20 years and 1/3 dependancy ratio.

In **Lucy Kanini Imugu -vs- Chege Wahome & 2 Others (2017) e KLR**, the court applied a dependancy ratio of 1/3 and a multiplier of 32 years to a deceased who died at 23.

Guided by the above, I shall apply a **multiplier of 32 years** against a ratio **of 1/3**. Thus considering the above and circumstances in the present case, I adopt and apply the following:

(c) Income - Kshs.3,600/=

(d) Dependancy ratio - 1/3

(e) Multiplier - 32 years

(f) Loss of dependancy would thus be

$12 \times 3,600 \times 32 \times 1/3 = \underline{\text{Kshs.460,800/=}}$

34. This benefit/award under Loss of dependancy shall be for the benefit of the deceased's grandfather, the only dependent namely Reuben Letale Simbili.

**35. The upshot is that I enter judgment for the plaintiff against the 1<sup>st</sup> defendant John Waiharo as hereunder**

**1. Liability - 100%**

**2. Special damages - 49,753/=**

**3. General damages**

- **Loss of expectation of life - 100,000/=**
- **Pain & suffering - 10,000/=**
- **Loss of dependancy - 460,800/=**

**Total 620,553/=**

**4. Special damages accrue interest at court rates from date of filing this suit.**

**5. General damages shall accrue interest at court rates from the date of this judgment.**

**6. Costs of this suit shall be borne by the 1<sup>st</sup> defendant to the plaintiff.**

**7. There shall be no costs to the 2<sup>nd</sup> defendant for reasons stated under paragraph 16 - 18 of this judgment.**

It is so ordered.

**Delivered, Dated and Signed at Nakuru this 18<sup>th</sup> Day of July 2019.**

.....

J.N.MULWA

JUDGE