



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 382 of 2011

LAWRENCE THEURI MWANGI (*Suing As the personal representative of the*

estate of the late Benson Mwangi Theuri (Deceased)*.....**PLAINTIFF*

VERSUS

THOMAS MUTUNGA MUSAU T/A TENOJI MOTORS LTD.....1ST DEFENDANT****

FRANCIS MAINGI KIIO.....2ND DEFENDANT****

JUDGMENT

The plaintiffs herein are the legal representatives of the estate of Benson Mwangi Theuri (deceased) who vide a plaint dated 29th August, 2011 sued the defendants claiming both general and special damages plus costs and interest, following a road traffic accident that occurred on 6th day of January, 2011 along Kangundo road at Njiiru Shoka Village.

The plaintiffs aver that on the said date the deceased was lawfully riding his motor cycle registration number KMCK 488A along the aforesaid road when the 2nd defendant as the driver, servant and/or agent of the 1st defendant so negligently drove, managed and/or controlled motor vehicle registration number KBK 825H that he caused the same to collide with the deceased. They aver that the 1st defendant is vicariously liable for the negligence on behalf of the 2nd defendant. The particulars of negligence of the 2nd defendant are set out in paragraph 5 of the plaint.

The plaintiffs plead that by reason of the matters aforesaid, the deceased sustained severe body injuries that caused his death. The estate has thus claimed damages under both the Fatal Accidents and Law Reform Acts.

The particulars of negligence are set out in paragraph 7 and 8 of the plaint. The plaintiffs have also claimed special damages which have been set out in paragraph 9 of the plaint.

The plaintiffs later filed an amended plaint on the 5th day of October, 2011 correcting the name of the 1st defendant from Thomas Mutinda to Thomas Mutunga Musau t/a Tenoji Motors Limited.

In a defence filed on the 24th October, 2011, the defendants have denied the claim and in particular, the ownership of motor vehicle KBK 825H and that the 2nd defendant was driving the same as an agent of the 1st defendant. The defendants have pleaded that in the alternative and without prejudice to the above, any such occurrence as the plaintiffs may prove was caused and/or substantially contributed to, by the negligence of the deceased who encroached on the lane of motor vehicle KBK 825H thus causing a head-on collision. The particulars of such negligence have been set out in paragraph 4 of the defence. The allegations of damage and loss are denied and the plaintiffs are put to strict proof thereof.

The plaintiffs filed a reply to defence on the 28th day of October, 2011 reiterating the contents of the amended plaint and joins issues with the statement of defence filed by the defendants. They have denied each and every allegation of negligence attributed to the deceased and the defendants are put to strict proof thereof.

At the hearing, the plaintiffs called three witnesses in support of their case. David Gitari Methu, who testified as PW1 is or was working as a motor cycle taxi driver (boda boda) at the material time. He adopted his witness statement dated the 29th day of August, 2011 as his evidence in chief. It was his evidence that he did not see the accident happen but he went to the scene after he was informed about the accident. He found the motor vehicle and the motor bike at the scene but the motor cycle rider had been rushed to hospital. The driver of the

motor vehicle was also not at the scene but the conductor was there. On earnings he stated that at the time, they made an average of not less than Kshs. 1,500 per day.

Lawrence Theuri Mwangi testified as PW2. He adopted his witness statement dated the 29th August, 2011 as his evidence in chief and produced the list of documents dated 29th August, 2011. He is the father to the deceased and the personal representative to the deceased's estate vide a limited grant issued on the 6th day of January, 2011. He received the report of the accident involving motor vehicle registration number KBK 825H and motor cycle registration number KMCK 488A. He stated that the deceased was a bodaboda operator along Bypass (Ruai – Nairobi) and he used to make between Kshs. 1,000 – 1,500 per day. That the deceased enjoyed a healthy and vigorous life and he was 31 years at the time of his death. He died one hour after the accident. He was the sole bread winner of his family and upon his demise, the estate has suffered loss and damage. He urged the court to grant him damages on behalf of the estate of the deceased.

Peter Mathenge Kiriba testified as PW3. He adopted his witness statement dated the 8th day of September, 2016 as his evidence in chief. It was his evidence that he was a conductor of motor vehicle KBA 975M and on the material day, they closed the day's work and fueled at Midas Petrol Station along Kangundo road as one heads to Ruai from Nairobi.

That at about 50 meters or so from the said petrol station, another motor vehicle Nissan matatu overtook their motor vehicle at high speed. There were bumps ahead and the matatu did not slow down at all. At the last bump, as the driver was trying to avoid a pot-hole, he swerved to the oncoming lane and was unable to return to his lane on time and collided with a motor cycle which was heading to Nairobi. The motor vehicle which was being driven carelessly collided with the motor cycle on its right lane. After the accident, the driver of the matatu left the scene and fled and the rider was taken to hospital by a good Samaritan

Thomas Mireri Onduso testified as DW1. He is a motor vehicle assessor working for Direct Line Insurance Company Limited. He assessed motor cycle registration number KMCK 488A and prepared a comparative report. He stated that the report was done based on the assessment report of the 3rd party assessor by name Fact Finders Investigators and Assessors. In their report, the motor cycle had been declared a total loss and he agreed with them. In his assessment he also relied on the log book and a photograph availed to them. He stated that he gave it a value of Kshs. 56,000/ and produced the report as defence exhibit number 1.

At the conclusion of the hearing, parties filed written submissions which the court has considered together with the evidence on record and the authorities relied on.

The two issues for determination are;

i. Liability

ii. Quantum of damages.

On Liability:

The evidence available to the court is that of PW3 and that of DW2. PW3 testified that he witnessed the occurrence of the accident and he gave an eye witness's account of the same. According to him, the driver of motor vehicle registration number KBK 825H was to blame for the accident. He stated that the said driver was driving at a high speed. That there were bumps ahead but the driver did not slow down and at the last bump as he was trying to avoid a pothole, he swerved to the oncoming lane and was unable to return to his lane thus colliding head-on with the motor cycle.

That the matatu collided with the motor cycle on its right lane and that the matatu was being driven carelessly.

On their part, the defendants doubted the genuineness of the evidence adduced by PW3 arguing that the same was not corroborated by PW2 who claimed to have witnessed the accident.

I have looked at the statement of PW2 and he stated clearly that he did not witness the accident but went to the scene after it had already occurred and therefore he could not have collaborated the evidence of PW3 as alleged by the defendants. In their submissions, the defendants have relied on the case of Jane Wairimu Maina Vs. Peter Githinji Kahindi & Another (2006) ECLR where the court relied on the case of Lucy Muthoni Munene Vs. Kenneth Muchange & Another Nairobi HCCC. Number 858 of 1988 where the court held;

“”----- it is an elementary principle of adjective law that whoever deserves any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”.

They have also relied on the case of Peter Okello Omedi V Clement Ochieng [2006] ECLR wherein the court held;

“ The failure by both parties to observe their respective obligations to each other might have caused the accident and in the absence of clear and uncontroverted evidence, I set aside the apportionment of liability by the trial court and substitute with 50/50 against each party”

The court has considered the issue of liability. The evidence of PW2 who was an eye witness is a clear account on how the accident occurred. He stated that he was a conductor in a matatu plying that route and he knew the road too well. They were working in the same area with the deceased but he did not know him personally before the accident but the deceased family later reached him and requested him to make a statement. It is my considered view that he was a truthful witness and his evidence was believable.

The defendants called DW2, who produced a copy of the OB extract on the accident. The same was produced as exhibit 2. His evidence was that the deceased was to blame for the accident going by the police abstract which he sought to produce but which was objected to by counsel for the plaintiff which objection the court sustained. In regard to his evidence the court notes the following aspects;

- i. He did not investigate the accident herein
- ii. He is not the one who filled the police abstract that he sought to produce.
- iii. He is not the one who entered the information in the OB and he could not tell the court who entered the same
- iv. The OB did not indicate who made the report of the accident and he did not even bother to peruse the police file before he came to court to testify.

The court notes that the police issued four different police abstracts for the same accident containing different information and that affected the credibility of the evidence of DW2 and the contents of the OB. He could not vouch for the truthfulness of what was entered in the OB and his evidence was therefore hearsay and this court cannot attach much weight to it. In any event, his police abstract was not produced and despite the defendants having sought an adjournment to avail the maker of the same to court, that was never done. In the premises, I find the 2nd defendant fully liable for the accident. On the other hand, though the defendants pleaded particulars of negligence against the deceased, there is no evidence offered on their part to support the same.

On quantum, the plaintiffs have urged the court to award a total of kshs 5,814,650/= as follows;

- a. Loss of dependency Kshs. 5,460,000/=
- b. Loss of expectation of life Kshs. 200,000/=
- c. Pain and suffering Kshs. 30,000/=
- d. Special damages Kshs. 154,650/=

The defendants on their part have urged the court to award damages as follows;

- i. Loss of expectation of life, Kshs. 100,000/=
- ii. Pain and suffering Kshs. 10,000/=
- iii. Loss of dependency Kshs. 768,000/=

The court has considered the above proposals and the authorities relied on by the respective parties.

a. Loss of dependency:

The evidence available to the court is that the deceased was a motorcycle rider earning between Kshs. 1,000/= - 1,500/= per day. He was 31 years and was not married. The defendants have urged the court to apply minimum wages of Kshs. 8,000/= which was obtaining at the material time arguing that there was not sufficient proof of earnings. The plaintiff on his part has urged the court to apply a multiplicand of Kshs. 1,200/= and has relied on the case of **Jacob Ayiga Maruja & another vs Simeon Obayo [2005] eKLR** (suing as the personal representatives of the estate of **Thomas Ndaya Obayo Kisumu Civil appeal No. 167/2002** where the court of appeal held that production of certificates is not the only way to prove the profession of a person and that production of documents is not the only way of proving loss of earnings. I concur with the plaintiffs submissions in this regard. However, the court also takes Judicial Notice of the fact that in a business like what the deceased was engaged in, the amount earned per day cannot be the same throughout the month. There are times when business is good and other times when it goes down. In the circumstances, I find Kshs. 700/= per day as a reasonable amount. The court also takes judicial notice of the fact that the motor cycle rider requires some days off in a month to rest. A total of 25 working days in a month is reasonable.

On the dependency ratio, it is trite that the extent of dependency is a question of fact to be established in each case. See the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Another [2013]eKLR** which cited the case of **Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988** and find that a ratio of ½ is reasonable in the circumstances of this case.

On the multiplier, the plaintiffs have urged the court to adopt 35 years while the defendants have submitted on 24 years. Being guided by the cases of **Mildred Aori Odunga vs. Hussein Daisy Limited (2010) eKLR** and that of **Henry Moruka vs. Catholic Diocese of Nairobi (Hccc. No. 241/2014) at Nairobi**, a multiplier of 25 years is reasonable.

On loss of expectation of life, a sum of Kshs. 150,000/- is reasonable. I am guided by the case of **Violet Jeptum Rahedi vs. Gilbert Kubai Mbogori (2013) eKLR**.

On pain and suffering, there is evidence that the deceased died in hospital but the court was not told how long it took before he succumbed to the injuries. A total of Kshs. 30,000/- for pain and suffering is reasonable. See the case of **Patricia Mona & Dennis Antony Musyoka Vs.**

On special damages Kshs. 129,381 is claimed in the amended plaint. It is trite law that special damages must be pleaded with as much particularity as circumstances permit and they must also be proven. See the case of **Francis Muthee Nthiga Vs. David N. Waweru (2014) eKLR** quoted in the decision of **Coast Bus Services Ltd. Vs. Murunga Banyani & 2 others Civil Appeal No. 192/1992** (unreported). The plaintiffs produced receipts totaling to kshs. 82,000/- which I hereby award.

On the material damage claim, Kshs. 74,000/= was pleaded being Kshs. 70,000/= as the pre-accident value of the motor cycle and Kshs. 4,000/= as Assessors fee. The law is clear that a material damage claim is in a special category of special damages and has to be pleaded and proven. The court has considered the two valuation reports produced in evidence by both parties herein. From the two reports, the assessors are in agreement on the pre-accident value/replacement value of the motor cycle at Kshs. 70,000/-. Save for the assessor's report that they produced as an exhibit, the plaintiffs did not call the assessor as a witness. On their part, the defendant called DW1. In his report he has agreed with the plaintiff's assessor that the motor cycle was a total loss. It was his evidence that in arriving at a figure of Kshs. 56,000/- he looked at the year of manufacture, the date of registration, the date of loss and subjected it to depreciation for the time it was operated.

According to him, it had been operated for eight months before the loss from 15/04/2010 when it was registered until the 6/01/2011. He applied a rate of 5% as the depreciation rate which is the show room depreciation rate and not 8% which is the normal depreciation rate. He stated that he heavily relied on the plaintiffs' report but he did not see the motor cycle. Comparing the two reports, I note that the plaintiffs' report has not taken into account the depreciation value on registration, value after registration and value at the end of eight months and also the probable defects which were very material in this case considering that the motor cycle was on the road for eight months and it was subject to tear and wear. In the premises, the defendants' report would be more accurate than the plaintiffs'. In that case, the court makes an award of Kshs. 56,000/- as pre-accident value of the motor cycle. As stated earlier on, the claim for material damage is a special damage claim. In addition to the proven special damages of Kshs. 82,000/=-, the court awards a further sum of Kshs. 56,000/= as the value of the motor cycle at the time of the accident. This makes a total of kshs. 138,000 a figure that is more than what was claimed.

The court can only make an award of Kshs. 129,381 pleaded and not more.

In the end, judgment is hereby entered for the plaintiffs against the defendants as follows.

Liability 100%

Loss of dependency = $Kshs. 700 \times 12 \times 25 \times \frac{1}{2} \times 25 = Kshs. 2,625,000/=$

Loss of expectation of life = Kshs. 120,000/=

Pain and suffering = Kshs. 20,000/=

Special damages = Kshs. 129,381/=

Total = Kshs. 2,894,381/=

The plaintiffs are also awarded the cost of the suit. The special damages to earn interest from the date of filing of the plaint whereas the general damages shall attract interest from the date of this judgment.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 14TH Day of NOVEMBER, 2019.

.....
L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*