



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 343 OF 2007**

**DINA MORAA & JAMES ONSANDO MOSE (Suing as the legal representatives of the estate of JAQUINE OSORO-Deceased).....PLAINTIFFS**

**-VERSUS-**

**THE SOTIK TEA COMPANY.....DEFENDANT**

**JUDGMENT**

1. Dina Moraa & James Onsando Mose, the plaintiffs herein and the legal representatives of the estate of Jaquine Osoro (*“the deceased”*) instituted the suit against the defendant by way of the plaint dated 13<sup>th</sup> April, 2007 in which they sought for both general damages under the Law Reform Act, Cap. 26 and the Fatal Accidents Act, Cap. 32 and special damages in the sum of Kshs.27,600/ plus costs of the suit and interest thereon.
2. The defendant was sued in its capacity as the registered owner of tractor registration number KAC 194Z Massey/Ferguson (*“the subject vehicle”*) at all material times.
3. The plaintiffs pleaded in their plaint that sometime on or about the 13<sup>th</sup> day of April, 2004 the deceased was lawfully walking on the pedestrian side of the road at Arrokyet Tea Estate when the defendant’s driver/employee negligently drove the subject vehicle, causing the same to knock down the deceased, leaving him with fatal injuries. The particulars of negligence were set out under paragraph 4 of the plaint.
4. It was similarly pleaded in the plaint that the deceased who was a minor and enjoying robust health prior to his death has left behind the following dependants:
  - (i) Dina Moraa                      Mother
  - (ii) James Onsando Mose        Father
5. Upon entering appearance, the defendant put in the statement of defence dated 19<sup>th</sup> May, 2008 to deny the plaintiffs’ claim.
6. Furthermore, the defendant averred in its defence that while it is admitted that the accident took place on the date and at the place indicated in the plaint, the particulars of negligence were denied. The defendant instead attributed the accident to negligence on the part of the deceased minor, the particulars of which it set out in its defence.
7. The defendant equally denied the particulars of loss/damage pleaded in the plaint.
8. At the hearing, the parties consented to the production of all the documents constituting the plaintiffs’ list of documents with the exception of the police abstract which was to be produced by the relevant police officer.
9. The 2<sup>nd</sup> plaintiff, namely James Onsando Mose, testified as PW1. In his evidence in chief, he adopted his witness statement as signed and filed.
10. Upon cross-examination, the 2<sup>nd</sup> plaintiff stated that he is the father of the deceased who died at the age of 11 years.
11. PW1 also gave evidence that prior to his death, the deceased attended Gucha Primary School, adding that the deceased had a partial hearing impairment.

12. It was also PW1's evidence that though he did not witness the accident, he can only infer that the subject vehicle was being driven at high speed at all material times, given the nature of injuries sustained by the deceased and in accordance with the sketch map shown to him, though adding that he later on visited the scene.
13. On being re-examined, the 2<sup>nd</sup> plaintiff reiterated that the deceased was in the company of fellow pupils when the accident took place and that the said accident occurred in a straight sketch.
14. When the matter came up before this court for further hearing on 26<sup>th</sup> May, 2019 it was noted that neither the plaintiffs nor their advocates were in court, hence the defendant's advocate applied to have the plaintiffs' case closed and which application this court allowed for the reasons aforementioned.
15. David Kiprono Mutai who was DW1 testified that he was employed as the defendant's driver and that prior to the accident, he had driven the subject vehicle for over four (4) years and had never been involved in an accident during that period.
16. It was the witness' evidence that he was not driving at a high speed and that he had in fact applied emergency brakes but was unable to avoid the accident, adding that it is he who reported the accident at the police station.
17. At the close of the hearing, the parties filed and exchanged written submissions. I have considered the same coupled with the authorities relied upon and I have observed that the twin issues for determination are on liability and quantum.
18. On *liability*, it is upon me to establish whether the defendant was negligent on the one part, and on the other part, whether the deceased contributed to the accident.
19. The plaintiffs submitted that the driver of the subject vehicle owed the deceased a duty of care and which duty of care he breached, resulting in the accident.
20. According to the plaintiffs, the evidence produced before this court shows that the accident was purely the result of negligence on the part of the defendant's driver who sped and veered off the road onto the pedestrian side; maintaining that the deceased did not in any way contribute to the accident while relying on the case of **EWO v The Chairman Board of Governors Agoro Yombe Secondary School [2018] eKLR** where the court held that a child should only be found guilty of contributory negligence once it can be established that he or she is of such an age as to be able to take the necessary precautions to ensure his or her safety.
21. In the end, the plaintiffs urged this court to find the defendant 100% vicariously liable.
22. In contrast, the defendant maintained its position that the plaintiffs have utterly failed to satisfy the evidentiary burden of proof associated with the tort of negligence, citing *inter alia*, the case of **East Produce (K) Limited v Christopher Astiado Osiro [2006] eKLR** in which the High Court acknowledged the duty of a plaintiff to prove some extent of negligence against a defendant where his or her claim rides on the tort of negligence.
23. Moreover, the defendant argued that the oral evidence of the 2<sup>nd</sup> plaintiff was purely hearsay since he did not witness the accident, hence inadmissible and merely speculative, further arguing that in any case, the plaintiffs did not call the investigating officer to produce the abstract, thus failing to meet the legal and evidentiary burden of proof in their claim.
24. It was the defendant's further submission that its driver was driving at a reasonable speed and that it was the deceased who abruptly appeared on the road while attempting to cross; maintaining that the said driver took all reasonable measures to avoid knocking down the deceased, to no avail. In this regard, the defendant urged this court to consider **Bawani Stores Limited & another v Margaret Magiiri Gitau [2015] eKLR** where the High Court on appeal substituted a finding on liability at 100% with that of 50:50 where a plaintiff was knocked down while attempting to cross the road; as well as **Postal Corporation of Kenya & another v Dickens Munayi [2014] eKLR** in which liability on appeal was apportioned in a similar fashion.
25. Ultimately, the defendant urged that should this court decide to apportion liability, then the same be done in the ratio of 50:50.
26. As the defendant correctly put it, the law is well settled that the legal burden of proving a claim for negligence rests with the plaintiff.
27. In the present instance, it is not in dispute that the accident took place. From my perusal of the pleadings and evidence, it is equally not controverted that the subject vehicle at all material times belonged to the defendant.
28. Further to the above, going by his evidence, it is clear that DW1 was in control of the subject vehicle when it knocked down the deceased.
29. From the foregoing, it cannot be questioned that the defendant's driver like any other driver on the road owed other road users a duty of care.
30. That said, the question that arises is whether there was a breach of such duty of care. Going by the evidence tendered before me, I have gathered on the one hand that PW1 did not witness the accident, neither did the plaintiffs call the investigating officer to produce the police abstract or sketch map, nor did they seek to call any other person who witnessed the said accident. Be that as it may, I am satisfied that since the occurrence of the accident is not denied, his evidence is admissible before this court.

31. On the other hand, DW1 mentioned that the road was wet and slippery, which position cannot be verified in the absence of any independent witness or evidence. Suffice it to say that he admitted to hitting the deceased and there is no way of telling the speed at which he was driving when the accident took place.

32. Though it is apparent that there are a few unfilled gaps in the circumstances of this case, it is my view that for the driver to have fatally knocked down the deceased, he must have been driving at a speed which would not have enabled him to brake in good time. The driver ought to have been on the lookout and exercised particular caution while on the road. It therefore follows that the duty of care owed to the deceased was breached, thereby leading to his death. I am therefore satisfied that the plaintiffs, having pleaded the *res ipsa loquitur* doctrine in their plaint, proved negligence against the defendant to the required standard.

33. Nevertheless, the circumstances of this case call upon me to consider the probability of any contributory negligence by the deceased notwithstanding the fact that this court did not have the privilege of hearing any independent witnesses for either party.

34. I noted PW1's evidence regarding the partial hearing impairment of the deceased, though he did not disclose the extent of such impairment. It is my opinion that it is therefore plausible that the deceased did not hear the subject vehicle approaching, though I also take the view that the deceased ought to have been able to see the subject vehicle regardless.

35. I have considered the evidence to the effect that the deceased was a minor coupled with the abovementioned authorities quoted by the plaintiffs in respect to contributory negligence for minors. I take the view that at 11 years of age, the deceased had a reasonable level of awareness on the need to be exercise care while near the road.

36. For the foregoing reasons, I would be hesitant to find the defendant entirely to blame. I have considered the Court of Appeal case of **Nderitu v Ropkoi & Another (2004) eKLR** as cited in **Postal Corporation of Kenya & another v Dickens Munayi [2014] eKLR** where an apportionment of 50:50 was made in the absence of clear evidence coupled with the finding that both road users were to blame for the accident.

37. While I acknowledge that the evidence herein is scanty as to the occurrence of the accident, I am also inclined to take into account the age of the deceased minor in addition to the fact that no evidence was adduced to show that at his age, he was not aware of the possible dangers associated with the road. In my view and being guided by the case of **MWM Suing as the administratrix of the Estate of the Late HGW v David Irungu Gichanga** where the court apportioned liability at 90:10 in the instance of a 10/11 year-old deceased minor, I deem it fair to apportion liability in a similar ratio of 90:10 in favour of the plaintiffs.

38. This brings me to the second issue for determination which has to do with *quantum*, beginning with the general damages which are sought in line with the provisions of the Law Reform Act and the Fatal Accidents Act.

*a) Pain and suffering*

39. Under this head, the plaintiffs sought the sum of Kshs.80,000/ though they did not cite any guiding authorities, whereas the defendant proposed a sum of Kshs.50,000/ with reliance on the cases of **David Ndungu v Wesley Kiptalam Kiptoo [2010] eKLR** and **F M & another v Joseph Njuguna Kuria & another [2016] eKLR** where similar awards were made at the instance of plaintiffs who had passed on within two (2) days of the accident.

40. Going by the evidence of PW1 supported by the certificate of death adduced as evidence, it is apparent that the deceased minor died two (2) days after the accident, during which time he likely suffered as a result of his injuries. I therefore find an award of Kshs.50,000/ to be reasonable.

*b) Loss of expectation of life*

41. On their part, the plaintiffs sought for an award of Kshs.200,000/. The defendant urged an award of Kshs.100,000/ citing *inter alia*, **Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR** in which case an award of Kshs.100,000/ was made where the deceased died at 12 years of age.

42. I have considered the above and note that the plaintiffs did not avail any authorities to support their proposed award under this head.

43. Needless to say, I appreciate that the courts have on previous occasions awarded conventional sums of Kshs.100,000/ thereabout, which I find reasonable. I will therefore make a similar award.

*c) Loss of dependency/lost years*

44. Under this head, it was the plaintiffs' submission that this court applies a multiplier approach by taking a multiplier of 40 years coupled with a multiplicand of Kshs.4,500/ to read as follows:

$$Kshs.4,500 \times 12 \times 40 = Kshs.2,160,000/$$

45. In contrast, the defendant contended that a multiplier approach would not suffice since the future of a minor cannot be ascertained.

46. I have considered and fully support the holding in **Oshivji Kuvengi & Another v James Mohamed Ongenge (Suing as a representative of the estate of Samuel Ongenge) [2012] eKLR** relied upon by the defendant where the High Court rendered itself thus:

**“I would, in the instance hold the view that the future of a minor is uncertain and it might be risky to assume what life he/she would have lived into adulthood. As such, I would award a global figure under the head of loss of dependency.”**

47. In the present scenario, I observed that the plaintiffs did not adduce any evidence to show the performance or school abilities of the deceased prior to his death or how far along he was in his education. It is therefore impossible to tell what he would have become in the future. In the premises, a global approach would be more suitable.

48. In the absence of authorities cited in this regard by the plaintiffs, I have taken into account the case of **H. Young & Company EA Ltd. & another v James Gichana Orangi-Kisii HCCA NO.207 of 2009** quoted by the defendant where an award of Kshs.323,300/ was substituted with one of Kshs.300,000/ for a deceased who was aged 11 years, though I note that the decision was made a few years back.

49. I have also drawn guidance from the more recent authorities of **Palm Oil Transporters & another v W W N [2015] eKLR** where a global award of Kshs.400,000/ was upheld on appeal in the case of an 11-year old deceased minor, and **MWM Suing as the administratrix of the Estate of the Late HGW (supra)** in which the High Court similarly upheld a global award of Kshs.600,000/ for a deceased minor bearing a similar age.

50. From the foregoing, I am satisfied that an award of Kshs.600,000/ would suffice under this head.

**d) Special damages**

51. The plaintiffs urged this court to award the amount of Kshs.48,700/ under this head, inclusive of the funeral expenses.

52. The defendant on its part contended that the special damages must be awarded as pleaded and proved.

53. It is trite law that special damages must be both specifically pleaded and strictly proved. I have perused the plaint and it is my observation that the special damages pleaded therein amounted to Kshs.27,600/ which is less than what was indicated in the submissions.

54. Upon considering the evidence before me, I have found that the plaintiffs only availed receipts totaling the sum of Kshs.12,576/. In the premises, I can only grant this sum being what was both pleaded and proved.

55. Consequently, I hereby enter judgment in favour of the plaintiffs as against the defendant in the manner hereunder:

**(i) Liability** *90:10 in favour of the plaintiffs*

**(ii) General damages**

**a) Pain and suffering** *Kshs.50,000/*

**b) Loss of expectation of life** *Kshs.100,000/*

**c) Loss of dependency** *Kshs.600,000/*

**(iii) Special damages** *Kshs.12,576/*

*Gross Total* *Kshs.762,576/*

*Less 10% contribution* *(Kshs.76,257.60/)*

***Net Total*** ***Kshs.686,318.40***

56. Costs of the suit are awarded to the plaintiffs. The plaintiffs shall also have interest at court rates on special damages from the date of filing of the suit and interest at court rates on general damages from the date of judgment until payment in full.

**Dated, signed and delivered at NAIROBI this 13<sup>th</sup> day of December, 2019.**

**J.K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiffs

..... for the Defendant