



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 299 OF 2015

NAMBUKI NGYEMA KILONZO.....PLAINTIFF

-VERSUS-

PATRICK KIAMBA.....1ST RESPONDENT/DEFENDANT

JOSEPH OSWAGA.....2ND RESPONDENT/ DEFENDANT

JUDGMENT

- 1) On 31st August 2012, **Francis Mbithe Kilonzo** deceased, was fatally injured in a road traffic accident while travelling as a fare paying passenger aboard motor vehicle registration No KAY 204R along Kajiado - Nairobi Road.
- 2) Ndambuki Ngyema Kilonzo, the plaintiff herein and the deceased's widower filed this suit on his own behalf and on behalf of the deceased's dependants under both the Fatal Accidents Act and the Law Reform Act against Patrick Kiamba and Joseph Oswaga, the 1st and 2nd Defendants respectively vide the plaint dated 31st August 2015.
- 3) In the aforesaid plaintiff the plaintiffs sought Judgment as follows:
 - a. *Special damages for ksh. 15,600.*
 - b. *General damages.*
 - c. *Costs of the suit.*
 - d. *Interest on (a) above at Court rates from the date of filing the suit until payment in full.*
 - e. *Interest on (b) and (c) above at Court rates from the date of Judgment until payment in full.*
 - f. *Any other relief this Honourable court may deem fit in the circumstances.*
- 4) The plaintiff successfully obtained a default Judgment against the defendants hence this suit proceeded for hearing as a formal proof.
- 5) The plaintiff testified without summoning independent witnesses to testify in support of his case. At the close of evidence the plaintiff filed written submissions Ndambuki Ngyema Kilonzo (PWI) adopted the contents of his written witness statement.
- 6) He stated that the deceased was his wife and that he obtained limited letters of administration ad litem whose copy he tendered as an exhibit in evidence.
- 7) PWI stated that Patrick Kiamba was the registered owner of motor vehicle registration number KAY 204 R, a public service vehicle and that Joseph Oswaga, at the material time was the driver of the aforesaid motor vehicle.
- 8) The plaintiff further stated that on 31st August 2013, the deceased was a fare paying passenger aboard the aforesaid motor vehicle along Kajiado – Nairobi Road when the 2nd defendant, managed and or controlled the same negligently that it got involved in an accident as a result of which the deceased sustained serious fatal injuries. The plaintiff stated that the deceased was aged 46 years at the time of death.
- 9) The Plaintiff listed the names of the deceased's beneficiaries as follows:

- a) Ndambuki Ngyema, Kilonzo - Husband 55 years
- b) Pauline Nduti Ndambuki, Daughter -24 years
- c) Mercy Kavivi Ndambuki, Daughter- 22 Years
- d) Maureen Wausi Ndambuki, Daughter -18 years

10) The plaintiff also produced a copy of the registration record, which shows that the motor vehicle is registered in the name of 1st Defendant. He also produced the police abstract to show that the 2nd Defendant was the driver of the motor vehicle.

11) It is pointed out by the plaintiffs that the 2nd Defendant negligently drove the aforesaid motor vehicle in high speed thus losing control and thus crashing and therefore the 1st Defendant should be held vicariously liable for the actions or omission of the 2nd Defendant .

12) PW1 said that the time of the accident the deceased was engaged in gainful employment as a registered nurse by **J.D Mc Carty Centre** and **Red Rock Behavioral Health Service** both based in Oklahoma City in the United States of America.

13) PW1, produced letters of appointment and pay slips. He also stated that the deceased enjoyed robust health before and at the time of the accident PW1, averred that as a result of the accident the deceased's estate suffered great loss and damage.

14) The plaintiff also produced documents showing that the deceased earned USD. 37,136.24 at J.D McCarty Center between January and August 2012 and also a sum of USD, 8,702.5 in the same period in Red Rock and that she used to support the family using 2/3 of the aforesaid earnings. The plaintiff also tendered documentary evidence showing the amount of money he spent to travel from the USA to Kenya to testify in this case.

15) Having considered the evidence and the submissions made by the plaintiff, two issues commend themselves for determination.

a) **First**, whether the defendants are liable for accident that fatally injured the deceased.

b) **Secondly**, whether the plaintiff is entitled to claim damages and if yes how much?

16) On the first issue, the plaintiff submits that the accident was solely caused by the negligent acts and omissions of the 2nd defendant. It is the evidence of PW1 that the 2nd defendant drove the motor vehicle at high speed and in a reckless manner. The plaintiff further tendered evidence showing that the deceased suffered a fractured skull as a result of the crash.

17) The deceased was a fare paying passenger hence she cannot take any blame. The plaintiff's evidence has not been controverted. I find that the plaintiff has proved his case to the required standards. I therefore, find the 2nd defendant wholly liable for the accident and the 1st Defendant vicariously liable for the accident caused by the 2nd Defendant.

18) The second issue is on quantum. Having established that the defendants are liable for the accident, the plaintiff is therefore entitled to claim damages. The plaintiff asked this court to award him ksh. 100,000/= for pain and suffering considering the nature of injuries the deceased sustained. It is clear that she must have suffered great pain before her demise. I award the plaintiff ksh. 30,000/=.

19) A claim for loss of expectation of life has also been lodged. The plaintiff asked this court to award him a sum of ksh. 300,000. The available authorities show that this court has previously awarded sums between 100,000/= and ksh 150,000/=. I award a sum of ksh 100,000/=.

20) The other head claimed in loss of dependency. The plaintiff claimed a sum of ksh 130,616,000/= which is arrived at by applying the multiplicand of 29 years at a rate of 563,000 by 2/3. The plaintiff stated that the deceased could have worked upto the age of 75 years since there is no retirement age in the USA.

21) Two issues emerge from the claim on this head by the plaintiff. The first issue is the question on the applicable monthly pay by the deceased used to receive. It is admitted in evidence that the deceased was employed as a nurse with **J.D Mccarty centre** earning a monthly salary of USD 37,136.24. It is also said she used to work part time with **Red Rock Behavioral Health Service** earning a sum of USD 8,702.5.

22) I think the appropriate employment this court should rely in assessing the monthly pay is that of **J.D Mccarty centre**, since it was the main employment of the deceased unlike **Red Rock Behavioral Health Service** where the deceased did part time. It is said she earned USD 37,136.24 between January and August 2012. It means the deceased earned a monthly pay of USD 4642.03, which is equivalent ksh. 464,203/=

23) The second issue is the appropriate age of retirement. The deceased was aged 46 years. I think the court must apply its discretion to set up a reasonable and appropriate multiplicand on age.

24) I am convinced that due to uncertainties of life that the deceased could as well have worked up to the age of 60. Therefore, I find a multiplicand of 14 years to be reasonable. Therefore the appropriate award on this head should be ksh 25,995,368 tabulated as follows:

464,203 x 14 x 12 x 1/3 = 25,995,368/=

25) The final prayer is for payment of special damages which is ksh. 15,600/= The amount was proved hence it is awarded as prayed.

The plaintiff has also sought for witness expenses in the sum of ksh. 1,003,076.28.

The prayer was not pleaded in the plaint therefore, it cannot be awarded. However, the Plaintiff should be awarded witness expenses provided for under the Civil Procedure Act and Rules.

26) In the end Judgment is entered in favour of the plaintiff and against the defendant jointly and severally as follows:

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|--|---------------------|
| i) Special damages ksh. | 15,600/= |
| ii) General damages for pain and suffering | 30,000/= |
| iii) Loss of expectation of life | 100,000/= |
| iv) Loss of life dependency ksh | 25,995,368/= |
| Total ksh | 26,140,968/= |
| v) Costs of this suit | |

Dated, signed and delivered at Nairobi this 13th of December, 2019.

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the 1st Respondent

.....for the 2nd Respondent