



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 509 OF 2012

**N W K & P B G (BOTH SUING AS THE PERSONAL REPRESENTATIVES
OF THE ESTATE OF S N K) DECEASED.....PLAINTIFFS**

VERSUS

FONTANA LIMITEDDEFENDANT

JUDGEMENT

The course of action herein is alleged to have arisen following a Road Traffic Accident that occurred on the 24th day of October, 2011 along Naivasha- Nairobi Highway near Gichengo at magina area.

In the plaint filed in court on the 19th October, 2012, it is averred that, the deceased S N K was lawfully driving motor vehicle registration number [Particulars withheld] lorry along Naivasha- Nairobi Highway when the defendant's driver and/or authorized agent, so negligently drove and/or managed its motor vehicle registration number KBG 984E that he permitted the same to lose control and violently collide with motor vehicle [Particulars withheld].

The particulars of negligence on the part of the defendant's driver are set out in paragraph 4 of the plaint while those of damage suffered by the estate of the deceased were set out in paragraphs 5 and 6 of the plaint. The plaintiffs have therefore filed the suit claiming damages both under the fatal accidents and the Law Reforms Acts.

The defendant filed its defence on the 20th February, 2013, and denied inter alia that it was the registered owner of motor vehicle registration number KBG 984E and that the same was being driven by its authorized driver at the time of the accident. It also denied that an accident occurred on the 24th October, 2011 involving any of its motor vehicles or at all and in particular its motor vehicle registration number KBG 984E and the deceased S N K, it was also denied that its driver was negligent. It averred that the accident was solely or substantially contributed to by the negligence on the part of the deceased and it has set out the said particulars in paragraph 5 of the defence. The particulars of loss and damage pleaded in the plaint are also denied.

A reply to the defence was filed on the 26th February, 2013 in which the plaintiffs join issues with the defendant's defence and have also denied the particulars of negligence attributed to the deceased.

In support of their case the plaintiffs called three witnesses,

The first plaintiff gave evidence as PW 1. She is the mother to the deceased and the wife to the second plaintiff P G. She sought to rely on the statement filed in court and the same was adopted as her evidence

in chief. She also sought to rely on the documents filed in the case herein which she also produced as exhibits. Among the documents that she produced are the demand letter dated the 30th November, 2011, copy of records for motor vehicle registration number KBG 984E, certificate of death for S N K, limited grant of letters of administration issued on the 7th May, 2012, Police Abstract, Certificate of birth for B K, statutory notice to Jubilee Insurance Co. Limited dated the 30th November, 2011 and receipts in support of special damages. She told the court that the deceased was their son and they were depending on him as the 2nd plaintiff had retired. That the deceased had two children namely B K and D W aged 11 and 8 years respectively as at the time of the accident. That he had divorced with his wife for 8 years and the plaintiffs were staying with the children but the deceased was solely responsible for the children.

She further told the court that the deceased was a driver earning Kshs. 18,000/= and a house allowance of Kshs. 6,000/= per month. He was giving them merely the entire sum. The deceased was aged 32 years at the time of his death and he enjoyed good health. He was working as a driver with [Particulars withheld] Limited.

She further told the court that the deceased was the provider of the young family and the aged parents and with his death, the estate has suffered loss and damage. That the estate spent over Kshs. 150,240/- as funeral expenses as per the documents filed in court.

On cross examination, it was her evidence that she did not witness the accident. She confirmed that as per the letter of appointment the deceased salary was Kshs. 15,000/- plus allowances of Kshs. 3,000/-. She said she is a farmer and she sells farm produce to feed herself and the children as the second plaintiff has retired. She has been a farmer for the last 30 years and she gets between Kshs.20,000/- to Kshs.60,000/- from the sale of farm produce. The deceased would send them between Kshs. 12,000/- - Kshs.13,000/- every month but the figures could fluctuate. The deceased used to live in Nairobi and could send her money for school fees which was about Kshs.6,000/- to 8,000/- per term for each child who are both in a private school.

Festo Matakwa Shisia gave evidence as PW2. It was his evidence that they were working together with the deceased at [Particulars withheld] Ltd. He applied to have his statement adopted as part of his evidence in chief. He told the court that on the 24th October, 2011 he was with the deceased and Paul Karimi in motor vehicle [Particulars withheld] and it was being driven by the deceased. They were travelling from Kitengela to Nakuru when they were involved in an accident at Magina area. The accident involved their vehicle and the defendant's motor vehicle registration number KBG 984E which was travelling from the opposite direction.

It was his evidence that motor vehicle KBG 984E was coming at a high speed and as it approached the vehicle they were travelling in, it was covering most of the road beyond the centre. The deceased tried to flash the lights so that the driver of the other vehicle could reduce the speed but unfortunately it hit and destroyed the cabin of the vehicle that they were travelling in after which their vehicle twisted.

That their vehicle stopped on the other side of the road. Motor vehicle KBG 984E hit their vehicle by its angle line after which their vehicle twisted, the right front tyre burst and the steering wheel also broke. It proceeded to the front and hit the other side of the road.

The deceased died on his way to hospital. That their driver was going uphill and he was driving at a speed of 60Kph. He reiterated his evidence that it was the lorry that hit the canter and that their driver was not driving at a high speed but it was the lorry that was being driven at a high speed. He was the last to be evacuated from the scene and the police found him there.

Paul Karimi Macharia gave evidence as PW3. He was a co-employee of the deceased at [Particulars withheld] Limited at the material time. He told the court that PW2, the deceased and himself were in motor vehicle [Particulars withheld] heading to Naivasha when the accident occurred. The deceased was driving the said vehicle. His statement was adopted as part of the evidence in chief.

According to him he saw motor vehicle KBG 984E being driven at a high speed from the opposite direction. It went on their side of the road and hit the vehicle that they were travelling in, on the right side. That their driver had tried to move to the far left. After the impact, their vehicle moved to the right side of the road as one heads to Nakuru. It was his further evidence that the deceased was driving keenly at a speed of about 60Kph and there were no other vehicles on that road at the material time. The deceased was thrown off the vehicle and the vehicle that they were travelling in, fell on him. That as the deceased and himself were being taken to hospital, the deceased died after ten minutes. The lorry stopped some distance from the scene of the accident. The deceased flashed lights to the other driver. There was a corner ahead on the road and the lorry had just negotiated the corner but the driver was unable to return to his lane and the two vehicles collided on their side of the road.

On cross examination he told the court that he was sitting in the middle in the driver's cabin and he was checking the speedometer and that their driver was driving at 60Kph. He said he saw the lorry when it was 20 metres away and it was being driven at the middle of the road and their driver could not swerve to the left as there was a ditch. The driver of the vehicle they were in, slowed down. When asked to draw a sketch plan where the point of impact was, his sketch showed that the point of impact was at the centre of their side of the road. On being shown the photos, he stated that the lorry was damaged on the side and that it did not have damages on either the left side or the front. While their vehicle had damage on the cabin and the body.

On further cross examination, it was his evidence that the lorry's right side mirror hit their vehicle's windscreen first, then the angle line hit the cabin right hand side.

In re-examination, he stated that the first impact was the lorry's side mirror which hit their vehicle which lost control on being hit and that the point of impact was on their side of the road.

The defendant did not call any witnesses to support it's case but both parties filed their submissions which this court has duly considered.

On liability, the plaintiffs submitted that from the evidence of the two eye witness, the driver of motor vehicle KBG 984E was negligent. He was driving at a high speed which was dangerous to the other road users and given that he was negotiating a corner he lost control of the lorry and rammed into motor vehicle [Particulars withheld], he failed to control the said motor vehicle, he failed to heed warning from the deceased, the point of impact was on the lane of motor vehicle registration number [Particulars withheld]. The defendant's sketch plan and photos were not produced and the defendant did not show how the accident occurred at all as it did not call any evidence. They urged the court to find the defendant 100% liable for the accident.

The defendant on its part capitalized on the evidence on record by PW2 and PW3 and especially on cross examination. Counsel for the defendant referred to the defendant's list of documents filed on the 20th February, 2013 and argued that according to those documents the defendant's motor vehicle does not show any frontal impact, it only shows shattered right driver's window, side mirror and cracked cargo body.

The defendant submitted that PW2 and PW3 could not explain why motor vehicle [Particulars withheld] finally rested on the left side of the lane the defendant's motor vehicle was using.

On quantum of damages, the Plaintiffs have submitted as follows:-

a. Loss of dependency

A multiplier of 35 years was suggested and in so doing so, the court was asked to consider the age of the deceased who was 32 years at the time of his death. The court was also asked to consider the official retirement age in Kenya at 60 years. A multiplicand of Kshs.18,000 was suggested which was his salary, going by the letter of appointment dated 12th September, 2011 which was produced as an exhibit. On dependency ratio, they urged the court to apply a

conventional ratio of 2/3.

b. Loss of expectation of life

They have urged the court to award a sum of Kshs.200,000/- considering the age of the deceased. They have relied on the case of **Violet Jeptum Rahedi Vs Albert Kubai Mbogori (2013) eKLR (HCCC No. 676/2009)** where a sum of Kshs.150,000/- was awarded for a deceased aged 44 years.

c. Pain and suffering

A figure of Kshs.30,000/- was suggested relying on the case of **Partricial Muna & Dennis Antony Musyoka (suing as personal administrators to the estate of Antony Musyoka) Vs Samuel Opot Omondi & National Environment Management Authority HCCC No. 574/2010** where an award of Ksh.20,000/- was made for a deceased who died at the scene of the accident.

d. Lost years

They asked the court not to make an award under this head and have relied on the case of **Hellen Waruguru Waweru [suing as the legal representative of Peter Waweru Mwenja (deceased)] Vs Kiarie Shoe Stores Limited (2015) eKLR.**

e. Special damages

The court was asked to award a total of Kshs.176,840/- as pleaded in the Plaint. On behalf of the defendant, a sum of Kshs.20,000/- was suggested for pain and suffering and the proposal is supported by the decision of the court in the case of **Philip Musyoka Vs Veronicah Mbula Mutiso (2013) eKLR.**

Under the head of loss of expectation of life, the defendant has proposed a figure of Kshs.100,000/- and has relied on the case of **Loise Wangui Macharia vs Hussein Dalacha & Another (2007) eKLR** and that of **Alice O. Alukwe Vs Akamba Bus Road Services (2013)eKLR.**

On loss of dependency, a multiplier of 20 years is suggested relying on the case of **Elijah Ole Kool Vs George Ikonya Thuo (2001) eKLR** and that of **Martha Ndiro Odera & Another Vs Come Cons Africa Limited (2015)eKLR.**

As regards the dependency ratio, a $\frac{1}{2}$ has been suggested. The reasoning behind this is that the 2nd Plaintiff is a retiree who is getting pension. That the deceased was earning a sum of Kshs.18,000/- per month and must have been using part of it to pay rent, to buy food and other expenses as he did not stay with the Plaintiffs and therefore, it is not logical that the deceased spend on his family more than half of his salary. In total a sum of Kshs.2,160,000/- has been proposed under this head made up as follows:- $18,000 \times 20 \times 12 \times \frac{1}{2} = 2,160,000/-$. On special damages the defendant has asked the court to award the claimed sum of Ksh.176,840/-

The court has carefully considered the evidence on record with regard to both quantum and liability. It has emerged from the evidence that the accident was as a result of a collision between motor vehicles registration Nos. KBG 984E and [Particulars withheld]. The plaintiffs called two witnesses who gave an account of how the accident happened. They both told the court that motor vehicle KBG 984E was being driven at high speed and it had encroached on the lane of travel of the motor vehicle [Particulars withheld]. They also told the court that the point of impact was the lane that their vehicle was travelling on. This evidence was not controverted by the defendant as it did not call any witnesses to support its case.

The defendant tried to challenge the evidence adduced by the plaintiffs' witnesses by way of submissions. They also relied on photographs that were taken at the scene of the accident but the same

were not produced as exhibits. It is trite law that a party cannot prove a case by way of submissions without calling any evidence unless it's on matters of law and not facts. As it stands now, the only evidence on record as to how the accident happened is by the Plaintiffs. This court is persuaded by the evidence of PW2 and PW3 on how the accident occurred and I do not hesitate to find the defendant's driver wholly liable for the accident.

On loss of dependency, the multiplicand as suggested by both parties at Kshs.18,000/- is hereby adopted by the court. The ratio of $\frac{1}{2}$ suggested by the defendant is in my view reasonable considering that the plaintiffs earn a good income from farming and at the same time the 2nd plaintiff is on pension. I will therefore adopt the ratio of $\frac{1}{2}$ and a multiplier of 25 years.

In the end, the court makes the following awards on quantum under the various sub heads.

i. Pain and suffering	- Kshs. 25,000/-
ii. Loss of expectation of life	- Kshs. 120,000/-
iii. Loss of dependency 1	
8,000 x 25 x 12 x $\frac{1}{2}$	- Kshs.2,700,000/-
iv. Special damages	- <u>Kshs. 176,840/-</u>
TOTAL	- <u>Kshs.3,021,840/-</u>

The Special damages to earn interest from the date of filing of the suit and general damages from the date of this judgment.

The Plaintiffs shall have the costs of the suit.

DATED, SIGNED and DELIVERED at Nairobi this 16th day of February 2017

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L. NJUGUNA

JUDGE

In the presence:

..... for the plaintiff

.....for the defendant