REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL CAUSE NO. 125 OF 2003

MOHAMMED HUKA (Suing as personal

representative of the estate of HUKA WAKO) ……....PLAINTIFF

Versus

ADAN KOSI……..….....……..…1ST DEFENDANT

ABDI ADAN OMAR…….....……..….2ND DEFENDANT

EDWARD S.M. JUMA……..……....….....…….3RD DEFENDANT

JUDGMENT

Damages

[1] By Amended Plaint on 16th December 2003, the Plaintiff sought for judgment again the defendants jointly and severally for:-

(a) General damages for loss and life and dependency;

(b) Cost of the suit;

(c) Interest on (a) and (b) at court rates.

The basis for the suit is that on 17th December, 2001, the deceased who was travelling as a fare-paying passenger in said motor vehicle motor vehicle KAN 151C when the 1st Defendant so negligently drovethe said vehicle that it was involved in accident and as a result of which the deceased sustained fatal injuries. The suit proceeded on formal proof. But before I evaluate the evidence tendered, let me first establish the propriety of service herein.

Service of summons

[2] The summons and plaint were served upon the 1st and 2nd Defendants on 20th November, 2003 and 21st November 2003 as is evidence by the Affidavit of Service sworn on and file 22nd November and 12th February 2009, respectively. The 3rd Defendant was served with summons and Amended Plaint on 2nd March 2009 as evidence in the Affidavit of Service sworn and filed on 31st Mach 2009 and 17th February

2016 respectively. None of the defendants entered appearance or filed defence. Accordingly, interlocutory judgment was entered against the 1st and 2nddefendants and 3rd Defendant on 24th February 2009 and 5th May 2016 respectively. The suit was heard on formal proof on 18th August, 2016, 8th September, 2016 and 29th September, 2016.

Evidence

[3] The Plaintiff was the only witness who gave evidence. His evidence is already part of record and I need not rehash it. But the gist of his testimony was that the deceased was his father. He is also a holder of limited grant to the estate of the deceased which he produced as exhibit 1. He testified that, on 17th December 2001, the deceased was travelling in motor vehicle KAN 151C as a fare-paying passenger when the 1st defendant so negligently drove the said vehicle as to cause it to be involved in an accident and as a result of which the deceased sustained fatal injuries. The accident was reported as shown by the Police Abstract marked as exhibit 4(a; he paid Kshs. 100 vide receipt marked as exhibit 4(a). He narrated that the deceased was burned seriously in the accident and was taken to hospital where he succumbed to the burns after one week. See the doctor's report marked as exhibit 5 and the death certificate marked as exhibit 6. He blamed the driver of motor vehicle KAN 151C for the accidentand asked the court to hold him liable thereof. He also stated that the 2nd Defendant was the person who was using the said vehicle whilst the 3rd Defendant was the registered owner of the said motor vehicle. See exhibit 2 & 3. The two should be held vicariously liable for the accident.

[3] His further testimony was that the deceased was a farmer and kept livestock. The deceased maintained all his children- including the plaintiff- and paid school fees for them. The Plaintiff told the court that by his death the plaintiff and the other children of the deceased especially those named in paragraph 9(v) to (xii) of the plaint were deprived of his support and maintenance. He was therefore claiming damages for loss of dependency, loss of amenities, pain and suffering on his own behalf and that of the other children of the deceased. However, he stated that, the children of the deceased continued with their educationthrough the estate of the deceased. He produced receipts of the amount of fees the deceased used to pay for his 12 children named in the plaint. See exhibits 7(a) to (h).

Submissions

[4] The Plaintiff's counsel filed submissions. He argued that it has been shown that the 1st defendant caused the accident of 17th December 2001 as a result of which the deceased sustained fatal injuries.The plaintiff also pleaded the doctrine of *res ipsa loquitor* and urged the defendants to be held jointly and severally liable. It was submitted, therefore, that the plaintiff has proved negligence on the part of the defendants and should be so held liable. On quantum, the plaintiff submitted that it has been established that the deceased was aged 61 years at the time of his death. See Certificate of Death and Postmortem Report. It was also submitted that the deceased was an active businessman who traded in livestock between Garbatula and Isiolo. They beseeched the court to follow after the decisions of **Nancy Njeri [2003] eKLR** and **Mary NJeri [2016] eKLR** to the effect that a business person can continue being active up to 70 years. In both cases, the court awarded a sum of Kshs. 100,000 for loss of expectation of life for a deceased person who was 61 years old. The plaintiff so prays. As for pain and suffering, the plaintiff submitted that a sum of Kshs. 2,000,000 would be reasonable as the deceased suffered pain for five days.

[5] Loss of dependency was also elaborately submitted upon; that the deceased had 9 years of active trading to support his family. It was shown that before his death he paid school fees for every respective child which is proof of earnings of the deceased. He paid about Kshs. 1,512,000 school fees for the 12 children. And applying a multiplier of 9 years the plaintiff proposed a sum of Kshs. 13,608,000 for loss of dependency. The total sum claimed by the plaintiff in all the three limbs is, therefore, Kshs. 15,706,000.

DETERMINATION

Liability

[6] The defendants did not file any defence. However, does the evidence adduced prove negligence on the part of the 1st defendant?The plaintiff pleaded *res ipsa loquitor.* This principle of *res ipsa loquitor* is now abundantly clear and much has been written about it in eminent literary works as well as judicial decisions. But, as was written in ***Winfield &Jolowicz on Tort 17th Edition***-

"This has traditionally been described by the phrase res ipsa loquitur – the thing speaks for itself. …. Its nature was admirably put by Morris L. J. when he said that it:

'Possesses no magic qualities, nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin. When used on behalf of a plaintiff it is generally a short way of saying:

'I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the defendant …' There are certain happenings that do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer."

The learned author further wrote:

"The essential element is that the mere fact of the happening of the accident should tell its own story so as to establish a prima facie case against the defendant. This is commonly divided into two parts on the basis of Erle C.J.'s famous statement in Scott v London and St. Katherine Dock Co:

'<u>There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."(Emphasis mine).</u>

[6] Applying this test, is there reasonable evidence of negligence which suggest that the accident happened from want of care? First, the evidence before the court is that, at the material time, motor vehicle registration number KAN 151C was under the control or management of the 1st defendant as its driver. Second, the uncontroverted evidence is that the vehicle was driven too fast and so negligently such that it rolled and caught fire. This was sell-involving accident and an inference could be drawn from the circumstances of this case that vehicles do not simply roll alone if the driver of the vehicle exercised proper care and control upon the vehicle. Accordingly, the accident occurred as a result of lack of care and proper control of the vehicle by the 1st Defendant. As such, the 2nd and 3rd defendants who are persons with possessory and ownership rights on the vehicle, would be vicariously liable for the actions of the 1st defendant. Accordingly, I find the defendants to be jointly and severally liable for this accident.

Causal effect between accident and injury

[7] But is there a causal effect of the accident to the death of the deceased? **InSTATPACK INDUSTRIES vs. JAMES MBITHIMUNYAO CIVIL APPEAL CASE NO. 152 OF 2003,** Alnashir Visram J (*as he then was)* stated:-

"Coming now to the more important issue of 'causation', it is trite law that the burden of proof of any fact or allegation is on the plaintiff. He must prove a causal link between someone's negligence and his injury. The plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

The Report from the Methodist Church Hospital, Maua where the deceased was being treated for the burns he received in the accident herein indicated clearly that the deceased died of *septicaemia due to massive burns.* The Certificate of Death also indicated the cause of death to be *septicaemia due to severe*

burns. The evidence before the court shows that the massive burns were sustained during the accident which occurred on 17th December, 2001 involving motor vehicle registration number KAN 151C. Accordingly, I find and hold that the deceased died ofinjuries sustained as a result of the negligence of the 1st defendant in the driving the said motor vehicle.

QUANTUM OF DAMAGES

Loss of expectation of life

[8] The plaintiff urged the court to award a sum of Kshs. 100,000 for loos of expectation of life. The awards for loss of expectation of life for a person whose death was untimely caused by the negligence of another should almost be conventional now. I will cite the persuasive decision of **Mary Njeri** (supra)and award a sum of Kshs. 100,000 for loss of expectation of life.

Pain and suffering

[9] Under this head, the plaintiff claimed a sum of Kshs. 2,000,000. They justified this proposal on the basis that the deceased died after 5 days. It is true that the deceased died after 5 days. From the report by the Methodist Church Hospital the deceased was admitted as an emergence on 17th December, 2001. The total skin area burnt was approximately 60%. The deceased was treated intensively with inter alia intravenous fluids, [including blood transfusion], pain control and amenities. He also underwent two surgeries for the burnt skin area to be debrided and dressed but despite the intensive treatment, his urine output diminished, his condition deteriorated and died. These medical facts depict extreme pain that the deceased suffered. And of significance, he suffered the pain for five days. Whereas a sum of Kshs. 2,000,000 being proposed is extremely high, I am convinced this case should attract more and I award Kshs. 200,000 as reasonable compensation for pain and suffering.

Of dependency

[10] It has been proved that the children of the deceased listed in paragraph 9(d) (v) to (xii) of the Amended Plaint were dependants of the deceased for up-keep and education. Receipts to show that the deceased paid school fees for them during his lifetime were produced. Accordingly dependency is proved. I will now proceed to determine the quantum of dependency.

[11] The Plaintiff has submitted that the deceased was an active businessman and was aged 61 years at the time he met his untimely death. They argued that, according to the now accepted principle, he had 9 years of active trading and to support his family. It was shown that, during his lifetime, he used to pay school fees for every respective child; and this was proof of earnings of the deceased?They stated that the deceased paid about Kshs. 1,512,000 school fees for the 12 children. And applying a multiplier of 9 years the plaintiff proposed a sum of Kshs. 13,608,000 for loss of dependency.

[12] Recapitulation of the facts above brings me to the point where I should ask whether this is an appropriate case for application of the multiplier method. Ringera J (as he then was) in the case of **KWANZIAvs.NGALALIMUTUA& ANOTHER**superbly stated that:

> **"The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation, where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."**

[13] Upon considering the evidence tendered, I have found that the children of the deceased listed in paragraph 9(d) (v) to (xii) were dependents of the deceased. The testimony of the Plaintiff was that the deceased was a businessman in livestock. However,despite having pleaded that he earned a monthly

oncome of Kshs. 100,000, there was no documentary evidence of the income or exact income that he made. I am, however, aware that the law in Kenya is that income of deceased may be proved by other means other than production of certificates or documents. See the decision by the Court of Appeal in the case of ***JACOB AYIGAMARUJA& ANOTHER vs. SIMEON OBAYO [2005] eKLR****that:*

> ***We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow together with the production of school reports was sufficient material to amount to strict proof for the damages claimed. Ground one of the grounds of appeal must accordingly fail".***

[14] But, what evidence is there in this case to prove earnings? The plaintiff produced receipts to show the school fees paid for admission number 4575 (i.e. the plaintiff) and 3505 (i.e. Adan Huka). The receipts for Adan Huka relate to a period after the death of the deceased. But that does not mean the deceased never paid fee for Adan Huka. Those for the plaintiff fall before the death of the deceased. However, the receipts do not support the submission by the Plaintiff that the deceased used to pay a sum of Kshs. 42,000 per term for each child. I will examine, for example, the receipts for fees paid for the plaintiff in the year 1999. Receipt No 1560 dated 15.2.199 is for Kshs. 14,000; Receipt No 1170 dated 10.3.1999 is for Kshs. 14,000; Receipt No2412 dated 18.3.199 is for Kshs. 5000; and Receipt No 920 dated 8.9.199 is for Kshs. 14,000. Surprisingly, there are three receipts for March 1999 and each bears a different item for tuition fee and Boarding fee. A simple addition brings the total to be Kshs. 47,000. One wonders also whether there were four terms in 1999. Therefore, these receipts may not clearly prove or be a safe basis upon which to peg the annual earnings of the deceased. Of note, the plaintiff also testified that the dependants herein continued with their education by dint of the deceased's estate. The mix makes application of multiplier method obscure. I will, therefore, abandon the multiplier method in calculating dependency. I appreciate that the children of the deceased were deprived of personal parental support and it is never the same when you are left to the estate for care. The deceased would still have earned through his business for another 9 years as he died at the age of 61. Accordingly, following the persuasive decision in the case of May Njeri (supra), I hereby award a global sum of Kshs. 4,000,000 for loss of dependency.

Of special damages

[15] In spite of production of a receipt for Kshs. 100 being payment for the police abstract, the plaintiff did not plead or prove any special damages; I award none.

Ultimate decision

[16] In accordance with the analysis of the facts of the case, the ultimate decision is that the plaintiff has proved on balance of probabilities that the 1st defendant so negligently drove motor vehicle registration number KAN 151C as to cause the accident which occurred on 17th December, 2001 as a result of which the deceased sustained fatal injuries. As such the 2nd and 3rd defendants are hereby held to be vicariously liable thereof. According, I enter judgement against the defendants jointly and severally as follows:-

(a) Loss of dependency…….Kshs. 4,000,000

(b) Pain and suffering……Kshs. 200,000

(c) Loss of expectation of life……..Kshs. 100,000

TOTAL……..Kshs.4,300,000

I also award the plaintiff costs and interest at court rate on the award from the date of this judgment. It sis

so ordered.

Dated, signed and delivered in open court at Meru this 7th day of March 2017

F. GIKONYO

JUDGE

In the presence of:

Mr. Carl Peters advocate for Mr. Karuti advocate for plaintiff

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F. GIKONYO

JUDGE