REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CIVIL CASE NO. 23 OF 2015

ELIUD PAPOI PAPA (*Suing as the Legal Representative of the Estate*

***of* BRIAN AFWANDE PAPOI (DECEASED)……...…….PLAINTIFF**

VERSUS

JIGNESHKUMAR RAMESHBAI PATEL……...……1ST DEFENDANT

SOLOMON AMBANI…….……2ND DEFENDANT

J U D G M E N T

1. On the night of 13th March, 2014 **Brian Afwande Papoi** (the deceased) was driving his saloon vehicle registration number **KAT 909Z** along the **Gilgil/Nakuru** road. He was involved in a collision with a motor vehicle **KBS 210T** (Tata lorry) at Soysambu and sustained fatal injuries.

2. The Plaintiff herein, **Eliud Papoi Papa** brings this suit in his capacity as the administrator of the estate of the deceased, and as the deceased's father, on his own behalf and on behalf of other dependents of the deceased. He pleaded negligence against the 1st and 2nd Defendants who are stated to be the registered/beneficial owners and/or drivers of the vehicle **KBJ 210T**. He seeks general damages and special damages in the sum of Shs 385,000/= against the Defendants.

3. On 26/8/2015 the Defendants filed a defence statement through Mukite Musangi & Company Advocates. Therein the Defendants denied all the key averments contained in the plaint, and in particular their alleged relationship to and ownership of the accident motor vehicle **KBS 210T**, the occurrence of the accident, negligence and liability for the accident. In the alternative they pleaded negligence against the deceased.

4. In his Reply to the Defence the Plaintiff clarified that at the material time, the 1st Defendant was the registered or beneficial owner of the accident lorry **KBS 210T** while the 2nd Defendant his agent and or driver. The Plaintiff also further reiterated other contents of the Plaint.

5. During the trial, the Plaintiff testified as **PW2** and called three witnesses, namely, **Charles Wechuli** (**PW1**), **PC Fredrick Gitari of** Gilgil Police Station (**PW2**) and **Lukania Boaz** (**PW4**). The Plaintiff's case is that he was the father of the deceased who was aged about 31 years at the time of death. He testified that the deceased worked as a Grant and Compliance Officer at a Non-Governmental Organization (NGO) and supported his parents, siblings and high school teenage son.

6. That on 13th March 2014, the deceased was driving his saloon motor vehicle **KAT 909Z** along the

Gilgil-Nakuru Road. The Plaintiff contends that the lorry **KBS 210T** driven by the 2nd Defendant, an agent or employee of the 1st Defendant had stalled inside the lane of the road reserved for traffic travelling from Gilgil to Nakuru, thus obstructing the road; that the deceased's vehicle travelling on the said lane rammed into the rear of the said lorry and that the deceased died on the spot as a result of injuries thereby sustained. Police from Gilgil Police Station attended the scene and removed the deceased's body from the scene.

7. The Plaintiff adduced evidence of the costs incurred in respect of the preservation and transportation of the body of the deceased as well as funeral expenses. He laments that he and his family, including his wife, children and only child of the deceased **Dancun Emusugut Papoi** have lost the financial support previously enjoyed form the deceased. **PW4** tendered evidence of the deceased's employment and income as the Grants and Compliance manager at **Adeso,** an **NGO**.

8. The two Defendants adduced evidence at the trial through **DW1 Solomon Ambani**, the 2nd Defendant and driver of the lorry **KBS 210T**. **DW1** stated that in the material period he was employed by the 1st Defendant as a driver of the said lorry that plied between Nairobi and Kisumu. That on the material date, he was driving from Nairobi headed for Kisumu, reaching Mbaruk at 8.00pm. On a busy stretch of the road, just before starting up a hill, there was a long convoy of vehicles on both lanes to and from Nakuru. This made it impossible to overtake. He was keeping on the left lane facing Nakuru when he noticed a vehicle behind him signal to overtake but just then, an oncoming vehicle flashed its lights

9. The vehicle behind the lorry driven by **DW1** seemed to return to the left lane, but **DW1** simultaneously heard a bang to the rear of his lorry, which was pushed towards the left side. He stopped. On observing the scene, he noted that his left hand side tyre had burst and the left hand side light and mud flap were damaged. He also noticed the deceased's body and the vehicle on the left side, outside the road but behind his lorry.

10. He stated that his lorry was mobile when the deceased's vehicle rammed into its rear and denied that he had stopped inside the road prior to the collision. Police came and towed away both vehicles after inspecting the scene and preparing rough sketches thereof. The vehicles were inspected subsequently. Although he was issued with a Notice of Intended Prosecution, **DW1** said that he was not charged with any offence.

11. The parties filed written submissions which I have considered alongside the respective evidence tendered. There is no dispute that the deceased was driving his motor vehicle **KAT 909Z** along the **Gilgil – Nakuru** road on the material night. And that, on reaching Soysambu his vehicle collided into the rear of the Defendants' lorry, **KBS 210T**, at the time being driven the same direction. It is not disputed that the 2nd Defendant (**DW1**) was the driver of the lorry at the time. That the said lorry was registered in the name of the 1st Defendant who was **DW1'S** employer is not in dispute. Further, it is common ground that following the collision of the two vehicles, the deceased sustained severe injuries and died on the spot, and further that police visited the accident a little while later.

12. The key issues in disputed in this case are whether the 2nd Defendant caused the accident through negligence and whether the two Defendants are liable for the same. Ultimately the court must determine whether the Plaintiff is entitled to the compensation claims captured in his plaint and evidence.

13. Undeniably, the sole eye witness to the accident herein is **DW1**. Although **PW1** claimed in his evidence to have seen **DW1's** lorry stalled at Mbaruk earlier on the material date, I was not convinced. For the following reasons. Firstly, **PW1** was, if he is believed, on his own business driving a North Rift matatu from Nairobi to Kitale. He claimed to have taken 8 hours to arrive in Gilgil from Nairobi due to congestion of traffic. He must have seen many vehicles on the road by the time he reached Mbaruk, and most certainly, as usually is the case, some of them stalled. What special interest drew him to the particular lorry of the Defendant?

14. PW1's statement that other North Rift drivers warned him in advance concerning the presence of the

lorry on the road at Mbaruk sounded contrived. Besides, he stated in his evidence in court that he was unable, due to the falling darkness and alleged mist, to identify the registration particulars of the "**white**" lorry he allegedly spotted stalled at Mbaruk.

15. Remarkably, his rather sketchy written statement filed into court and which he adopted in his testimony boldly declared the registration numbers of the said vehicle to be KBS 210T. I found it extraordinary that by sheer happenstance **PW1** would allegedly later learn about the accident involving the deceased whom he did not know previously and find his way to his home in Kitale where he offered information on the lorryto **PW2.** However, **PW1** seemingly but did not find it necessary to record a statement with police. His lame excuse when challenged on the matter was that **PW2** told him that the police would contact him.

16. I do therefore agree with the submissions by the Defendant's advocate that, so far as the occurrence and cause of the accident is concerned, **PW1's** evidence had no probative value. In the attempt to establish negligence, the Plaintiff's version of the accident sought to heap all the blame on the Defendants, while the Defendants through **DW1** in turn blamed the deceased.

17. The question I have grappled with, looking at the two conflicting versions of the accident is this: Did the Defendants leave their lorry on the road without warnings, thereby causing obstruction and the ensuing collision, or did the deceased while trying to overtake in dangerous circumstances ram into the rear of the lorry of the Defendants which was moving on its correct lane of the road?

18. On the question of obstruction, once **PW1's** evidence is discarded, the only evidence by the Plaintiff left standing are police sketch plans prepared after the accident, and photographs showing the respective damage sustained by the accident vehicles. Having reviewed these, I do not accept that in this case, the sketch plans and the recorded damage can properly support a conclusion that the lorry had, prior to the accident obstructed the road while parked therein. I say so because, unless the lorry was moved after the accident, it should have on this theory, remained inside the road. In this case, the lorry did not appear to be completely inside the road as such. Secondly if indeed 2 metres of the lorry protruded into the road as per the sketches, the damage caused by the collision should have been also evident on the right hand side of the lorry.

19. That notwithstanding, the evidence by **DW1** regarding the manner in which the accident occurred, is upon scrutiny equally doubtful. If indeed, as **DW1** stated, the deceased while in the process of overtaking his lorry met an oncoming vehicle and pulled back left, damage sustained by the lorry should have been visible on its right hand side too, and not concentrated on the rear left hand side as is the case.

20. Further, damage to the deceased's vehicle ought to have been concentrated on the left hand side. That does not appear to be so, from the photographs of the lorry produced by the Plaintiff and admitted by the **DW1**.

21. These photographs (Exhibit 1A and B) reflect damage almost exclusively to the rear left hand side of the lorry, including the left hand side tyres which seemingly burst on impact. Equally, from the photographs of the deceased's vehicle [Exhibit 3A – C] the impact of the collision ripped off most of the front right hand side panels including the roof. However the left hand side seemed intact save for the shattered windscreen and damaged hood.

22. It is inconceivable in my view, looking at the damage, even accepting for argument's sake that **DW1** was mobile at the time of collision, that the deceased's vehicle having abandoned the overtaking maneuver pulled back into the left side, and then veered at such an oblique angle, that only the driver's side caught the left hand side tail of the lorry. If that were so, the police sketches would not indicate that the two vehicles after collision rested apart but almost in a straight line behind each other.

23. Indeed it seemed from the sketches, that the deceased's vehicle while lying over 75 metres behind the lorry was facing Nairobi direction. Or is it possible that the scene was interfered with before the arrival of police? After all, dead men tell no tales. **DW1,** on the face of it, stopped his lorry some 75 metres from

the spot where the deceased body rested after apparently being ejected from his vehicle, also in the same linear fashion but between the two vehicles. My considered view is that the photographs and sketches produced by Gilgil Police do not support the accident version by **DW1**. At the same time, there is no credible evidence that the lorry KBT 210S was stalled inside the road at the time of collision.

24. Thus, the court is confronted with conflicting and irreconcilable evidence regarding how the collision occurred and which driver is to blame. It is true that under Section 107 of the Evidence Act the Plaintiff was obligated to prove his allegations of negligence against the Defendants. However, the existence of conflicting versions on the collision does not necessarily mean that nobody was liable; a collision involving two vehicles almost always involves fault on the part of one or both drivers. Both parties in their submissions have referred me to the decision in the case of **John Wainaina Kagwe -Vs- Hussein Dairy Limited [2010] eKLR** (in the High court) and in the Court of Appeal [2013] eKLR.

25. For their part, the Defendants in relying on the High Court decision, asserted that the Defendants were not to blame as the deceased was obligated to exercise due care, and to keep a safe distance while driving behind the Defendant's lorry; in other words, that as the driver in **John Wainaina Kagwe** (High Court), the deceased was entirely to blame for the collision and therefore his own death.

26. The Plaintiff submitted that the Defendants were to blame, but in the alternative, that in the event the court found the collision evidence conflicting and therefore unable to find liability at 100% against the Defendants, it should apportion liability equally. For this proposition, the Plaintiff relied on the Court of Appeal decisions in **John Wainaina Kagwe, Hussein Omar Farah -Vs- Lento Agencies [2006] eKLR** and **Anne Wambui Nderitu -Vs- Joseph Kiprono [2004] eKLR**. In these cases the court grappled with conflicting versions in respect of collisions involving two vehicle drivers.

27. In **Hussein Omar Farah** the Court of Appeal, after setting out the conflicting versions of the collision stated:-

> "**The appellant's driver testified that the collision occurred because when the trucks were driving head to head, the respondent's driver turned to his side and hit the appellant's lorry. But, the former testified that it was the appellant's driver who suddenly got into the road and the collision occurred. The collision is a fact and a certainty but the question still remains whether the accident occurred because the appellant's truck swerved as it was being overtaken or because its driver suddenly got into the road?**
>
> **In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. In the case of <u>BARCLAY – STEWARD LIMITED & ANOTHER VS. WAIYAKI</u> [1982-88] 1 KAR 1118, this Court said:-**
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> > **"The bare narrative of the accident gives rise to a number of possibilities. Either Waiyaki was driving on his correct side and the Datsun hit his vehicle on its correct side or Mr. Cottle was driving on his correct side where the Range Rover crushed it."**
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> **The Court said further:-**
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> > **"The collision is a fact. It is, however, not reasonably possible to decide on the evidence of <u>Waiyaki & Gitau</u> who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame."**
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> **In <u>BAKER V MARKET HARBOROUGH INDUSTRIAL CO-OPERATIVE SOCIETY LTD</u> [1953] 1 WLR 1472 at 1476, Denning L.J. (as he then was) observed inter alia as follows:-**

"Everyday, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them…….. "

See also WELCH V STANDARD BANK LTD [1970] EA 115 at 117 and SIMON V CARLO [1970] EA 285. It cannot be doubted that both drivers are to blame. In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame……..."

The trial court, as we have said, had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame.

28. In **Anne Wambui Ndiritu's** case the Defendant blamed the motor cyclist Plaintiff for hitting the rear part of the Defendant's lorry in a bid to overtake it, the Court of Appeal upon reviewing the evidence stated:-

"The Plaintiff asserted that the accident was solely caused by the negligence of the Defendant's driver…... The Defendant also asserted that accident was solely caused by the negligence of the motor cyclist……In the event each party was under a duty to prove their own assertions but they did not do a good job of it.

There is no doubt that an accident occurred between the vehicles on the Nyeri – Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry drive and the motor vehicle failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We apportion liability for the accident at 50/50."

29. The case of **John Wainana Kagwe** (Court of Appeal) involved serious injuries to the Plaintiff after his vehicle collided with the Respondents'. In that case, the Respondent's vehicle was left on the road, at night and without any illumination or warning, with a large portion of it protruding into the Plaintiff's way. The Plaintiff's vehicle violently rammed into the rear of the Respondent's lorry. The Court of Appeal, in setting aside the decision of the High Court blaming the Appellant/Plaintiff concluded that while the Respondent was guilty of obstructing the road, the Appellant was also negligent. Liability was apportioned at 50:50 between the two drivers.

30. As observed earlier, it is not proved in this case, and indeed it was not expressly pleaded by the Plaintiff in the particulars of negligence, that the Defendants' vehicle lay on the road obstructing the road, thus causing the collision with the deceased's vehicle. Other particulars of negligence, some of them general were however pleaded. The Plaintiff's and Defendant's account of the accident was equally doubtful. Of the collision however there is no dispute. In the circumstances, and based on the decision of the Court of Appeal in **Hussein Omar Farah** and **Anne Wambui Ndiritu**, I must find that the deceased and **DW1** contributed equally in causing the collision and both must shoulder liability at 50:50.

31. Moving on to quantum, the Plaintiff has through submissions by Mr. Nyende urged an award of Shs 200,000/= for pain and suffering and Shs 300,000/= for loss of expectation of life. For their part the Defendants propose Shs 10,000/= and Shs 60,000/= respectively. Authorities cited include **Kenya Railways Corporation -Vs- Samuel Mugwe Gioche [2012] eKLR** and **Mary Wangui Mukuria -Vs- Kenya Bus Services Limited [2000] eKLR**.

32. Considering inflation trends over the years and the fact that the deceased died instantly, I would award

the sum of Shs 50,000/= for pain and suffering and Shs 300,000/= for loss of expectation of life (See **Sitati J in Eshapaya Olumasayi & Another -Vs- Minial H. Lalji Koyedia & Anor. [2008] eKLR**).

33. According to the Plaintiff, the deceased was unmarried but was survived by a teenage son who is still in school, his parents and siblings who were dependent on him. He was 31 at death and employed. He earned a gross monthly salary (basic salary and house allowance) of Shs 487,703.28. His statutory deductions amounted to Shs 234,961.92 in February 2014, leaving a net salary of Shs 312,741.00. This is the correct multiplicand as the statutory deductions cannot be included in his income. However the deduction of Shs 60,000/= as rent cannot be treated as a statutory deduction.

34. Regarding the multiplier, the Plaintiff proposes 35 years pointing out that as a qualified professional and barring ill-health, the deceased would likely have continued to work for a further 10 years after retirement. It is not clear to me why the Defendants submitted that the applicable multiplier is 19 years, which suggests that the deceased would have been gainfully engaged until the age of 50 years. There is no basis for such a projection but neither is it likely that the deceased, notwithstanding being a professional would have been in gainful employment until 70 years of age as the Plaintiff asserts. I am however willing to accept that the deceased likely would have worked for about 4 more years in his profession after retirement at 60 years. I will therefore adopt a multipler of 33 years.

35. There is uncontroverted evidence that the deceased was unmarried but he supported his school going son, **Dancun Emusugut Papoi** whose responsibility has now fallen in the lap of the retired Plaintiff. It is not unexpected in the African context, that the Plaintiff as a retired person and his wife being parents of the deceased, were dependent on his support. More so as he was a university graduate with a relatively high income. There was however no evidence or basis to find that the deceased's unidentified siblings were dependent on him.

36. In the circumstances of this case, a multiplier of 1/3 as proposed by the Defendants would work injustice against the minor dependent of the deceased. As stated in **James Chelangat Bor -Vs- Andrew Otieno Onduu [1982-1992] 2KAR 28** and approved by the Court of Appeal in **Jackline Mueni Nzioka -Vs- Jetha Ramji Kerai Civil Appeals No 154** and **155 of 1996**, dependency is a matter of fact, and the application of 1/3 ratio is not a settled rule of law. Still, it is not unreasonable to expect that a person who assumes responsibility for his wife and children would apply the larger part of his income to their needs, and less to his parents, for instance. That probably explains the inclination by many counts to rely on of the 1/3 and 2/3 dependency ratios as a rough and ready tool for assessing dependency in such situations.

37. In this case, there is firm and uncontroverted evidence that the deceased supported his minor son and his two parents. Clearly, he must have spent a good fraction of his income towards that support. Thus, I am prepared to accept, that the deceased applied 2/3 of his income in providing for his father, mother and minor son, while applying the remaining 1/3 to his own upkeep. Thus general damages under the Fatal Accidents Act would work out as follows:-

33 years x 12 x Shs 312,741.00 x 2/3 = Shs **82,563,624/=**

(Eighty Two million Five Hundred Sixty Three Thousand Six Hundred and Twenty Four only).

Applying the 50:50 ratio to the total, general damages for lost dependency is **Shs 41,281,812/=** (Forty One million Two Hundred Eighty One Thousand, Eight Hundred and Twelve only).

38. Special damages pleaded and proved amount to **Shs 345,000/=** (Three Hundred Forty Five Thousand only).

39. In the result, general damages are awarded as follows

- Damages for pain and suffering Shs 50,000/= (net Shs25,000/=)

- Damages for loss of expectations of life Shs 300,000/= (net Shs150,000/=)

- General damages under the Fatal Accidents Act

- Net Lost dependency Shs 41,281,812/=

Sub Total Shs 41,456,812/=

Special damages

- Mortuary bills Shs 10,000/=

- Coffin Shs 85,000/=

-Hearse and transport in respect of funeral Shs 150,000/=

-Tents, seats and food in respect of funeral Shs 100,000/=

-Shs 345,000/= (net Shs 172,500/=

GRAND TOTAL Shs 41,629,312/=

33. The grand total comprising general and special damages awarded after applying the 50:50 ratio amounts to Shs **41,629,312/=** (Forty One Million Six Hundred Twenty Nine Thousand Three Hundred and Twelve only).

34. As obligated under Section 4 of the Fatal Accidents Act, and in light of the age of **Dancun Emusugut Papoi**, the deceased's son, I will apportion damages awarded in respect of lost dependency that is Shs 41,281,812/= (Forty One million Two Hundred Eighty One Thousand, Eight Hundred and Twelve only) as follows:-

a. **Eliud Papoi Papa** (father of the deceased)

- Shs 10,000,000.00 (Ten Million)

b. **Salome Papoi** (Mother of the deceasaed)

- Shs 6,281,812.00 (Six million Two Hundred Eighty One Thousand, Eight Hundred and Twelve only)

c.**D E P** (minor son of deceased

- Shs 25,000,000.00 (Twenty Five Million only)

TOTAL

- **Shs 41,281,812/=**

(Forty One million Two Hundred Eighty One Thousand, Eight Hundred and Twelve only)

35. The minor's share in (c) above is to be invested in an interest earning account with a reputable bank, investment institution or company in the joint names of the Plaintiff and the Deputy Registrar of this court, to be released to the minor upon his attaining the age of majority. For the avoidance of doubt any sums payable as legal fees in respect of the suit are to be deducted from the portions assigned to Eliud Papa Papoi and to Salome Papoi in (a) and (b) above only.

36. Half of the costs of this suit are awarded to the Plaintiff. Interest will apply on the entire decretal sum at court rates from the date of this judgment. Stay of Execution for 30 days.

Delivered and signed at Naivasha on this **2nd** day of **June**, **2017**.

In the presence of:-

Mr. Nyende for the Plaintiff present

Mr. Terer for the Defendant - absent

C/C - Barasa

C. MEOLI

JUDGE