



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL SUIT NO.1121 OF 2001

JOEL MOTANYAPLAINTIFF

***(SUING AS LEGAL REPRESENTATIVE OF THE
ESTATE OF THE DECEASED ENOCK MOTANYA)***

VERSUS

SWAN CARRIERS LTD.....RESPONDENT

JUDGMENT

By an amended plaint dated 26th June 2001, the plaintiff Joel Motanya, the legal representative of the estate of Enock Motanya, deceased is seeking damages against the defendant, Swan Carriers Ltd. The plaintiff's case is that on 10/1/2001 the deceased Enock Motanya was travelling as a passenger in motor vehicle registration number KAB 671C which collided with lorry registration number KAH 836W along Mai Mahiu Road causing injuries to the deceased.

The plaintiff claims that the injuries were as a result of the negligence on the part of the defendant as the owner of the Motor vehicle registration number KAH 836W. The claim is denied in the defendant's statement of defense, where it is contended that the injuries were caused by the sole negligence of the plaintiff or in the alternative the accident was totally beyond the control of the defendant and was solely caused by circumstances beyond the control of the defendant.

At the hearing of the case, **Dr Japheth Amugada** testified as **PW1**. He told the court on oath that he has a Bachelor of Medicine and Bachelor of surgery from Nagpur Medical College in India having graduated in 1977. That he was currently practicing medicine at IPs Building on Kimathi Street in Nairobi.

Dr Amugada testified that that the deceased visited his clinic complaining of having been involved in road traffic accident on 10/1/2001 along Naivasha –Nairobi road. That the plaintiff informed the Doctor that he was a passenger in a saloon car in which he sustained injuries. That the deceased was admitted to the Nairobi Hospital then later transferred to Kenyatta National Hospital. The deceased had suffered head injuries with loss of consciousness for several weeks. He also had lacerations on the right eye ball. He had also complained of loss of memory for recent events and painful and itchy eyes with difficulties focusing distant objects.

At the time of the examination, the deceased was slow in speech, stammering in answering questions. He had poor balancing when walking almost falling and partial deafness in the left ear. Dr Amugada concluded that the deceased sustained serious head injuries with subsequent loss of memory for recent

events, poor focusing of distant objects and painful itchy eyes. The injuries were serious and complicated and a big hindrance to his progress in the teaching profession. He also testified that the patient's future cannot be predicted as the injuries were serious and they were on the head. He told the court that he had a discharge summary from Kenyatta National Hospital, a default report of Prof Sande a Neuro Surgeon and x-rays from the Nairobi & Aga Khan Hospitals. He also produced an original copy of the Medical report together with Prof Sande's detailed report on the patient. He also told the court that he charged for medical report and court attendance.

Joel Motanya, the administrator of the estate of the deceased Enock Motanya testified as PW2. He also relied on his witness statement that he recorded on 29th November, 2011 with his advocate. He witnessed the material accident. He told the court that he works for the Ministry of Works, Roads Department in Nyeri. He testified that on the material date of the accident on 10/1/200, at about 9.30 pm he was travelling together with the deceased in motor vehicle KAB 671C a saloon car from Nakuru to Nairobi. The said motor vehicle was being driven by David Gathu and on reaching the Mai Mahiu escarpment on their way to Nairobi, and as they were finishing the last corner of the 9 kilometer stretch of the escarpment they encountered two Lorries being driven in high speed on both lanes as they were climbing.

There was no escape route. Their driver Mr Gathu slowed down and the next thing was that one of the Lorries rammed into the saloon car. He was seated in the front cabin. He was injured but he managed to get out of the saloon car and assist his brother Enock who was unconscious get out of the car. Their driver Mr Gathu was stuck in the driver's seat. He died on the spot.

Pw2 approached a man of Asian origin who grudgingly helped the plaintiff and his brother Enock to the nearest Ministry of Public Works Camp near the mobile Weighbridge, about 3 kilometers away. They were received by a watchman who alerted campers who immediately placed them in a Government vehicle and took them to Hospital.

The plaintiff/witness requested two men from the MOW camp to accompany the Asian man to the scene of accident and wait for police to come and he was later informed that there were two vehicles at the scene of accident- the saloon car and the Lorry KAH 836 W which knocked them killing the driver and seriously injuring the plaintiff and his late brother Enock Motanya.

The plaintiff/witness conducted the search on the ownership and they discovered that it belonged to the defendant herein and Diamond Trust Kenya. He produced the Search certificate as an exhibit. He later reported to police and was issued with a police abstract produced as an exhibit.

He further testified that he filed a case against the owner of the lorry because he was also injured in the accident and his motor vehicle in which they were travelling was also damaged. The case is Milimani CMCC 4487/2002 Enock Motanya vs. Swan carriers Ltd. That in that case the court ruled that liability was to be shared 50:50. He appealed and the High Court awarded 100% liability against the defendant in HCCA 27/2003. He produced the copy of the judgment delivered on 14/5/2007 in NAIROBI HCCA 27/2003 as an exhibit.

He also testified that while this case was ongoing, the original plaintiff who is not deceased Enock Motanya who had sued in this suit in his own capacity as the injured plaintiff was involved in another traffic road accident and he died in 2006. The plaintiff herein Joel Motanya then obtained letters of administration of the deceased's estate and was subsequently substituted to continue the suit herein. A copy of the letter of Administration was produced as an exhibit.

At the time of the accident, the court heard that the plaintiff/ deceased Enock Motanya was a trainee teacher at the Narok Teachers College in his 1st year of study. He was discontinued from learning because of the debilitating injuries that he had suffered but he was later re admitted in 2004 and he cleared his course in 2005. That the deceased died in a different road accident before he got employed.

PW2 further testified that he was seeking compensation for the deceased's estate which is medical expenses, general damages for pain and suffering loss of income together with costs of this case. The

deceased Enock Motanya was the plaintiff's younger brother.

At the close of the plaintiff's case, the defendant did not offer any evidence. They were served with a hearing notice but they did not attend court.

The plaintiff filed written submissions on 20th February, 2015. It was submitted on his behalf that he also sustained injuries in the same accident as Enock Motanya the deceased, and filed Civil Suit No. 4487 of 2007 in the Chief Magistrate's court where liability was apportioned at 50:50 between Joel Motanya and the defendant. Joel was dissatisfied with the judgment and he appealed successfully and the defendant was found to be liable at 100%. The plaintiff therefore urged the court to consider the said judgment and find the defendant 100% liable in negligence.

On damages for pain suffering and loss of amenities, the plaintiff submitted that they had produced two medical reports, one by Dr Amugada dated 15/8/2003 and that of Prof Sande dated 16/4/2002. He submitted that the reports revealed that the deceased suffered head injury with loss of consciousness of several weeks and cut over the right eye brow. The report also stated that the said injuries resulted into loss of memory, difficulty in speech and poor balance; he developed risk of epilepsy and had 2% permanent disability.

That the deceased was 23 years at the time of the accident and was enrolled in a teachers training college. The plaintiff submitted that under the head of general damages for pain, suffering and loss of amenities Ksh 5,000,000 will adequately compensate the plaintiff. The plaintiff relied on the following cases **Tery Kanyua Marangu vs. Wells Fargo Ltd, Meru HCCC no. 18 of 2013, Peris Onduso Omondi vs. Tectura International ltd & Another Nairobi HCCC no 715 of 2002**

On damages for diminished earning or loss of income the plaintiff submitted that the deceased was confirmed as primary school teacher in the death certificate, he was due to complete his diploma and would have earned a gross salary of 16,000 and net 13,000 after deductions according to the Teachers Service Commission salary scale. The plaintiff argued that if it were not for the accident the deceased would have qualified as a teacher in 2003 and earned Kshs 16,000 for 3 years up to 2006. The plaintiff suggested Ksh 468,000. The plaintiff also urged the court to award Ksh 542,827 as special damages as pleaded in the amended plaint.

I have considered the pleadings that were filed by the parties to this suit and the evidence adduced by the plaintiff. The defendant, beyond filing a defence dated 9th august 2001 on 17th august, 2001 did not attend court to testify on the same. The plaintiff's evidence therefore remains uncontroverted.

I find the issues before the court for determination to be:

1. ***Whether the defendant was liable in negligence for the material accident and the resultant injuries sustained by the deceased plaintiff?***
2. ***Whether the plaintiff is entitled to damages and if so, what is the quantum payable?***

On liability, the plaintiff urged this court to adopt the decision in **Nairobi High Court Civil Appeal No.27 of 2003** where this court found the defendant herein to be 100% liable for the material accident. I am not bound to follow the said decision. I have to independently assess the evidence adduced by the plaintiff in this case and arrive at my own independent conclusion.

In my view each, case is different and should be determined from its own peculiar circumstances. In civil cases, the standard of proof is that on a balance of probabilities. The burden of discharging that standard lies on the party who alleges as is provided for under section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. It was therefore incumbent upon the plaintiff to prove his case against the defendant, on a balance of probabilities even if the defendant did not offer any evidence to support his written defence and or to controvert the evidence adduced by the plaintiff.

In this case, the plaintiff's case is that the material accident was caused by the negligence of the

defendant's driver, agent or servant who drove the defendant's Motor vehicle registration No. KAH 836W negligently thereby colliding with motor vehicle registration No. KAB 671C occasioning the deceased serious injuries. He testified that they were on a climbing lane and that two Lorries; one belonging to the defendant and another were coming from the opposite direction in high speed and occupying both lanes on the road. There was no escape for their driver Mr David Gathu who unfortunately lost his life in the fateful accident. The defendant's motor vehicle crushed them hence the injuries sustained by his brother the late Enock Motanya. The plaintiff produced a police abstract showing that the accident was reported to the police. Although the plaint did not make any specific reference to the doctrine of vicarious liability, the defendant denied paragraph 4 of the amended plaint which stated that the accident was caused by the defendant's agent/servant or driver. The defendant in their defence also blamed the plaintiff for failing to take any evasive act to avoid the accident and or to ensure his own safety while travelling. They also insinuated that the accident was beyond the control of the defendant.

From the foregoing, the occurrence of the accident is not denied what is denied is that the accident was caused by the defendant's negligence or that of its agent, servant or driver as pleaded. The defendant being a Limited liability Company, no doubt, could not have been physically driving the accident motor vehicle. The motor vehicle could only have been driven by a natural person. The police abstract does not show the who the driver of the Lorry was.

The doctrine of vicarious liability was expounded in the case **Morgan – Vs – Launchbuy (1972) 2 All ER 606**, stated that,

“In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish agency relationship it is necessary to show that the driver was using the car at the owners request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”

In **Kenya Bus Services Ltd v Dina Kawira Humphrey Civil Appeal no. 295 of 2000 [2003] eKLR**, the court observed that:

“According to the pleadings, we are concerned here with the master's liability for his servants' torts. In such a case, it is the existence of the relationship of the master and servant which gives rise to vicarious liability – see PRITOO V. WEST NILE DISTRICT ADMINISTRATION [1968] EA 428 at page 435 paragraphs E-F). In KARISA V. SOLANKI [1969] EA 318 the Predecessor of this Court said at page 322 paragraph 9 G.

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v. Sully (1931) 47 T.L.R. 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver”.

In applying the said principles to the facts of this case, **PW2** who was a passenger in the motor vehicle wherein the deceased plaintiff was when the accident occurred testified that the lorry rammed into the saloon car. In his statement filed in court, he described how the accident occurred; he stated that the accident occurred at 9.30 pm. They were traveling in the saloon car together with Enock Motanya and the car was driven by Mr David Gathu. When they were about to finish the last corner of the 9km stretch of the escarpment they saw two Lorries climbing up on both lanes at a high speed. Their driver drove slowly as he tried to avoid the accident but unfortunately the lorry rammed into the saloon car. **PW2** also testified that he did a search and established that the defendant is the owner of the lorry that caused the accident. The said evidence is uncontroverted the defendant did not call the driver to give his side of the story of how the accident occurred.

The defendant's Director did not also come to challenge the claim that the driver of the motor vehicle KAH 836W was its agent or employee. In absence of such evidence, I find that the defendant is liable for the acts of its driver, agent or servant then in control of the Lorry registration No. KAH 836W and is therefore 100% liable in this case.

On whether the appellant is entitled to damages, an award of damages in any case is a matter of the discretion of the trial court, that discretion required to be exercised judicially. **PW1** testified that the deceased sustained serious injuries as a result of the accident. The injuries involved:-

- Severe head injury causing brain damage
- Laceration over the right eye brow
- Loss of consciousness for several weeks
- Poor memory
- Difficulty with speech
- Poor balance
- Changed personality

PW1 produced a medical report dated 15/8/2003 and another medical report from Nairobi neurological & pain clinic by Dr Sande dated 16/4/2002 both showing severe injuries. The Police abstract shows the initial injury to have been grievous harm whereas the P3 form filled on 16/7/2004 also classified the injuries sustained by the deceased plaintiff as grievous harm.

The plaintiff submitted that Ksh 5,000,000 will compensate the plaintiff adequately. I find the plaintiff has proved injuries suffered by the deceased on the balance of probabilities.

On awards of general damages for pain and suffering and loss of amenities, Courts have held that damages for injuries suffered must be within consistent limits. The damages should represent a fair compensation but should not be excessive.

In **Harrison Mbogo v The Attorney General [2004] eKLR** Ang'awa J held that she could have awarded the plaintiff **Ksh 60,000** if liability was proved in claim of damages for Head injury (concussions), Five days unconscious, multiple cut wounds on left hand and scalp, Soft tissue injuries in multiple sites.

In 2006 Osiemo J, awarded the plaintiff **Ksh Sh.1,200,000/=** general damages for pain suffering and loss of amenities in **ANTHONY MWONDU MAINA v SAMUEL GITAU NJENGA [2006] eKLR** where the plaintiff was involved in accident and he sustained the following injuries:

- Head injuries and concussion with loss of consciousness for one week;
- laceration on the forehead and occipital region;
- compound fracture of the radius and ulna of the left arm;
- fracture of the olecranon process of the left elbow;
- impacted fracture of surgical neck on left humerus bone;and
- fracture of the acromion process of the left clavicle and on the blade of the scapula bone.

More recently in April 2015 Weweru J awarded Kshs 2,000,000/00 for pain, suffering and loss of amenities in the case of **Geoffrey Njogu Mwangi v Francis Mbugua Gichia & another [2015] eKLR** for **major head injuries which led to loss of consciousness for a few days and multiple deep lacerations on the left side of the neck.**

In this case Doing the best that I can, and taking into account similar awards made in cases of similar nature as above, I award the plaintiff Kshs **1,500,000** for pain, suffering and loss of amenities.

For the loss of earning capacity or loss of income, the award can be categorized as special damages which have to be *specifically pleaded and strictly proved*. The damages under the head of loss of earning

capacity has however been classified as general damages but these have also to be proved on a balance of probability. The Court of Appeal in **William J Butler v Maura Kathleen Butler [1984] eKLR**

“A plaintiff’s loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury. The English Court of Appeal made an award under this head in *Ashcroft v Curtin [1971] 1 WLR 1731*, and by now, it is not a new principle in that jurisdiction.”

In this case it was pleaded under General damages; the plaintiff pleaded in paragraph 5 of his plaint that **“the plaintiff who was due to travel abroad to attend university failed to travel and has suffered diminished loss of earning capacity.”**

In the evidence on oath adduced in court, PW2 testified that **“the deceased was a 1st year trainee teacher at Narok Teachers college and that at the time of his demise(in 2006) he had already completed training which was delayed by the injuries he sustained in the accident.”**

In the submissions by his counsel, it was submitted that **“the deceased could have completed his training in two years and earning Ksh 13,000 under the Teachers Service Commission salary scales.”**

I am not persuaded to award damages under this heading. The plaintiff did not adduce evidence to support the claim as pleaded in any way. Parties are bound by their pleadings. The plaintiff did not seek leave to amend the plaint to state what the deceased was doing at the time of the accident and what he was expected to do thereafter that was lost. The evidence adduced on oath was at material variance with the pleadings.

Besides the deceased’s national identity card which was filed among the plaintiff’s list of documents, the plaintiff did not produce any document to show what he alleged to be the deceased’s profession or what he was doing between 2001 and 2006 before his death in a separate road accident.

It would have been in order to produce even certificates of training since it was alleged that he finally completed his training though late following the accident. It is not for this court to assume what the deceased could have earned by way of submissions from the bar. The plaintiff should have adduced evidence to show how much a trained teacher would be expected to earn.

No evidence was adduced to show that the deceased had even completed his forth form or the said training at his death in 2006. No Teachers Service Commission salary scales were produced to prove what the deceased would have earned before his demise. In my view, the plaintiff failed to discharge the burden of proving that damage of loss of earning capacity on the part of the deceased on a balance of probabilities. I therefore decline to grant that prayer for loss of earning capacity and dismiss it accordingly.

On special damages, the plaintiff pleaded for Kshs. 542,827.00.

The law regarding special damage is that it must not only be specifically pleaded, but it must be strictly proved. The plaintiff pleaded for

a. Dr Amugada’s medical report	Kshs	2,000.00
b. Police abstract	Kshs	100.00
c. Nairobi Hospital Charges	Ksh	426,112.00
d. Aga Khan Hospital Radiology charges	Ksh	11,700.00
e. Kenyatta National Hospital charges	Kshs	51,915.00
f. Professor Sande’s charges on treatment	Ksh	45,000.00
g. Professor Sande’s Medical Report	Ksh	6,000.00

Regrettably, none of the plaintiff’s documents filed in court or directly produced in court during the

hearing tended to prove that the sum of Kshs. 542,827 was ever incurred. What the list of documents filed in court contain are invoices and demands for payment of the bills incurred, save that in one demand by Nairobi Hospital dated 25th July,2002, the hospital acknowledged receipt of only Kshs 40,000, from the plaintiff leaving a balance of Ksh 386,112 unpaid. That being the case, this court finds that none of the special damages specifically pleaded were strictly proved and I therefore disallow them. The receipt for 5,000 dated 19/1/2015 produced for Doctor Amugada's court's attendance fee is a witness expense which is a cost of the suit and not a special damage, which, in any event, was not specifically pleaded. I disallow it too.

I will nonetheless only allow Ksh 40,000 Nairobi Hospital charges whose receipt was acknowledged in writing as stated above.

This court cannot allow special damages on the basis of invoices. Special damages are reimbursements for what is actually expended and not for what is claimed by a third party creditor as a debt due and owing by the plaintiff.

In the end I find the defendant 100% liable for the accident and the resultant injuries suffered by the deceased plaintiff. I award the plaintiff administrator of the deceased's estate the following:

1. General damages for pain, suffering and loss of amenities – Ksh **1,500,000.00**
2. **Loss of earning capacity not proved. It is declined**
3. Proven Special damages Kshs 40,000.00
4. Interest at court rates from date of judgment on the general damages until payment in full
5. Interest at court rates on special damages from date of filing suit till payment in full
6. Costs of the suit herein are awarded to the plaintiff.

Dated, signed and delivered in open court at Nairobi this 5th day of June, 2015.

R.E.ABURILI

JUDGE