



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 154 OF 2013**

**MILLICENT KIMURI and BENSON WANJOHI NJOGU** (Suing as administrators of the

Estate **EPHANTUS MURIMI WANJOHI** (Deceased).....**PLAINTIFF**

**VERSUS**

1. **MBISI LINAH CATHERINE**
2. **GEORGE WEKESA WECHULI**.....**DEFENDANT**

**JUDGMENT**

1. The Plaintiffs sued the Defendants claiming recovery of damages under Fatal Accidents Act and Law Reforms Act arising from an accident alleged to have occurred on 8<sup>th</sup> May, 2011 along Naivasha - Nairobi Road. The 1<sup>st</sup> Defendant was sued as the registered owner of motor vehicle registration number KBK 977K (*'the vehicle'*) while the 2<sup>nd</sup> Defendant was sued as the 1<sup>st</sup> Defendant's driver and the beneficial owner of the vehicle. The Defendants denied the Plaintiffs' claim in their statement of defence.
2. I have given due consideration to this matter, the issues falling for determination are whether or not the Plaintiffs have established culpability on the part of the Defendants. If the aforesaid is answered in the affirmative, to what extent are they liable and what damages are available to the Plaintiffs. I note that ownership of the vehicle was uncontested and I shall not belabour on it. Only the Plaintiffs brought witnesses. Millicent Kimuri (PW2) did not witness the occurrence of the accident thereby her testimony is not of essence on the issue of liability.
3. The Plaintiffs argued that from the evidence of PC Alex Menge Osoro's (PW1) an inference can be made that the deceased was walking off the road when the vehicle lost control and hit him and therefore the driver of the vehicle was to blame for the accident. It was submitted that the doctrine of *res ipsa loquitur* is applicable considering that the Defendants did not rebut the Plaintiffs' evidence. They stated that the said principle applies for the reason that the subject matter was entirely under the control of the 2<sup>nd</sup> Defendant. On this point the Plaintiffs cited **Bikwatirizo v. Railway Corporation (1971) E.A. 82**. The Defendants on the other hand contended that the Plaintiffs are statutorily bound under Section 107, 108 and 109 of the Evidence Act (Cap 80) Laws of Kenya to discharge the burden of proof in order for their claim to succeed. It was submitted that the Police Abstract produced by PW1 confirmed that the 2<sup>nd</sup> Defendant was not charged which to them is an indication that the investigating officer found no fault on the part of the 2<sup>nd</sup> Defendant. It was further argued that PW1 after referring to the certificate of examination and test of motor vehicle inferred that the vehicle might have suffered a tyre burst which was not a human error and not that the driver was speeding. It was argued that PW1 who was the only witness who gave an account of the accident did not attribute negligence to the 2<sup>nd</sup> Defendant. It was submitted that the Plaintiffs have to prove that the 2<sup>nd</sup> Defendant was to blame for the accident and demonstrate that

the driver should have anticipated the accident and that he failed to act reasonably in avoiding the accident. In this regard the Defendants cited Livingstone Otundo v. N M (a minor suing through her next friend M A) (1990) eKLR and Eastern Produce (K) Limited v. Christopher Atiado Osiro (2006) eKLR.

4. The testimony of PW1 was of no value under this head because he was not the investigating officer. His duty was merely to produce documents such as the police abstract. I am therefore left to weigh the Plaintiff's case vis a vis the Defendant's considering that there is no evidence on liability. The Defendant did not adduce any evidence to controvert the Appellant's case. The 2<sup>nd</sup> Defendant who was the driver failed to testify to explain exactly how the accident occurred and what measures he took to avoid the accident. there is a presumption in law that he who has evidence but chooses to withhold it, such evidence must have been detrimental to him. Further, the consequence of such failure was discussed in Karuru Munyoro v. Joseph Ndumia Murage & Another Nyeri HCCC No. 95 of 1988 Makhandia J held:-

***“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff’s evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”***

5. In the circumstances, I find that the Plaintiffs have on a balance of probability proved that the Defendant was liable for the accident. Considering however that the deceased was a pedestrian, he ought to have been on the look-out for any carelessly driven vehicles. He too must shoulder some liability. Bearing in mind that the Plaintiffs' claim that the deceased was knocked off the road has not been contended, I find and hold the Defendants 70% liable for the accident and Plaintiff 30% liable.
6. On quantum, the Plaintiffs suggested a sum of KShs.100,000/= for pain and suffering while the Defendants suggested KShs. 10,000/=. On loss of expectation of life, the Plaintiffs submitted that the deceased who was aged 30 years at the time of his death had no history of bad health and they suggested that a figure of KShs. 150,000/= would suffice under this head. The Defendants on the other hand urged that a sum of KShs. 100,000/= would suffice since it is the conventional figure courts normally award. In common law, the courts have evolved two principles, *loss of expectation of life and pain and suffering*. Under the head pain and suffering court award a conventional sum which has increased over the years from KShs. 10,000/= to KShs. 100,000/=. The basis of the increase has basically been based upon the increase of life expectancy. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case, the deceased died on the date of the accident from multiple injuries and blunt force trauma. He must have suffered some pain but which pain did not last long. I am of the view that the conventional figure of KShs. 100,000/= for pain and suffering and KShs. 150,000/= for loss of expectation of life suffices. These awards are however capped to a minimum so that the estate does not benefit twice from the same death under the Fatal Accidents Act and the Law Reforms Act.
7. Under the head of loss of dependency, the Plaintiffs argued that the deceased would have worked up to the retirement age of 65 years since he was healthy. They proposed a multiplier of 35 years. They urged for the application of a multiplicand of 2/3 since the deceased was the sole bread winner for the family. That he had five dependants being her wife, two sons, sister and father. The Defendants on their part proposed a multiplier of 20 years and argued that the deceased life could have been shortened by vicissitudes of life. They did not contend the salary applicable and the ratio of dependency. The deceased was at the time of his death aged 30 and would have worked for 35 more years had his life not been shortened by the accident. Bearing in mind the vicissitudes of life or other imponderables which would have shortened his working life, I apply an average multiplier of 30 years. The Plaintiffs' loss of dependency therefore works as follows:-

KShs. 44,100 x 12 x 30 x 2/3 = KShs. 10,584,000/=.

8. The Plaintiffs claimed KShs. 500/= for motor vehicle search, KShs. 30,000/= for limited grant of administration and KShs. 30,000/= for funeral expenses while the Defendants were agreeable to the award of KShs. 8,490/= which they stated was pleaded and proved. Under the head of special damages, the Plaintiffs pleaded KShs. 8,350/= being funeral expenses and postage costs of KShs. 140/=. The receipt on record is for mortuary services for KShs. 8,000/= and a receipt for KShs. 50/=. The Plaintiffs therefore only proved special damages of KShs. 8,050/= which I hereby award.

9. The Plaintiffs' award in total is made as hereunder:-

Pain and suffering	KShs. 100,000/=
Loss of expectation of life	KShs. 150,000/=
Loss of dependency	KShs. 10, 584,000/=
Special damages	KShs. 8,050/=
Less	KShs. 150,000/=
Sub-total	<u>KShs. 10,692,050/=</u>
Less 30% liability	KShs. 3,207,615/=
<b>Total award</b>	<b><u>KShs. 7,484,435/=</u></b>

Plus costs and interest at court rates.

Dated, Signed and Delivered in open court this 17<sup>th</sup> day of July, 2015.

J. K. SERGON

**JUDGE**

In the presence of:

.....for the Plaintiffs.

..... for the Defendants.