



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 113 OF 2006

RAMESH R. VAYA)

KUNDAN R. VAYA) (Suing as legal representatives of the late

VEREN R. VAYA (Deceased).....PLAINTIFF

VERSUS

HITEN Z. LIMBANI.....DEFENDANT

J U D G M E N T

1. The Plaintiff filed a suit against the Defendant seeking both general and special damages arising out of a road traffic accident that occurred on the **20th August, 2006**.
2. It was pleaded that on the material date while **Varen R. Vaya** (deceased) was lawfully travelling as a passenger in motor-vehicle **Registration Number KRX 467** along **Kitengela – Isinya Road**, the Defendant negligently, carelessly and/or recklessly drove, managed and/or controlled the motor-vehicle which lost control, veered off the road, hit the bridge and caused the accident, consequences whereof the deceased sustained fatal injuries.
3. Subsequently the Defendant was charged in **Kajiado Traffic Case No. 679 of 2006** with the offence of causing death by dangerous driving.
4. As a result of the accident the deceased sustained fatal injuries, hence the claim under the **Fatal Accidents Act** and the **Law Reform Act**.
5. In a statement of defence, the Defendant denied having been the registered owner of the motor-vehicle **Registration Number KRX 467** at the time of the accident. He denied negligence on his part and/or that of his agent, servant and/or driver. He averred that the deceased substantially contributed to the negligence in the circumstances.
6. At the hearing, PW1 **Ramesh Ratanzi Vaya** the father of the deceased stated that on being called he reached Mater Hospital to find his son in the car. He was pronounced dead.
7. In his defence the Defendant stated that he tried his best to control the motor-vehicle as he swerved to avoid colliding with an on-coming motor-vehicle. The deceased who had not fastened his belt opened the door of the motor-vehicle in an attempt to come out. In the process the door got caught by the guardrails, hence the accident occurring. On cross-examination he stated that the other motor-vehicle that was involved in the accident was repaired at their garage. The insurance having denied liability he caused it to be repaired.
8. Issues for determination as agreed may be condensed as follows:
 - i. Whether the Defendant was the registered owner of the motor-vehicle **Registration No. KRX 467**.
 - ii. Whether the deceased was a passenger in motor-vehicle **Registration No. KRX 467** at the time of the accident.
 - iii. Whether the Defendant was negligent in the circumstances.

- iv. Whether the deceased contributed to the accident.
 - v. Whether quantum of damages is payable to the Estate of the deceased.
9. The Plaintiff produced in evidence a copy of records from the Registrar of Motor-Vehicles which proved the fact that as at **August, 2006** the owner of motor-vehicle **Registration No. KRX 467 Nissan/Datsan Saloon** was **Hiten Z. Limbani**. This was proof that the Defendant herein was the owner of the motor-vehicle by registration. I am aware of the fact that this may not be conclusive proof of ownership. In the case of **Nancy Ayemba Ngaira V. Abdi Ali (2010) eKLR** it was held that a person who enjoyed actual ownership, beneficial ownership, possessory ownership or any other categories, may for practical purposes, be much more relevant than the person whose name appeared in the Certificate of Registration of Motor-Vehicle.
 10. In the instant case the Defendant enjoyed actual possessory ownership of the motor-vehicle and on cross examination admitted being the owner of the motor-vehicle.
 11. It is not in dispute that the deceased was a passenger in motor-vehicle **Registration No. KRX 467** on the fateful date and at the time of the accident.
 12. Negligence as particularized on the part of the Defendant was that: He drove the motor-vehicle at an excessive speed; he drove the motor-vehicle without due care and attention; driving the motor-vehicle on the wrong side of the road; driving without regard to the passenger in the motor-vehicle; failing to slow down, stop, swerve or have effective control of the motor-vehicle in order to avoid the accident; and ignoring traffic rules with impunity.
 13. It is trite that the onus of proof is usually on the person who alleges and in matters where negligence is alleged there must be fault. In the case of **Kiema Mututu V. Kenya Cargo Handling Services LTD (1991) 2KAR 258**. It was held that:

“there is yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the Defendant where the claim is based on negligence.”

14. The Plaintiff herein did not witness the accident. However, following the accident, investigations were carried out by the police which culminated into the Defendant being blamed for causation of the accident whereafter he was charged with a Traffic Offence. Ultimately he was acquitted of the charge but after he was called upon to defend himself. Proceedings and Judgment of the court in **Traffic Case No. 676 of 2006** form part of this case.
15. The Defendant herein as a driver of motor-vehicle **Registration Number KRX 467** in which the deceased was travelling as a passenger owed him a duty of care. He ought to have driven the motor-vehicle carefully.
16. Evidence adduced established the fact that the Defendant started overtaking motor-vehicle **Registration No. KAJ 585T** and another vehicle without properly looking out. He attempted to overtake at a bridge. Overtaking of another motor-vehicle moving on a bridge is not permitted. Having made the attempt, the Defendant acted recklessly. The Defendant’s action of disregarding traffic rules resulted into his motor-vehicle hitting the guardrails. As a consequence, his motor-vehicle split into two. It has been opined that the impact of overspeeding is what resulted into the motor-vehicle splitting into two (2).
17. At the outset the Defendant admitted liability and even repaired the motor-vehicle that he hit. Therefore, the Plaintiff has proved on a balance of probabilities that the Defendant breached a duty of care to other road users. It is argued that the accident was partially caused by the deceased for not fastening the seat belt and attempting to open the door of the motor-vehicle. Looking at the nature of injuries that were sustained by the deceased – It was opined by the Doctor that the cause of death was head, chest and abdominal injuries following the accident. It was not alleged that the deceased fell out of the motor-vehicle. He sustained injuries as a result of the impact of overspeeding that resulted into the motor-vehicle splitting into two. At the outset the Defendant did not attribute negligence to the deceased. He blamed the owner of the motor-vehicle he was attempting to overtake. He did not make any attempt of having him enjoined in the proceedings as a third party. Evidence adduced established the fact that he was the one at fault therefore I hold him 100% liable.

QUANTUM

18. **Pain and Suffering.** The Plaintiff stated that the deceased was taken to hospital after the accident. This means that his death was not instantaneous. He was pronounced dead prior to being admitted into the hospital. On that head I will award **Kshs. 50,000/=**.

19. **Loss of Expectation of life**

The deceased was **23 years old**. The average life today is about **50 – 55 years**. Had it not been for the wrongful death the deceased would have lived for many more years. A conventional figure given by most courts on this head is **Kshs. 100,000/=**. In the premises being duly guided, I award a sum of **Kshs. 100,000/=**.

20. **Lost Years**

The deceased died at the age of **23 years**. He obtained a **Commercial Pilot's Licence** at the age of **22 years**. However at the time of his death he was not in gainful employment. It was submitted that he would have earned between **USD 3000 – 3500** per month had he lived. According to **Exhibit 7**, a letter from the **Kenya School of Flying**, it is stated that in event that he got employed he would have earned approximately **USD 1000 – 2000** prior to being promoted. He was expected to go for further training after attaining **1500 hours experience**.

21. This in essence means that whether or not he would be employed was mere speculation. His Estate ought to get what he would have benefited from. But there was no guarantee that he would have been employed. Hours that he would have flown could not be estimated.

22. I would, therefore treat him like an inexperienced pilot entitled to **USD 1000**. Taxes of **30%** would leave him approximately **70%**. Considering that he could have incurred other expenses associated with livelihood, he would remain with a net income of approximately **USD 400**. This would translate to approximately **Kshs. 40,000/=**. I would therefore determine his earning to have been about **Kshs. 40,000/=**.

23. The deceased would have been expected to work comfortably up to the age of **50 years**. I therefore take a multiplier of **20 years** instead of the proposed **42 years**. I do also have in mind the vicissitudes and uncertainties of life. A multiplicand of **1/3** will be appropriate.

24. I will in the premises work out the multiplication as follows:

$$40,000 \times 12 \times 20 \times 1/3 = 3,200,000.$$

25. **Special Damages**

Per the pleadings special damages pleaded amount to **Kshs. 76,086**. What was specifically proved was **Kshs. 57,886/=**

which I award.

26. From the foregoing, I enter Judgment for the Plaintiff as against the Defendant as follows:

<i>i. Pain and Suffering</i>	Kshs. 50,000/=
<i>ii. Loss of expectation of life</i>	Kshs. 100,000/=
<i>iii. Lost years</i>	Kshs. 3,200,000/=
<i>iv. Special damages</i>	Kshs. 57,886/=
Total	Kshs. 3,407,886/=

With costs of the suit.

27.It is so ordered.

Dated at Kitui this 10th day of November, 2015.

L. N. MUTENDE

JUDGE

Dated, Signed and Delivered at Machakos this 9th day of November, 2015.

P. NYAMWEYA

JUDGE