



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 715 OF 2003

ROSE MUNYASA and FULMENA CHABWANGA

Suing as the administrators of the estate of

ANGELINE CHABWANGA.....PLAINTIFFS

VS

DAPHTON KIROMBO.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LTD.....2ND DEFENDANT

J U D G M E N T

The Plaintiffs, Rose Munyasa and Fulmena Chabwanga sued as the administrators of the estate of Angeline Chabwanga, deceased, following a road accident on 22nd November, 1999 at Voi. The accident involved Motor vehicle Reg. No. KAL 587B which was driven by Daphton Kirombo, the 1st Defendant but owned by Barclays Bank of Kenya, the 2nd Defendant.

By way of an amended plaint dated 24th July, 2006 and pursuant to leave granted by the honorable court on 17th June, 2003 in **Miscellaneous Civil Application No. 383 of 2003. (O.S)** the Plaintiffs are seeking judgment against the Defendant jointly for:

1. ***Damages under the fatal accident Act (Cap 32) Laws of Kenya for the Benefit of the deceased's dependants.***
2. ***Damages under the Law Reform Act (Cap 26) Laws of Kenya for the Benefit of the estate of the deceased.***
3. ***General damages for pain and suffering and loss of expectation of life.***
4. ***Cost of this suit.***
5. ***Interest on (a), (b), (c), (d) above court rates from the date of this suit until payment in full.***

The plaintiff claims the following particulars of negligence on the part of the 1st Defendant.

1. Driving at a speed which was excessive in the circumstances.
2. Failing to check the road worthiness of the vehicle.

3. Causing or permitting the said motor vehicle to be driven when it was not in a road worthy condition.
4. Causing or permitting the said motor vehicle to roll and overturn on the road and /or failing to take any or any adequate measures to prevent the rolling of the said Motor vehicle.
5. Causing or permitting the said motor vehicle to be driven along the said road when they knew or ought to have known that it was unsafe to do so.
6. Failing to take any or special care while on the road.
7. Failing to stop, slow down, or in any other way so to manage or control the said motor vehicle to prevent it rolling and overturning.

Rose Munyaka, PW1, told the court that she was the administrator of the deceased estate together with another. She testified that the accident was caused by the 1st Defendant which in her opinion was a self-caused accident. Although she did not witness the accident, she told the court that she attended the inquest which concluded that the 1st Defendant was responsible for the accident. She also told the court that prior to her death, the deceased was in good health and was supporting the family. She prayed for damages on behalf of the beneficiary. She produced the following documents:

1. Letters of Administration-Exhibit 1
2. Court order granting leave to file out of time-Exhibit 2
3. Certificate of death –Exhibit 3
4. Police Abstract-Exhibit 4
5. Pay slip of the deceased- Exhibit 6
6. A copy of the proceeding of the inquest-Exhibit 7
7. Copies of certificate of birth for the dependents-Exhibit 8

The claim is opposed. The 1st Defendant contends that he was in no way negligent in relation to how the accident occurred. He stated that he took all necessary measures to prevent the accident. During the trial, he testified that the motor vehicle was in good condition and he controlled it with the consideration of the safety of all passengers.

I read the pleadings filed by all the parties in support of their respective position and having considered the evidence that was adduced by the parties during the trial including the written submissions. The Parties in this matter framed fourteen (14) as agreed issues for determination. I will consolidate the issues and address them in the following manner:

I. Whether the suit is time barred.

II. whether the Defendant by his negligence caused the accident

III. Whether the plaintiff is entitled to the quantum of damages proposed.

On the first issue, the Defendants argued that leave obtained empowered the plaintiff to bring the suit against the 2nd Defendant only as it appears on the face of the order. No application was ever made and no leave was brought to file suit against the 1st Defendant. The Defendant claims that leave ought to have been sought to specifically enjoin him.

The Defendant complained that the order granting leave was not served upon them and neither was the application seeking leave brought to the Defendants attention. They submitted that the leave to file suit out of time having been granted ex parte, it was upon the plaintiff to establish exceptional circumstance on the body of the plaint to prove that, they were entitled to bring the cause of action out of time.

The Plaintiffs on the other hand submitted that the accident occurred on 22nd November and the suit filed on 14th July, 2003. They contended that the high court granted leave to file the suit out of time as shown by the exhibit No. 2. The plaintiff argued that the suit against the 1st Defendant could not be time barred since the cause of action was revived when the court granted leave to file the suit out of time. They maintained that once the cause of action was revived, it was then upon the plaintiff to sue and add the 1st Defendant to the suit. In support of the argument, the Plaintiffs relied on **DILIPASAL VS. HERMAN MUGE & ANOTHER Civil Appeal No. 49 of 2000**, where the Court of Appeal stated that the claim was not time barred under the Limitation of Action Act since the claim over the motor vehicle has always been there right from the beginning

The Plaintiffs further contends that even if the suit against the 1st Defendant were to fail, such failure is not fatal to the plaintiff claims against the 2nd Defendant as what has to be proved by the plaintiff's is not the 1st Defendant liability but negligence. And once the plaintiffs have proved the driver's negligence then the 2nd Defendant is vicariously liable for such negligence whether or not the driver of the vehicle is a party to the suit. The Plaintiffs relied on **SAMUEL GIKURU NDUNGU v COAST BUS COMPANY LTD [2000] eKLR** where the Court of Appeal held that the liability against the employer largely depends on the pleadings and the evidence in support of the claim. Vicarious liability of the employer is not pegged on the employee's liability but on his negligence.

In the instant case, it is not disputed that the plaintiff was granted leave to bring the suit out of time. The only issue is whether leave granted on 17th allowed the plaintiff to add the 1st Defendant into the suit. In my view with or without the drivers name as the Defendant in the suit the cause of action would not be affected in anyway? The Plaintiffs are pleading negligence on the part of the driver of motor vehicle KAL 587B. It does not matter whether the driver was enjoined in the suit or not. The owner of the motor vehicle is liable in damages where it is proved that the driver was negligent. See. **SAMUEL GIKURU NDUNGU v COAST BUS COMPANY LTD [2000] eKLR**.

I am not, therefore, persuaded to find that leave was not granted to add the 1st Defendant. I find that the suit is not time barred as alleged by the Defendants.

On the second issue, the Plaintiffs submitted that he 1st Defendant was negligent and therefore liable for the fatal accident. The allegation was denied. Defendants submitted that the court should not apportion blame merely on account of the ruling made on 21st July, 2005 as extreme prejudice would be occasioned on the defence. They stated that the inquest was contradictory and the court should not rely on it to blame the driver for the accident.

In response plaintiff submitted that the ruling made by the court in the inquest and the recommendation that the 1st Defendant should be prosecuted, has not been challenged in any way. The Plaintiffs further submitted that the Defendants cannot urge the court not to rely on it since they did not appeal on the findings of the court.

This court did not get the opportunity to hear evidence directly from the eye witnesses. The Plaintiffs produced the proceedings before the court of the Inquest No. 38/02 in which the court concluded that the driver is to be blamed for the accident. The purpose of the inquest was to establish the cause of death of the decease and others. In my view the court will not ignore the ruling made on the inquest. As stated by the Plaintiffs, the ruling remains unchallenged and forms part of the evidence before the court and this court will rely it besides other evidence, to make its finding on the issue of liability.

The evidence before the court is without a doubt that the Defendants drove the Motor Vehicle KAL 587B at high speed such that he could not control it. On that evidence alone I have no reason not to find the Defendants liable for the accident. However, I also in addition take into account the ruling in the inquest to cement the driver's negligence which led to and caused the accident.

I compute liability at 100% jointly and severally with the 2nd Defendant being vicariously liable for the

acts of his agent and or servant who was the driver who caused the accident.

On whether the plaintiff is entitled to the quantum of damages. The Plaintiffs claim damages under the Fatal Accident Act and the Law Reform Act. Under the Fatal Accident Act the Plaintiffs claim that the deceased died aged 35 years and had 25 more years of service since the retiring age at the 2nd Defendant is 60 years. She was earning a basic salary of Kshs. 19,236/-, a house allowance of Kshs.1,320/- giving her a gross monthly earning of Kshs.20,556/-. Her statutory deductions were NSSF Kshs.80/-, NHIF 320/- and PAYE Kshs.2,185/- therefore her monthly net earnings was Kshs.17,971/-. The Plaintiffs submitted that her claim under the Fatal Accident Act is $Kshs.17,971/- \times 25 \text{ years} \times 12 \text{ months} \times 2/3 = Kshs. 3,594,200/-$.

Under the Law Reform act, the Plaintiffs claim a total of Kshs.3,744,200/- in which Kshs.50,000/- is for pain and suffering. They submitted that the deceased died a painful and brutal death on the spot. They also claim Kshs.10,000/- for loss of expectation of life.

The Defendants on the same issue submitted that there is no evidence that the plaintiff was employed by the 2nd Defendant on permanent and pensionable terms for the suggested multiplier to be applied. The Defendant stated that from the Personal Accident/Claim form that was before court, the deceased worked as a subordinate staff with no guarantee she could have been maintained until retirement. In support of this argument, the Defendant relied on case of **ROGER DAINTY Vs MWINYI OMAR HAJI & ANOTHER (2004) eKLR** where the court of appeal stated that to ascertain the reasonable multiplier in each case the court should consider relevant factors like the income of the deceased, the kind of work, the prospect of promotion and his expectation of working life. The Defendant submitted that the a multiplier of 15 would be appropriate therefore her claim under the fatal accident Act is $17,971 \times 15 \times 12 \text{ months} \times 2/3 = Kshs.2,156,520$

On the issue of damages under the Law Reform Act. The Defendant submitted that the deceased died immediately after the accident therefore the award of Kshs.30,000/- would be appropriate. The loss of expectation of life the Defendant submitted that Kshs.70,000/- would be appropriate in this case. The total damages would be Kshs.2,256,520/- less Kshs.955,267.50 which was given to the dependent as compensation.

In my view, under the Fatal Accident Act damages will be awarded for loss of dependency. To assess the same the court must determine the multiplicand, the multiplier and the ration of dependency. As for the multiplicand I accept that the deceased income was Kshs.17,971/-. I will use the same in this case.

In determining a reasonable multiplier to be applied in a case such as this one, the court is required to apply the facts available before it. In the instant case there is no evidence before court when the deceased was to retire from employment. There is no guarantee that the deceased could have lived to the retirement age of 60 years as suggested by the Plaintiffs. This court takes judicial notice of the fact that the life expectancy of an average Kenyan has in the recent years gone down due to the increased incidences of poverty, the HIV/AIDS pandemic and other diseases. I will apply the general retirement age which is 55 years. In the instant case, a multiplier of 20 years will do justice. As to dependency, there is no doubt that the deceased had dependents. I therefore hold that the dependency ratio that shall be applied in determining the damages to be paid to the deceased estate shall be 2/3. The damages to be paid to the deceased estate under the Fatal Accidents Act shall therefore be:

$Kshs. 17,971 \times 20 \text{ years} \times 12 \text{ Months} \times 2/3 = Kshs.2,875,360$

As to damages under the Law Reform Act, the deceased died instantly. The Defendant conceded Ksh.30,000/- for pain and suffering. The court awards the same. The Court of Appeal decision in **Kemfro Africa Ltd t/a "Meru Express Services (1976) & Anor – vs- Lubia & Anor (No 2) [1987] KLR** had suggested Kshs.100,000/- for loss of expectation of life, I see no reason not to award it, and I hereby award the same.

In the premises therefore judgment is entered for the Plaintiffs as against the Defendants jointly and

severally as hereunder:

(i) On Liability

Liability is apportioned at 100% in favour of the plaintiff and as against the Defendant.

(ii) On quantum

- a. Under the fatal Accident Act Kshs. 2,875,360/-
- b. Pain and Suffering Kshs. 30,000/-
- c. Loss of expectation of life Kshs. 100,000/-

Total **Kshs. 3,005,360/-**

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Less any advances made to the plaintiff's with court's interest from the date of this judgment.

(iii) Costs are to the Plaintiffs.

Dated and delivered at Nairobi this 16th day of September, 2014.

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D A ONYANCHA

JUDGE