



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 396 OF 2010

LEAH WAIRIMU ZAKARIA1ST PLAINTIFF

MERCY WANGUI.....2ND PLAINTIFF

(Both suing as the legal representatives of the Estate of PETER WANGI MUNYORO)

VERSUS

JOHN LUNDU KAHI.....1ST DEFENDANT

KABANSORA MILLERS LTD.....2ND DEFENDANT

JAMES KABIRU.....3RD DEFENDANT

JUDGEMENT

Plaintiffs' Case

1. The plaintiffs have instituted these proceedings in their capacities as the legal representatives of the estate of **Peter Mwangi Munyoro** (hereinafter referred to as the deceased) claiming general and special damages, costs and interests arising from a road traffic accident which allegedly took place on 21st October, 2009.
2. It was pleaded that on the said date the deceased was lawfully walking along Nairobi-Naivasha Road at *Soko Mjinga* Market Area when the 3rd Defendant who was driving Motor Vehicle Reg. No. KAN 077V owned by the 1st and 2nd Defendants through his negligence caused the said vehicle to violently hit the deceased causing him fatal injuries.
3. It was pleaded that the 3rd defendant was driving at a speed that was excessive in the circumstances, failed to brake, slow down, swerve or otherwise avoid hitting the deceased, failed to stop after hitting the deceased, failed to have any adequate or sufficient look out for other road users, failed to have any regard for the safety of the pedestrians walking along the road, particularly the deceased, failed to have any sufficient or adequate control of motor vehicle KAN 077V, failed to observe the Highway code, failed to maintain the said motor vehicles in good working mechanical condition and allowed a defective motor vehicle to be on the road.
4. As a result of the foregoing it was pleaded that as a result of the said accident, the estate of the deceased suffered and continues to suffer loss and damage whose particulars were contained in the plaint. The Defendants however failed to admit liability despite demand to that effect being made.
5. In her evidence **Leah Wairimu Zakaria**, who testify as PW1 adopted the contents of her statement dated 10th July, 2011 as part of her examination in chief. According to the said statement, the deceased, her son, was a business person selling groceries at the said market and

- was married to the 2nd plaintiff herein and they had four children aged 11, 9, 6 and 2½ years respectively who all depended on the deceased. Apart from that the deceased was supporting her at the time of his death. According to her the 2nd plaintiff and herself were the personal representatives of the deceased having been granted limited letters of administration ad litem on 4th March, 2010.
6. According to her testimony, she was not present at the time of the accident. On being informed of the accident he went home and found that the deceased had already been taken to Naivasha Mortuary. According to her they were jointly buying potatoes from Kinangop and selling the same and were getting Kshs 3,000/- per day. The said income according to her was helping them as well as her husbanding who had a stroke. Since the death of the deceased, she testified she was experiencing problems. She also had a child in secondary school.
 7. PW1 testified that by that time their home in Molo had been burnt down and hence they did not have a home hence the accident affected her life s she had nobody to assist her. She therefore sought compensation. She produced the plaintiff's bundle of documents as PEx1 save for the police abstract.
 8. In cross examination by **Mr Omenta** for the 1st and 2nd Defendants, the witness testified that she was called **Wairimu Zakaria** and the deceased was her son and had a wife who was born in 1985. She said that the wife was staying together with her and was engaged in small activities which could not sustain herself. According to her one of the deceased's children was in standard 3, another in standard 2, while another in standard 1 and the last born in nursery. Apart from the deceased's children she also had 2 children of her own. She said that she wanted assistance.
 9. In cross-examination by **Mr Kinyanjui** for the 3rd Defendant, PW1 said that the deceased's wife was called **Mercy Wangoi** and confirmed that they recorded a statement with the police. She was however unaware of the existence of any other case and had not heard of an inquest. She also was unaware if the police blamed anyone. According to her she was selling potatoes, cabbages and carrots which they were getting from Kinangop. In her evidence they were buying 40-50 sacks which they were selling on wholesale and the 2nd plaintiff was also assisting them. According to her they were selling the produce to people from Nairobi but not on retail. However at the market there were retailers. She reiterated that she was an Internally Displaced Person (IDP) from Molo and had been there for one year. According to her she had never seen retailers sell on both sides of the road.
 10. In her evidence there are a lot of potatoes in Kinangop and one cannot miss the same. They however used to look for them everywhere even in Olenguruone. According to her they were not being asked for licences save by the County Council though she did not have copies of the receipts. Since she had problems she never used to bank the money since it was all being spent. According to her they were spending Kshs 600/- per day. She testified that the deceased went to school up to standard 8. Apart from the business they were doing farming at Molo and were bringing products to *Soko Mjinga*.
 11. The witness said that there was a funeral committee which assisted in the expenses and the committee spent a lot of money. According to her the deceased was buried at Molo and without the committee they would not have managed on their own.
 12. In re-examination by **Mr Njoro**, she said that I was the deceased who was getting the potatoes and without him she was handicapped. She reiterated that the money was not being banked but was being used domestically. According to the 2nd plaintiff was assisting because she was sickly. In her evidence the business was no longer doing well because she was alone as the 2nd plaintiff was committed. She said that they contributed towards the funeral expenses and that the bulk of the money came from the family contributions.
 13. The next witness was **Kelvin Njagi** who testified as PW2. According to him, he was a mason in Runda. He also recorded a statement. According to his statement, on 21st October, 2009, he was selling carrots along the Nairobi-Naivasha Highway when he was motor vehicle Reg. No. KAN 077V Toyota traveling at a high speed and it knocked down and ran over the deceased. The driver however did not stop as the vehicle was in a high speed and he ran away. He was however chased by a good Samaritan and was arrested. The matter was then reported to the police.
 14. According to his statement the deceased was a businessman selling green vegetables at *Soko Mjinga* and would sell things like carrots, cabbages and potatoes as well as other groceries

- depending on the season.
15. In his testimony, PW2 said that the vehicle was from Naivasha going towards Nairobi and the deceased was off the road. According to him, his customer came and he started crossing the road but when he was about to cross a vehicle came and hit him and went. According to him the vehicle was a white saloon Reg No. KAN 077V Toyota Corolla. When the vehicle did not stop the deceased's customer followed it and later the customer's vehicle, the vehicle which hit the deceased and a police vehicle came. He however did not know where the police vehicle came from. When people examined the deceased they realised that he was already dead. The police then took the measurements collected the body and went away.
 16. According to him the vehicle was from Naivasha toward Nairobi. He had been selling carrots there for three years. He testified that the road was straight for about 200 metres and when the deceased started crossing there was no vehicle. He however admitted that there were many people on both sides of the road. From Naivasha side, he said one can see the road for far. According to him most vehicles do not speed though this vehicle was speeding which according to him was not normal. He therefore blamed the owner of the vehicle. According to PW2 he was with the deceased whom he had known for more than 12 years. The deceased in his evidence was married with 4 children and was the breadwinner. He said that at the time of the accident the police were not present and it was them who narrated what took place.
 17. In cross-examination by **Mr Omenta**, he insisted that he was present when the accident took place and it was between 8-10am. The vehicle, according to him was from Naivasha going towards Nairobi and they were on the right side of the road as one faces Nairobi direction. When the deceased saw his customer he started crossing the road to the other side at a time when there was no other vehicle and was hit when he was about to cross. According to him he saw the deceased being hit by a white vehicle Reg No. KAN 077V which was being driven fast and did not stop. In his evidence he saw the Registration number and confirmed the same when the vehicle came back though he did not see the driver who never came out. He testified that the customer's vehicle was KBE though he could not remember the rest of the numbers. When he realised that the deceased was dead he went to call the father. He confirmed that from Naivasha direction one can see the road for 200 metres and though people do not over speed this driver was over speeding. According to him, he did not notice the vehicle until the deceased was hit and he did not know the speed at which the vehicle was being driven.
 18. The witness knew he knew the deceased for 12 years and also knew his wife **Mercy Wangoi** for a long time. To him she used to stay at home while the deceased was doing business with the mother and most of the time she was not assisting as the mother was the one assisting.
 19. In the witnesses' opinion it was the driver who was on the wrong as most drivers do reduce speed.
 20. In answer to questions posed by **Mr Kinyanjui**, the witness confirmed having recorded his statement at the Police Station. While reiterating his evidence he said that there was no Zebra crossing at the place of the accident. According to him the customer's vehicle which was from Naivasha direction stopped off the road at the Parking Bay. He said he knew the customer who used to come every Tuesdays and Fridays to buy potatoes and carrots as well as other produce. When a customer comes he said they either take the produce to them or the customer goes to them and that people do rush to the customer though according to him people do not cross the road in a hurry. He however admitted having witnessed another accident between vehicles. In his evidence the deceased was not carrying anything and one can cross the road in 3 seconds if running and 30 second when walking. To him the deceased was not running and he was standing with him. He looked at the road before crossing when the witness informed him his customer had stopped.
 21. He however clarified that though he knew him for 12 years he was just a neighbour and he was not assisting him. While confirming that there was no Zebra crossing he said the deceased was hit on the road. To him people know that the place is a market. In his evidence the deceased was hit by the bumper but was not raised up. He testified that there were police officer less than three kilometres ahead and he did not know whether people would have beaten the driver. It is these police officers who came with the driver. It was his evidence that the sacks would take the deceased two days to sell. He however was not aware whether anyone was charged. According to him the deceased was buried in Mau Summit in Molo and he wasn't aware whether there was a committee.
 22. In re-examination the witness said he was not aware where the police came from and it was

- normal for people to cross the road. According to him this was the only accident in which a person was hit and the deceased had been there for 8 years.
23. The next witness to testify as PW3 was the 2nd plaintiff **Mercy Wangui Muchiri**, the deceased's widow. According to her he passed away in 2012 and was involved in a road accident after being knocked by a vehicle. She similarly relied on her statement filed herein in which she stated that on 21st October, 2009 she was informed her husband, the deceased was involved in a motor vehicle accident at the market along Naivasha-Nairobi Highway having been hit by motor vehicle Reg No. KAN 077V and had passed away. The matter was reported at Magumu Police Base and the deceased's body was taken to Naivasha District Hospital Mortuary and a post mortem conducted on 26th October 2009.
 24. They then embarked on funeral arrangements with the family and incurred expenses to the tune of Kshs 177,000/=. The deceased according to her was a business person selling various groceries at *Soko Mjinga* Market and was earning a minimum of Kshs 1,000/- per day which was translating to Kshs 30,000/- per month. In her evidence the deceased was the family's sole breadwinner and had 4 children to support aged 11, 9, 6, and 2½ years respectively. In addition he was supporting his mother and hence as a result of the death of the deceased they had greatly suffered loss. She confirmed that she was a co-administrator to the estate of the deceased. According to her the said children were learning and it was the father who was taking care of them. As a result of the death of the father she said she had gotten a lot of problems educating them and taking care of them. She therefore sought compensation. She produced their birth certificates as exhibit 2.
 25. In cross-examination by **Mr Kinyanjui**, the witness said the deceased went to school up to standard 7 and had no bank account though he had a business permit which she unfortunately did not have. She was however unaware whether the deceased was paying any taxes. To her he was getting Kshs 1,000/- per day though she had no evidencing support of the same. Although the deceased was doing business with the mother, she said she would also assist and was still selling vegetables at the same market. However due to illness her mother in law was no longer engaged in the business while the father in law recently passed away. According to her they did not hold a fundraising for the deceased's funeral though there was a meeting of the villagers who contributed but could not recall how much. In her evidence the amount spent was Kshs 170,000/-. Since they were IDPs they could not save the money and he was unaware whether the deceased had any savings. She said that this was her first time to come to court and she did not know whom the police blamed.
 26. No cross-examination was undertaken by **Mrs Omenta** and in re-examination she confirmed that because the money was little they could not open an account. Having moved from Molo she said they rented a house.
 27. The next witness for the plaintiff was **PC Patrick Mwendu** who testified as PW4. According to him he was attached to Magumu Sub-base on general duties and was the investigating officer of the subject accident which involved Motor Vehicle Reg. No. KAN 07V Toyota Saloon and Pedestrian. The information according to him was received from a motorist and later the driver, **James Kabiru**, went and reported the accident. He testified that he went to the scene where he established that the vehicle had knocked down a pedestrian who was crossing the road from the right to left as one faces Nairobi from Magumu. He then drew a sketch plan and later escorted the vehicle to the police station and took the deceased to the mortuary. He later recorded statements from the witnesses one whom was a passenger and other pedestrians.
 28. According to him as the evidence from the pedestrian and the passenger differed he decided to refer the matter to the State Counsel for perusal and further action. He confirmed that he filled in a police abstract for the family and for the driver and the name of the deceased was **Peter Mwangi Munyao**.
 29. In his evidence he found the body at the scene off the road on the right side of the road as one faces Nairobi from Magumu and established that the point of impact was 1.4 metres from the edge on the left lane of the road facing Nairobi from Magumu. However the body was off the road about 5 metres from the point of impact. According to him, they were unable to establish who was to blame hence the file was transferred to the State Counsel Nyeri through the PCIO and the same was returned back to Magumu on 16th December 2011 with the opinion that the driver be charged for causing death by dangerous driving which pinion he concurred with. According to him the accident occurred at *Soko Mjinga* which is ever busy. The witness produced the police abstract,

- the OB and copies of the correspondences and as exhibit. He testified that he was paid Kshs 7,000/-.
30. In cross-examination by **Mr Odhiambo**, he reiterated that he was the investigating officer and that he visited the scene at 10.35am immediately after the report was made at about 10.30am. While reiterating his evidence in chief on the point of impact and the position of the body he said that the deceased was not walking off the road. According to him he obtained the information from either the scene or from the driver and it was indicated that the deceased was running across the road without due care. He stated that he recorded statements from 5 people and there was variance on their reports since while the pedestrian stated the deceased was off the road,, the occupant of the vehicle said he was crossing the road. One of the people according to him was **Joseph Gatagwa** who said the vehicle went off the road and hit the deceased which evidence however did not agree with the sketch plan. According to the driver's statement the accident occurred in the middle of the road which was in conformity with the sketch plan.
31. The witness reiterated that he agreed with the opinion of the State Counsel on who was to blame. He however said that since he did not know how to trace the driver no proceedings had been instituted against the driver as he was unreachable. According to him, though there is a slight bend one can see far. He however said that he was unable to say whether the driver was over speeding and there were no tyre marks on the road. According to him the matter was referred to the State Counsel because there was confusion on the statements. In his view two of the witnesses who were at the scene gave uniform statements.

Defendants' Case

32. The 1st and 2nd Defendants denied ownership of the suit vehicle and stated that the 1st had sold the same vide a sale agreement dated 24th June, 2008 to the 3rd Defendant who was the sole owner of the vehicle at the time of the accident hence they were not liable.
33. They further denied the allegation of negligence and attributed the accident to the negligence of the deceased
34. On behalf of the Defence, **James Kabiru Kariuki** testified as DW1. According to him, he was a businessman staying in Nakuru. On 11th October, 2009, he was from Nakuru to Nairobi driving Toyota Reg No. KAN 077V and on approaching *Soko Mjinga* some vegetable vendors started crossing the road from the left while another person came from the right and ran fast across the road towards the left side and he only saw him when he was in the middle of the road between 2-3 metres. Whereas he tried to brake and avoid him, it was too late because the person was undecided where to run to and in that confusion he hit him. The point of impact according to him was on his lane in the middle of the road within the yellow line. He testified that he was on the road on his left side between the yellow lines. It was his evidence that his average speed was around 50-60 Km/hr. According to him the deceased was running across the road and he blamed him since he ought to have looked left and right before crossing the road.
35. In cross-examination by **Mr Kiragu** he stated that he was a regular traveller on that road and knew *Soko Mjinga* Market. He said people do criss-cross the road and it is a busy place with many people. According to him, he was a driver for 7 years and at the time of the accident he was doing 70km/hr before reaching the market but on approaching he was going at between 50-60 km/hr. He however said that he could not dispute the fact that he was driving at 70 km/hr though he had reduced the speed.
36. According to him, he saw a group of young men about 5-7 crossing from the right to the left and they were a little far. In his evidence the weather was clear and the deceased was knocked on the left side of the road as you face Nairobi and he was next to the edge of the road though he was undecided. The witness said he applied brakes and when he saw people crossing he reduced the speed. Since he went and stopped ahead, he said he did not know where the deceased landed though he was about 2 metres from the point of impact on the road on the left side. After writing his statement, he was bonded to appear in Court though according to him, he has never appeared in Court.
37. In re-examination he said that ordinarily people sell in the market and when he saw people crossing he reduced speed and that the deceased was left behind. He however saw him two metres when running and according to him since he did not expect the deceased, it was difficult to avoid

hitting despite applying brakes and trying to swerve. In his evidence he stopped the car ahead and put on hazard and reported the accident. Later he came with police officers who told him to go to the Police Station. In his view the deceased was to blame for not looking out.

Plaintiff's submissions

38. At the close of the case, the plaintiffs submitted that a copy of the record dated 12th January, 2010 showed that the suit vehicle was registered in the names of the 1st and 2nd Defendants who did not testify. Although there was a document alleging that the 1st Defendant had agreed to sell the vehicle to the 3rd Defendant, it was submitted that the allegation was not proved and the 3rd Defendant did not allude to the said sale hence the 1st and 2nd Defendants remain the registered owners of the vehicle while the 3rd Defendant is the beneficial owner hence all the three are liable.
39. It was submitted that since the deceased died the same day the Court ought to award him Kshs 15,000/- for pain and suffering. For loss of expectation of life the Court was urged to award 150,000/- based on **Violet Jeptum Rahedi vs. Albert Kubai Mbogori [2013] eKLR.**
40. On loss of dependency based on the same case Kshs 6,000,000/= based on multiplicand of 25 years at the monthly earnings of Kshs 30,000/= per month. It was further submitted that the Court ought to award the special damages claimed.

3rd Defendant's Submissions

41. On behalf of the 3rd Defendant, it was submitted that since the evidence showed that the deceased was crossing the road without due care and attention the Court ought to find based on **Patrick Mutie Kimau & Another vs. Judy Wamui Ndurumo [1997] KLR** and **Nzioka Muli vs. Kenya Bus Services Ltd [2002] eKLR** that it was the deceased who was responsible for the accident.
42. It was however submitted that if the Court finds the 3rd Defendant liable then he would be entitled to Kshs 10,000/= for pain and suffering. With respect to claim for dependency under the Fatal Accident Act, it was submitted that in the absence of proof of income the Court ought to apply a multiplicand of Kshs 3,000/= per month with dependency ration of 2/3 and a multiplicand of 15 years as the deceased was 32 years. On special damages it was submitted that only receipts for Kshs 28,200/= were valid as the others did not have stamp duty and reliance was placed on **Agnes Wanjiku Ndegwa vs. Kenya Power & Lighting Company [2014] eKLR.**
43. In the 3rd Defendant's view the suit ought to be dismissed with costs.

Issues for determination

44. I have considered the foregoing and in my view I agree with the 3rd Defendant that from the evidence and pleadings, the following are the issues which fall for determination in this suit:
- a. **Who was the owner of the vehicle No. KAN 077V?**
 - b. **Who was to blame for the accident?**
 - c. **What is the quantum that would adequately compensate the deceased estate?**
 - d. **Who should bear the costs of the suit?**

Determination

45. The first issue is the ownership of motor vehicle No. KAN 077V. It was contended that the 1st and 2nd Defendants were not liable because they had sold the suit vehicle to the 3rd Defendant. The Court appreciates that ***Traffic Act*** is an Act of parliament to consolidate the law relating to traffic on the roads; it is not an Act which decides *de facto* or *de jure* ownership of vehicles hence ownership of vehicles passes by sale and delivery and registration books are only evidence of title and property passes in accordance with the ***Sale of Goods Act*** when the contract of sale is made. See **Osumo Apima Nyaundi vs. Charles Isaboke Onyanicha Kibondori & 3 Others Civil Appeal No. 46 of 1996.**

46. However no evidence was adduced to support this contention. Without such evidence and as there is evidence on record that the vehicle was registered in the names of the 1st and 2nd Defendants and as it was admittedly being driven by the 3rd Defendant, I find that the three defendants are jointly and severally liable as being the owners and/or controllers of the same subject to the finding on liability and to that issue I now proceed.
47. The plaintiff's case was that the deceased was crossing the road and was about the complete crossing when the vehicle hit him. It was evidently clear that the road was fairly straight and one would have expected the deceased to have seen the vehicle approaching. On the other hand the 3rd Defendant though being well versed with the market and its population testified that he was driving at 80 KPH. After hitting the deceased whose body was thrown 5 metres away, the 3rd Defendant did not or was unable to stop immediately. Again there were no brake marks at the scene of the accident to show attempts if any that the 3rd Defendant took. In my view these facts clear show that the 3rd Defendant was driving at a speed which was excessive in the circumstances and that he had no proper lookout. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142** it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. Taking into account the circumstances of this case I find that the liability of the Defendants' ought to be and is hereby apportioned at 50%.
48. That leads me to the issue of the quantum that would adequately compensate the deceased estate. The deceased was a small scale businessman. He was the sole breadwinner of his young family and was aged 32 years. Together with his mother they were doing business. Although there is no evidence of how much he was earning, it is obvious that he must have been earning something to keep his family. Although the widow testified that he was getting Kshs 3,000/- per day, that may not be correct as it was admitted that the amount of earnings was not enough to be banked. Nothing however turns on the said issue as she testified that the deceased was giving her Kshs 600/- per day. In my view this sum is reasonable. Since there is a specific sum which the deceased was disbursing towards the family upkeep the issue of the dependency ratio of 2/3rds is not relevant. However, the evidence was that it was taking him two days to sell his products hence the Kshs 600.00 would most probably be for two days hence making his daily earnings to be Kshs 300.00.
49. As the deceased was in his own business one can reasonably expect that he would have gone on with the business past the normal retirement age. I would therefore apply a multiplicand of 28 years. It follows that loss of dependency would be Kshs 300 X 30 X 12 X 28 = 3,024,000.00.
50. With respect to special damages an issue of stamp duty was raised. On this issue I can do no better than quote **Makhandia, J** in **Bishop Henry Paltride vs. James Mugo Mbuthu & Another Nyeri HCCC No. 65 of 2001** where the learned Judge said:

“in regard to non-admissibility of unstamped instruments in evidence, although the law under section 19(1) of the Stamp Duty Act is that receipts not having a revenue stamp may not be admitted in evidence, it is noteworthy that the defendant's lawyer did not object to their production in evidence during the hearing. He cannot now take the objection in his written submissions”.

51. I accordingly award the plaintiffs Kshs 47,000.00. I however decline to award funeral expenses since part of the same was according to the plaintiffs contributed by the funeral committee and there is no evidence of how much money was contributed to by the deceased's family.
52. With respect to pain and suffering since the deceased seems to have died soon after the accident I agree with the Defendant that the sum of Kshs 10,000/- is adequate.
53. In the result I enter judgement for the plaintiff against the Defendants jointly and severally on the following terms:
- a. **Kshs 3,034,000.00 general damages with interest at Court rates from the date of judgement till payment in full.**
 - b. **Kshs 47,000.00 special damages with interest at court rates from the date of filing suit till payment in full.**

c. Costs

54. The said award shall be discounted by 50% pursuant to the Court's finding on liability.

Delivered in court this 14th day of November, 2014.

GV ODUNGA

JUDGE

Delivered in the presence of:

Mr ngoima for Mr Okanga for the Plaintiff

Mr Malebe for Mr Njuguna for the 3rd Defendant

Cc Patricia