



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NO. 26 OF 2005

Alice O. Alukwe (*suing on behalf of*

Maureen Alukwe Deceased).....PLAINTIFF

VERSUS

AKAMBA PUBLIC ROAD SERVICES LTD.....1ST DEFENDANT

SOFITRA LIMITED.....2ND DEFENDANT

DIXON ODHIAMBO OGUOKO.....3RD DEFENDANT

SAMUEL MBURU GICHANGA.....4TH DEFENDANT

JUDGMENT

1. The claim herein arises out of a fatal road accident which occurred on the 7th May 2002 along the Nakuru-Eldoret Road involving an Akamba Scania Bus registration no. KAH 783 B and a lorry Toyota Trailer registration number KAK 553 X. The Plaintiff filed this suit in her capacity as the personal representative of the Estate of Maureen Alukwe (*hereinafter referred as the deceased*) pursuant to the letters of administration *ad litem* issued to her on 20/08/2004. This claim is brought both under the Law Reform Act and the Fatal Accidents Act Cap 32, Laws of Kenya.

2. The Plaintiff's case as per the plaint filed on 10th February 2005 was that on 7th May 2002, the deceased was lawfully traveling as a passenger in the First Defendant's motor vehicle when the Fourth Defendant so negligently and carelessly abandoned a towing trailer along the road thereby causing the First Defendant's bus to loose control, veer off the road and roll several times. The deceased was tossed out of the bus and crushed under its weight. She sustained severe injuries and died as a result thereof (*copies of the post mortem report and death certificate were produced as exhibits 1 (a) and (b)*). The Plaintiff attributed the occurrence of the accident to the drivers of both vehicles and articulated the particulars thereof in the Plaint.

3. The Defendants herein denied the allegations by the Plaintiff. The First and Third Defendants filed a Joint Statement of Defence on 4th March 2005 wherein they denied the averments in the Plaint and in particular that the First Defendant was the registered owner of the motor vehicle registration number KAH 783 B and the occurrence of the accident as alleged. They also filed a contributory notice under Order 1 Rule 21 of the Civil Procedure Rules claiming indemnity or contribution against the Second and Fourth Defendants. By a Joint Defence filed on 3/05/2005 the Second and Fourth Defendants also denied

the allegations in the Plaint, that the Second Defendant was the owner of motor vehicle registration number KAL 553X or having any knowledge of the occurrence of the accident and in the alternative they blamed the Third Defendant for the same.

4. The parties also filed written submissions to which they annexed various authorities in support of their respective positions. The Plaintiff's submissions were filed on 16th February 2013, those of Second and Fourth Defendants on 16th November 2012 and the First and Third Defendants on 19th November 2012. I have considered the same and I find that the issues for determination in this matter are:

- (a) *whether the Plaintiff has proved negligence against the third and fourth Defendants,*
- (b) *if so what is the apportionment of liability,*
- (c) *quantum on general and special damages, if any, to which the Plaintiff is entitled.*

LIABILITY

5. PW2 testified that he was PW1's neighbour and therefore knew the deceased as PW1's daughter. He alleged that on the date of the accident, he was also a passenger in the First Defendant's vehicle and talked to the deceased during the stop over at Nakuru. He was seated behind the driver and stated that he witnessed the occurrence of the accident. His testimony was that the driver of the vehicle swerved the bus to the left causing its front and rear wheels to lean over the road to the left. He was unable to bring the vehicle back to the road and the bus skidded for about 50 meters before it rolled. He did not see any obstruction that the First Defendant was allegedly trying to avoid when he swerved to the left. He did confirm that the lorry was parked on the right side of the road as you face Nakuru, about 50 meters away from the where the bus swerved and rolled but there was no contact between the two vehicles and he could not tell whether the lorry had contributed to the occurrence of the accident.
5. The First and Third Defendants on their part blamed the Fourth Defendant for parking the Second Defendant's vehicle in the middle of the road without giving any warning to other road users. Indeed the Fourth Defendant was charged with the offence of causing death by obstruction contrary to section 46 (1) of the Traffic Act, (*Cap. 403, Laws of Kenya*) and was convicted of this offence. The First and Third Defendants sought to rely on the judgment of the court in that case.

7. DW1 produced a certified copy of the judgment. He explained that the original copy could not be produced as the court file had been destroyed in the year 2007 under the Records Disposal (Court) Rules with the leave of the Chief Justice granted on 9th October 2007 and pursuant to the Gazette Notice Vol. CIX No. 35 of 18th May 2007.

8. The Plaintiff in its submissions argued that the Fourth Defendant negligently abandoned the lorry along the road with no indicators or lights in utter disregard of other road users. It was also admitted that the Fourth Defendant had been charged with the offence of causing death by obstruction as alleged. Counsel however submitted that the outcome of the case was not clear as the copy of the judgment produced was not reliable. The witness admitted that the same had been given to him by Counsel for the First and Third Defendants.

9. It was submitted on behalf of the Second and Third Defendants that the copy produced was certified after the destruction of the original and the witness was not able to tell who certified the undated copy. Further whereas the undated copy emanated from his office, DW1 had not counter-checked the same against the register wherein all new cases are registered and could therefore not verify that it was a true copy of the original. In addition, having not been a party in the traffic proceedings, the witness did not know what had transpired thereat and had only attended court to produce the copy. Therefore the court was urged to disregard this exhibit as its authenticity had not been proved.

10. The Second and Fourth Defendants did not lead any evidence in support of their case but relied on their submissions. According to them the Plaintiff had failed to prove their case to the required standards

against them. PW2 testified that the bus had not obstructed the First Defendant's vehicle as it was parked on its side of the road, the accident occurred about 50 metres from the lorry and there was no contact between both vehicles. He therefore urged the court to infer that the Third Defendant was attempting to overtake at a section of the road that is prohibited since there is no other way that he would have encountered the trailer on its lane.

ANALYSIS OF EVIDENCE

11. I have considered the evidence adduced and the submissions of the parties. Ownership of motor vehicles as at the time of the accident was proved by the copies of records tendered as evidence. It is clear that on the material night, both vehicles were at the scene of the accident. The Fourth Defendant's vehicle had been parked on the road. The dispute revolved around the circumstances of the occurrence of the accident and the parties advanced two versions. In the first version it was alleged that the Second Defendant's vehicle had been carelessly parked on the road encroaching the other side of the road without warning and was the cause of the accident.

12. This was the averment contained in the Plaint and evidence by the First and Third Defendants who produced a copy of the judgment delivered in the criminal case instituted against the Fourth Defendant. I have perused the copy of the judgment sought to be relied upon and considered the submissions of the parties on the same. The Court is mandated under Section 83 of the Evidence Act, (*Cap. 80 of the Laws of Kenya*) to presume to be genuine every document purporting to be a certificate, certified copy of any other document which is:-

(a) declared to be admissible as evidence of any particular fact; and

(b) to presume to be genuine every document purporting to be a certified copy if it is substantially in the form and purporting to be executed in the manner directed by the law in that behalf; and purporting to be duly certified by that officer.

13. A judgment is a public document under Section 79 of the Evidence Act and a certified copy thereof may be produced in proof of the contents of the original document under Section 83 thereof as long as the same was certified lawfully. The said copy was certified by a Resident Magistrate a person who is authorised to do so. Although it was alleged that the same could have been certified after the original had been destroyed as the date of certification was not provided, I note that it is not required that the certification date be provided. Therefore, the certified copy is substantially in the form and was executed in the manner provided for by the law. In addition DW1's explanation that the original copy could not be produced having been destroyed in accordance with Section 68 (1) (c) of the Evidence Act laid a proper basis for its production. I have no reason to doubt its authenticity and find that it is admissible in these proceedings.

14. However, PW2 could not find fault with the Fourth Defendant as according to him there was no obstruction in the Third Defendant's way. The Second Defendant's vehicle was parked in its lane and in addition the accident occurred some distance from where the same had been parked. Consequently it was alleged in the Second version, that the Third Defendant was attempting to overtake and only suddenly saw the lorry and veered off to the extreme left to avoid hitting it which was also the submission by the Second and Fourth Defendants.

15. In my view, from the evidence, the lorry had been so negligently parked that it obstructed the road. PW2 who was at the scene and alleged to have witnessed the accident did not testify that there was another vehicle at the scene of the accident which the Third Defendant was attempting to overtake when he noticed the lorry and veered off the road. The trial court which had the opportunity to observe a sketch plan produced by the Inspector of Police confirming that the lorry had crossed the yellow line and a section of it had encroached into the other side of the road, found that the Fourth Defendant had obstructed a large section of the road, had switched off his hazard lights and had not placed any reflectors or other object to warn other motorists that the motor vehicle had been parked in the road. He therefore found that the bus swerved to the left in an effort to avoid ramming into the parked lorry.

16. On the above evidence, I find that the Fourth Defendant was negligent and hold him liable. However, it is clear that the driver of the bus was driving at an excessive speed and failed to keep a proper look out that he was unable to see that the lorry had been parked on his side of the road and take proper steps to avoid hitting it. He was also negligent and contributed to the accident. Consequently, I hold that the Plaintiff has established on a balance of probability that the accident occurred as a result of the negligence of the drivers of both vehicles. I apportion liability in the ratio of 20:80 as against the Third and Fourth Defendants.

QUANTUM

17. I will deal with the Plaintiff's claim for damages under the following heads:-

(a) General damages

(i) Pain and suffering

18. Damages under this head are awarded on the basis of the time the deceased suffered pain before her death. The evidence that has been submitted was that the plaintiff sustained fatal injuries upon being crashed by the bus and died on the spot. The Plaintiff sought Kshs. 100,000/= under this head. The First and Third Defendants urged the court to award Kshs. 20,000/= while the Second and Fourth Defendants proposed a figure of Kshs. 10,000/=. I find that an award of Kshs. 50,000/= under this head is appropriate.

(ii) Lost years

19. In determining the award under this head I am well guided by the principles laid out by the Court of Appeal in the case of **Hassan v Nathan Mwangi Kamau Transporters & 4 others [2008] 1 KLR (G&F) 90:-**

“My summary of their relevant principles is this:

- (i) A parent cannot insure the life of his child,*
- (ii) The death of the victim of the negligence does not increase or reduce the damages for the lost years,*
- (iii) The sum to be awarded is never a conventional one but compensation for a pecuniary loss,*
- (iv) It must be assessed justly and with moderation,*
- (v) The complaints of insurance companies at the size of such awards should be ignored,*
- (vi) Disregard remote inscrutable speculative claims,*
- (vii) Deduct the victim's living expenses during 'the lost years' for they would not form part of the estate,*
- (viii) A young child's present or future earning in most cases would be nil,*
- (ix) An adolescent's would usually be real, assessable and small,*
- (x) The amount will vary greatly from case to case for it depends on the facts of each one including the victim's station in life,*
- (xi) Calculate the annual gross loss,*
- (xii) Apply the multiplier (the estimated number of 'lost working years') accepted as reasonable in*

each case,

(xiii) Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her; and

(xiv) Living expenses include the reasonable cost of housing, heating, food, clothing, insurance, travelling, holidays, entertainment, social activity and so forth. ”

20. The Plaintiff testified that the deceased was 24 years old at the time of her death. She had been employed as an Executive Secretary in the firm of Kilonzo & Company Advocates and according to the pay slip submitted as evidence she was earning a monthly salary of Kshs.10,000/= and this is the sum I adopt as the multiplicand.

21. On the multiplier, it was the plaintiff's submission that the deceased would have worked for upto the retirement age of 60 years and therefore urged the court to adopt a multiplier of 36 years. The First and Third Defendants relied on the decision of the Court of Appeal in Mombasa Civil Appeal No. 123 of 1985 **Hassan vs. Nathan Mwangi Kamau Transporters & Other** where the deceased was 17 years old and the court assessed damages for lost years using a multiplier of 16 years. The Second and Fourth Defendants proposed a multiplier of 20 years. I am of the view that the deceased would have engaged in gainful employment for 30 years, taking into account the uncertainties of life.

22. The deceased was not married and was survived by her father Arthur Alukwe and mother Alice Alukwe. Therefore, it is my view that she spent half of her salary on living expenses. Consequently, I award Kshs. 1,530,000/= for lost years computed as follows: 10,000 (*multiplicand*) x 30 years (*multiplier*) x 1/2.

(iii) Loss of expectation of life

23. The deceased was young was young and healthy and would have probably lived a long and happy life. Under this head, the Plaintiff sought a figure of Kshs. 100,000/=, the First and Third Defendants proposed Kshs. 60,000/= while Second and Fourth Defendants submitted for Kshs. 70,000/=. I award Kshs. 100,000/= as general damages under this head.

(b) Special damages

24. The Plaintiff pleaded special damages of Kshs. 58,860 as follows-

- | | |
|----------------------------|--------------------|
| (a) cost of postmortem | Kshs. 5,000/= |
| (b) Funeral expenses | Kshs. 45,000/= |
| (c) Cost of advertisements | Kshs. 8,760/= |
| (d) Police abstract | <u>Kshs. 100/=</u> |

Total **Kshs. 58,860/=**

25. However she only produced the receipt for the police abstract and the advertisement charges. There were no receipts produced to prove the claim for funeral expenses. However, the court may make a reasonable award in the absence of such proof. The Court of Appeal in the case of **Jacob Ayiga Maruja & another Vs. Simeon Obayo [2005] eKLR** awarded the Plaintiff Kshs. 60,000/= for funeral expenses and held thus-

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on.

»

We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.

26. I therefore award the pleaded and proved sum of Kshs. 8,760/= and Kshs. 30,000/= as funeral expenses.

CONCLUSION

27. In summary I enter judgment on liability for the Plaintiff against the Third Defendant at 20% and 80 % against the Fourth Defendant and award her Kshs. 1,648,760 made up as follows:-

(a)	<i>General damages for pain and suffering</i>	Kshs.	50,000/=
(b)	<i>General damages for lost years</i>	Kshs.	1,530,000/=
(c)	<i>General damages for loss of expectation of life</i>	Kshs.	100,000/=
(d)	<i>Funeral expenses</i>	Kshs.	30,000/=
(e)	<i>Special damages</i>	<u>Kshs.</u>	<u>.....8,760/=</u>
	<i>Total</i>		<u>Kshs. 1,648,760/=</u>

28. The above sum shall carry interest at court rates from the date hereof till payment in full. The plaintiff shall also have the costs herein and apportioned likewise.

Dated, signed and delivered at Nakuru this 7th day of November, 2013

M. J. ANYARA EMUKULE

JUDGE