



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 48 OF 2007

CHARLES OSANO KIJANAH(*suing as the legal representative of the estate of the late MICHAEL OSANO*.....**PLAINTIFF**

VERSUS

COAST BUS MOMBASA LIMITED.....**1ST DEFENDANT**
DOLPHIN COACHES LIMITED.....**2ND DEFENDANT**

JUDGMENT

1. THE PLEADINGS

By an Amended Plaint dated 1st March 2007, the Plaintiff (*the Administrator of the estate of Michael Otieno Osano - the deceased*), sued the Defendants herein, and claimed -

- (a) *Special Damages in the sum of Kshs 40,900/=*
- (b) *General Damages under the Fatal Accidents Act, and the Law Reform Act*
- (c) *Costs of the suit and*
- (d) *Interest on (a), (b) and (c) at court rates.*

By a Statement of Defence dated 28th March 2007 and filed on 2nd April 2007, the 2nd Defendant denied liability for the accident and blames the 1st Defendant for the accident. The 3rd Defendant CMC Motors Group Ltd. filed a Statement of Defence dated 4th May 2007. The essence of the 3rd Defendant's defence was that it was a co-owner to secure payment to it of outstanding moneys for the purchase of the Bus. It denied any liability to the plaintiff or the deceased's estate. No evidence was led against it, and did not take further part in this action.

The 1st Defendant's Defence was filed on 16th March 2007. It was dated 15th March 2007. Again the essence of the 1st Defendant's defence is that its driver was not negligent, and set out an elaborate counter-claim against the 2nd Defendant, and the particulars of negligence on the part of the 2nd Defendant.

2. THE EVIDENCE

The evidence in this entire case was taken down by the Hon. Lady Justice Mugo. Four witnesses testified on behalf of the Plaintiff. The Defendants offered no evidence at the close of the Plaintiff's case. I asked counsel for the respective parties to file written submissions which they did. The 1st Defendant's submissions dated 17th November, 2010 were filed on 18th November 2010. The second Defendant's written submissions were dated 17th November 2010 were filed on 19th November 2010. The plaintiff's counsel's submissions dated 23rd November 2010 were filed on 24th November 2010.

The three counsels tried to summarize the evidence but the most concise is that of Mr. Njuguna Matiri counsel for the 2nd Defendant. I have perused the evidence as per the court record. PW1 whose evidence is the sole basis of the plaintiff's case did not himself witness the accident or investigate it. He testified from the record of the Police file of investigations carried out by his colleagues before he took over the case when he moved to the Mau Summit Police Patrol Base.

There is no dispute that an accident took place on the material night of 24th March 2006, and that several people died, including one Michael Otieno Osano (*the deceased*). PW1 testified that the accident occurred along the Eldoret-Nakuru Highway near Mau Summit, Jogoo Area. The accident involved motor vehicle number KAP 759T Scania Bus owned by the 1st Defendant, and motor vehicle number KAS 874M owned by the 2nd Defendant. The 1st Defendant's Bus was being driven by one Idi Juma who perished in the accident.

According to the evidence of PW1, the 1st Defendant's Bus, driven by its driver, servant or agent, was overtaking an undisclosed lorry or truck when it met the 2nd Defendant's motor vehicle, and to avoid a head-collision, the 2nd Defendant's motor vehicle swerved to its near side, but not far enough before the 1st Defendant's motor vehicle hit it at the rear, causing it to lose control, swerved to its right, hit the curb and overturned. In the process the 1st Defendant's driver Idi Juma died, the plaintiff's son Michael Osano sustained injuries to which he succumbed and died at 6.00 a.m. on the morning of 24th March 2006 at the Nakuru Provincial General Hospital. In the opinion of PW1, based on the record of the Police Investigations upon which he based his testimony, the accident was solely caused by the driver of the 1st Defendant Coast Bus Mombasa Ltd., that he overtook the undisclosed vehicle without due care and attention and recklessly so.

The evidence of PW2 consisted of the deceased's business, and earnings for the years 2005, when the deceased's business was put at Shs 23,241,250/= (*gross*) and shs 1,255,523/= (*net or profit*), and speculative growth of Ksh 26,925,00/= (*gross*) for the year 2006, and shs 1,590,059/= (*net profit*) for that year.

PW3 was the deceased's brother. He paid -

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| (a) | for the post mortem | Shs. 3,000/= |
| (b) | coffin | Shs 16,000/= |
| (c) | Preservation of body | Shs 2,500/= |
| (d) | Motor vehicle hire | Shs 2,000/= |

PW4 is the father of the deceased and testified that the deceased had 2 wives, and 5 children. The wives were unemployed, and like him were entirely dependent on the deceased, and that he used to receive a monthly stipend of Shs 10,000/= from the deceased.

ANALYSIS OF THE EVIDENCE

From the evidence it is clear that the accident was largely caused by the negligent driving of the 1st Defendant's driver, Idi Juma who perished in the accident. The accident is said to have happened just after mid-night (*12.05 a.m. according to the good Samaritan who phoned PW3 - the brother of the deceased*). In those circumstances it cannot be said that the hours were so late as to cause drowsiness or

sleep on the part of the 1st Defendant's driver. What is more likely is the scenario described by PW1, **firstly** that the driver of the 1st Defendant was driving fast in the circumstances, and **secondly** he was overtaking another truck. That combination is lethal where the overtaking driver meets an on-coming vehicle from the opposite direction. The overtaking vehicle has little room to manoeuvre and pull back with another vehicle on its rear side and the on-coming vehicle right on his "nose".

The chances are either a very violent collision with metal cringing and passengers bones and limbs being snapped like dry twigs, or the on-coming vehicle taking evasive action, like the 2nd Defendant's driver did to avoid the head-on collision, but sometimes not quick enough to enable the on-coming vehicle enough room to pass him. In this case, the 2nd Defendant's driver avoided a head-on collision, but because of the 1st Defendant's driver's speed, the 1st Defendant's bus hit the rear of the 2nd Defendant's bus, causing it to lose control, hitting the curb and overturning, killing its driver Idi Juma, and causing the deceased various injuries from which he died.

In the circumstances I would agree with the assessment of PW1 that the driver of the 1st Defendant was 90% responsible for the accident. I would also find the 2nd Defendant's driver responsible or blame for 10% of the accident. I say so because it is apparent again from the evidence of PW1 that the 2nd driver's bus was also being driven fast. If it were not, its driver would have so managed and controlled it that it may well have avoided killing a pedestrian - Joseph Mwaniki Kakima.

Having come to those conclusions, the next question for me is to assess damages, in terms of the Amended Plaintiff wherein the plaintiff claimed special damages, general damages, costs and interest.

SPECIAL DAMAGES

The term special damages connotes or means the costs and other expenses actually incurred by the plaintiff in the burial of the deceased. It is not disputed the deceased died in Nakuru and his body was taken for burial at his rural home in Kaksingri West Location in Suba District. Although PW3 payments aggregated to Shs 24,000/= a sum of Kshs 40,900/= was accepted as comprising that sum and other burial expenses. I would find that sum for the plaintiff.

PAIN AND SUFFERING

It is noted from the evidence of PW3 that the accident occurred just after mid-night. The deceased suffered pain for nearly six hours before he gave up the ghost due to severe loss of blood (*massive pelvic haemorrhage*) and pelvic fracture. In other words he did not die immediately after the accident. I would award him the suggested figure of Kshs 150,000/= for pain and suffering.

LOSS OF EXPECTATION OF LIFE

The deceased was said to be 32 years of age. He was a youth. He may have lived another 30 to 40 years, as he is said to have enjoyed good health. I would award Shs 100,000/= for loss of expectation of life.

LOSS OF DEPENDENCY

The star witnesses on this head of the claim were PW2 an auditor, and PW4, the deceased's father. According to these witnesses, the deceased was a businessman running an Electronics shop at Oile Market in Kisumu. According to PW2 (*the Auditor*), the business had a turnover of Shs 23,000,000/= with a nett profit of Kshs 1,255,533/= for the year 2005, and a turnover of Kshs 26,925,000/= and a profit of Kshs 1,590,059/= for the year 2006.

PW4's "**Statement of Accounts**" was rejected by the court as it had not been included in the plaintiff's list of documents. No bank accounts in relation to the plaintiff's business were produced, there was no proof of existence of any bank account. There was no evidence of any Tax Returns or tax

payments.

Finally the counsel for the 2nd Defendant submitted that the deceased's lifestyle did not reflect a person with a business turnover of Shs 26,000,000/= per year and more so the business collapsed after his death.

I would agree with Mr. Matiri that these figures are a **mathematic tale with no empirical basis**. They cannot be a safe basis with which to work out a fair award for the loss of dependency. PW4 stated that the deceased supported him with the sum of Ksh 10,000/= per month. That to me sounds more like the deceased's net figure every month in his business. The deceased was 32 years, and taking a retirement age of 60 years, he would have carried on his business for perhaps another 28 years. I would however go by counsel's multiplicand of 25 years.

The loss of dependency would thus be calculated at the rate of the annual income, the years of expected dependency, that is -

$$\text{Shs } 10,000 \times 12 \times 25 \times \frac{2}{3} = 2,000,000/=$$

In summary therefore, I would enter judgment for the plaintiff as follows -

(1) Pain and Suffering	-	Shs	150,000/=
(2) Loss of Expectation of Life	-	Shs	100,000/=
(3) Loss of Dependency	-	Shs	2,000,000/=
(4) Special Damages	-	Shs	<u>40,900/=</u>
Total		Shs	<u>2,290,900/=</u>

I would also award the plaintiff costs and interest at court rates from the date of judgment till payment.

Dated, signed and delivered at Nakuru this 4th day of March 2011

M. J. ANYARA EMUKULE
JUDGE