



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 282 of 1990**

**MUMBA NZAI RANDU ..... PLAINTIFF**

**VERSUS**

**MURGIAN TRANSPORT (K) LTD ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**Asige for the plaintiff  
Obel for the Defendant  
Court clerk – Kazungu**

**J U D G E M E N T**

The plaintiff sued the defendant company under the Law Reform and Fatal Accidents Acts as the legal representative of the late Katana Benzai Mshondo who died on 15-11-89 when an explosion occurred inside a tanker number KJY 606 where the deceased was engaged in cleaning duties. It was pleaded that the defendant had engaged the deceased and instructed him to carry out the said cleaning but without taking all reasonable, suitable and adequate precautions to ensure the deceased's safety while at work. And that the defendant company exposed the deceased to a risk it knew of.

It was further pleaded that Katana died at age 30 leaving his father (the plaintiff) and a wife. That Katana enjoyed good health earning Sh.1200/- p.m. part of which he expended on the said 2 dependants. That by the said demise, Kalama's estate suffered loss and the dependants lost support. So the court was asked to assess and award damages, costs and interest.

A defence filed on 14-10-91 denied that the defendant had a contract of employment with the deceased, implying or expressing the duty of care by the latter of the former at the place of work. Or that the deceased was fatally injured as alleged and that the defendant was responsible by way of negligence. And that the deceased was either wholly or substantially responsible for the accident in question. It was set out in the particulars that he neglected to follow instructions as to take adequate care of his own safety, and that he was not alert and this exposed himself to the risk which he knew while on duty.

It does not appear on record if the plaintiff replied to this defence – see (O. 6 r. 9 Civil Procedure Rules). The record however has 9 draft issues filed by the plaintiff on/about 5/2/92. The trial opened on 5/5/04 with Kesi Kirao (PW.1).

He told the court that he knew the plaintiff herein and that the deceased (Katana) was his workmate. That PW.1 was a turn boy on a sub contract with the defendant company. That the deceased was a turn boy with the defendant. When the two were on duty at the premises of the defendant on the material day, the latter's supervisor (Hassan) directed them to clean a certain truck due for loading the following day. It was a petrol tanker to be cleaned so that it could be loaded with edible oil. That the deceased proceeded to open the cover on the top of that tanker. He lowered himself inside ready to do the cleaning. In the meantime PW. 1 went to fetch some cleaning agents. That the two had to work in underpants only and no protective gear was provided. As this witness returned to the truck, he heard a loud explosion from the tanker Katana had entered. As he scrambled to get out, Katana was all ablaze. The staff ran to his aid, an ambulance arrived and the deceased was rushed to hospital. He died 3 days later. That the two had cleaned tankers before. That cleaning the subject tanker (of petrol) took place at 5 p.m. while it had been in the sun the whole day. That that meant petroleum vapours had been building up in the tanker. That when Katana died the defendant assisted in providing transport to his burial place plus cash contribution of Sh.4,000/-.

In cross examination PW.1 said that he was cleaning motor vehicles of one Alwi which had been subcontracted to the defendant and he was not its employee at all. To him the deceased was the defendant's staff because he saw him using its motor vehicles. But that the motor vehicle they were about to clean, the subject motor vehicle, had been subcontracted to the defendant by some Somali. That there was this explosion from inside this tanker, although it did not burn at all. He denied that the deceased had moved to that truck with a cigarette – a dangerous thing he could not do.

In re-examination, this witness repeated that the subject tanker had been subcontracted to the defendant to transport its goods. That the deceased was the defendant's employee who traveled a lot delivering its goods. That he had taken a spanner, not a cigarette into the tanker.

The plaintiff (PW.2) then testified. That the deceased, his son, was employed by the defendant. He had a wife but no children. When he died PW.2 visited the defendant's offices, met officers there and they assisted him with Sh.4000/- to carry out burial arrangements. He himself spent money on those arrangements. That Katana earned Sh.1,200/- p.m. He took out a grant of letters to administer Katana's estate on 21- 11-94 (Note: the suit was instituted on 25-4-90 without the grant) Kadzo Katana (PW.3) the deceased's wife, was next. She married Katana in 1986. He worked for the defendant as a turn boy. That he used to earn Sh.1200/- p.m., Sh.800/- which he gave PW.3 to support and run the family affairs. They had no children (but she had her own 2 children) The defendant did not call any evidence and both sides submitted.

On liability the plaintiff's side maintained that since its testimony had not been rebutted it remained that the deceased was the defendant's employee and it did in circumstances, what pointed to the employer's negligence or breach of contractual duty. This bit must be determined first.

The defendant on its part, submitted that the plaintiff had not proved that the deceased was employed by it and that he was on its duties when the alleged explosion took place.

On liability this court finds that the plaintiff has not shown this court that his son (Katana) was an employee of the defendant. Such proof lies in the way of muster roll, payment records, employment documents etc. None of those or any other credible evidence has been brought to find that the defendant employed the deceased and so it had a duty to him as to the place, condition nature and surroundings of work. It could as well be that the deceased was employed by someone else (see PW.1) but he was doing cleaning duties on the motor vehicles subcontracted to and lying on the premises of the defendant. So tragic as this incident was, without proof of employer-employee tie, liability is hard to establish. It was claimed that the deceased was employed by the defendant, but there was no proof of that.

The other point to address is whether this suit is competent or not. From the submissions of the defendant it is not. Reference was made to the Law of Succession Act (Cap. 160) regarding what a legal representative has authority to do over a certain deceased's estate (including suits as those brought under the Law Reform Act/and case law). There was no evidence of the grant which the plaintiff claimed he obtained on 21- 11-94. But even had that been exhibited, it had been obtained some 3 years after the suit was filed. Such grant should be obtained before a suit is instituted and that here that was not the circumstance this suit is incompetent (see S. 80 (2) the Law of Succession Act and **Otieno vs. Ougo & Another [1987] KLR 270, Tronistik Union Int. & Anr. Vs. Mbye & Anr. [1990] LLR 299** both from the Court of Appeal). A grant of letters of administration takes effect from the date of grant and one who desires in any way to do such acts as affect the estate of a deceased person, ought to obtain such grant before such acts. Suing on behalf of the deceased's estate is an act affecting that estate and can only be indulged into after a grant of letters of administration of that estate. That was not the case here. A grant was obtained long after the suit was filed. It is incompetent. So without more this suit is dismissed with costs. However had it passed muster, this court would have gone on to assess damages under the two Acts (above) as principles attaching to them allow. In the circumstances no probable quantum of damages can be put down.

**Judgement accordingly.**

**Delivered on 1st July 2005.**

**J.W. MWERA**  
JUDGE