



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2745 OF 1990

TERESIA KANGWELE MBANDI PLAINTIFF

VERSUS

BENDAMIN DEON MUSAU & ANO.....DEFENDANTS

JUDGMENT

This is a motor vehicle accident case.

It is an old matter having been filed on the 6th of June , 1990 by Teresia Kangwele Mbandi who is the widow of the deceased.

The Plaintiff filed this suit under the Fatal accidents Act Cap.32 only. She made no prayers under the Law Reform Act.

In brief, she sued the 1st defendant as the owner of the motor vehicle bus reg. No. KWP 051 and the 2nd defendant as the driver of the said vehicle.

That on the 9th of October, 1987 the deceased was involved in an accident. According to the Plaintiff, the bus veered off into the bush along the Mombasa-Nairobi road thus causing the death of the deceased.

No action was taken on this suit for four years. The parties finally came for hearing on the 25th November, 1998 when the evidence of the plaintiff was recorded and heard by Hon. Justice Mitey J. The Hon. Judge adjourned to allow the plaintiff produce an original death certificate. The case never proceeded to hearing until the 28th April, 1999. It was placed before me, because for the month of April, 1999 I had been assigned Running down cases to hear.

I proceeded with the case under Order 17 r 10 CPR which permits me to continue on trial of another judge if he is not in he station. Currently Hon. Justice Mitey is not in the Nairobi station for this week or so.

I then took the evidence of the plaintiff in details. She informed the court that her husband worked with “Wendo wa Bus Services”. He would leave evening to go to work and returned in the evening. Every month he would provide Kshs.1,200/- for her up keep and those of her children.

On the day in question of the 9.10.87 she had gone to the market and overhead people speak of an accident. She did not pay much attention until the evening when she found her husband had not returned home. She went on enquire the following day at the police and then the hospital. She found her husband

dead.

She informed the court that she had no other employment. That she depended wholly on the deceased for her livelihood. Friends and relatives helped her with moneys. She has since began a business of selling vegetables.

I also note that she said her father in law thereafter provided land for her.

The Plaintiff admitted in Cross examination that she was never an eye witness in the case. She only heard of the accident.

She produced the original death certificate, police abstract form and documents showing that the children belonged to her and the deceased.

It was thus as a surprise when the advocate for the plaintiff stated that there needs not be proof by the plaintiff to prove negligence. In his opening address to this court he stated that:

“The Plaintiff will show that it is upon the defendant to prove they were not negligent in this action”. Order 17 r 2(1) CPR requires that:- “..... the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.”

There were only three agreed issues. The first being

“1. Was the accident caused solely by the 2nd defendants negligence or was it an inevitable accident?”

The Plaintiff also pleaded particulars of negligence.

As only the plaintiff was called as the only witness and whereas she stated she did not witness the said accident, the advocate for the plaintiff pleaded the doctrine of “Res ipsa loquitur” From the defendants authority of David Nandwa V. Kenya Kazi Ltd (1982-880 IKAR 1178.

It held as per the judgement of Gachuhi Ja that “Res ipsa loquitur”, being a rule of evidence, does not need to be pleaded.

The fact though remains, that there is no evidence at all before me, to prove negligence on the part of the defendant.

The defendants in their defence filed on the 15.10.90 denied the allegations of negligence. They nonetheless pleaded at para 3 of the defence (last sentence):-

“The defendants shall contend that the said accident occurred due to factors beyond the control of the 2nd defendant and or that it was inevitable.”

All the plaintiff required to do was to produce the proceedings of the lower court case under Section 34 of the Evidence act. The police abstract shows that the driver was charged with the offence of causing death by dangerous driving in case No.92/88. No results of the case was obtained.

“Evidence given by a witness in a Judicial Proceeding is admissible in a subsequent Judicial proceedings a later stage in the same proceeding, for the purpose of perusing the facts which it states”.

The advocate for the plaintiff could have caused the proceeding of the lower court to be admitted in the trial to establish negligence - especially from the evidence of the scene of Criminal traffic police who may have taken the measurement of the scene. The Plaintiff could have actually called at least one eye witness who would describe the scene. Was the accident inevitable? This is difficult to know as no evidence of

the accident has been proved. All the plaintiff though, require to do is to establish an accident occurred through the negligence of the defendants. It is up to the defendants to submit this contention.
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I hereby would find that no evidence on liability has been established. I hereby dismiss this case on those grounds.

As to the issue of Quantum which I am required to consent and make my findings, I believe the plaintiff was an employee of the defendant No.1. I also believed that he was earning a salary. The problem is that the plaintiff can only recall Kshs.1,200/= which she was being given per month by the deceased. We have only her word for this.

Further the plaintiff advocate prayed that an award of Ksh.345,600/- be given to the plaintiff (24 x 12 x1,200/-). He required that a multiplier of 24 years be taken. The deceased died aged 31 years old.

Proof of income simply done by having a letter from the defendants to admit that fact especially so under order 12 r 3. CPR. All this ought to have to have been done during the pretrial. I hereby find that an award of kshs.345,600/- would have been reasonable in the circumstances (inclusive of the 2/3 rd.) I apportion this figure amongst the dependants as of 1987 as follows:-

1. Teresia Kangwele Mbinda widow 95,600/-
2. Minoo Mbandi daughter 50,000/-
3. Matata Mbadi son 50,000/-
4. Mwikali Mbandi daughter 50,000/-
5. Makau Mbandi son 50,000/-
6. Mutie Mbandi daughter 50,000/-

Ksh.345,600

I hereby dismiss this suit with costs to the defendants.

Dated this 29th day of April, 1998 at Nairobi.

M.A. ANG'AWA

JUDGE