

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

**AT NARIOBI
CIVIL CASE NO. 1064 OF 1994**

PHILOICE KABAYEKA OLUOCH..... PLAINTIFF

VERSUS

KENYA BU SERVICES LIMITED 1ST DEFENDANT

FARAJA INVESTMENTS LIMITED 2ND DEFENDANT

JUDGMENT

The plaintiff's husband was killed in a road accident on the 26th of October, 1992. According to paragraph 4 of the Plaint, the deceased was a passenger in a motor vehicle registration number KXD 781 owned by the First Defendant. The said vehicle collided with motor vehicle registration number KAC 375H owned by the Second Defendant.

On the 24th August 1994 the parties filed a statement of Agreed Issues and the first agreed issue was:-

1. "Was the deceased at the material times a passenger in the motor vehicle registration number KXD 781?" On the 30th May 1997 the parties agreed on liability subject to the Plaintiff proving that the deceased was a passenger.

The consent letter signed by the advocates for the Plaintiff, First Defendant and Second Defendant dated 21st April 1997 and filed in court on 30th May 1997 reads as follows:-

"By consent Judgment is hereby entered on liability at 15% to 85% as against the 2nd and 1st Defendants respectively subject to the plaintiff proving the deceased was a passenger."

It is clear from the pleadings and the Court record that the issue of whether the deceased was a passenger in motor vehicle KXD 781 was crucial. The whole case was based on that fact.

The Defendants did not call any evidence.

The evidence by the Plaintiff and her brother-in-law tends to indicate that the deceased was actually a passenger in motor vehicle registration number KAC 375H . Counsel for the Plaintiff did not deem it fit to apply to amend the Plaint to conform with the Plaintiff's evidence. He has now sought to amend the Plaint when replying to the First Defendant's submission. He claims that it was unfortunate and unintentional mix-up in drafting. This might have been so at the time the Plaint was filed, but counsel for the Plaintiff was put to notice when Issues were being agreed upon. He never apparently referred to his brief. Later judgment on liability was entered by consent subject to proof that the Plaintiff was a passenger. Yet this appears not to have triggered counsel's brain to look at the pleadings and his brief. Surely when counsel for the Plaintiff prepared the brief for hearing, assuming he did, he must have recognised the glaring mistake in his pleading. He did not. If all the above failed, then the evidence of the Plaintiff and her brother-in-law should have made him apply to amend the Plaint even at that late stage.

I am aware that the Rules provide that pleadings can be amended at any stage. In this particular case the agreed issue of whether the deceased was a passenger in motor vehicle KXD 781 went to the root of the case.

The consent judgment on liability was conditional on the Plaintiff proving that the deceased was a passenger in motor vehicle KXD 781. This, the Plaintiff has failed to do.

I therefore dismiss the Plaintiff's suit with costs. I order that the costs shall be paid by the Plaintiff's advocates as they have been responsible for the mix-up.

Delivered this 10th day of December, 1997.

J. V. JUMA

J U D G E