



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 6577 OF 1991**

**JACINTA WANGARI.....PLAINTIFF**

**-Versus-**

**KENYA BUS SERVICES LTD.....DEFENDANT**

**JUDGMENT**

On the 11<sup>th</sup> December, 1988 at about 7.45 p.m one Peter Ndungu Wainaina was driving his motor vehicle registration No. KXY 385 along Ngong Road in the direction of Ngong Town when his vehicle collided with a bus registration No. KUG 850 owned by the first Defendant and driven by the second Defendant. Peter Ndungu Wainaina died as a result of the said collision. His wife then instituted this suit claiming damages under the Fatal Accidents Act and the Law Reform Act.

The Defendants filed a defence stating that collision was caused by the negligence of the deceased.

The Plaintiff called two witnesses. P.W.2 JAMES WAINAINANGENGA was traveling with the deceased in the same motor vehicle. According to him, the deceased was driving on the left side of the road and at Indiana Hotel he saw a motor vehicle overtaking another one.

These vehicles were traveling in the opposite direction from their own vehicle. There was a bend on or curve. The deceased swerved to his left, off the road. He then heard a bang. He came to Kenyatta National Hospital. After 2 days he was discharged and at the police station he found the bus, a Leyland Kenya bus registration No. KUG 850. It had a scratch at the rear. p.w. 3 MARTIN WAITHAKA said that he was driving his vehicle behind two cars which in turn were behind the Kenya bus. He was the last in the queue. At Indiana Hotel there is a bend. He heard a scratch of brakes then a bang. He moved to the scene and found KBS on its side of the road and the other vehicle also on its side of the road. He said the collision was caused by the Kenya bus overtaking another vehicle at a bend,

The 2nd Defendant was convicted of causing death by dangerous driving in Traffic case No. 5183 of 1988.

The Defendants did not give any evidence and they did not call any witnesses. I am satisfied on the evidence of P.W.2 JAMES NJENGA and P.W.3 MARTIN WAITHAKA that the accident was caused by the second deceased served off the road but not avoid the or bend. The deceased swerved off the road but could not avoid the collision. No evidence has been adduced to show how the deceased contributed to the accident. In fact the damage to the vehicles indicates that the collision took place when the bus was swinging back to its side of the road. The damage to the deceased's vehicle was in front while damage to the bus was on the rear right. The bus then stopped on its side of the road so did the deceased's vehicle.

Counsel for the Defendants has submitted that since there is no direct evidence on the point of impact liability should be apportioned 50/50 on the basis of the decision in BERKLEYL STEWARD - vs-LEWIS WAIYAKI (1982 - 88) 1 KAR 1118. He further submitted that conviction of the second Defendant does not close the issue of contributing negligence - see Civil Appeal No. 121 of 1993 DAVID KINYANJUI & OTHERS -vs.- MESHAK OMARI MUNYORO.

In the instant case there was direct evidence of P.W.2 JAMES NJENGA that before the accident the deceased was driving on the left side of the road. The deceased swerved to the left, off the road to avoid the collision, then a bang. P. W. 3 MARTIN WAITHAKA found both vehicles on their respective sides of the road. The deceased was trapped in his vehicle. This means there was no way he could have driven from the point of impact whereas I agree that conviction alone does not close the issue of contributory negligence, I hold that in the instant case I am satisfied on the evidence before me that the 2<sup>nd</sup> Defendant was wholly to blame for the accident. It was not disputed that the 2<sup>nd</sup> Defendant was an employee of the 1st Defendant and driving the said motor vehicle in the course of his employment with the 1st Defendant I therefore hold that the 1st Defendant is vicariously liable. Special damages were agreed as follows:-

- (a) Police abstract shs. 100/-
- (b) Post mortem report shs. 100/-
- (c) Funeral expenses shs. 30,000/-
- (d) Value of motor vehicle 140,000/- -15,000/-, salvage shs.125,000/-
- (e) Assessors fees 1,130/-
- (f) Towing charges - shs. 3,000/-
- (g) Letters of administration 15,300/- (h) traffic proceedings - shs. 280/-

Total = shs. 174, 9100/-

The deceased was aged 28 years at the time of his death and was an engineer by profession earning a gross salary of shs. 13,000/- per month. Evidence was led by his wife that he was in timber business with P.W.2 JAMES WAINAINA NJENGA. Mr. Njenga confirmed and stated that it was the deceased who used to find the customers by virtue of his profession and employment while Mr. Njenga procured the timber. The Plaintiff stated that the deceased used to give her shs. 8,000/- per month in cash and used to give his mother shs. 10,000/- per month also in cash. P.W. Mr. Njenga stated that the name of the partnership was Kimuga Hardware & Timber Supply which was not registered. There were no books of accounts. They relied on trust for each other. Some bank statements were produced but these were in the name of the witness. According to Mr. Njenga the deceased used to pass through the Timber Yard after his duty at 5 p.m. They used to share shs. 15,000/- per month.

What emerges from the evidence is that the deceased used to get some extra income akin to commission rather than partnership drawings. In the absence of documentary proof as to the amount and doing the best I can in the circumstances, noting that such commissions are not necessarily paid on monthly basis, I assess per month.

The deceased was married with a child and used to pay school fees for his brothers.

In doing so I am mindful of the decision in Civil Appeal NO.119 of 1995 RYCE MOTORS LTD. -vs- ELIAS MUROKI. The distinction is that the evidence of the Plaintiff is supported by that of P.W.2 JAMES NJENGA and the documentary evidence from some of the customers. On the multiplier to be adopted counsel for the Plaintiff was submitted that 22 would be appropriate relying on SERAUMA JUMA-vs- BAT 1978 KLR 40 where the deceased was aged 29 years and the court adopted 22 as a multiplier.

Counsel for the Defendants has on the other hand suggested<sup>14</sup> relying on SHEIKH MUSHTAQ HASSAN-vs- NATHANMWANGI KAMAU (1982 - 88) 1 KAR 946. The deceased was 28 years old with a wife aged 22 years.

One would have expected him to live and earn some income upto the retirement age of 60 years. We have, however, also to bear in mind the imponderables. He might never have reached that age. In the circumstances I adopt a multiplier of 18.

His gross income as stated above was shs. 13,000/- from the salary and shs. 7000/- from commission. I would subtract a sum of shs. 4000/- for income tax and other statutory deductions. I would therefore award a sum of kshs. 16,000/- x 12 x 2/3 x 18 = shs. 2,304,000/- under the Fatal Accidents Act.

Counsel for the Defendants has submitted that I should dismiss the claim for damages under Law Reform Act since the Plaintiff obtained letters of administration after the suit had been filed. Such letters of administration have no effect. He relied on Civil Appeal No. 145 of 1990 TROVISTIK UNION INTERNATIONAL-vs- MRS. JANE MBEYU. That court of Appeal decision delivered on the 19<sup>th</sup> October 1993 overruled the Court of Appeal decision in ROMAN C. HINTZ -vs- MWANGOMBE MWAKIMA (1988) 1 KAR 482 which was delivered on the 26 July 1984.

The HINTZ CASE ruled that one would sue under Law Reform Act without taking out the letters of Administration. The TROUISTIK CASE has ruled that one must obtain the letters of Administration. The question that arises is what happens to those cases filed between July 1984 and October 1993 where letters of Administration were not obtained.

In the instant case suit was filed without obtaining letters of Administration. Subsequently the Plaintiff obtained letters of Administration. Is the Plaintiff entitled to recover under the Law Reform Act? Decisions of the Court of Appeal are binding to all courts below it and indeed are law. Before October 1993 an advocate could confidently file suit claiming damages under Law Reform Act without obtaining letters of Administration. That was the law.

Now that the Court of Appeal has decided to reverse its own decision, why should the litigant suffer in the process? The Plaintiff took steps to take the letter of Administration after suit was filed. Is the exercise in obtaining such letters of Administration futile? In my view such an exercise is not futile. The Court of Appeal in the TROUISTIK CASE stated in effect that the purpose of obtaining letters of administration of the Estate. It gave the example of husband and wife leaving apart and whose son is involved in an accident and dies intestate. One obtains letters of administration, the other does not. It is that with letters of administration that will claim under the Law Reform Act.

In the instant case by declaring the claim under Law Reform Act as incompetent would mean that the Plaintiff would have to withdraw the suit, obtain letters of administration, then file a fresh suit. The suit would be statute barred, the litigant would pay the extra court fees and advocate's costs and would beat the bottom of the hearing list should he obtain leave to file suit out of time. All these for no fault of his own or that of his counsel. In the instant case the Plaintiff is the widow of the deceased. She is the person entitled to obtain the letters of administration and indeed did obtain such letters.

We have to realize the society we live in. Indeed in most cases one is out to unnecessary expenses to obtain letters of administration just to file suit after his beloved one is killed in an accident. In normal circumstances he would not have bothered with this alien practice. To hold that all those cases filed on reliance of HINTZ CASE and letters of administration have been obtained subsequently are to be dismissed would be the greatest injustice the Court of law have ever perpetrated on the society. The law does not act retroactively.

In the instant the Plaintiff obtained the letters of administration and is entitled to recover under this head.

I therefore enter Judgment for the Plaintiff against the Defendants jointly and severally for shs. 2,578,910/-. The Plaintiff will also have the costs of this suit and interest.

**Delivered this 4<sup>th</sup> day of june 1996.**

**J.V. O JUMA**

**JUDGE**