



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 166 of 1995

FLORENCE REBECCA KALUME..... PLAINTIFF

- Versus -

1. COASTLINE SAFARIS

2. TRANSAMI LIMITED..... DEFENDANTS

JUDGMENT

Florence Rebecca Kalume (Florence) is a widow and the holder of a Grant of letters of Administration for the estate of ANDREW ATIS KALUME. The deceased was her son. He died on 19.2.94 whilst he was travelling as a fare-paying passenger in motor vehicle registration No. KAA 491K, which was travelling along the Nairobi Mombasa Road and on that fateful day at Ndii-Voi, collided with another motor vehicle KTP 123/ZA 8292. The first motor vehicle was owned by M/S Coastline Safaris (Coastline) while, the second was owned by M/S Transami (K) Limited (Transami).

On 8.3.95 Florence filed suit against the two owners of those motor vehicles. She alleged that the drivers of those vehicles were negligent and she particularised seven of those acts of negligence. She also alleged that her son died as a result of the negligence of those drivers and therefore the owners of the motor vehicles are vicariously liable for the special loss she suffered which she quantified in the plaint at Shs. 10,100/=. Two other dependants are named in the plaint: a daughter and a son of the deceased aged 10 and 5 years respectively at the time. The deceased was married but the wife collapsed and died one month after the accident. She therefore sought to recover the sum of Shs. 1,000 and general damages under the Law Reform Act and the Fatal Accidents Act.

Both owners of the motor vehicles filed defences. Coastline through Kishore Nanji Advocate and Transami through P.M. TUTUI & CO. Advocates.

Coastline admits that the motor vehicle belonged to them and that it was involved in a Road Traffic accident whilst being driven by its authorised servant. They deny however that the deceased was a passenger in that motor vehicle or that there was any negligence on the part of their servant as alleged and particularised or at all. The entire blame, they say, was on the servant of Transami who was in charge of the other motor vehicle. They particularised such negligence. No particulars of injury or special damages is admitted. The only other matter which was admitted by Coastline was the Demand Notice which was received but could not be complied with because no liability was shown to attach.

On their part Transami admits the fact of the accident as stated but deny that the deceased was a passenger in the Coastline motor vehicle. They denied that their servant was negligent as pleaded and

sought proof from the plaintiff. They further denied all allegations of injury or loss suffered by Florence or anyone else as particularised or at all. Issues were framed by the parties before the suit came up for hearing. There are 6 of them:-

1. Was the deceased a passenger in motor vehicle Reg. No. KAA 491K?
2. Was the accident caused by the negligence of both drivers of motor vehicle Reg. Nos. KPT 132/ZA 8292 and KAA 491K?
3. If so to what extent did each party contribute to the accident
4. Has the plaintiff suffered loss as a result of the accident and if so how much?
5. Is the plaintiff entitled to damages and if so how much?
6. What should be the order as to costs?

Hearing commenced before me on 27.5.96. Only Florence gave evidence on oath and Mr. Ouma, her Advocate closed the case. Both defendants called no evidence and closed their cases on that note. All counsel made submissions of law at the close, of their cases.

I shall examine the issues put forth before me in the light of the evidence adduced. The evidence on the first issue is that the deceased was working at Nyeri as a D.O. I and was transferred to Mombasa in February 1994. He never arrived in Mombasa. Florence never went to see the body of the deceased. She saw it during the funeral service on 25.2.94. She recalls having instructed Advocates to obtain a Police Abstract Report which she produced as Exh.2. It is Form P 10A No. A199730 and was completed by the Base Commander, Highway Patrol Base, Voi on 10.1.95. There was no objection from the defence to the production of this exhibit. The information supplied in the Abstract form confirms that the two motor vehicles were involved in an accident and that eight passengers, including the deceased, had fatal injuries. A Certificate of Death was also exhibited as exhibit 3 and confirms the death of the same person on the date of the accident as a result of the said accident. The Police Abstract does not say in which motor Vehicle the deceased was a passenger. No other evidence was called to verify this assertion. Both defendants deny that the deceased was a passenger. It is particularly denied that he was a passenger on motor vehicle Reg. No. KAA 491K. That is the issue to be answered. Indeed it can only be the issue for there is no allegation or averment that the other motor vehicle was a passenger carrying vehicle. I am satisfied on the basis of the Police Abstract that the deceased was a passenger on the day he met his death. He could only have been in motor vehicle KAA 491K which was admittedly involved in that accident. I answer the first issue in the affirmative.

The evidence on the 2nd issue is certainly non-existent. Florence was obviously not at the scene of the accident. Several acts of negligence have been alleged against the respective, drivers of the motor vehicles. These particulars must be proved before the court is called upon to find fault with the said drivers. This is trite law. I am not entitled to infer negligence where none is proved. The defendants produced a Court of Appeal Authority KIEMA MUTUKU -V-s- KENYA CARGO HANDLING SERVICES LTD. (1991) 2 KAR 258 where it was held:

"There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence".

The authority was challenged by Mr. Ouma on the ground that it's applicable to Industrial/factory accidents and not motor accidents. But the ratio decidendi is so widely phrased that it would cover all actions based on negligence... There was no particular difficulty in proving the allegations made in this case. The information provided in the Abstract Form by the police to the plaintiff's advocates shows that the accident was investigated and that one of the drivers had been charged in court with the offence of causing death by dangerous driving. The court files number and the police file number is supplied to those advocates. Apparently no attempt was made to find out the outcome of the said case or to summon

the police officers who carried out the investigation to shed some light on the allegations of negligence. The plaintiff does not even rely on the doctrine of Res Ipsa loquitor

In answer to the second issue raised therefore I find that there is no evidence of negligence against either of the drivers and I have no basis for making a finding that they or any of them caused the accident. The drivers were admittedly the servants of the two defendants. It follows therefore that liability against the defendants is not proved and the plaintiff's suit should fail. The other issues framed are consequential on liability being established. I cannot for example answer issue No.3 on the extent to which each party contributed to the accident as there is no evidence laid before me on that issue. If the 2nd and 3rd issues had been proved however, I would still have found it difficult to give judgment for the plaintiff on the special damages pleaded and the general damages. This is because there was no proof that a sum of Shs. 10,000 was incurred in special damages. The law is clear that special damages must not only be pleaded but must be specifically proved see RYCE MOTORS LTD. ANOTHER,-Vs- ELIAS MUKORI CA 119/95. The evidence by Florence on this aspect was that

"Funeral expenses were incurred but I have no documents to show the expenses."

In the absence of proof I would have awarded the conventional figure of Shs. 5000 for funeral expenses.

Evidence on dependency was equally inadequate. Florence merely said the deceased "used to bring 5000 per month or 10,000 at times". But she was shown a salary slip indicating that the deceased monthly take-home salary was Shs. 3983/=. She does not stay with the children of the deceased. They stay with their maternal grandmother and receive assistance and maintenance through some, property left by the deceased.

I agree with Mr. Nanji and Mrs. Tutui that in the absence of clear proof on such dependency which I find there was not, the conventional proportion of the deceased's income should be adopted and a multiplier of 14 should be applied. Both counsel for the defendant's also concede as submitted by the plaintiffs counsel that under the law Reform Act a conventional figure of Shs. 100,000 is awarded and I agree. I would also have awarded the costs of the suit to the plaintiff.

In view of my finding on liability however, the suit is dismissed. Costs will normally follow the event unless there are reasons to depart from this principle. The plaintiff here is a widow who' not only lost her son in a tragic road accident but has also lost her grandchildren to their maternal grandmother. She was not to blame for the failure to adduce sufficient evidence to prove liability. She is indeed deserving of sympathy. I would even go further, and suggest, for I can only suggest, that the defendants consider sharing and offering her some ex gratia payment. For purposes of my judgment however, I will make no order as to costs.

Dated at Mombasa this 18th day of July, 1996.

P.N WAKI

JUDGE

18.7.96

Coram: Waki, J.

Miss Kinyanjui for Nanji for 1st defendant Wanyonyi h/b for Ouma for plaintiff Mrs.AA buodha for 2nd defendant