



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 3723 of 1990

HELLEN MUHONJA MAINA..... PLAINTIFF

VERSUS

PETER KINAGI GITUKA..... DEFENDANT

JUDGMENT

HELLEN MUHONJA MAINA is the widow of Charles Gakobo Maina -deceased). She brings this action in her capacity as the administrator of the estate of the deceased and also on her own behalf and on behalf of her two minor children as dependants of the deceased. The claim is expressed to be under both the Law Reform Act, Cap. 25, of the Laws of Kenya, and under the Fatal Accidents Act, cap. 32, of the Laws of Kenya. Her allegation is that the deceased died as a result of injuries sustained in a road accident on 17.3.89, which accident she blames on the negligence of the defendant. The defendant does not deny that the deceased died in the alleged accident but avers that the accident was caused by the sole negligence of the deceased, or that in the alternative the deceased contributed thereto. Accordingly both liability and quantum are issues for determination in this trial. I will begin with a consideration of the issue of liability.

In brief the evidence on behalf of the plaintiff is this. The deceased was driving a fiat car KWT 058 on the night of the 17th March, 1989 along Mbagathi road, Nairobi, with intention of joining Langata road and ultimately proceeding home to Ngei Phase II. The time was around midnight. It was drizzling. His brother, PW3 was driving behind him but with an intention of joining Langata road and turning left in order to proceed to BuruBuru where he lived. At the same time, PW1 was driving along Langata road from the direction of Nairobi dam towards Nairobi west. The defendant was also driving along Langata road from Ongata Rongai towards the City Centre. According to PW1, he was driving at a slow speed of about 30-50 K.P.H. There was a vehicle behind him whose head beams were high. In front of him, about 50 metres away, he saw a small car making to join Langata road. The said car stopped at the junction temporarily (which according to him is the same thing as momentarily) and then curved into Langata road in front of him. According to him, all this was in order and the small car was not a danger to him as he was some distance away from it. While all this was happening, the vehicle which was behind him, overtook him on the right of the yellow lane at a great speed, he heard some screeching noise, and then that vehicle, which he saw was a lorry, collided with the small car in front of him. The collision occurred on the stretch between the prison officers' mess and the post office at the junction of Langata and Mbagathi roads. The small car was pushed to the ditch across the road. The lorry stopped in the middle of the road. P.W.I noted after the collision that the lorry was KTQ 507. He then stopped at a safe distance and got out of his car to go to the rescue of the driver of the small car. Other motorists also stopped on the road. Metal bars were used to open the door of the small car. The driver, who was a man, was removed and taken to hospital. PW1 went home but he was sufficiently disturbed by the accident to visit the scene on the morrow. He found the vehicles had been towed away but he recovered a road license for KWT 058. He took this document to Langata Police station and reported the matter. PW3 who was driving behind the deceased testified that the deceased was about 20 metres ahead of him on Mbagathi road. The

deceased stopped at the junction of Mbagathi/Langata road for a little while and then entered Langata road. The witness then saw a big vehicle overtaking a small car ahead of it. That big vehicle collided with the deceased's motor vehicle on Langata road. When he reached Langata road, he found his brother's vehicle had been pushed off the road on the right side. The lorry was stationary in the middle of the road. This witness is the one who took the deceased to hospital. I may also record that according to this witness the deceased had taken two beers in the company of the witness and his wife at Silver Springs Hotel a few minutes before the accident. Both witnesses were rigorously cross-examined by Mr. Gachomba, the defendant's counsel. They were unshaken and maintained their evidence.

The defendant's evidence is that on the material night he was driving his own lorry KTQ 507 on Langata road from the direction of Ongata Rongai towards Nyayo National stadium with intention of going to Jericho estate. There was a small vehicle ahead of him. He overtook that vehicle at the bumps alongside the B.P. petrol station just before Dr. Thomas Bernado Children's home. After overtaking, he started descending towards the Mbagathi/Langata road junction. As he approached the junction he saw a small vehicle on Mbagathi road. The vehicle slowed down as it moved in the direction of Langata road. The defendant thought that the driver of that car had seen his vehicle on Langata road. So he proceeded instead of stopping at the junction of Mbagathi and Langata roads, the driver of the other car emerged straight onto Langata road, which is at that point the major road. The defendant applied brakes but since it was wet. The lorry skidded and crashed into the small vehicle. He could not veer to the right since there were other vehicles travelling towards the direction he was coming from. After the accident his vehicle stopped in the middle of the road and the small vehicle ended in a ditch off the road on the side going towards Langata. He alighted from his vehicle and together with other motorists extricated the driver of the small vehicle from his car and put in another vehicle that took him to hospital. The said driver did not say anything but the defendant could smell alcohol from his vehicle. He also noticed three bottles full of alcohol in that car. Defendant was of the view that the accident would not have occurred if the driver of the small vehicle had stopped at the junction. In his view, he was not to blame for the accident. He was charged in the Kibera court in Traffic case No. 1578/89 with the offence of Causing death by dangerous driving and he was acquitted. Defendant insisted that the accident occurred some 500-800 metres after he had overtaken the other vehicle at the bumps. He also stated that he did not see P.W3 at the scene of the accident but saw him at the Kibera court during the traffic proceedings. He did however concede that he saw PW1 at the scene of the accident and that he had overtaken his vehicle before the accident occurred. He denied overtaking him as both approached the Mbagathi/Langata road junction. He also denied that the accident occurred while he was overtaking. He further denied that he was overtaking illegally on a continuous yellow line. According to him he had overtaken before he reached the continuous yellow line. On that evidence, counsel for the defendant urged me to find that deceased was the sole author of his own misfortune. The accident was caused by deceased's failure to stop as required before joining the main road. I was asked to disbelieve the evidence of PW1 that deceased stopped momentarily at the junction before joining the main road on the basis that the witness was hesitant about the point. I was also asked to disbelieve his evidence that defendant overtook him when deceased's motor vehicle was 20-30 metres in front of the witness on the grounds that the evidence was in the circumstances improbable and in any case the witness was not truthful as he had denied ever taking alcohol whereas in the traffic proceedings relating to the death of the deceased, he had confessed that he used to drink. I was invited to take judicial notice of the behavior of drinking Kenyan's on Friday nights. The inference counsel sought me to draw was that PW1 as a drinking Kenyan must have been drunk on the night of the accident - a Friday - and accordingly his judgment of distance was impaired. The evidence of PW3 that deceased did stop at the Junction for a while should be disbelieved because, according to defendant's counsel, the witness had contradicted himself on the point of whether the deceased had taken any alcohol on the night of the accident as he told the traffic court that he had not drunk at all but he admitted to this court that deceased had taken two beers. Let me observe at this juncture that the alleged contradiction between PW1's testimony in this court and the traffic court on his drinking habits was not put to the witness and his response thereto solicited. And PW3 was also not a contradiction in his testimony about the fact of the deceased's sobriety on the night of the accident. Be that as it may the entire record of proceedings, evidence and Ruling in Principal Magistrate's Criminal Case No. 1578/89 in which the defendant was the accused was tendered in evidence, without objection by counsel for the defendant, and marked as DEI. Counsel for the plaintiff submitted that the evidence of PW1 and PW3, which he praised as candid and consistent, pointed to the fact that the defendant decided to and did overtake another vehicle at a

junction of the minor and mainroads. That coupled with the fact that there was a continuous yellow line at the spot was an act of gross negligence. In counsel's view the deceased could not have thought that a truck would commence overtaking a small vehicle at a junction. Accordingly, I should find that the defendant was solely to blame for the collision. Counsel deceased was not drunk beyond a safe limit.

I have weighed the above evidence and submissions. I was particularly impressed by the evidence of PW1. He was a straightforward person and his evidence was not hesitant as alleged by counsel for the defendant. He was also in a sense an independent witness in that he was not related to or known to either the deceased or the defendant before the accident. There was no evidence that he was drunk on the night of the accident. And while I am prepared to take judicial notice that in general alcohol drinking Kenyans do indulge themselves on Friday nights, I am not prepared to conclude that every such Kenyan indulges himself on any and/or every Friday. It would be quite imprudent to find without tangible evidence that a particular individual was inebriated on a specific day. I therefore do not find that the judgment of PW1 was impaired by drink. PW3's evidence tallies with that of PW1 on both the fact that the collision was at the junction of Langata/Mbagathi road as the defendant had just overtaken PW1's car and also on the existence of a continuous yellow line at that stretch of the road. I approach his evidence with caution as he is the brother of the deceased. I have nonetheless accepted his evidence as entirely truthful. I prefer the evidence of these two witnesses to that of the defendant on the existence of a yellow line at the spot of the collision and the fact that the defendant had just overtaken PW1's car when the collision occurred as the more probable version. The fact that after the collision the lorry stopped in the middle of the road disproves the defendant's contention that he had long overtaken PW1's car when the accident occurred. If that were so, his vehicle would have stopped on the left side of Langata road as one goes towards the city centre. And the deceased's motor vehicle would have been pushed down the middle of the road and not into the ditch on the very opposite side. This consideration and the fact that I observed the defendant to bear the demeanour of an insincere witness - he was tense during his entire testimony and he cast his eyes firmly down on the witness box as if he were a fixture there - lead me to make the following findings of fact. First, the accident occurred around midnight on a drizzling Friday night. Secondly, it occurred off the junction of Langata and Mbagathi roads at a point marked by a continuous yellow line. Thirdly, the defendant was in the process of or had just overtaken PW1's car. Fourth, the deceased stopped momentarily at the junction and then entered Langata road when P.W.'s car was to high right about fifty metres away. And finally, the deceased had just taken two beers before the accident. Defendant's evidence that he saw three bottles of alcohol in the deceased's car after the accident was not put to the plaintiff's witnesses. But even if it were true, it would be neither here nor there. I now return to the big question. Was the defendant negligent in behaving as he did? How about the deceased? Who should be visited with blame for this collision and, if applicable, to what extent? Remembering that the defendant is alleged to have been negligent and the deceased is alleged to have wholly or partially contributed to his own demise, I may as well restate the respective legal duties. All drivers on the highway are under a legal duty not to use proper care not to cause injury to other persons - whether they be other drivers or pedestrians or owners of property - who happen to be on or adjacent to the highway or whose property is on or adjacent to such highway and who accordingly are so placed that they may reasonably expect to be injured by the omission to take such care. And any driver who fails to take reasonable care for his own safety will be found guilty of contributory negligence. The standard of care demanded is that of an ordinary reasonable man. The personal inidiosguciecied of the affected drivers count for nothing. Proper care dictates that one avoids excessive speed, that one keeps a proper look out, that one obeys traffic rules and adheres to the Highway code and so on (see *BOURHILL v YOUNG* (1943) A.C. 92). It is against that duty and standard of care that I should judge the conduct of the defendant and the deceased in this case. When I do so, I find that the defendant was in overtaking near a road junction at a stretch with a continuous yellow line in circumstances of wetness of the road and when he had seen the deceased approaching the junction short of the standard of care of a reasonable man. He breached all the injunctions in the highway code not to overtake on the outside of the yellow line and never to overtake at or near a junction. He was clearly in breach of his duty of care to the deceased. And this breach of duty of care has occasioned loss and damage for which the defendant is liable. But the deceased was not a virtuous virgin either. He took at two beers before setting out to drive at night, he then approached a road junction, stopped fleetingly, he did not give way to vehicles which were on his right on the major road to pass, he took a chance of entering into the said road when a vehicle was only fifty metres away and the chance turned out to be a fatal error of judgment. It matters not that he believed he will execute his move safely.

And the judgment of PW1 that it was safe to do so I regard as an opinion of another driver at the material time. It is important but not conclusive on whether the deceased exercised the prudence and care of an ordinary reasonable man. In my judgment he did not. He accordingly contributed to the fatal collision with the defendant's lorry. In my view, the deceased must in all the circumstances of this case shoulder the greater portion of blame for entering into the main road without sufficient regard for his own safety. I would apportion liability between the defendant and the deceased in the proportions of forty (40) per cent and sixty (60) per cent to the disadvantage of the deceased. I now turn to a consideration of the quantum of damages.

From the evidence on record, I make the following findings of fact. The deceased was a specialized mathematics teacher. He was married to the plaintiff and their marriage was blessed with two children. The widow was aged 31 years when the deceased passed away and was aged 36 years at the time of the trial. Their son Eric Steele Maina is now aged eleven years but was aged five years at the time of the deceased's demise. Their daughter was then aged about one year and is now about seven years old. The deceased had a net regular employment income of Kshs 12,097 including house allowance. He earned a monthly average of Kshs. 15,000-20,000/- from private tuition. This latter amount does not appear to have covered funeral expenses. FATAL ACCIDENT'S ACT

(a) Loss of dependency - Kshs 4.8 million on the basis of a multiplication of 20,000/- a month and a multiplier of 20.

(b) The amount to be apportioned as court think At Mr. Kyalo further submitted

That the decision in KEMFRO AFRICA LTD VS A.M. LUBIA (1982-88) 1KAR 727.

demands that an award under the Law Reform Act must be offset against an award under the Fatal Accidents Act and accordingly the net overall award to the Plaintiff should be Kshs 2,390,000/-. This last figure must have been arrived at erroneously by omitting to include damages for loss of expectation of life and the special damages as part of the award under the Law Reform Act. Had a proper arithmetical approach been followed, the next amount claimed would have been Kshs. 2,234,962/-.

Mr. Gachomba, the defendant's advocate on the other hand submitted that damages for loss of expectation of life are a conventional sum of Kshs 70,000/- and no special facts had been proved in this case to warrant more. As regards the claim under the Fatal Accidents Act, he submitted that I should adopt a multiplicand of one third of the net income of the deceased and a multiplier of between 10 and 15 in view of the improved financial status of the plaintiff even though such improvement is not connected with the death of the deceased.

I now turn to a consideration of the quantum of damages in Funeral expenses. FATAL ACCIDENT'S ACT

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I now turn to a consideration of the quantum of damages in light of the above evidence and submissions. There is no doubtthat the claim by the Plaintiff in her capacity as theadministrator of the estate of the deceased under the Law ReformAct is a distinct and separate cause of action from the claim bythe plaintiff on her own behalf and on behalf of the minor childrenof the deceased as dependants of the deceased under the FatalAccidents Act. It is however recognized that in assessing damagesunder the Fatal accidents act, the trial court should take intoaccount the award under the Law reform act because the lossuffered under the former Act must be offset by the gain to thedependants from the estate under the former Act. See KEMFRO VSA.M. LUBIA & ANOTHER & ANOTHER (supra). And as regards the award under the Fatal accidents act, the guiding principleswould appear to be these. First, the Court must find out as a factwhat the annual loss of dependency is. In so doing, the relevantincome is the net earnings of the deceased. There is noconventional fraction to be applied, each case depends on theevidence before the court. Secondly, the annual loss of dependency must be multiplied by a figure representing a reasonable number ofyears purchase. In adopting the said multiplier, the court musthave regard to such personal circumstances of both the deceased andthe dependants as age, expectation of working life, expected lengthof dependency, and the vicissitudes of life. The capital sum soarrived at must be discounted to allow for lump sum payment and,where applicable, the chances of widow's remarriage, see HAYES VSPATEL (1961) E.A. 129 and BOR V ONDVV (1988-1992) 2 K.A.R. 288 for the above propositions of law.

Applying the above principles to the evidence and submissionson record, I take the following view of the matter. Under the LawReform Act, the estate of the deceased is entitled to a sum ofK.shs 70,000/- as conventional damages for loss of expectation oflife. There is no evidence that the deceased was conscious andexperienced pain from the moment of the accident to the moment ofdeath. An award for damages for pain and suffering before death istherefore unmerited. There is no point of entering into alaborious mathematical calculation of the damages for lost years asit is manifest that those prospective earnings of the deceased arethe fund from which an award for loss of dependency is to be madeunder the Fatal Accidents Act. Special damages in the sum of Kshs.51,618/- are well proved. Given that the amount the deceasedearned from his private tuition ought to have been declared for taxpurposes, I am not prepared to assume the position that all of itwas available for domestic and other family uses. I accordingthink that a multiplicand of Kshs. 17,000/- per month is morereasonable than the Kshs. 20,000/- urged for by plaintiff'scounsel. As regards a multiplier, I think that sixteen (16) isquite reasonable in all the circumstances of this case. Thecapital sum I arrive at is Kshs. 3,264,000/-. I will discount itby about one fifth (20%) to allow for lump sum payment. Thedamages I find as appropriate for loss of dependency is thus Kshs.2,612,000/-. Taking into account that I have refrained from makingan award for lost years under the Law Reform act, I am of the 15opinion that bearing in mind the apportionment of liability thefollowing awards can be made without injustice to either party:-

A. LAW REFORM ACT, Cap. 26 LAWS OF KENYA

(i) General damages for loses of expectation of life - Kshs.

28,000.00

(ii) Special damages - K.shs 20,648.00

B. FATAL ACCIDENTS ACT, CAP. 32, LAWS OF KENYA

General damages for loss of dependency - Kshs. 1,044,800/-.

This award is to be apportioned as follows:-(i) Hellen Muhonja Maina - widow - K.shs 522,400.00

(ii) Eric Steele Maina - Minor son - K.shs 261,200.00

(iii) Catherine Wangari Maina - minor daughter - K.shs 261,200.00

Total K.shs 1,044,800.00

I direct that each minor's share shall be invested in an interestearning account with the Housing Finance Company of Kenya Ltd inthe joint names of the Plaintiff and the Registrar of thishonourable court on terms that the Plaintiff may withdraw theperiodical interest for the maintenance and advancement of theminors and that the capital and interest remaining on the accountof each minor be released to them upon the attainment of eighteenyears, the same being the age of majority.

In the result there will be judgment for the plaintiff againstthe defendant in the sum of Kshs. 1,072,800/- as general damagesand Kshs. 20/648/- as special damages. The Plaintiff will alsohave interest on damages at the usual rates and the costs of the suit.

It is so decreed,

Dated and delivered at Nairobi this 15th day of May, 1995

A.G. RINGERA

JUDGE