REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE NO 818 OF 1988

MAGDALENA YULA MUTUA ….....……..…PLAINTIFF

VERSUS

ISAACK MWANIKI ……...…….. DEFENDANT

JUDGMENT

This action is brought against the defendant by the mother of the son, John Munyao Mutua, who was killed in a road traffic accident on the 28th January 1988. The action is brought on behalf of the deceased's estate under the Law Reform Act and on the Plaintiff's own behalf as a dependant by virtue of the Fatal Accident Act. The plaintiff is the sole dependant. She is an elderly woman. Her age was not disclosed.

As to how the accident happened there is the only evidence of the defendant's driver to the effect that the deceased was lying across the road due to drunkenness when he was run over and was thereby killed by the defendant's motor vehicle. The defendant's driver had not yet been licensed to drive a motor vehicle when the accident happened – so that even if the deceased was having a drunken sleep in the middle of the road a prudent driver who is keeping a look-out for obstacles might have noticed him and taken the right act to avoid the collision. It is axiomatic to say that not every obstacle in a driver's path must be run over and crushed. The fact that the defendant's driver was unqualified to drive precludes any possibility that he drove competently ie with the degree of care and attention which a prudent driver would exercise. (See *Simon v Peat* [1951] 1 All ER 447). I am thus constrained to find the defendant vicariously liable to pay damages for his driver's culpable negligence which resulted in the death of the plaintiff's son.

The deceased was aged 35 when he met his death. He was unmarried and had no children. Although the plaintiff denied that he drunk alcohol, the evidence on the police file is that he was a terrible drunkard. I accept this evidence. I am consequently unable to think that the plaintiff ever depended on a son of that character for if he spent most of the days inebriated he could not at all have had a working life. On this aspect I find it pertinent to refer to the case of *Basies vs Powell Duffryn Associated Collieries Ltd* (1942) AC 601 where Lord Wright, at p 617 said:

"There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence subject to the element of future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment."

It is quite improbable that the deceased whose portrait is given in the police file had the capacity to have had any regular earnings from of which he could have supported his mother. Therefore, I am of the

considered view that the mother's story about his having engaged himself in regular and lucrative vegetable farming out of which he earned money is a made-up one as it could be quiet evidently incompatible with the character of a man who lay or slept anywhere after inbibing the *mnazi* drink. Consequently, I assess the value of the plaintiff's lost dependency at nil.

But under the Law Reform Act I award the plaintiff the following conventional figures.

(a) Funeral expenses and abstract report Shs 8100/=

(b) Pain and suffering arising from the fatal injuries Shs 4000/=

(c) Loss of expectation of life Shs 70,000/=

Accordingly I give judgment for the plaintiff against the defendant for Shs 82,100/= with interest and costs on the subordinate scale.

Dated and Delivered at Mombasa this 27th January, 1993

I.C.C. WAMBILYANGAH

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JUDGE