



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 2426 OF 1982

ALI.....PLAINTIFF

VERSUS

GITAU.....RESPONDENT

JUDGMENT

The plaintiff herein filed an amended plaint dated 19/6/1985 filed on 2/7/85 bringing an action for the benefit of the dependants of the deceased under the Fatal Accidents Act cap 32 Laws of Kenya and the Law Reform Act cap 26 Laws of Kenya. The plaint averred that on 19/10/1979 at about 9.15 am the deceased entered defendant's shop as a customer when all of a sudden through no fault of his own whatsoever the mezzanine floor then collapsed which fell on the deceased together with drums and tins of paint. Consequently he was seriously injured and died on the same day from injuries sustained.

That the said injuries were occasioned to the deceased by reasons of the breach of a statutory duty under s 2 of the Occupier's Liabilities Act cap 34 Laws of Kenya and by reasons of the negligence on part of the defendant, his servants and/or agents.

The plaintiff then gave particulars of negligence and particulars of dependants. His monthly income was indicated as 15,000/- and that he was the sole support of the named dependants and by his death they have lost support they used to get from him and the deceased's estate has also suffered loss.

The plaintiff prayed for special damages, general damages, costs, interest and any other relief that the Court may deem fit to grant. The action was brought by the father on behalf of himself and the other dependants.

I checked the record but I did not see any amended defence. The defence on the file is the one filed on 22nd Sept 1982. The defendant denied that he was guilty of the alleged breach of the common duty of care of the plaintiff under the Occupiers Liability Act or any negligence in the respects alleged in para 4 of the plaint or in any respect. In the alternative and without prejudice to the foregoing the loss and damage was caused by the plaintiff himself in that he unreasonably failed to move out of the shop after having noticed the mezzanine floor would collapse and after having received express warning of the collapse of the mezzanine floor by the defendant and having to move away from the shop premises.

In the further alternative and without prejudice to the foregoing, the loss and damage was wholly due to the negligence of the owners of the premises M/s Ositum Investments Ltd in their construction, maintenance and repair of their said premises in respect of which the defendant was just a tenant.

The evidence adduced is very brief PW1 testified that he is the father of the deceased. They used to do business together running a shop and transportation business. He was in Mandera in 1979 when he learned that his son who had come to collect goods in Nairobi had in fact died as a result of a roof of a shop collapsing on him.

He came to Nairobi, took police abstract exh 1, post-mortem done exh 4, received death certificate exh 2 and then transported the body to Mandera by air as per exh 3. The deceased left a wife and 3 children who now reside with him in Nairobi. That he PW1 fell sick and the wife of the deceased was unable to run the business.

When cross-examined he stated that his son was in charge of the business and after his death the business went down and it had to be abandoned all together.

PW2 is wife of the deceased .She stated she married the deceased in 1972 and he died leaving her with three children. She was a housewife while the husband was a businessman. That she tried business after he died but it failed and she now resides with her parents-in-law in Nairobi.

When cross-examined she stated that she has not made any effort to secure a job. PW3 testified that on 19/10/79 he was working in the shop of the defendant as a manager. He opened the shop at 9.00 am and then the deceased whom he knew as a customer came in as usual. As soon as he entered the (roof) floor collapsed on them. On the roof upstairs they had stored some paints in containers of 4 litres and 20 litres. That the ceiling, which was used as storage, had been constructed by the landlord as they found it there when they moved into that shop. When the floor collapsed he became unconscious.

When cross-examined he stated as at the time of accident he had been in that shop for 4 years. That the wall suddenly collapsed. That it was the duty of the landlord to maintain the premises- Four Ways Investment. He was firm the landlord was aware of the fittings because in 1977 he increased rent because they were using the floor as well as the ceiling as a storage place. The premises were later demolished and put up a new building.

PW4 an employee of a firm of accountants who were dealing with the plaintiff's accounts produced balance sheets Exh 5, 6 to the effect that the business started going down after the death of the other partner.

When cross-examined he stated the deceased was the younger partner and he was contributing more and that is why the profits went down after his death. The defendant gave evidence to the effect that at the material date of 19/10/79 he was running a shop selling paints. He had been leased a shop by Four Ways Investment Ltd. The defendant arrived at the shop on the material day around 9.30 am when he found a crowd gathered among them the police and fire brigade. He noticed all the paints in the ceiling had fallen down. He reported the matter to Crown Paints as he was their agent. He said he does not know what caused the paint to fall. He entered the shop in 1975 and there had been no incident. The shop was in good condition and he was surprised when the accident happened.

The landlords were responsible for repairs. He found the fixtures in that shop. He did not put up fixtures in the shop. He was paying rent of 1,000/- but this was later changed to 2,000/- as he was using the ground floor as well as the ceiling. He denied liability, as he was just a tenant. He added that they demolished the shop and put up another building before the lease expired.

When cross-examined he denied that he had stocked a lot of paint in the shop. He does not know how many they were but he conceded that a large proportion was returned to Crown Paints after the accident. He found the shelf there and he never did any repairs on it and does not know if there was a limit for the weight to be supported on the roof. He produced the agreement as Exh 2.

At the close of the whole case, the plaintiff's counsel submitted that –

- 1) The deceased met his death at the said shop due to the negligence of the defendant because the

collapsing of the wooden floor was due to the poor state of repair of the wooden structure and due to the heavy weight of the paint stored up there. Thus the heavy weight of the paint stored up was the proximate cause of the accident.

2) The agreement by which the defendant bought property from Ositum Investment Ltd such as all the furniture and fittings including the mezzanine floor, ceiling and chairs and counters. These were his property and he was responsible for their repairs.

3) The tenant owed a duty of care to all his customers and it was his duty to ensure that the premises were safe and that the fittings did not come off. Had necessary repairs been done, the deceased could not have died.

4) The defendant must have known that the ceiling was in disrepair or was recklessly overloaded.

5) The deceased was not in a position to establish the state of the ceiling before or after the accident and it is only the defendant who could know the state of repairs.

6) They rely on the doctrine of *res ipsa loquitur* by which the defendant is called upon to explain how the accident happened without him being negligent.

The defendant on the other hand submitted as follows:-

1) That the defendant does not deny that the accident occurred and the deceased died as a result of that accident but denies that he was liable for the cause of the accident.

2) That under the lease agreement the duty to repair including the mezzanine floor rested with the landlord.

3) That in the agreement for the purchase of furniture and fittings there was no mention of the mezzanine floor.

4) There was an increase in rent for extra space and this shows the mezzanine floor did not belong to the defendant.

5) That should the Court find that the defendant was liable then it should also find that the landlord contributed to this situation by not inspecting the premises and ensuring that it was safe.

Having assessed all the evidence on the record as well as having perused the submissions of both parties it is clear from the evidence that the fact of death is not disputed. As for evidence of PW3 the deceased was a customer at the said shop. He had come to buy paint for his shop in Mandera, PW3 was the manager in this shop.

As soon as they entered, the roof collapsed spilling the paint. The deceased died of injuries sustained on the same day but PW3 was rushed to hospital and he recovered.

As to what caused the roof or ceiling to collapse is not clear but from the facts on the record from the evidence of PW3 and the defendant is that the mezzanine floor was used to as a storage space. It was reached by a wooden staircase. It is their evidence that they used to pay rent for 1000/- but when they started using the storage upstairs the landlord started charging them 2000/-. The defendant stated there was a lease agreement but he could not avail it as it had been destroyed. He however produced Exh 2, which is an agreement between him and his predecessors, from whom he bought the business. The items purchased are set out in the schedule of that agreement namely:

1) Seven (7) iron shelves

2) One (1) counter

- 3) Two (2) chairs
- 4) Two (2) desks
- 5) Wall ceiling fittings light fittings
- 6) Two (2) display lights.

The question now arises, who had a duty to maintain and repair the fittings inside? It is the stand of the plaintiff that as per Exh 2 it is the defendant, while it is the stand of the defendant that it was the duty of the landlord. The lease agreement was not available to the Court in order to enable the Court know the duties of each party under the agreement. The defendant and his manager PW3 gave their version. The landlord was excused from the proceedings on a technical point. The company had been struck off from the Registrar of Companies but it was not clear as to whether they had been reinstated or not and as such their version is not available.

I will now proceed to look at their duties under the statute. This duty is governed by the Occupiers Liability Act cap 34 Laws of Kenya. S 3(2) provides for a common duty of care whereby the occupier of any premises owes a common duty of care to his visitors which is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

The premises in question was shop-selling paint. The deceased was a customer. It was upon the tenant, who was the occupier to ensure that the premise was safe for customers to come in, buy goods and go away safely. As such I agree with the plaintiff's submission that the tenant owed the deceased a duty of care and he was in breach of this duty towards him. The question now is whether the tenant was negligent. The particulars of negligence were given in the plaint and for purposes of clarity I will set them out here again-

- 1) Failing to prevent usual dangers likely to cause injuries.
- 2) Failing to take measures by way of periodic examination or other inspection or otherwise to ensure that the said wooden mezzanine floor was in a reasonable safe condition and was not defective or dangerous and not in a condition in which it would collapse suddenly.
- 3) Failing to ensure that the mezzanine floor did not become overloaded with drums and paint tins.
- 4) Failing to support the said mezzanine floor so that it does not collapse.
- 5) Failing to ensure that the said mezzanine floor was constructed in a professional or workman-like manner with proper materials and supports so as to be safe from loading the same with drums and paint tins.
- 6) Failing to replace or keep in repair the said wooden mezzanine floor.
- 7) Failing to warn the deceased that the said wooden mezzanine floor was dangerous.
- 8) *Res ipsa loquitur* in ground No 7 of particulars of negligence it deals with failing to warn the deceased that the ceiling was dangerous.

The defendant in his defence in para 5 averred that the loss and damage suffered was caused or alternatively contributed by the negligence of the plaintiff in that he unreasonably failed to move out of the shop premises after having noticed that the wooden mezzanine floor would collapse and after having received express warning of the collapse of the mezzanine floor by the defendant and having been told to move away from the shop premises.

On this aspect, we have evidence from the defendant himself that he has been in that shop for a period of 4 years prior to the incident. There had been no other incident before the one forming the subject matter of this suit and there were no signs that the mezzanine floor was going to collapse.

In the premises, if the defendant was not suspecting anything and there had been no prior warning then there was no need for a notice. All the same the defendant never said that there was such a warning displayed.

PW3 was the manager in the shop. He confirmed there had been no incident for the 4 years they had been there. There was no indication that the mezzanine floor was going to collapse. He said that there was no warning. He is the one who was present. According to him he opened the shop and the deceased entered the shop with him. As soon as they entered the mezzanine floor collapsed on him. That the wall collapsed suddenly. As such the deceased had no prior warning and he cannot be said to have unreasonably failed to move away and there was no way he could have noticed that the mezzanine floor was going to collapse and lastly there was no express warning for him to move away. If anything it was PW3 who could have issued this express warning. He said in his evidence there was no time for anything.

In the premises I find that there was no contributory negligence on the part of the deceased. Grounds 2, 4, 5 and 6 are inter-related. They relate to failing to ensure that the said mezzanine floor was constructed in a professional and workman like manner, failing to replace or keep in repair. The defendant said he found these fixtures in the shop. He was supported by PW3. The agreement by which he purchased the business, Exh D2m shows that he bought them as fixtures. There is nothing to show that the defendant had a hand in their construction in order to ensure that they are constructed in a professional manner with good materials. As for their repairs Exh D2 does not say he was to maintain and repair them.

As for his evidence it is the landlord who was to maintain them as per the lease agreement. We were told that the lease was destroyed during the accident. The defendant was supported by PW3 that it was the landlord who was to do the repairs. There is nothing on record to controvert this. The fact that he purchased fixtures shows that he found them there. Ground 1 and 3 of the particulars of negligence are inter-related in that they relate to failing to prevent usual dangers likely to cause injuries and failing to ensure that the mezzanine floor did not become overloaded with drums and paint tins. We have evidence from the defendant and PW3 that it is the tenant who was in exclusive use of the shop. He had been running that shop for the last 4 years. They used to get supply of paints from Crown Paints from time to time. They used to store paint on the floor but when there was an increase in the supply as per the evidence of PW3, they started using the mezzanine floor and this is the time when the landlord increased the rent from KShs 1000/- to KShs 2000/-.

Therefore, the only inference that can be drawn from the act of increasing rent is that the tenant was using both the ground floor and mezzanine floor. Was the mezzanine floor overloaded? We have evidence that there was a lot of paint in drums of 20 litres and 5 litres tins on the mezzanine floor. PW3 and the defendant confirmed this. This is evidenced by the fact that after the incident a lot of paint was spilled and a lot of it was returned to the factory.

The question of overloading will be considered along with the issue of *res ipsa loquitur*. I now come to the duty of the landlord. There was an attempt to join the landlord as a third party to the proceedings but the move aborted when it was discovered that the company had been removed from the Register of companies and the defendant had to be advised to try and trace the company whether operating under the same name or under a different name before he can join them to the proceedings failing which to claim contribution from them in the event of judgement being entered against them.

There is no dispute that Four Ways Ltd was the landlord. As per evidence from the defendant and PW3 they are the ones who were to carry out repairs as per the lease agreement.

S 5 (1) of The Occupiers Liability Act cap 34 Laws of Kenya whose essence is that where the premises is occupied by tenant and under the term of the lease the duty to repair falls on the landlord, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same

duty in respect of dangers arising from any default by him in carrying out that obligation as if he were an occupier of the premises.

In this case since the landlord was to carry out repairs it was incumbent upon him to make routine checks and inspection to ensure that the fixtures therein were strong enough to support the load of paint that was spread on the mezzanine floor. Had they done this I am sure it would have been drawn to the attention of the tenant that the fixtures could not support the load.

This brings me to the question what caused the accident. The plaintiff's counsel has submitted that there is only one probability and that is the mezzanine floor was overloaded. The evidence is that it all happened suddenly. As per evidence of the defendant a lot of paint had been brought in by Crown Paints between Monday and Friday and in the absence of evidence to show that the figures for the sales corresponded to the figures for orders brought in the only most probable and logical conclusion is that most of the paint that came in was stored in any available space, thus resulting in an overloading situation.

The plaintiff relies on the doctrine of *res ipsa loquitur* in the case of *JFA Ogol v Wilson Murumbu Murithi* (1982-88) KAR 859, it was held that once it was proved that the appellant was hit while on a pedestrian crossing the doctrine of *res ipsa loquitur* applied and the burden was on the respondent to explain and demonstrate that the accident was not due to any fault on his part. In this case the plaintiff has established that the wall suddenly collapsed on the deceased as he entered the shop. The defendant has said this doctrine does not explain.

In view of what has been said about the state of the premises the doctrine of *res ipsa loquitur* applies and it is up to the defendant and his landlord to explain how the accident happened. However they are not to prove how and why the accident happened but to prove that the accident was due to no fault of their own. This burden has not been discharged and the only conclusion is that both the tenant and the landlord are guilty of negligence, the tenant because he overloaded the mezzanine floor without ensuring that it was fit to carry that load and the landlord because he failed to inspect the premises, carry on repairs and ensure that the fixtures were fit and able to support the storage of goods on the mezzanine floor.

Having established liability, I now come to the assessment of damages. The plaintiff claimed damages under three heads; special damages under the Law Reform and Fatal Accidents Act, damages for loss of dependency, under special damages falls funeral expenses and transportation of the body. There is no dispute that there was death and definitely funeral expenses were incurred. The amount claimed of Kshs 7,000/- is reasonable and I will allow it.

As for transportation charges there are receipts Exh 3 evidence that the body was flown to Mandera for burial. I will allow this figure of Kshs 19,000. There is a receipt for abstract of Kshs 100/-, I will allow this figure. The total under this head is Kshs 26,100/-.

The damages under the Law Reform and Fatal Accidents Act for loss of expectation of life for the benefit of the estate. Under this head the Court is usually guided by awards made by other Courts in similar circumstances. PW1 and 2 who are father and wife of the deceased stated that at the time of death the deceased was aged 29 years. He was assisting his father to run a shop as well as transport business. Since his death the family business suffered. The family auditors produced accounts Exh 4 to show that the profits in the business went down after the death of the deceased and eventually the family was forced to close the business as the wife PW2 was unable to run the business. As such the deceased estate suffered. It is the stand of the plaintiffs that had the deceased lived the family's business would have prospered for the benefit of all members of the family. Assessing damages in this area is not easy because the Court has to place monetary value on a life that is lost. The Court also has to anticipate what the deceased could have contributed to the welfare of his family had he lived.

In the case of *Amolo Isaka vs Francis Nyamoche & Attorney General* HCCC 1399/85 (Nairobi) in which the Court awarded Kshs 70,000/- for the deceased who was aged 17 years and was finishing his fourth form. In *Abeli Jamaa Abdulla v John Mwaura Kinuthia* HCCC 1719/86 the Court awarded Kshs 70,000/-

under this head. The case of *Alexander Maigua Wangombe v David Nderitu Ndungi* HCCC 3630/85 (Nairobi) the Court awarded Kshs 60,000/- under this head. In the case of *Mohamed Hussein Aden v Samuel Kinyanjui Benard Njihia* HCCC 3834/86 the Court awarded Kshs 80,000/-. Using the quoted cases as guidelines I would assess Kshs 80,000/- under this head.

I now come to damages for loss of dependence. The plaintiff's counsel has stated that all family members were dependants while the defence counsel has submitted that the father is not entitled to anything as he was doing business and that the wife should have looked for a job to mitigate the loss.

The basis for this head of damages is to find out how much the dependants have lost in terms of support as a result of the deceased's death. The loss is felt by all family members irrespective of their financial independence.

In assessing this loss one has to take the age of the oldest member of the family. The father was aged 55 years while the mother was 47 years old. In my opinion with the said financial base at the least a life span of 20 years for the parents would be appropriate which means the father would have depended on the son for about 15 years while the mother would have been depended on the son for 23 years.

As for the wife, she was aged 26 years and she would have been depended on the husband for 30 years. As for the children the oldest was aged 7 years and this would have taken 11 years to reach the maturity. The youngest child was two years, which means she would have been dependant on the father for 16 years. The deceased was aged 29 years would have been actively engaged in business up to around 55 years or even 65 years as suggested by the plaintiffs' advocates which means he would have worked for 36 years if his retirement age was taken to be 55 years he would have retired after 26 years. The Court has to find a multiplier between the figure of 15, 16 and 26 years.

The defence suggested a multiplier of 15 years while the plaintiff's lawyer suggested a multiplier of 26 years.

I now come to the issue of income. The deceased died in October 1979. As per audit reports the deceased and his father made a profit of Kshs 66,536/20 each. As the figures that follow show the profit margin dropped because of the loss of the young active partner who was the deceased. What we are concerned with is the profit at the time of the death. In the case of *Sera Juma v BAT (Kenya) Ltd and another* [1978] KLR 40, it was held *inter alia* that in calculating an award of damages, the dependency sum and the multiplier depend on facts of the case and no general rule can be applied as to how the multiplier should be determined and other cases although providing some guidance are only of limited assistance. Some of the factors to be considered were those observed by the judge in the quoted case page 42 paragraphs 9-11.

“There can be no doubt that this figure would have increased as time went by for a number of reasons such as general increases in salary scales, improvement of the deceased's earning power and salary increments let alone the deceased looking for greener pastures also whereas his experience widened”.

The widow told the Court she had no intention to remarry and no deduction should be made for prospects of re-marriage.

Page 43 pr A” in all circumstances of this case a reasonable multiplier is 20 and not lower”

Applying the guidelines in the above case the facts of the case before me, I find that there were no prospects for the business growing borne by the fact that the profits dropped after the deceased was only 29 years old although we were not told when he started business, it is possible his profits would have expanded with the passage of time due to expansion and experience in business management.

As for the widow, she has never remarried since 1979 about 12 years to the date of hearing and I am of the opinion that no deductions should have been for prospects of re-marriage.

As for the multiplier bearing in mind the fact that the oldest dependant would have depended on the deceased for 16 years and the widow for 26 years, if the deceased were to retire at 65 years, she would have depended on the deceased for about 30-35 years.

I will split the dependency into two, one for the parents and the other for the children and the widow. For the parents I will use a multiplier of 15 years. It is on record that the father who was getting a share of the profits from the business. However, it is an agreed principle that in the African community, parents expect financial support from their children irrespective of their own financial ability however minimal. The share of the profit was Kshs 66,536/20 half of this will be ploughed back into the business working at a figure of Kshs 33,268/10 out of this the Court has to make an allowance for income tax, water and electricity bills and other incidentals. Reducing this amount to Kshs 30,000. I will assume 10% will go to the parents annually. This will work out at $Ksh\ 10/100 \times 30,000 \times 15 = 45,000/-$ this will give an average of Kshs 3,000/- per year.

As for the widow and the children I stated that the deceased would have actively engaged in business up to the age of 60 – 65 years. His working life would come to 36 years. I have to take into account the fact that the business would have gone down, or depreciated. The deceased would have died from natural causes or would have been incapacitated in one way or another.

This will therefore reduce the number of years of working life. I do not find anything special to make me depart from the principle in the case of *Sera Juma v BAT (Kenya) Ltd and another* [1978] KLR 40 in which a multiplier of 20 was used. I would adopt the same for this case. The multiplier of 20 for the widow and the children and the 15 year multiplier for the parents totals up to a working life of 35 years for the deceased and that is reasonable. The dependency for the widow would work out at Kshs 30,000, less 3,000/- for the parents leaving a balance of $Kshs\ 20,000 \times 2/3 \times 20 = 360,000/-$.

In the premises I will enter judgment for the plaintiff against the defendant who has the tenant jointly and severally with the landlord of the premises on the following terms.

- (1) Funeral expenses Kshs 7,000/-
- (2) Transportation for the body Kshs 19,000/-
- (3) Damages under the Law Reform for the benefit of the estate Kshs 80,000/-
- (4) Damages for the parents dependency Kshs 45,000/=
- (5) Damages for the widow and the children dependency at Kshs 360,000/-. The total works out at Kshs 466,000/-.
- (6) The figure under 1 and 2 comprising special damages will carry interest at court rates from the date of filing of the suit.
- (7) The figure of Kshs 45,000 and Kshs 360,000 will carry interest at court rates from the date of judgement.
- (8) The plaintiff will also have costs of the suit.

Dated and delivered at Nairobi this 30th day of July, 1992

R.N NAMBUYE

JUDGE