



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE NO 602 OF 1987

SARO..... PLAINTIFF

VERSUS

KENYA BREWERIES LTD..... DEFENDANT

JUDGMENT

The plaintiff is the father of Said Ali Kahindi, deceased, who died in a road accident on 29th December, 1986 aged 6 years. The suit is brought under the Fatal Accidents Act and the Law Reform Act.

The plaintiff avers that the deceased was a pedestrian when the defendant's servant negligently caused the defendant's vehicle reg No KSY 823 to violently collide with the plaintiff's child causing him instant death. The defendant denies negligence and contends in para 3 of the written statement of defence that –

“the deceased was knocked down by a speeding *matatu* travelling along the said road from the opposite direction at the same time and due to violent impact threw the deceased on its offside to hit the rear offside body of the defendant's motor vehicle. The said *matatu* disappeared from the scene of the accident”.

The plaintiff testified that he was not present when the accident occurred but that when he went to the scene at 6.30 pm, he found the deceased lying in the middle of Mombasa/Nairobi road at Changamwe. The defendant's bus was stationary partly on the road and partly outside the road, a short distance from where the child was lying.

Hassan Ali (PW2) testified that he was near the butchery on the left side of the Mombasa/Nairobi road as you face Nairobi. He then saw the defendant's bus coming from Mombasa direction at high speed. At that time the deceased was crossing the road from right to the left. The bus did not hoot and hit the deceased at the middle of the road. The deceased was hit by the front right side of the vehicle near the head lights and he fell on the road. The bus stopped about 10 metres ahead of the child. According to him, there are shops, petrol station and dwelling houses at the scene. He denied that there were vehicles either ahead or behind the defendant's vehicle at the time of the accident.

The defendant called one witness' – Phillip Mutuku Myanzi (DW1) who was the driver of the defendant's bus.

According to his evidence, there was a bus and trailer ahead of his vehicle and a car behind. The bus was moving slowly – 5 kph – 10 kph. There was a *matatu* coming from Nairobi direction. As the *matatu* passed, DW1 heard a loud noise behind. He looked behind through the mirror and then saw the *matatu*

moving in a zigzag manner.

A passenger in his bus (DW1's) told him that something had been hit and asked him to stop. He stopped the bus and then saw that a child had been crushed on the head and was lying on the middle yellow line. DW 1 then decided not to drive away and to report to police lest he was accused of knocking the child down and failing to stop.

In cross-examination, DW1 testified that he did not check the *matatu*; that he does not know whether the vehicle was a *matatu* or not, that he did not see the *matatu* hit the child; that police took measurements in relation to the position the deceased was lying and the position of defendant's bus and that no part of his vehicle came in contact with the body of the deceased either after or before the deceased was hit.

It is clear that the deceased was hit while on the road.

It is also clear that the scene is a built up area.

The deceased was 6 years old. As he was so young, no negligence would in law be attributed to him and in any case, the defendant has not pleaded contributory negligence.

PW2 was an eye-witness and he has given credible evidence showing that it is the defendant's bus which hit the deceased.

The defendant's claim that the deceased was hit by a *matatu* is based on conjecture. DW1 did not see the *matatu* and does not know whether it was a *matatu* or not. He did not see the *matatu* hit the deceased. It appears that DW1 was inattentive and did not know that his bus had hit a child until a passenger in his bus drew his attention to the fact.

The defence pleaded that the deceased was violently thrown by impact and hit the rear offside body of the defendant's vehicle is inconsistent with DW1's evidence who testified that the body of the deceased did not at any time, come in contact with his bus.

The police did not admittedly pursue the *matatu*.

Accident happened in broad daylight. It is inconceivable that if there was a *matatu* which caused the accident, the passengers could have failed to make the driver stop by administering "mob justice" which unfortunately is common on our roads. In similar situations, DW 1 admits that the police took measurements as if it was the defendant's bus which had hit the deceased.

DW1 stopped the bus on his own and went to report to the police. The inconsistencies in the evidence of DW1 and the statement of defence and the conduct of DW1 after the accident amply support the evidence of PW2 and I am satisfied that it is the defendant's bus which hit the deceased due to negligence of DW1.

This is a case of *res ipsa loquitur*. The defendant is vicariously liable for the negligence of DW1.

The deceased was 6 years old. Mr H Jiwaji states that general damages under statutory law including loss of expectation of life is currently between Kshs 75,000 and Kshs 120,000.

Mr Shikeley for the defendant asks me to award not more than Kshs 50,000 on the basis of *Jane Mbeyu & Anor v Tronishk Union & Anor* HCCC 172/ 87 (MBS). In that case the court assessed damages for loss of expectation of life in respect of a man aged 65 at Kshs 50,000.

In the case referred to by Mr Shikeley, damages were given for loss of expectation of life under the Law Reform Act for the benefit of the estate. The damages here are being sought under the Fatal Accidents Act. In English Law damages are awarded under Fatal Accidents Act where the evidence shows that the parents reasonably expected a pecuniary benefit which they have lost as result of the death of the child. A mere possibility of pecuniary benefit is disregarded in English Law – see–*Abdullahi v Githinye*, [1974]

EA 110. But from the nature of our society, the courts have taken a more realistic view that parents expect financial help from their children when they grow up. In our rural society, the children continue to render useful services to the parents which otherwise would be offered by paid workers. No doubt then that the parents are saving money from the free services of the children and those services should be converted into money.

Further, even when the children grow up and get married, they generally continue to give financial help to their parents.

It is perhaps for those reasons that the courts are now giving substantial awards.

The case of *Cosmos Ogotu v Makairo Bus Trading Co Ltd* HCCC 3003/ 84 is often referred to. In that case the deceased boy was 10 years old and in school – Class III. Court awarded Kshs 70,000 in June 1985. The deceased child in this case is much younger and there is no evidence that he was in school. He was living in town.

In all the circumstances, an award of Kshs 100,000 would be reasonable. The special damages of Kshs 4,500 for funeral expenses was not proved and I assess funeral expenses at Kshs 3,000. The expenditure of Kshs 100 on police abstract is not disputed.

I enter judgment for the plaintiff for Kshs100,000 general damages and Kshs 3,100 special damages.

The defendant will pay the costs of the suit at High Court scale.

Dated and Delivered at Mombasa this 21st Day of May, 1990

E.M.GITHINJI

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JUDGE