



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)

CIVIL CASE 1700 OF 2002

YUSSUF ABDALLAH (Suing as the Legal Representative

Of the estate of RUKIA SUKUR KHAMIS) PLAINTIFF

VERSUS

MOMBASA LINERS LIMITED DEFENDANT

JUDGMENT

Parties had taken consent dates for hearing in this matter for the 24th and 25th November, 2004. The suit was confirmed during the call over. On the day called out for hearing the defendants together with their advocate Mombasa Liners Limited, M/s Ngaah & Co. advocates were absent. The court waited for them until 10.30 a.m. The suit proceeded for hearing under order 9b r 3(a) CPR. Namely, this court being satisfied that the defendant were aware of the hearing date, the court may proceed with the suit ex-parte which it accordingly did. I: FACTS OF THE CASE

Rukia Surur Khamis aged 31 years old in 1999 is said to have been a copy typist with the Embassy of Sudan in Nairobi. She allegedly died on the 27th day of September 1999 as a result of a road traffic accident. Her brother Yusuf Abdullah took out letters of administration and filed suit on the 17.10.00 seeking compensation for the wrongful death of his sister. The defendant's M/s Mombasa Liners Ltd entered appearance and filed defence whereby they denied that Rukia (now deceased) was a passenger in their said bus on the material day. Even if she was a passenger the accident was:- "An act of God, inevitable, force Majorure . . ." The plaintiff had alleged that the bus hit a giraffe along the Mombasa-Nairobi highway swerved and proceeded to collide with a lorry on the other side of the lane.

During the trial, Yusuf Abdallah (the plaintiff herein) attended court and informed this court in his evidence that he had escorted his sister to the bus stop where she took the said Mombasa Liners Ltd bus to travel to Nairobi. It was he who bought the ticket for her. Unfortunately he learnt of the accident. He proceeded to Nairobi and buried her at the KIBERA cementary. The other information he gave was that Rukia had been married but her husband had died through some misfortune earlier on. She was therefore a widow and had not married again. He was unable to produce a death certificate for Rukia.

The other information he gave was that Rukia worked at the Embassy of Sudan at Nairobi. The Embassy official declined to give him any information as to her letter of appointment, her pay slips or salaries earned. She indeed was a copy typist in the said embassy and he would often visit her there. Finally, he said that she had two children whom he now looks after. These children, a son and a daughter who are minors belonged to deceased but there was nothing before the court such as a birth certificate on any document or certification to show that indeed they were deceased's children. The next witness called was No.67366 P.C. Timothy Ringera a police constable attached to the Machakos Traffic department. He had been in the police force for 5 years. In his evidence he identified the police abstract from which he

stated that he authorized and produced it to court as evidence. He then narrated how an accident occurred along the Mombasa – Nairobi road caused by a Giraffe but admitted that he was not at the scene of the accident/nor was he ever present when the accident occurred. He was not the investigating officer, nor did he know anything of this case save to writing the police abstract form by extracting the information from the observation book (OB). The plaintiff then closed his case and prayed that this court pays him compensation under the Law Reform Act under the Fatal Accidents Act. II) LIABILITY

This is a civil suit in tort. The basis of such a case is that the defendants by the negligent acts caused a wrong to occur, to which the said wrong has caused injuries to a claimant. There would therefore be a need by a claimant to prove such negligence on the part of the defendant. In this case, the plaintiff required to bring an eye witnesses to describe what actually occurred during the said accident. Such eye witness could be fellow passengers in the bus or the persons in the lorry vehicle which was said allegedly to have collided into. If the plaintiff could have shown, through that evidence, that the defendants agent and or driver was reckless and careless in his driving despite there being an obstruction allegedly on the road, it this the evidence the court would require. The investigating officer, who investigated the case did not attend court. The witness who did, claimed that there was a recommendation that inquest be held, which inquest had not been done. If the investigating officer had attended he would have reconstituted the scene of the accident and confirmed to this court whether indeed there had been an obstruction on the road for the defendant to have avoided. The defence was that of an act of God. What requires to have been done by the plaintiff was to establish that the accident was not an act of God nor was it inevitable. This again would have been done by eye witnesses describing how the accident actually occurred. Due to the lack of these crucial evidence I wish to rely on the case law of:- Mary Oyo Wanyama & Others V Nairobi City Council CA 252/98, Gicheru, Tunoi, Lakha,JJJ

In which the plaintiff/appellant and three others had sued the respondents for the wrongful death of Pontianus Ngondwe Muckoya (now deceased) a passenger in the respondents vehicle that was involved in an accident along the Naivasha Nairobi road. At the trial “no witnesses were called [nor] did the defendant testify nor led any evidence. The trial judge found for the defendant and dismissed the suit for there being no proof of evidence On appeal the appellant said they relied on doctrine of res ispa loquitor. The court of appeal held that the plaintiff must prove the facts before they can rely on res ispa Loquitor. That indeed there was ‘nothing on record to show how the accident happened.’”

This present case is and falls under the same situation and I accordingly dismiss it. I am required by law to state what my possible award would be. I outline the same herein. III: QUANTUM A: Law Reform Act i) Pain and suffering There was no evidence led by the plaintiff as to whether the death was instance or whether the deceased died at a later stage. I am therefore inclined not to have awarded any damages under this head. ii) Loss of expectation of life The deceased, a widow having two children had a bright future before her. The possible award to have been given would have been Ksh.70,000/- under this head of damages. iii) Lost years

The employers of the deceased failed to avail her details. Being a foreign mission they are immuned from any court proceeding. There was no evidence given as to the wage factor on multiplicand of the deceased. I would therefore base the wage factor to the minimum wage the same being Ksh.3,000/-. I would further place the number of years the deceased would have worked at 20 years. Thus $Ksh.3,000/- \times 20 \text{ years} \times 12 = Ksh.720,000/-$. The advocate for the plaintiff had referred to me the case law of:- ii) David Mukii Mareka V Richard Kanyago & Others J.L.A. Osiemo,J. Hccc78/00 Whereby an award of lost years was given of Ksh.3.8 million. In that said case the deceased was a minor whilst in this case the deceased is an adult. ii) Mary Wahu Mwaura V Warsme Onar Faral Hccc815/00 Ang’awa,J.

Where the plaintiffs deceased husband a businessman died as a result of a road traffic accident loss dependency was given at 3.2. million with 10 years being the multiplier but the wage factor was Ksh.40,000/- The case of:- David Ngunje Mwangi V The Chairman of the Board of Governors Of Njiri High School Hccc2409/98 An award of Ksh.1.680,000/- was awarded to a minor involved in a road traffic accident.

I therefore find the sum awarded above of 720,000/- reasonable. B) Under the Fatal Accidents Act It is

noted that this act provided for dependants. The plaintiff was a brother to the defendant is not a dependant. He is therefore not permitted to obtain the benefits from the deceased estate personally. This is as outlined under section 4 of the act. He may sue as an administrator of the estate of the deceased. He did produce a limited grant dated the 27.4.00 in which he proved he has authority and locus to file suit. Where there are minors there must always be two administrators not one as is in this case if he sues on behalf of the dependants of the deceased. These dependants are said to be two minor children and a mother. There has been no proof from the plaintiff by way of a birth certificate to show that indeed the deceased was the mother of the children. Proof to show the children existed by way of a birth certificate, documents or certification was required and lacking. I would further state that if this head had been proved it would have been discounted. The effect that a claim under the Law Reform Act and the Fatal Accidents Act would be taken into account. The claim would have stood as dismissed. iv) Special Damages The claim sort was:- a) Police abstract - Ksh.100/- b) Death certificate - Ksh.50/- c) Funeral expenses - Ksh.10,000/-

The plaintiff failed to produce the Ksh.100/- receipt for the police abstract fee. The plaintiff also failed not only to produce the 50/- receipt for the death certificate but the actual death certificate itself. As to funeral expenses the plaintiff never spoke of this nor produced any supporting documentation. I would not have made any award under this head of damages of Special Damages. I accordingly dismiss this suit. I make and award no costs to the defendants as they were absent and failed to attend court.

Dated this 25th day of November, 2004 at Nairobi.

M.A. ANG'AWA

JUDGE

Mulwa & Co. Advocates for the plaintiff

Ngaah & Co. Advocates for the defendant