



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3052 OF 1995

WYCLIFFE NYONGESA.PLAINTIFF

VERSUS

ETYANG IMONYARO THE ATTORNEY GENERAL.DEFENDANTS

JUDGMENT

This is an unfortunate case.

According to the plaint filed on the 9.10.99, the deceased one Justus Wanjala Nyongesa – a minor aged 9 years old, was alleged to have been involved in a road traffic accident along the Thika Road.

When the father of the deceased came to give evidence, he stated that he was not at the scene of the accident when it occurred. He received information of the accident. He rushed to the Gertrude children's hospital where the deceased was pronounced dead on arrival. He transported the body of the deceased to the City Mortuary and later for burial to his rural home.

No other evidence was adduced to court.

A) Liability

Wycliff Nyongesa, the father to the deceased, who is also the legal representative and the Plaintiff herein having adduced no other evidence means that this suit falls into the principle of the case of:-

Mary Ayo Wanyama V. Nairobi City Council C.A. 252/98

In the above suit the Plaintiff gave evidence but was not at the scene of the accident. The Plaintiff was in fact not able to establish how the defendant was negligent and as such the Court of Appeal upheld the dismissal of the suit by the superior courts.

The advocate for the Plaintiff stated, from the bar, that the defendant had admitted that an accident occurred. Because of this admission by them the Plaintiff need not prove liability, namely that the deceased was negligent. He further went to state that as the deceased was a minor, then the issue of negligence does not arise as minors are not held liable in negligence for road traffic accident.

According to the defence – the accident was admitted but that they were held negligence was denied.

I wish to just outline how a party can prove liability and negligence in a Tort case.

1. Where there is an interlocutory judgment.

Where an interlocutory judgment has been entered against the defendant for failing to file a memorandum

of appearance and defence such judgment is final. The Plaintiff need not prove liability.

All he requires to do is to go for the formal proof of the assessment of damages on quantum,

2. Section 34 of the Evidence Act

Where a lower court or a subsequent court has heard the parties on the same facts and issues for instance, if there was a traffic court case in the lower court, the proceedings of that lower court is then used in the civil case. This assists in not recalling the witnesses a second time and the proceedings of the trial court of the subordinate courts a subsequent court may be used.

3. Eye Witness/direct evidence

An eye witness who witnessed the accident. This is direct evidence. In this present case the advocate for the Plaintiff claimed no liability should be placed on any minor of tender age on the grounds that contribution to liability in principle does not lie.

I must point out that the plaintiff is under a duty to first prove that an accident occurred. He does so through the above three ways as outlined by this court.

The defendants may thereafter rebutt this evidence by stating that indeed they were not negligent. The burden would then shift to the defendant to establish that they were not negligent according to the defence or unknown person is blamed for the accident.

At the time of trial, the State Council representative of the Attorney General was absent. They did attend court the second day and called no evidence.

I wish to state that after evidence is led on liability it is at that stage that the court looks into the issue as to whether the minor is to be blamed or contributed to the accident.

According to the two cases of:-

1. Bashir Ahmed Butt

V.

Uwais Ahmed B. Khan by Abdul Khan 1982-88)IKARI

A minor pedestrian was involved in a road traffic accident when the minor was struck by a vehicle.

The Court of Appeal held as per Madan J.A. (as he then was)

“The practice of the civil courts ought to be that normally a person under the age 10 years cannot be guilty of contributing negligence and thereafter in so far as a young person is concerned only upon clear proof that the ... making the commission he had capacity to know that he ought not to do the act or make the omission”.

I held in the case of:-

Eliud Sundani Majimbo Matumba

suing as legal representative

V.

Cleophas Wanyonyi Simiyu & Another

That the minor did not contribute to the accident – based on the above principle.

Law JA. (as he then was) who upheld the above principle also sat on the bench that heard the case of:-

Rahima Tayab & Another

V

Anna Mary Kinanu (an infant suing by her next of friend)

(1982-88) IKAR

and said that there in fact was no rule or otherwise that contributory evidence may be given to the minor.

I find in this present case that the plaintiff required to just prove an accident occurred. I do not agree with the advocate's argument that because the principle that a minor is not held negligence in an accident that the said facts establishing such accident need not be called. It is important that such evidence is called before the court weighs the evidence as to who is responsible for blame or to state the contribution of the same.

I would accordingly dismiss this suit.

I am required to state what my award would have been if per chance the plaintiff was successful in his suit.

II Possible Quantum

a) Law Reform Act

The Plaintiff holds limited grant of letters dated 6.7.95. This gives him locus to represent the estate of the deceased.

i) Pain and suffering

I have no evidence that the deceased was alive after the accident, as such I would not have made any award under this head.

ii) Loss of expectation of life

The advocate for the plaintiff relied on the case law of:-

aa) Rahab Wanjiku Gitonga

v

Almas Njoroge Mungai

Nakuru HCCC 59/97 unreported

Rimita J.

Where a deceased male adult aged 64 years was awarded Ksh100,000/= to his estate.

bb) Jackson Magata Kuritu

Charles Cheruiyot Keter

Nakuru HCCC 437/96 unreported Ondeyo J.

Where a young youth male aged 16 years was awarded Ksh150,000/= to his estate.

I find that a reasonable conventional figure under this head be Kshs70,000/=.

iii) Lost years

The advocates for the plaintiff did not address me on this head of damage. There would have been called evidence of what the father may have aspired the son to be and called professionals to give evidence.

In the case law of:-

Sheikh Mustafa Hassan

Nathan Kamau and Others (1982-88) IKAR

Whereby the evidence in the superior court was called of what possible earnings the deceased would have earned and has now lost.

As there is no evidence in this case I would note that the deceased was a school going child. He would have at least earned a minimum sum of Kshs3,000/= as wages.

I would adopt a multiplication of 17 years being the same as in the Sheikh Mustafa Hassan case (supra) for a minor.

I would have awarded $\text{Ksh}3,000/= \times 17 \text{ years} \times 12 = \text{Ksh}612,000/=$.

c) Fatal Accidents Act

I would have made no amend under this head on the issue of dependency.

b) Special Damages

A total of Ksh25,110/= was pleaded.

The Plaintiff never spoke of these claims nor did he submit any proof that he incurred the said expenses.

I would not have made any award under this head.

I hereby dismiss this suit with no orders as to costs as the defendants were absent during the trial of this case.

In summary

a) Pedestrian minor aged 9 years old in 1994.

b) Alleged pedestrian/road traffic accident

c) Injuries

Fatal

d) Liability - Nil

e) Possible award

I. Law Reform Act

i. Pain and suffering – Nil

ii. Loss of expectation of life – Kshs70,000/=

iii. Lost years.

Kshs3,000/= x 17 x 12 = - Kshs614,000/= II. Fatal Accidents Act – Nil

III. Special Damages - Nil

Not proved.

This suit stands dismissed with no orders as to costs.

Dated this 28th day of April, 2004 at Nairobi.

M. Ang'awa

Judge

C.N. Kihara & Co. Advocate for the plaintiff

J.A. Mwaniki State Counsel for the Attorney-General