



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Case 1 of 2003

ANDERSON KENGA BULUSHI.....PLAINTIFF

VERSUS

SAN RATHOD AUTOMOBILE.....DEFENDANT

JUDGMENT

The plaintiff has brought this suit under the Law Reform Act for the benefit of the deceased person's estate.

The deceased who was a pillion passenger on a bicycle along Lamu Road was involved in a road accident in which he received fatal injuries on 31st January, 2002. The bicycle, it was alleged, was hit by motor vehicle Reg. No. KAK 929B driven by the defendant's authorized driver.

From the evidence the accident must have occurred between 6.30 pm and 7.30 pm.

According to Changawa Kenga (PW2), who was the pedal cyclist, as he cycled he heard a motor vehicle hoot behind him. He left the road to the pedestrian path. The motor vehicle, however, followed him and his passenger off the road and knocked them down. The motor vehicle did not stop. PW2 took out a pen and noted the registration number of the motor vehicle.

Another eye witness, George Kenga Bulushi (PW5) told the Court how he saw the motor vehicle hit a cyclist and his pillion passenger. PW5 confirmed that he saw the motor vehicle in question and also noted its registration number. He was walking with one Shida Baraka when the accident occurred. They rushed to the victims before alerting two police officers who were nearby. With the police they chased the motor vehicle and pointed it to the police when they caught up with it near Sabaki Bridge. On quantum, the deceased at the time of his death was 24 years old and was married with two children aged 3 and 2 years, respectively. He was employed as a waiter at Metro Hotel where he earned Kshs. 6,000/= per month. With this he supported his parents, immediate family and siblings.

Following his death the family spent Kshs. 13,500/= as funeral expenses.

In considering this case, the first thing to be established is liability of the defendant's driver.

The evidence by PW2 was that he was riding his bicycle with the deceased as a pillion passenger on Malindi-Lamu road. Behind them he heard a motor vehicle hoot.

He gave way and the motor vehicle while overtaking them brushed the deceased and the impact threw them off the bicycle. The deceased sustained fatal injuries while PW2 had bodily injuries.

According to PW2 he was able in that state to record the registration number of the motor vehicle, a yellow trailer.

Another eye witness, PW5 also witnessed the accident and reported the same to police officers who were nearby. He also noted the number and the colour of the motor vehicle. They chased it and the driver arrested. This is the evidence linking the motor vehicle in question, KAK 929 D to this accident. The only defence witness, Sadiq Said Mohammed, however gives a totally different version. According to him after the motor vehicle, which had broken, was ready, it left for Mombasa. He was driving a rescue motor vehicle behind the trailer. The police stopped them and informed them that their trailer had caused an accident. Although he had driven all along behind the trailer he did not witness any accident involving the trailer. Turning to the evidence of PW2, I find it highly unlikely that in the circumstances of the accident he was still able to see the motor vehicle which had hit them and even had an opportunity to record its registration number.

Remember that the accident was at about 7pm, nearly dark. It was sudden and the deceased and PW2 were thrown off the bicycle by the impact. The deceased was critically injured while PW2 too sustained injuries. Yet, with all these happenings, PW2 would like the Court to believe his version. No wonder, he was not able to produce the piece of paper on which he recorded the registration number of the motor vehicle.

PW5 alleged also that he witnessed the accident. That he was in the company of one Shida Baraka. After the accident, he accompanied the police in pursuit of the motor vehicle.

He also stated on oath that he did not know the victims. He recorded his statement with the police on 1st day of February, 2002, a day after the accident. The same day Shida Baraka also recorded his statement. PW5's statement is two paragraphed and only relates to his role in identifying the deceased person's body for post-mortem. Contrary to his assertion, the victims were his brothers. Similarly Shida Baraka is a brother to the victims and his statement relates only to matters arising after the accident. He too attended the post-mortem examination. Cpl. Changazi was emphatic that after his investigations failed to yield sufficient results he recommended that an inquest be conducted. The same is pending to date.

Clearly from the above analysis, liability has not been proved.

In the result this suit must fail. The same is dismissed with costs. However, although I have come to this conclusion, I must, nonetheless, proceed to assess damages which I would have awarded had I found that the defendant was liable.

I was urged to award Kshs.1.5 in general damages. The claim is brought only under the Law Reform Act. On the deceased person's income, no evidence was tendered on the same even though it

was alleged that he worked in a hotel. On pain and suffering there is evidence that the deceased did not die straight away. He was rushed to a hospital nearby where he afterwards died. He certainly suffered pain albeit briefly. The trend in such cases is to award a modest figure for the brief pain suffered. For instance in **Changawa Kaleli Konde and Another V Osman Musa Ibrahim**, HCCC.N0. 30 OF 2005 (Malindi) I awarded Kshs.5,000/= for pain and suffering in an accident where the deceased died instantaneously. The deceased in the present case died some hours after the accident. I would have awarded Kshs. 10,000/= for pain and suffering.

Pleaded as special damages was Kshs. 10,500/= made out as follows:

Funeral expenses 10,000/=.

Police abstract – 100/=

Death Certificate – 400/=

But in his testimony. PW1 – Anderson Kenga stated that the coffin was Kshs. 3,500/= and items he categorized as “others” amounted to Kshs.10,000/=. Not a single documentary evidence was produced in proof. It is trite that special damages must specifically be pleaded and strictly proved.

The plaintiff is not entitled to special damages.

I would have awarded the plaintiff Kshs.10,000/= as general damages together with costs and interest.

However, as the plaintiff failed to establish liability against the defendant, the order of this Court is that the suit is dismissed with costs.

Dated and delivered this 15th day of November 2005 at Malindi.

W.OUKO

JUDGE



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