



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Case 69 of 2004**

**AGNES BOSIBORI OGEGA (*Suing as the administrator of the estate of***

**NELSON MATUNDA OSIEMO (*deceased*) ..... PLAINTIFF**

**VERSUS**

**TEA RESEARCH FOUNDATION .....1<sup>ST</sup> DEFENDANT**

**JOSEPH MAWIA MUTISYA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The plaintiff, **Agnes Bosibori Ogega** filed suit in her capacity as the administrator of the estate of **Nelson Matunda Osiemo** – deceased (*hereinafter referred to as the deceased*) against the defendants Tea Research Foundation (*1<sup>st</sup> defendant*) and Joseph Mawia Mutisya (*2<sup>nd</sup> defendant*) seeking to be paid the damages under the **Law Reform Act** and the **Fatal Accidents Act** and special damages on account of the fatal injuries that the deceased sustained when he was hit by motor vehicle registration No. KAL204U (*the said motor vehicle*) owned by the 1<sup>st</sup> defendant and driven by the 2<sup>nd</sup> defendant. The plaintiff averred that as the deceased was walking along Kericho – Nakuru road, the 2<sup>nd</sup> defendant negligently drove the said motor vehicle that he caused it to veer off the road thereby hitting the deceased who sustained serious injuries and died on the spot. The plaintiff solely blamed the defendants for causing the said accident. The plaintiff claimed that as a result of the death of the deceased from the said accident, the family of the deceased lost dependency and further incurred special damages in burying him. The plaintiff particularized the special damages that the family had incurred. She further listed the dependants of the deceased. She pleaded with the court to grant her damages as prayed in her plaint together with costs.

When the defendants were served, they filed a defence. They denied that their said motor vehicle was involved in the accident pleaded by the plaintiff and put the plaintiff to strict proof thereof. In the alternative, the defendants pleaded that if the said accident occurred, then it was because of the negligence of the deceased who walked on a highway used by vehicular traffic without due care and attention. The defendants denied that the plaintiff was entitled to be paid any damages under the **Law Reform Act** and the **Fatal Accidents Act** as pleaded in the plaint. They further denied that the plaintiff was entitled to be paid any special damages as a result of the said accident. In essence, the defendants put the plaintiff to strict proof thereof to establish a case of negligence against them. They urged this court to dismiss the plaintiff's suit with costs.

At the hearing of the case, the plaintiff called five witnesses in her bid to establish her case against the defendants. She testified that she was the wife of the deceased. However she did not produce any document to establish that she was indeed married to the deceased. She testified that she received information that her husband (*the deceased*) was fatally injured in an accident. At the time she was residing at Nyamira District. She confirmed that the deceased was killed in the accident involving motor vehicle registration No. KAL 204U. She applied and was issued with the limited grant of letters of administration to enable her file the suit (letters produced as plaintiff exhibit No. 8). She paid the sum of Ksh.1, 080/= to the court in order to be issued with the said letters of administration (*receipt produced as plaintiff's exhibit No.9*) She was issued with a death certificate confirming that the deceased had been killed in the said accident (*death certificate produced as plaintiff exhibit No. 1*)

She testified that the deceased's body was buried at Nyamira. The family bought a coffin for the sum of Ksh. 12,000/= which they used to bury the deceased in (*produced as plaintiff's exhibit No. 6*). She testified that before the deceased was buried, he was clothed with a suit which they had purchased for Ksh.3, 000/=. He wore shoes which they had purchased for Ksh.1, 500/=. She did not however produce any receipt to establish that she had indeed expended such sums. They paid a mortuary fee of Ksh.1, 000/= (*receipt produced as plaintiff's exhibit No.7*). She testified that after the deceased was buried, she undertook a search at the Registrar of Motor Vehicles and established that the said motor vehicle was owned by the 2<sup>nd</sup> defendant (*copy of records produced as plaintiff's exhibit No.4*)

She testified that her marriage with the deceased was blessed with five children, namely; James Ombongi Matunda, 21 years, Josephine Kwamboka, 18 years, Vincent Nyariaro Matunda, 16 years, Peter Mokaya Matunda, 15 years and Evelyn Nyanduko Matunda, 12 years. She testified that at the time of his death, the deceased was aged 49 years and was employed as a clerk by Sambu Auctioneers. She stated that the deceased used to earn a salary of the sum of Ksh. 7,000/= per month. She did not however produce any document to establish that indeed the deceased earned such sum of money. Apart from that, she testified that the deceased used to engage in the business of buying and selling chicken and eggs. She estimates that the deceased used to earn about Ksh.10, 000/= per month from the said business. She testified that the deceased used to assist her and the family in paying for their maintenance and upkeep. The deceased further paid the school fees for their children who were still in school. The plaintiff urged this court to grant her compensation on behalf of the deceased's estate as pleaded in her plaint.

PW2 Patrick Nyaega Mayaka and PW3 Jesse Nyaega, father and son respectively, testified that on the 18<sup>th</sup> of October 2003, at about 6.30pm while they were seated outside their house near Duka Moja along the Kericho – Nakuru road, they witnesses motor vehicle registration No. KAL 204U being driven at a high speed and in a zigzag manner along the said road. It had just drizzled and the tarmac surface was wet. The said motor vehicle lost control and hit the deceased who was standing on the side of the said road. PW2 and PW3 knew the deceased prior to the said accident. They testified that the deceased was hit by the said motor vehicle and died on the spot. They both blamed the driver of the said motor vehicle for causing the said accident. They denied the suggestion by the defendants that the said accident could have been caused in any way by the deceased. They testified that after the said accident, the driver of the said motor vehicle, did not stop but instead drove off from the scene of the accident. However, they were able to note the registration number of the motor vehicle. The registration number of the vehicle was confirmed from the side mirror of the motor vehicle which was left at the scene when the said motor vehicle hit the deceased.

PW4 PC Dan Omachode produced the police abstract report in respect of the said accident as plaintiff's exhibit No.3. He confirmed that the traffic police investigated the case and established that it was the driver of motor vehicle registration No. KAL 204U who caused the said accident. The driver of

the said motor vehicle was charged with several traffic offences and was duly convicted. PW5 Sikulu Elias, a clerk at the Traffic registry at the Kericho Principal Magistrate's Court, produced the file in respect of traffic case No. 1409/2003 where the 2<sup>nd</sup> defendant was charged with three offences under the **Traffic Act**. He testified that the 2<sup>nd</sup> defendant was charged with the offence of causing death by dangerous driving, was convicted and fined Ksh.15, 000/= or in default two years imprisonment. He was further charged for failing to report an accident and failing to stop after an accident. In the two offences, he was found guilty and sentenced to pay a fine of Ksh.2, 000/= on each count or in default he was to serve two months imprisonment. The file in respect of the traffic case was produced as plaintiff's exhibit No.10. The defendants did not offer any evidence and duly closed their case.

After the close of both the plaintiff's and the defendants' case, the parties to this case agreed by consent to file written submissions in support of their respective cases. The plaintiff and the defendants filed their respective written submissions. Having carefully read the pleadings filed by the parties to this suit, and having carefully considered the evidence that was adduced by the witnesses on behalf of the plaintiff, and further having considered the written submissions filed by the parties to this suit, the issues for determination by this court are two fold; who is to blame for the accident that took place on the 18<sup>th</sup> of October 2003 that resulted in the death of the deceased" If the above issue is determined in favour of the plaintiff, what damages should be paid to the plaintiff on behalf of the deceased's estate"

As regard the issue of liability, the plaintiff offered evidence which was not controverted by the defendants. She testified that the deceased was killed when motor vehicle registration No. KAL 204U owned by the 1<sup>st</sup> defendant was carelessly driven by the 2<sup>nd</sup> defendant that he caused it to veer off the road and hit the deceased thereby causing him to sustain fatal injuries. I believed the eye witness account offered by PW2 and PW3 that they saw the said motor vehicle, which was being driven at a high speed and in a zigzag manner on a wet tarmac surface, veer off the road and hit the deceased. The deceased died instantly after being hit by the said motor vehicle.

The said motor vehicle did not stop after the accident. The 2<sup>nd</sup> defendant did not report the accident to the police. However, a side mirror of the said motor vehicle was left at the scene after the said accident. The said side mirror had the registration number of the said motor vehicle. The traffic police investigated the circumstances of the said accident and established that it was the 2<sup>nd</sup> defendant who was solely to blame for the said accident. He was charged in court with three traffic offences. He was convicted on all the three counts under the **Traffic Act**. He was fined or in default thereof he was to serve a term in prison. The proceedings in respect of the said traffic case were produced in this court as plaintiff's exhibit No.10. I have read the said proceedings and I am persuaded on a balance of probabilities that indeed it was the 2<sup>nd</sup> defendant who caused the said accident by negligently and carelessly driving the said motor vehicle on the said road that he caused it to veer off the road, hit the deceased and causing him to sustain fatal injuries.

The 2<sup>nd</sup> defendant drove the said motor vehicle at a high speed on a wet tarmac surface. He did not take due care of the pedestrians that were on the side of the said road. I have evaluated the evidence adduced. I am convinced on a balance of probabilities that the plaintiff has established that it is the 2<sup>nd</sup> defendant who caused the said accident that resulted in the death of the deceased. The evidence by the plaintiff was not controverted by the defendants because they chose not to offer any evidence. The 1<sup>st</sup> defendant, as the owner of the said motor vehicle, is vicariously liable for the acts of negligence of the 2<sup>nd</sup> defendant. I therefore hold that the defendants shall jointly and severally be solely liable for causing the said accident. They are hereby held to be 100% liable.

On quantum, the plaintiff testified that she was married to the deceased and they were blessed with five children aged between 21 years and 12 years. Although the plaintiff did not produce any

documentary evidence to support her contention that she was married to the deceased, her evidence was uncontroverted. I therefore hold that she has established on a balance of probabilities that she was married to the deceased. She further testified that the deceased was aged 49 years at the time of his death and had been employed as a clerk by an auctioneering firm at Kericho. She stated that the deceased used to earn Ksh. 7,000/= as monthly salary. She further stated that the deceased used to undertake a business of selling chicken and eggs which used to earn him a monthly income of Ksh.10, 000/=. In respect of these two amounts, the plaintiff did not produce any documentary evidence.

She further testified that the deceased used to support her and the children of the marriage. In the written submissions filed in court, the defendants has proposed that the multiplier to be applied in respect of the deceased in calculating the amount due to his estate under the **Fatal Accidents Act** should be 6 years while the plaintiff proposes the multiplier to be applied should be 10 years. I have evaluated the said submissions including the decided cases which were referred to by both the plaintiff and the defendants; in the circumstances of this case I will apply a multiplier of 8 years. Both the plaintiff and the defendants agreed that the deceased applied 2/3 of his net income to support his family. I will adopt the said dependency ratio of 2/3.

As regard the amount that the deceased earned, as stated earlier in this judgment, the plaintiff did not prove that the deceased earned the sums of Ksh. 7,000/= and Ksh.10, 000/= respectively. In the circumstances of this case therefore, I will be constrained to apply a figure which the court may be accused of plucking from the thin air. I have considered that the deceased's rural home was Nyamira District. He was residing at Kericho and obviously he was engaged in some activity that generated income. Although the plaintiff was not able to produce and documentary evidence to support her oral testimony that the deceased was in salaried employment, since her testimony was uncontroverted, I will adopt the sum of Ksh.5, 000/= as the monthly income that the deceased earned. I therefore award the plaintiff the following damages under the **Fatal Accidents Act**;

$$\text{Ksh. 5,000/= (being the monthly income) } \times 12 \text{ (months of the year) } \times 8 \text{ years (the multiplier) } \times 2/3 \text{ (the dependency ratio) } = \text{Ksh.320, 000/=}$$

I will make no award under the **Law Reform Act** because to do so would make the plaintiff benefit twice from the same cause of action. And in any event, even if this court were to make an award under the **Law Reform Act**, this court would be mandated to take into account the said amount when making an award under the **Fatal Accidents Act**. Taking into account means that this court would have to deduct the amount made under the **Law Reform Act** from the amount awarded under the **Fatal Accidents Act**.

The plaintiff pleaded that she be awarded Ksh.40, 925/= as special damages on account of the funeral expenses that she incurred when she buried the deceased. She however produced receipts for the sum of Ksh.12, 000/= which she used to purchase the coffin. She also produced a receipt of Ksh.1, 080/= which she paid as court fees when she applied for letters of administration. She further produced a receipt of Ksh.1, 000/= being the amount that she paid as mortuary fees. I will however award her the sum of Ksh.30, 000/= which she pleaded as funeral expenses because this court takes judicial notice of the fact that the community where the plaintiff hails from, mourners have to be fed. The body of the deceased was also transported from Kericho to Nyamira District using some mechanical means. I therefore award the plaintiff the sum of Ksh.31, 080/= as special damages.

The upshot of the above is that judgment is entered for the plaintiff against the defendants jointly and severally as hereunder;

**(i) On liability**

The defendants are hereby held to be 100% liable in damages to the estate of the deceased.

**(ii) On quantum**

The plaintiff is awarded

(a) Under the Fatal Accidents Act ..... Ksh.320,000/=

(b) Special damages ..... Ksh. 31,080/=

TOTAL ..... Ksh.351, 080/=

(iii) The plaintiff shall have the cost of the suit.

(iv) Interest on special damages shall be paid from the date of filing suit whilst interest on general damages shall be paid from the date of delivery of this judgment.

**DATED at KERICHO this 2<sup>nd</sup> day of November, 2006**

**L. KIMARU**

**JUDGE**



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