REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (COMMERCIAL AND TAX DIVISION)

CIVIL CASE 6577 OF 1991

JACINTA WANGARI……..PLAINTIFF

-Versus-

KENYA BUS SERVICES LTD.....DEFENDANT

JUDGMENT

On the 11th December, 1988 at about 7.45 p.m one Peter NdunguWainaina was driving his motor vehicle registration No. KXY 385 alongNgong Road in the direction of Ngong Town when his vehicle collidedwith a bus registration No. KUG 850 owned by the first Defendant anddriven by the second Defendant. Peter Ndungu Wainaina died as aresult of the said collision. His wife then instituted this suit claimingdamages under the Fatal Accidents Act and the Law Reform Act.

The Defendants filed a defence stating that collision was caused bythe negligence of the deceased.

The Plaintiff called two witnesses. P.W.2 JAMES WAINAINANGENGA was traveling with the deceased in the same motor vehicle.According to him, the deceased was driving on the left side of the roadand at Indiana Hotel he saw a motor vehicle overtaking another one.

These vehicles were traveling in the opposite direction from their ownvehicle. There was a bend on or curve. The deceased swerved to hisleft, off the road. He then heard a bang. He came to Kenyatta NationalHospital. After 2 days he was discharged and at the police station hefound the bus, a Leyland Kenya bus registration No. KUG 850. It had ascratch at the rear. p.w. 3 MARTiN WAITHAKA said that he was driving his vehiclebehind two cars which in turn were behind the Kenya bus. He was thelast in the queue. At Indiana Hotel there is a bend. He heard a scratchof brakes then a bang. He moved to the scene and found KBS on its sideof the road and the other vehicle also on its side of the road. He said thecollision was caused by the Kenya bus overtaking another vehicle at abend,

The 2nd Defendant was convicted of causing death by dangerousdriving in Traffic case No. 5183 of 1988.

The Defendants did not give any evidence and they did not callany witnesses. I am satisfied on the evidence of P.W.2 JAMESNJENGA and P.W.3 MARTIN WAITHAKA that the accident was caused by the second deceased served off the road but not avoid the or bend. The deceased swerved off the road but could not avoid the collision. No evidence has been adduced to show how the deceasedcontributed

to the accident In fact the damage to the vehicles indicatethat the collision took place when the bus was swinging back to its sideof the road. The damage to the deceased's vehicle was in front whiledamage to the bus was on the rear right. The bus then stopped on itsside of the road so did the deceased's vehicle.

Counsel for the Defendants has submitted that since there is nodirect evidence on the point of impact liability should be apportioned50/50 on the basis of the decision in BERKLEYL STEWARD - vs-LEWIS WAlYAKI (1982 - 88) 1 KAR 1118. He further submitted thatconviction of the second Defendant does not close the issue ofcontributing negligence - see Civil Appeal No. 121 of 1993 DAVIDKINYANJUI & OTHERS -vs.- MESHAK OMARI MUNYORO.

In the instant case there was direct evidence of P.W.2 JAMESNJENGA that before the accident the deceased was driving on the leftside of the road. The deceased swerved to the left, off the road to avoidthe collision, then a bang. P. W. 3 MARTIN WAITHAKA found bothvehicles on their respective sides of the road. The deceased was trapped in his vehicle. This means there was no way he could have driven fromthe point of impact whereas I agree that conviction alone does not close the issue of contributory negligence, I hold that in the instant caseI am satisfied on the evidence before me that the 2nd Defendant waswholly to blame for the accident. It was not disputed that the 2nd Defendant was an employee of the 1st Defendant and driving the saidmotor vehicle in the course of his employment with the 1st Defendant Itherefore hold that the 1st Defendant is vicariously liable.Special damages were agreed as follows:-

(a) Police abstract shs. 100/-

(b) Post mortem report shs. 100/-

(c) Funeral expenses shs. 30,000/-

(d) Value of motor vehicle 140,000/- -15,000/-, salvage shs.125,000/-

(e) Assessors fees 1,130/-

(f) Towing charges - shs. 3,000/-

(g) Letters of administration 15,300/-(h) traffic proceedings - shs. 280/-

Total = shs. 174, 9100/-

The deceased was aged 28 years at the time of his death andwas an engineer by profession earning a gross salary of shs. 13,000/- per month. Evidence was led by his wife that he was intimber business with P.W.2 JAMES WAINAINA NJENGA. Mr.Njenga confirmed and stated that it was the deceased who used tofind the customers by virtue of his profession and employmentwhile Mr. Njenga procured the timber. The Plaintiff stated thatthe deceased used to give her shs. 8,000/- per month in cash andused to give his mother shs. 10,000/- per month also in cash. P.W. Mr. Njenga stated that the name of the partnership was Kimuga Hardware & Timber Supply which was not registered. Therewere no books of accounts. They relied on trust for each other.Some bank statements were produced but these were in the nameof the witness. According to Mr.Njenga the deceased used to passthrough the Timber Yard after his duty at 5 p.m. They used toshare shs. 15,000/- per month.

What emerges from the evidence is that the deceased used to get some extra income akin to commission rather thanpartnership drawings. In the absence of documentary proof as tothe amount and

doing the best I can in the circumstances, notingthat such commissions are not necessarily paid on monthly basis, Iassess per month.

The deceased was married with a child and used to payschool fees for his brothers.

In doing so I am mindful of the decision in Civil Appeal NO.119 of 1995 RYCE MOTORS LTD. -vs-ELIAS MUROKI. Thedistinction is that the evidence of the Plaintiff is. supported by thatof P.W.2 JAMES NJENGA and the documentary evidence fromsome of the customers.On the multiplier to be adopted counsel for the Plaintiff was submitted that 22 would be appropriate relying on SERAAUMA JUMA-vs-BAT 1978 KLR 40 where the deceased wasaged 29 years and the court adopted 22 as a multiplier.

Counsel for the Defendants has on the other hand suggested14 relying on SHEIKH MUSHTAQ HASSAN-vs- NATHANMWANGI KAMAU (1982 - 88) 1 KAR 946.The deceased was 28 years old with a wife aged 22 years.

One would have expected him to l*ive* and earn some income uptothe retirement age of 60 years. We have, however, also to bear inmind the imponderables. He might never have reached that ageIn the circumstances I adopt a multiplier of 18.

His gross income as stated above was shs. 13,000/- from thesalary and shs. 7000/- from commission. I would subtract a sumof shs. 4000/- for income tax and other statutory deductions. Iwould therefore award a sum of kshs. 16,000/- x 12 x2/3 x 18=shs. 2,304,000/- under the Fatal Accidents Act.

Counsel for the Defendants has submitted that I shoulddismiss the claim for damages under Law Reform Act since thePlaintiff obtained letters of administration after the suit had beenfiled. Such letters of administration have no effect. He relied onCivil Appeal No. 145 of 1990 TROVISTIK UNIONINTERNATIONAL-vs- MRS. JANE MBEYU. That court ofAppeal decision delivered on the 19th October 1993 overruled theCourt of Appeal decision in ROMAN C. HINTZ -vs-MWANGOMBE MWAKIMA (1988) 1KAR 482 which wasdelivered on the 26 July 1984.

The HINTZ CASE ruled that one would sue under LawReform Act without taking out the letters of Administration. TheTROUISTIK CASE has ruled that one must obtain the letters ofAdministration. The question that arises is what happens to those case filed between July 1984 and October 1993 where letters ofAdministration were not obtained.

In the instant case suit was filed without obtaining letters ofAdministration. Subsequently the Plaintiff obtained letters ofAdministration. Is the Plaintiff entitled to recover under the LawReform Act" Decisions of the Court of Appeal are binding to allcourts below it and indeed are law. Before October 1993 anadvocate could confidently file suit claiming damages under LawReform Act without obtaining letters of Administration. Thatwas the law.

Now that the Court of Appeal has decided to reverse its owndecision, why should the litigant suffer in the process" ThePlaintiff took steps to take the letter of Administration after suitwas filed. Is the exercise in obtaining such letters ofAdministration futile" In my view such an exercise is not futile.The Court of Appeal in the TROUISTIK CASE stated in effectthat the purpose of obtaining letters of administration of theEstate. It gave the example of husband and wife leaving apartan*d* whose son is involved in an accident and dies intestate Oneobtains letters of administration, the other does not. It is that with letters of administration that will claim under the LawReform Act.

In the instant case by declaring the claim under LawReform Act as incompetent would mean that the

Plaintiff wouldhave to withdraw the suit, obtain letters of administration, thenfile a fresh suit. The suit would be statute barred, the litigantwould pay the extra court fees and advocate's costs and would beat the bottom of the hearing list should he obtain leave to file suitout of time. All these for no fault of his own or that of his counsel.In the instant case the Plaintiff is the widow of the deceased. Sheis the person entitled to obtain the letters of administration andindeed did obtain such letters.

We have to realize the society we live in. Indeed in mostcases one is out to unnecessary expenses to obtain letters ofadministration just to file suit after his beloved one is killed in anaccident. In normal circumstances he would not have botheredwith this alien practice. To hold that all those cases filed onreliance of HINTZ CASE and letters of administration have been obtained subsequently are to be dismissed would be the greatest injustice the Court of law have ever perpetrated on thesociety. The law does not act retroactively.

In the instant the Plaintiff obtained the letters ofadministration and is entitled to recover under this head.

I therefore enter Judgment for the Plaintiff against theDefendants jointly and severally for shs. 2,578,910/-. The Plaintiff will also have the costs of this suit and interest.

Delivered this 4th day of june 1996.

J.V. O JUMA

JUDGE