REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 1933 OF 1978

ESTHER NKUDATE.....PLAINTIFF

VERSUS

TOURING & SPORTING

CARS LTD & ANOTHER.....DEFENDANT

JUDGMENT

The plaintiff is the mother of the deceased boy, Tipanko Nkudate, and she has brought this case claiming damages under the Law Reform Act for the benefits of the estate of the deceased. The father of the boy has died.

The deceased's family normally lives outside Kajiado but, at the time of the accident in which the deceased lost his life, namely 8th October 1976, the family had moved to the outskirts of Nairobi. They were seeking shelter there during the period of drought, which the plaintiff described as the "cattle disaster of 1976". According to the plaintiff, the deceased was not used to the traffic of the city; yet it is possible that, on the day in question, the deceased might have been connected with herding cattle near the road in question. According to the evidence of Mr Eves there were cattle in the vicinity of the accident, but it is not absolutely clear that the deceased was herding them.

None of the plaintiff's witnesses, herself included, saw the accident at, as the defence relates, 12.45 pm on 8th October 1976 on Langata road. It is not in dispute that at the time the second defendant, Mr McRae, was driving an Alfasud car (registration KQJ 022) towards his home for lunch) but unfortunately came into collision with the deceased. This car was owned by Mr McRae's employer, the first defendant (Touring & Sports Cars Ltd), and there is no dispute that the company will be vicariously liable if Mr McRae is proved to have been negligent. The plaintiff relies on inferences drawn from the facts of the accident as discovered by Inspector Ndungu and the statement of Mr McRae at the time when the inspector visited the scene. It was understood that the deceased ran across the road from Mr McRae's right. The issue for trial was whether Mr McRae was in any way negligent in failing to avoid the collision with the deceased or whether it had been impossible for him to avoid the accident. That is so because it was considered that the deceased could not be guilty of contributory negligence.

I should perhaps clarify the point that the deceased could not be guilty of contributory negligence. The age of the deceased was admitted to be six years at the time of his death. Mr McRae seems to have thought that he might have been older from his size, but Mr Eves (who gave *de bene esse* evidence) described him as a small boy, quite thin, of about six or seven years of age. I think that defence counsel

was quite right, on that evidence, not to challenge the allegation of the plaintiff that the deceased was six years old.

Following upon that finding of age, counsel referred to the *dictum* of Madan JA in *Bashir Ahmed Butt v Uwais Ahmed Cahan* (unreported) in the Court of Appeal. In the opinion of Madan J A, no child below the age of ten years can be guilty of contributory negligence. I do not know whether this is an accepted opinion by the Court of Appeal; and it seems to be at variance with the position accepted by the Court of Appeal in *The Attorney- General v Vinod* [1971] EA 147, in which reference was made to Lord Denning MR's observations in *Gough v Thorne* [1966] 1 WLR 1387. In my view the position is that each case must be decided on its own merits, the determining factor being whether the child is mature enough to be able to take precautions for his or her own safety, having in mind that young children do not usually have sufficient experience in these matters.

In this case there are the facts that the boy was very young and that he was not accustomed to traffic. Defence counsel's concession was, with respect, quite right. It follows that the only issue is whether Mr McRae was guilty of any negligence.

Platt J then having reviewed the evidence concluded: it was, then, in failing to keep a good look-out and control his vehicle by slowing down in order to meet unforeseable eventuality that Mr McRae erred. He also failed to warn the boy by using his horn. It may also be that he failed to take sufficient evasive action.

The plaintiff is entitled to damages for loss of expectation of life. This is a conventional sum. It used to be between £400 and £500 (*Benham v Gambling* [1941] AC 157). It has been increased to K£850 by this Court.

According to Lord Denning MR in *Lim Poh Choo v Camden and Islington Area Health Authority* [1978] 3 WLR 895, 908, the conventional sum is £750. I indicated in argument that, as it was a conventional sum, it ought not to be increased by every turn of the inflationary screw. The two sides are the quest for a reasonable figure in view of the loss of purchasing power of money and, on the other hand, the danger of increases to the public. Lord Denning MR observed about the conventional sum for pain and suffering ([1978] 3 WLR at page 909):

I may add, too, that if these sums get too large, we are in danger of injuring the body politic: just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and these are passed to the public in the shape of higher and higher fees for medical attention.

The same applies to the conventional sum for loss of expectation of life. Large sums under this hand will affect insurance policy premiums. They will add to inflation, and will continue a trend in which the award will itself be useless soon after it is made. I am told that the conventional sum in England has reached a higher sum than ever Lord Denning MR allowed.

In my view, the ceiling ought to be set now at K£850; but, in the circumstances of this case, the loss of expectation of the child ought to be lower than the ceiling. I will award K£750.

There will be judgment for the plaintiff in the sum of K£750 with costs and interest as prayed.

Judgment for the plaintiff with costs.

Dated and delivered at Nairobi this 8th day of June 1979.

H.G PLATT

JUDGE