



1. Vehicle collision – matatu
2. Male adult aged 41 years old
3. Fare paying passenger
4. Effects of not joining third party
5. Liability 100%
6. Quantum

General damages

- a) Law Reform Act
Pain and suffering Ksh.100,000
Loss of expectation of life Ksh.60,000
- b) Fatal Accidents Act – Nil
- c) Special Damages – Nil

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 242 OF 1999**

JEMIMMAH WAMBUI NJOROGE PLAINTIFF

VERSUS

PHILIP MWANGI DEFENDANT

JUDGMENT

A brief back ground of this case is as follows:- Jemimmah Wambui Njoroge is the widow of James Njoroge. She holds letters of administration for his estate.

On the 10.2.99, at about 6.00 a.m. her husband left home to travel to Nairobi. She later received news that she had been involved in a road accident. She went to Kijabe Hospital and was not able to find him. She later found him at the city mortuary Nairobi.

She brings this suit against Philip Mwangi who is both the owner and driver of the vehicle registration No. KAA 411 H, Nissan matatu for the wrongful death of her husband. A claim of General Damages and Special Damages was sought by her. I have before me six agreed issues for determination.

- 1) Whether the defendant, his agent and or servant was guilty of negligence leading to the accident?

The plaintiff was not present during the accident. She nonetheless called PW2 a passenger who was traveling in the same vehicle. PW2 informed the court that he boarded the vehicle in question together with the deceased. They knew each other but had not planned to be on the same vehicle together. They left Nairobi at about 300 p.m. and headed for Naivasha as the vehicle reached Kijabe area he felt the vehicle break hard. There was a loud bang and he lost consciousness. This did not last long. He found himself at the floor of the vehicle. He came out and of the vehicle to look for James Njoroge. He was crying and was in pain. Good Samaritans rushed them to Kijabe Hospital. PW2 was admitted for two

days. When he was discharged and went home he learnt of the deceased's death.

The defendant came to court and gave evidence. His version of the story is that he owned and drove the vehicle in question. He then stopped at a stage to drop off a passenger. He looked through his rear mirror and saw a vehicle far off. He then pulled out onto the road. As he traveled he mentioned that about 100 meters away a bus was traveling behind a lorry. The said bus attempted to overtake the lorry. The road was not able to take the three of them at once. The defendant pulled himself to the extreme left. He was not able to pull out very far as the railing had been placed at the side of the road. The railing had been put on either side of the road to stop vehicles from falling lower down to another road that went underneath.

As far as the defendant was concerned he did the right thing. He stopped. The bus came by still on his side of the lane and knocked his side of the vehicle. He lost consciousness and found himself at the hospital. He denied that he was over speeding.

PW2 claimed that the vehicle was at high speed. Was the defendant negligent? The defendant has been accused of failing to stop, swerve back, keeping a brother look out and driving at a high speed.

The defendant claimed he was unable to swerve and had in fact stopped. From the evidence before me I find that the defendant was negligent to the extent that this case would permit as seen in the next issue.

Issue No.2

Who was to blame for the accident?

The blame is on the defendant for the accident. It is the reasons why he has been sued. The defendant on the other hand blames the bus and lorry that was approaching him at the time of the accident. I believe the defendant's story as the police abstract report actually reflects that a lorry and bus was also involved in the accident. Namely, the bus registration number KAB 244B Volvo Bus (Nyao Bus).

The bus was trying to overtake the lorry. It was unable to go back to its side of the lane and collided with the defendant's vehicle.

All the plaintiff has to prove is that the deceased was a passenger in a vehicle, and that that vehicle was involved in an accident that caused the deceased fatal injuries. Who is to blame for the said accident lies with the defendant.

Unfortunately when the defendant was sued he filed a defence stating that he was "stranger to the suit". It has turned out that he was not a stranger and in fact the deceased was his passenger.

What the defendant's advocate should have done is take out third party proceedings against the bus driver and owner. The bus commonly known as Nyao bus corporation may probably not be in existence any more as well as the insurance company of Kenya, National Assurance.

The order to apply under is order 14 r (1) of the CPR which reads:

"14(1) where a defendant claims as against any other party to the suit (hereinafter called the third party).

a) That he is entitled to contribution or indemnity . . . He may by leave of the court, issue a notice hereinafter called a third party notice) to that effect . . .

If the court permits such party to be joined to the suit liability between such parties may be determined at this moment the owner of the bus or lorry are not party to this suit. I can therefore not make orders against them.

As failure to take out third party proceeding was not so done by the defendant, he must bear the blame for this accident. He may perhaps later claim from the alleged third parties not joined subject to the limitation of actions. I compute the liability at 100%.

Quantum

Issue No.3

Did the deceased estate suffer any loss and damages as a result of the death of the late James Njoroge? Yes, the deceased estates suffered loss and damages.

Issue 4

Does the plaintiff have any locus to sue both under the law Reform act and the Fatal accidents act or any of them? I find that the plaintiff has locus to sue under both

Issue No.5

What quantum of damages is the plaintiff entitled to and who should pay the same? Under General damages and the Law Re form act, I note that the deceased was still alive during the accident. He was taken to hospital where he died.

I would hold that he is entitled to damages for pain and suffering which I find in this circumstances to be reasonable. Namely, the injuries sustained according to the death certificate is:-

- i) Chest injury
- ii) Heamothorax
- iii) Crush injury pelvix
- iv) Loss of blood
- v) Crush Shock

I would award Ksh.120,000/- as a fair reflection of the pain and suffering

For loss of expectation of life I would award the convential amount of ksh.60,000/-.

Under the fatal accidents act, the plaintiff gives a list of dependency.

These are:

- 1) Jemimah Wambui (widow)
- 2) M N (son 15 years)
- 3) M W (daughter 16 years)
- 4) Samuel Kinyanui Nyoro (son 9 years)

The plaintiff came to court and was unable to clearly establish the ages of her children. It is this that the advocate for the defendant took exception. He implied that this award should not be given. The plaintiff said she had left the children birth certificate at home. In normal circumstances these certificate of birth ought to be produced to prove the children of the deceased.

The plaintiff must also prove as to what extent the deceased provided for her and the children. Should the school fee be tabled? The house holds expenses? I have also the issue of income. The plaintiff stated verbally that deceased earned a total of Ksh.10,000/-. The plaintiff states this amount is actually Ksh.20,000/-. There was no business colleague nor any records to show the actual amount the deceased earned. Two Municipal permits were produced but the plaintiff was unable to inform us of what business this was for . It was PW2 who causally mentioned in his evidence that the deceased dealt with books. The business has since collapsed.

I believe the deceased may have for all intent and purposes been a farmer and tired his hands at business. This is just guess work.

I decline to award this head of damages and dismiss the same as not having been proven. I also dismiss the prayer on special damages as having not been proven.

In summary

1. Motor vehicle collision
2. Male adult aged 41 years old
3. Fare paying passenger
4. Effects of not joining 3rd party
5. Liability 100%
6. Quantum

a) Law Reform Act

- | | |
|---------------------------------|---------------|
| i) Pain and suffering | Ksh.120,000/- |
| ii) Loss of expectation of life | Ksh. 60,000/- |

b) Fatal Accident Act and

Special Damages	Nil_____
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Total	Ksh. <u>180,000/-</u>
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I award cost of this suit to the plaintiff.

I award interest from the date of this judgment.

Dated this 27th day of February, 2001 at Nairobi.

M.A. ANG'AWA

JUDGE