

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE NO. 9 OF 2014

- 1. FAUSTINE CONSTANTINE MNG'ANYA.....1ST PLAINTIFF**
- 2. ULRICK FAUSTINE MNG'ANYA (a person of unsound
Mind by his natural Guardian FAUSTINE
CONSTANTINE MNG'ANYA
his next friend).....2nd PLAINTIFF**
- 3. CONSTANTINE FAUSTINE MNG'ANYA
(Late a minor, by FAUSTINE MNG'ANYA but
Now having attained majority).....3RD PLAINTIFF**
- 4. AGNESS FAUSTINE MNG'ANYA
(Late a minor, by FAUSTINE MNG'ANYA but
Now having attained majority).....4TH PLAINTIFF**

Versus

- 1. RASHID JAFARI.....1ST DEFENDANT**
- 2. JEETENDRA PRABHUDAS
ZAUVERCHAND.....2ND DEFENDANT**
- 3. MAXINSURE (TANZANIA) LIMITED.....3RD DEFENDANT**

JUDGMENT

B.R. MUTUNGI, J:

The plaintiffs who enjoy the legal services of M.R.M. Lamwai & Co are claiming against the defendants jointly and severally for the sum of Shs. 605,000,000/=. The stated

amount claimed being damages arising out of the fatal accident which occurred on 8/3/2013 having seriously injured the late Catherine Constantine Mng'anya (the 1st plaintiff's wife) herein shall be referred as the deceased. The deceased later passed on while admitted in hospital after the fatal accident.

The said accident was alleged to have been caused by the 2nd defendant's motor vehicle with Registration No. T. 837 CAG, (Eicher) which was negligently driven by the 1st Defendant. Thus, the plaintiffs in their amended plaint prayed for judgment and decree against the defendants as follows;

- a) The defendants jointly and/ or severally pay the plaintiff the sum of Shs. 605,000,000/=.*
- b) The Defendants jointly and severally pay the plaintiff interest on the decretal amount at the Court's rate of 11% per annum from the date of judgment till when the decree is satisfied in full.*

c) The defendants jointly and severally pay the costs of and incidental to the suit.

d) Any other relief (s) that the Honourable Court may deem fit

The suit proceeded ex parte against the 1st and 2nd defendants. The reason being that it was only the 3rd defendant who appeared and defended the suit despite being served by publication. The 3rd defendant's written statement of defense thereof strongly opposed the alleged claims pressed herein by the plaintiffs.

For ease of determination of the suit, the following were issues agreed upon by both parties and consequently framed by the court.

- 1. Whether the 1st defendant was negligent in the way he drove the motor vehicle as a result caused the fatal accident.*
- 2. Whether the 1st defendant was driving the motor vehicle in the course of his employment.*

3. Whether the 2nd defendant is vicarious liable for the negligence of the first defendant.
4. Whether the plaintiffs were the deceased's dependants.
5. Whether the 3rd defendant is liable to the plaintiffs under the insurance policy in respect of the motor vehicle Registration No. T. 837 CAG
6. What reliefs are the parties entitled thereto.

During the hearing of the suit, Mary Lamwai and Mr. Kagirwa learned Counsel appeared for the plaintiffs and the 3rd defendant respectively.

— In order for the plaintiffs to prove their case, a total of three (3) witnesses were called in evidence. These are FAUSTINE CONSTANTINE MNG'ANYA (PW1), ELIONOO PIRIVATUS MTABI (PW2) and DEUKADIA AQUILINE KIMARIO (PW3). Whereas, the 3rd defendant in opposing the suit summoned one MAGNUS MARTIN MGWEMBE (DW1).

The facts leading to this suit are as follows; PW1 testified that on 7/12/1974 had married the deceased and issued with a certificate of marriage which was admitted as Exhibit P.1. He went further by alleging during their marriage, were blessed with three children Ulrick Faustine Mng'anya, Handline Mng'anya and Fremin Faustine Mng'anya. They were also living with the 3rd and 4th plaintiffs, who were born out of the wedlock (PW1's children).

PW1 alleged on 8/3/2013 after the said accident had occurred along the Bibi Titi Mohamed Road near the traffic lights at Mnazi Mmoja did lead to the deceased's death on 12/3/2013. The burial permit was admitted as Exhibit P.2. PW1 made a follow with the police, and was informed of the identity of the driver of the fateful vehicle which had caused the said accident (the 1st defendant). This was from the particulars of the accident and a sketch map (Exhibit P.3 collectively). Further PW1 tendered the motor vehicle

registration card, insurance documents dated 5/6/2018, the insurance dated 1/6/2012, motor claim forms, copy of driving license which were admitted collectively as ID-1. He insisted the said motor vehicle was insured by the 2nd defendant through the 3rd defendant.

PW1 went further by stating the deceased was a caterer and also owned a shop in which her income per month was Tshs. 2,000,000/=. More so, PW1 after being appointed as the administrator of the deceased's estate (Exhibit P.5) did write a letter to the 3rd defendant (Exhibit P.4) seeking for the payment in view of the said accident. PW1 alleged the 3rd defendant intended to give him Tshs. 2,000,000/= as condolences. He alleged the said amount was not sufficient since he incurred costs in buying a coffin, transportation costs, food and drinks to facilitate the burial expenses as per Exhibit P.6 Collectively. He further claimed to have incurred costs since he was temporary working for

T.R.L in Mwanza as per ID-2. (he lost wages for six months). He further claimed the 2nd plaintiff had permanent mentally related health problems (mental retardation). He is the one who is taking care of him to date, after the deceased who all along had shouldered the burden. In view thereof the second plaintiff needs financial support which previously was provided for by the deceased.

PW1 prayed the court awards the amount claimed since the death of the deceased has led to the family loss of income. He is still unemployed hence prayed the court to help him look after the 2nd plaintiff. The deceased was the bread winner of the family handling all matters pertaining to the family upkeep.

Meanwhile PW2 who testified as the deceased's neighbour alleged she was working with the deceased in the catering project. She went further by alleging that in a day they would collect an average of Tshs. 800,000/=. She

clarified that, she was the owner of the said project, and the deceased would only give a helping hand and would be paid accordingly. The deceased would then take care of the whole family including PW1 who had retired by then. PW2 further elaborated that the deceased also owned a small retail shop to supplement the family expenditure.

PW2 went further and explained that, the 2nd plaintiff was a mentally challenged person in need of the deceased's full attention during her life time. The second plaintiff is now at home under the care of PW1. She explained that she was not aware of the existence of the 3rd and 4th plaintiffs.

The above narration was supported by PW3 who happens to be the deceased's young sister. She (PW3) further narrated of how they got information of the said accident. Further that, the deceased was the family bread winner from the proceeds of the catering work and a small

retail shop she owned near her home. PW3 was not aware of any other dependants apart from the second plaintiff.

On the other hand, DW1 working as the 3rd defendant's Assistant Claim Officer admitted to have received PW1's claims. DW1 testified further that, upon receiving the said claims, they appointed an assessor to investigate the alleged accident, who subsequently confirmed the occurrence of the same. The said assessor issued them a report dated 14/10/2013 (Exhibit D1).

DW1 testified further the said assessor advised them to pay PW1 Tshs. 4,700,000/=, however PW1 and the 3rd defendant had reconciled and PW1 agreed to receive Tshs. 2,000,000/= as per the discharge voucher (Exhibit D2). DW1 testified further while they were preparing the payments as agreed, they were suddenly issued with the plaintiffs' claim of more than Tshs. 200 million.

Upon closure of the hearing, the two sides did file their respective final written submissions. Each proceeding at length to support their case with relevant authorities.

Starting with the first issue *on whether the 1st defendant was negligent in the way he drove the motor vehicle as a result caused the fatal accident*. I have gone through the court record and the testimonies from the witnesses in this suit, I find the following observations which can easily assist me in determining the matter.

One; it is an undisputed fact that, PW1 had married the deceased via a Christian celebrated marriage on 7/12/1974 as per Exhibit P.1. **Two;** the adduced evidence by both camps indicate that, despite the fact that the deceased was a house wife but she also involved herself in small businesses. **Three;** the deceased had died due to the motor vehicle accident (Eicher with Registration No. T. 837 ATD) which occurred at Bibi Titi Road near the Traffic Lights on

documents were merely admitted for the purposes of identification as ID-1. It goes without saying the said documents were not properly admitted as Exhibit hence they have no legal value in support of the plaintiffs' suit for the intended purpose.

Further, the plaintiffs' side merely alleged the said accident had occurred on the zebra cross hence the 1st defendant ought to have been extra careful therein. However, Exhibit P.3 does not reveal as to whether the said accident was caused by the 1st defendant's negligence. This position was also corroborated by PW1 during cross examination who outrightly admitted that he was not at the scene when the accident occurred.

It would seem the plaintiffs were relying on the conviction of the first defendant in the traffic case to impute negligence, but it is a common known principle that one need prove the civil case and its claims independently. To

be precise, the procedure is that in a civil case the court must weigh the evidence in total disregard of the criminal case. As already noted PW1 did make it very clear that he was not around the scene of accident, though he is aware there are traffic lights and a zebra crossing in the said area. In view thereof he was not in a position to ascertain whether at the time of the accident the car in issue was allowed by traffic lights and the deceased disallowed or vice versa.

From the above stated analysis, I find the first issue is answered negatively.

Regarding the second issue *whether the 1st defendant was driving the motor vehicle in the course of his employment.* This issue should not detain me for so long. The entire court record and the adduced evidence on the plaintiffs' side was to the effect that, the said motor vehicle was driven by the 1st defendant. There is no further evidence be it a contract of service or otherwise which was

tendered by the plaintiffs to confirm whether there was an established fiducial relationship of an employer and employee between the 1st and 2nd defendant.

In line with the above, in my settled mind I find the mere fact that the said motor vehicle was driven by the 1st defendant on the material date and time does not automatically confirm he (the 1st defendant) was employed by the 2nd defendant.

The second issue is hence answered in the negative.

As to the third issue *whether the 2nd defendant is vicarious liable for the negligence of the first defendant*. This issue is answered in line with the outcome of the second issue. I say so because, since there was no evidence as to whether the 1st defendant was acting in the course of employment, definitely at this juncture the issue of vicarious liability cannot arise at all. In addition, the court record is

silent as to whether the 1st defendant was the 2nd defendant's agent or otherwise.

In the event, the third issue is answered negatively.

As regards the fourth issue *whether the plaintiffs were the deceased's dependants*. PW1 in his testimony suggested the plaintiffs were the deceased's dependants. Upon my objective perusal of the evidence I find the said allegation lacks merits. This is because the birth certificates of the 2nd to 4th plaintiffs were not tendered by PW1 to confirm whether they really existed. This proof was of utmost importance since PW1 had only mentioned three children out of which it is only Ulrick Faustine Mng'anya listed. Therefore, the two Constantine and Agnes according to PW1 were his own children born out of wedlock. PW2 said nothing in regards to these children.

As if not enough, PW3 in cross examination appeared to be unaware of the existence of the 3rd and 4th plaintiffs. The question is why PW1's testimony contradicts with that of PW3 who is a near relative of the deceased? In my settled view, the answer to this issue must be concluded to the effect that, there was no proof that the plaintiffs were dependants of the deceased. The only available testimony is of PW1 which confirms he was the deceased's husband. PW1 merely alleged to have suffered loss upon losing his wife, but did not substantiate as to how much he depended on her.

In its totality, the plaintiffs have failed to prove the alleged assertion as required by law pursuant to **section 110 (1) of the Evidence Act [Cap. 6 R.E 2002]**. For ease of reference, the said section states;

'Whoever desires any court to give judgment as to any legal right or liability dependent on the

existence of facts which he asserts **must prove that those facts exist.**'[Emphasis is mine].

In a similar vein, the Court of Appeal of Tanzania in the case of **ABDUL-KARIM HAJI VERSUS RAYMOND NCHIMBI ALOIS AND ANOTHER, CIVIL APPEAL NO. 99 OF 2004 (CAT-ZNZ) (UNREPORTED)** at page 7 stated;

'It is an elementary principle that he who alleges is the one responsible to prove his allegations.'

In view of the foregoing analysis, I find the fourth issue is answered in the negative.

Coming to the fifth issue *whether the 3rd defendant is liable to the plaintiffs under the insurance policy in respect of the motor vehicle Registration No. T. 837 CAG.* As far as the above earlier stated fifth undisputed fact is concerned, in the totality I find the 3rd defendant is not liable to the plaintiffs under the insurance of the said motor vehicle. It is

In my settled view, Exhibit ID1 collectively has no legal value to back up what had been alleged by the plaintiffs. In the event I find the fifth issue is answered negatively.

Turning to the 6th issue as to *what reliefs are the parties entitled thereto*. In totality the claimed amount of Tshs. 605,000,000/= by the plaintiffs were merely pleaded as pointed earlier and more so in paragraphs 13-16 of the amended plaint in which the particulars of the amount claimed were stated. These are Tshs. 300,000,000/= for PW1's matrimonial support he would have enjoyed for the whole of his life considering he is now retired from public service, Tshs. 100,000,000/= each for 2nd, 3rd and 4th plaintiffs for loss of material and mental expenses. In my settled view the same are of a nature of specific damages which must be strictly proved.

It is an obvious fact that the plaintiffs' claims are governed by the law Reform (Fatal and Miscellaneous

Provision) Act Cap. 310 R.E 2002 specifically under section 3 of the said Act. From the wording of section 3, the plaintiffs to succeed the claim must have proven the person died and the death was caused by the wrongful act of the defendant. In this case the 1st defendant as already shown earlier the plaintiffs have failed to prove the case against the 1st defendant's negligence. Further, the plaintiffs were required to prove the loss of reasonable expectation of pecuniary benefit sustained by the family of the deceased. In that regard there are principles to be followed in ascertaining the amount to be paid in fatal accident's claim as were enunciated in the case of **Devies Versus Powell Duffoyne Associated Collieries [1942] AC 601** at page 617 that;

· '(1) to estimate the loss of earnings the sum which the deceased probably would have earned but for the fatal accident (2) to estimate the lost benefit that is the pecuniary benefit which the

with no material evidence upon which to gauge the amount to be paid by the defendants.

The 1st plaintiff (PW1) is claiming for funeral expenses yet he had admitted in evidence that this was a family affair and funds were raised by the well-wishers. He did not prove the amount taken from his pocket. This issue is found to have no merits.

My stance is backed up by the case of **STANBIC BANK TANZANIA LIMITED VERSUS ABERCROMBIE & KENT (T) LIMITED, CIVIL APPEAL NO. 21 OF 2001 (CAT-DSM) (UNREPORTED)** at page 7 the Court of Appeal held;

'The law is that special damages must be proved specifically and strictly'.

In the upshot, and in respect to what I have resolved in the 1st, 2nd, 3rd, 4th and 5th issue, I definitely find the instant suit is to be sanctioned to a dismissal.

Consequently, I hereby dismiss the suit as I herein do.

The 3rd defendant is entitled to costs of the suit.

It is so ordered.




B.R. MUTUNGI

JUDGE

22/6/2018

Read this day of 22/6/2018 in the presence of Mary Lamwai for the plaintiffs and holding brief for Mr. Jovin for the 3rd defendant.

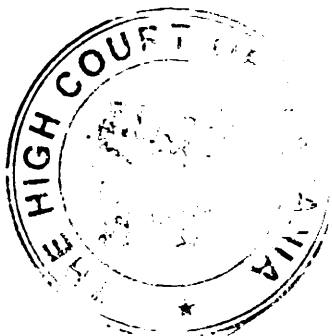



B.R. MUTUNGI

JUDGE

22/6/2018

Right of Appeal Explained.




B.R. MUTUNGI

JUDGE

22/6/2018