



Purma Holding Co Ltd v Omae & another (Suing as the legal representative of the Estate of Abner Mogeni Omae (Deceased) (Civil Appeal E003 of 2022) [2024] KEHC 7759 (KLR) (26 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E003 OF 2022
PN GICHOHI, J
JUNE 26, 2024**

BETWEEN

PURMA HOLDING CO LTD APPELLANT

AND

PENINA O OMAE & GRACE KERUBO OMAE (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABNER MOGENI OMAE (DECEASED) RESPONDENT

(Being an appeal from the judgment issued at Chief Magistrate's Court in Gombo CMCC No. 213 of 2016 delivered on 6th December, 2022)

JUDGMENT

1. The background of this appeal is that vide a plaint dated 18/08/2016 and in their capacity as the legal representative of the estate of Abner Mogeni Omae, Penina O. Omae & Grace Kerubo Omae (hereafter referred to as the Respondent) sued Purma Holding Co. Ltd (hereinafter referred to as the Appellant) under *Fatal Accidents Act* and *Law Reform Act* seeking judgment against the Appellants for:-
 - a. Special Damages.
 - b. General damages.
 - c. Costs of and incidental to the suit.
 - d. Interest on (a) , (b) and (c) above at court rates.
 - e. Any other relief that the court may deem fit and just to grant.
2. The Respondent pleaded that on or about the 03rd day of January 2016, the deceased was lawfully walking along the verge of Kisii- Kilgoris road when at Nyamache Junction, or thereabouts, the



- Appellant's driver , servant or agent so negligently drove, managed and/or controlled the Appellant's aforesaid motor vehicle registration mark KBH 374 C along the said road the he caused the same to violently knock down the deceased as a consequence of which the deceased sustained fatal injuries. They particularised the negligence on the part of the Appellant.
3. The Respondent pleaded that the Appellant was either personally or vicariously liable for the tortious acts and/or omissions of his driver , servant and /or agent.
 4. In their statement of defence dated 23/09/2019, the Appellant admitted being the registered owner of the suit motor vehicle at all times material to this suit but denied the occurrence of the accident as stated by the Respondent . In the alternative and without prejudice, he pleaded that if the accident did occur as alleged or otherwise and which he denied, then it was caused by the or contributed to by the deceased's own negligence. He particularised the negligence on the part of the deceased.
 5. In its judgment dated 08/12/2021 and delivered on even date (not 06/ 12/2021), the trial court entered judgement in favour of the Respondent as against the Appellant at follows:-Liability at 100%.Paing and suffering – Kshs. 50,000/= .Loss of expectation of life- Kshs.100,000/= .Loss of Dependency Kshs.3,600,000/= .Special Damages - Kshs.272,170/=
 6. Dissatisfied with the judgement and decree, the Appellant filed this appeal on the grounds that:-
 1. The learned trial magistrate erred in law and in fact by holding the Appellant liable for causing the accident where there was no iota evidence adduced by the Respondent showing that the Appellant hit/knocked down the deceased.
 2. The learned trial magistrate erred in law and in fact by finding the Appellant liable when the Respondent's pleading and evidence adduced on liability were at variance.
 3. The learned trial magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on pleadings thereby arriving at erroneous decision on liability.
 4. The learned trial magistrate erred in law and in fact by applying wrong principles of law while assessing damages under the various heads and so doing arrived at an erroneous decision which is manifestly high and excessive in the circumstances.
 5. In arriving at his decision, the trial magistrate did so in speculative and cursory manner not guided by law or any set of legal principles and failed to exercise his discretion within the applicable principles of law and the failure to adhere to the foregoing has occasioned a serious miscarriage of justice and ought to be reversed.
 7. The appeal was canvassed by way of written submissions. The Appellant filed his submissions dated 12/01/2023. On liability, Counsel for the Appellant submitted that the Respondent had the onus to prove her case and that the burden does not shift on the appellant regardless of whether the appellant adduced any evidence.
 8. Further, it was submitted that there was no evidence tendered before the court to show that the Appellant's motor vehicle veered off the road and knocked down the deceased as pleaded for in the plaint.
 9. It was further submitted that the evidence adduced in the matter was at variance with the pleadings which the court ought to have disregarded.



10. On quantum, it was submitted that though the assessment is at the exercise of judicial discretion, it ought to be exercised in accordance of the law. The Appellant challenged the multiplier of 30 years applied by the trial court on the grounds that the trial court failed to make any reference to the principles of assessing the multiplier. This Court was therefore urged to substitute the same with a multiplier which is within comparable decisions.
11. The Appellant also urged the court to set aside the special damages that were not proved. He sought costs of the appeal.
12. On her part, the Respondent filed submissions dated 20/01/2023. On liability and while referring to the Appellant's submissions, Counsel for the Respondent submitted that the Appellant explicitly admits having not brought any witness to dispute the Respondent's evidence during trial.
13. That, further, the Appellant does not dispute the occurrence of the accident in question and that the deceased was not to blame for the accident, rather they are disputing the occurrence of the accident as framed in the pleadings lodged in the trial court.
14. It was the Respondent's contention that in the absence of a third- party introduced by the Appellant or any witness brought by the Appellant to rebut evidence by the eye witness and the police officer, the Court should hold the Appellant solely to blame for the accident.
15. Further, it was submitted that the Respondent pleaded particulars of negligence of the Appellant's driver but they were not rebutted during trial despite covering the circumstances of the suit as tendered by the witnesses. Counsel therefore submitted that the Respondent had proved the case on a balance of probabilities and therefore, the appeal on liability must fail.
16. On quantum, it was submitted that the higher Court should not be quick to interfere with the amount of general damages awarded in the trial court unless:-
 1. The award is inordinately high or low as to represent an entirely erroneous estimate.
 2. The court proceeded on wrong principles or misapprehended evidence in some material respect.
17. On the first principle, Counsel submitted that the deceased was aged 25 years at the time of death . That the trial magistrate observed that the deceased was in good health as at the time of death and would have worked until retirement age of 60 years. Counsel therefore urged the Court to fine the multiplier applied by the trial court not excessive and that the award is also discretionally. He urged the Court to dismiss the appeal with costs
18. This being the first Appellate Court there is need to give a fresh look at the evidence adduced before the lower court bearing in mind that I had no benefit of having seen or hearing the witnesses as they testified. See *Selle & Another vs Associated Motor Boat Co. Ltd* (1968) EA 123.
19. Grace Kerubo Omae who testified as PW1, adopted as evidence in chief the joint witness statement by herself and Penina N. Omae (as the mother and widow of deceased respectively). That statement is dated 18/8/2016.
20. In that statement, it is stated that they "received the accident message from the eye witness who knew the deceased that the deceased was lawfully walking on the verge of Kisii- Kilgoris road on 03rd January 2016 at about 18.30 hours and when at Nyamache junction or thereabouts, motor vehicle registration mark KBH 374 C T/L Cruiser along the said road veered off the road and knocked down the deceased whereby he sustained fatal injuries on the spot."



21. They reported the matter at Ogembo Police Station and to the area chief of the deceased and got letter. They spent Kshs. 150,000/= for the funeral and after the burial, they obtained the death certificate and letters of administration before filing the suit.
22. In her testimony before court, she produced several documents as exhibits in support of her claim, being :-Death Certificate - P Exhibit 1.Letters of Administration Ad litem dated 06/08/2016 – P Exhibit 2.Receipt of Kshs. 2,500/= for professional fees in regard to Grant- P Exhibit 3.Post Mortem Report- P Exhibit 4.Burial Permit - P Exhibit 5.Deceased's TSC Certificate - P Exhibit 6.Deceased's transcript - P Exhibit 7.Letter from Nyambeti Primary School- P Exhibit 8.Bundle of Receipts for Kshs. 272,170/= for funeral expenses- P Exhibit 8.Police abstract- P Exhibit 9.Demand Notice- P Exhibit 10.
23. She testified that she was married to deceased and they had two children namely, D.O and J.O who were aged 7 and 5 years respectively as at the time the deceased died. That at the time of death, the deceased had just started working as a teacher at a school in Ogembo but had not started to earn a salary. She explained that due to the death, she lost his love and had difficulties taking the children to school and feeding them.
24. In cross-examination she stated that she did not witness the accident and did not have the deceased's payslip though he earned a salary of Kshs. 15,000.
25. PW2 No.68995 P.C Owour from Ogembo Police Station traffic section testified that, in respect of traffic accident at 3/1/2016 involving motor vehicle KAY 123N Toyota Matatu and Motor Vehicle KBH 374C Toyota Landcruiser, the deceased was a pedestrian and that he was hit by the Toyota Matatu which lost control after being hit from behind by the Land cruiser KBH 374C owned by the defendant. He blamed the Motor vehicle KBH 374C for the accident since it lost control and hit matatu from behind.
26. On cross-examination, he stated that he did not conduct the investigation but he had the investigation file in court. That the matter was pending under investigation.
27. Zedekiah Okwema PW3 adopted his witness statement dated 19/5/2021 as his evidence in chief. On cross-examination, he stated that he was a passenger in Motor vehicle KAY 123N Toyota Shark and that the vehicle was about to stop where the deceased was off the road when the vehicle he was travelling in was hit from behind by the Appellant's vehicle and it was in the process that their vehicle and not the Appellant's vehicle that knocked down the deceased.
28. The Appellant closed its defence without calling any witness.
29. From that analysis, the issues for determination are :-
 1. Whether the Respondent proved liability on the balance of probabilities.
 2. If liability was proved, what ought to have been the award on damages.
30. On the first issue, Section 107 of the *Evidence Act*, Cap 80 Laws of Kenya provides that :-
 - (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."



31. Further Section 109 of the Act provides that :- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
32. Further still, Section 112 of the Act provides that:- “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
33. The said provisions therefore differentiate the legal and evidential burden of proof and on the two. The Court of Appeal in *Mbuthia Macharia vs. Annah Mutua & Another* [2017] eKLR had this to say on two:-
 - “(16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced.”
34. The shifting of the evidential burden of proof was settled by the Supreme Court in *Raila Amolo Odinga & Another vs. IEBC & 2 Others* [2017] eKLR that:-
 - “(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the Plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
 - (133) It follows therefore that once the Court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the Respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the Respondent to adduce evidence to prove compliance with the law...”
35. Preliminary findings by investigation officers placed the Appellant liable since he hit the matatu that in turn hit the deceased. So that had the Appellant not hit the matatu, the accident would not have occurred. Having demonstrated that the Appellant’s vehicle veered off the road and hit the matatu whose registration was disclosed and which in turn fatally knocked down the Respondent, then the evidential burden had shifted to the Appellant.
36. The Appellant did not adduce any evidence to show how the deceased caused or contributed to the accident. The Appellant did not take out any third-party notice to enjoin the motor vehicle Registration number KAY 123N Toyota Shark matatu.
37. There is nothing in the trial court record to show that Appellant was denied a chance to file third party proceedings as he purported. The record shows that the Appellant never filed third party proceedings.



In the circumstances of this case, there is no basis upon the Respondent would have been found to have contributed the accident. The Respondent proved his case on a balance of probabilities as provided for by the law. The appeal on liability therefore fails.

38. On quantum, an appellate court should jealously safeguard the trial court's findings bearing in mind that an award of damages is discretionary.

39. Indeed, the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR held thus:-

“... it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

40. The Court went on to say:-

“This is the principle enunciated in *Rook v Rairrie* [1941] 1 ALL E.R. 297. It was echoed with approval by this Court in *Butt v. Khan* [1981] KLR 349 when it held as per Law, J.A that:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

41. Under *Law Reform Act*, the Plaintiff (Respondent herein) had relied on the case of *Irene W. Kagondu & Another V W. K. Tilley (Muthaiga) LTD & another* [2008] eKLR where the deceased died on the same day and was awarded Kshs. 70,000/=. Noticing that the deceased herein died on the spot and also factoring inflation, the trial court awarded Kshs. 50,000/= for pain and suffering. This Court finds that the trial court was properly in arriving at that award. There is no reason to disturb that finding.

42. Under Loss of Expectation of life, the trial court awarded Kshs. 100,000/= on the grounds that the deceased was twenty-five (25) years of age at the time of death and had no medical challenges or threats to his life. That is a conventional figure awarded by courts including *Irene W. Kagondu & another* (supra). This Court affirms that award.

43. Under the *Fatal Accidents Act*, the trial court used a multiplier -multiplicand approach in arriving at Kshs. 3,600, 000/=. In so doing the court applied a multiplier of Kshs. 15,000.00 for the reasons that though no pay slip was adduced in evidence, it took judicial notice of the starting salary of a P1 teacher at Kshs. 21,304. It applied a dependency ratio of 2/3 noting that the deceased left two (2) minors below ten (10) years of age. The court applied a multiplicand of thirty (30) years stating that the deceased was in good health and could have worked up to sixty (60) years given that despite having been fully registered, he was not permanently employed in a public school. That he could have taken more than five years to be fully absorbed.



44. In its judgment, the trial court held:-

“From the evidence before me, the deceased left behind a mother , wife and two children who depended on him. Further, it was stated that the deceased was a fully registered teacher with TSC and that he had been newly employed. However, PW1 did not produce any payslip but availed a letter from the school. PW1 stated that the deceased was earning Kshs. 15,000/= at the time and while taking notice that the starting salary of a PW1 teacher is Kshs. 21,304/-, I am inclined to use the Kshs. 15,000/= stated by PW1 as the income of the deceased at the time.

45. The evidence on record and which was not controverted is that the deceased had just started working as a teacher at a school in Ogembo. He is not a person who anticipated employment. He was in employment and certainly would have been paid for his services. To use a global sum approach simply because there was no prove of payment of salary would be injustice in the circumstances. He had a wife and children who depended on him. There is no justification to interfere with the trial court’s reasoning in application of multiplier/ multiplicand approach and in the manner it did. That award is upheld.

46. On special damages, it is trite that they must be specially pleaded and strictly proved. The Respondent claimed:-Police abstract- Kshs. 200/=Death Certificate- Kshs. 150/=Cost of coffin- Kshs. 30,000/=Funeral expenses, transport and post mortem- Kshs.216,000/=.Legal fees for obtaining letters od administration- Kshs. 25,000/=.Cost of search of owner of motor vehicle- Kshs. 500/=.

47. However, the receipts produced for a total of Kshs. 272,170/= and this is the sum awarded by the trial court. The award is upheld.

48. In conclusion therefore, this court finds that the appeal has no merit. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KISII (VIRTUALLY) THIS 26TH DAY JUNE 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

N/A for Respondent

Ruto - Court Assistant

