



Okinyi & 2 others v Purda (Suing as Legal Representatives of the Estate of the Late Narinoi Purda (Deceased)) (Civil Appeal E004 of 2021) [2024] KEHC 9798 (KLR) (29 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9798 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E004 OF 2021
F GIKONYO, J
JULY 29, 2024**

BETWEEN

**WILFRE OKINYI 1ST APPELLANT
ENOCK KARANI MOENGA 2ND APPELLANT
FAMILY BANK LIMITED 3RD APPELLANT**

AND

**PEMPA OLE PURDA RESPONDENT
SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE
NARINOI PURDA (DECEASED)**

(Being an appeal from the judgment and decree of Hon. G.N. Wakabiu (CM) delivered on 30.03.2021 in Narok CMCC Suit No. 1077 of 2019)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate’s Court at Narok in Civil Suit No. 1077 of 2019 delivered on 30.03.2021 in which the trial court made awards as follows: -
 - a. Liability 70:30
 - b. Pain and suffering Kshs. 20,000/=
 - c. Loss of expectation of life Kshs. 100,000/=
 - d. Award under *Fatal Accidents Act* kshs.463,420.80/=
 - e. Special damages Kshs. 35,000/=



Subtotal Kshs. 618,420.80/=

Less 30% contributory negligence.....Kshs. 185,526/=

Total award Kshs. 432,895/=

2. The memorandum of appeal dated 19.04.2021 cited five (5) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

3. The suit arose from a traffic accident along Narok-Mai mahiu road on 07.11.2018 involving a motor vehicle registration No. KCE 213K. The deceased was walking off the said road as a lawful pedestrian. The said motor vehicle knocked the deceased thereby causing fatal injuries to him. The respondent blamed the appellant's driver. The deceased lost his life in the accident. Particulars of negligence were set out against the driver of the appellants. The deceased was 65 years old.
4. During the trial, the respondent called two witnesses- Pempa Ole Purda and PC Eric Nyamweya.
5. The appellant closed their case without calling any witnesses.

Directions of the court

6. The appeal was canvassed by way of written submission.

The Appellants' Submissions

7. The appellants submitted that the award under loss of dependency was inordinately high for a 65-year-old. The appellants relied on the case of Loice Wanjiku Kagunda Vs Julius Gachau Mwangi CA 142/2003(UR) cited in Francis Odhiambo Nyunja & 2 Others V Josephine Malala Owinyi(Suing As The Legal Administrator Of The Estate Of Kevin Osore Rapando(Deceased))[2020] eKLR.
8. The appellant submitted that the awarded general damages were inordinately high as the magistrate erred in using 8 years as a multiplier without any basis at all. The respondent did not prove that the deceased was a business person earning Kshs. 40,000/=. The trial court adopted a multiplier approach and adopted Kshs. 7,240.95 being the salary of a casual labour and a multiplier of 8 years. The appellants contend that the multiplier adopted was inordinately high since the deceased had already attained the age of retirement provided by Kenyan law. The appellants proposed a multiplier of 3 years and the sum of Kshs. 463,420/= be substituted with the sum of Kshs. 173,760 tabulated as $7,240.95 \times \frac{2}{3} \times 3 \times 12$. The appellants relied on the case of Elizabeth Gathoni Thuku (suing as the legal representative of the estate of Charles Gitonga Wathuta V Peter Kamau Maina & Another [2021] eKLR.
9. The appellants urged this court to uphold the judgment on liability and award of Kshs. 20,000/= for pain and suffering, Kshs. 100,000/= for loss of expectation and Kshs. 35,000/= for special damages.
10. The appellants prayed for the costs of this appeal. They relied on section 27(1) of the [Civil Procedure Act](#).

The Respondent's Submissions

11. The respondent submitted that the trial court directed itself well by holding the appellants 70:30 liable for the accident.



12. On loss of expectation of life, the respondent submitted that the appellate court would not disturb an award of damages unless it is inordinately high. The respondent relied on the case of Bahir Ahmed Butt Vs Uwais Ahmed Khn(1982-88)KAR, and Peters Vs Sunday Posts Limited (1958)EA424.
13. On loss of dependency, the respondent submitted that an award of general damages was at the discretion of the trial court which the appellate court should not interfere unless the court acted on wrong principles. The respondent relied on the case of Daniel Mwangi Kimeni & 2 Others Vs J.G.M. [2016] eKLR, and Gicheru Vs Morton & Another [2005] 2KLR, Beatrice Wangui Thairu Vs Hon. Ezekiel Bergatuny & Another Nairobi HCCC No. 1638 of 1988(UR), GKN & LNN Vs Civiscope Ltd [2021] eKLR
14. The respondent submitted that the special damages were both pleaded and supported by a receipt which the respondent produced in evidence during the trial

Analysis and Determination

Duty of court

15. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the [Civil Procedure Act](#)).
16. The first Appellate Court should, therefore, evaluate the evidence afresh and make its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of Selle & Anor –Vs- Associate Motor Boat Co. Ltd 1968 EA 123.

Issues

17. This court has been called upon to determine liability and the quantum of damages.

Liability

18. Who is to blame for the accident, and by what proportion if at all? Where does the evidence lead the court?
19. It was not disputed that the accident occurred on 07.12.2018. the vehicle involved was also not disputed. PW-PC Eric Nyamweya testified that the 1st appellant was charged with a traffic offence of causing death by dangerous driving vide traffic case no. 154 of 2019.he produced a police abstract as pexh3.PW2 admitted not being the investigation officer but in charge of traffic investigations. He could not tell whether the deceased was drunk or not
20. The trial court found the driver of the appellant's vehicle partly to blame for the accident, and so held the appellants liable in the ratio of 70:30.
21. In the police abstract, the police blame the driver of motor vehicle KCE213K for the accident.
22. Liability draws upon the evidence. The evidence shows that the driver of the motor vehicle in question knocked the deceased.
23. The appellants in their submissions have not challenged that issue of liability. The respondent also does not challenge the liability.
24. Accordingly, the trial court did not err in placing liability at 70:30 against the appellants based on vicarious liability. The appeal on liability fails and is dismissed.



Quantum

25. An appellate court will only interfere with the trial court's discretion in the assessment of damages where; i) there is an error in principle; and or ii) the award of damages is so inordinately high or low as to represent an entirely erroneous estimate of damages (*Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR).
26. This claim was founded on the [Law Reform Act](#) and Fatal Accident Act. These laws provide for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years-loss of dependency.

Loss of Dependency

27. Section 4 [Fatal Accidents Act](#) provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents, and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.”

The concepts of multiplicand and multiplier

28. Simply, the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.
29. See Ringera J (as he then was) in the case of *Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another*, Nairobi HCCC No. 1638 of 1988.
30. The appellant submitted that the awarded general damages were inordinately high as the magistrate erred in using 8 years as a multiplier without any basis at all. The respondent did not prove that the deceased was a business person earning Kshs. 40,000/=. The trial court adopted a multiplier approach and adopted Kshs. 7,240.95 being the salary of a casual labour and a multiplier of 8 years. The appellants contend that the multiplier adopted was inordinately high since the deceased had already attained the age of retirement provided by Kenyan law. The appellants proposed a multiplier of 3 years and the sum of Kshs. 463,420/= be substituted with the sum of Kshs. 173,760 tabulated as $7,240.95 \times \frac{2}{3} \times 3 \times 12$.
31. On loss of dependency, the respondent submitted that an award of general damages was at the discretion of the trial court the appellate court should not interfere unless the court acted on wrong principles
32. PW1 produced a certificate of death as P Exh 4. The deceased died at the age of 65 years.
33. In light of the possibility that the deceased would probably work until he was 70 years old, this court finds the multiplier of 5 years reasonable.
34. Both parties herein agree with the multiplicand and dependency ratio. What was challenged is the multiplier.



35. This court tabulated the award as $7,240.95 \times 5 \times \frac{2}{3} \times 12 = 289,638$
36. From the foregoing, this court finds Kshs. 289,638 would be reasonable compensation for loss of dependency.

Loss of expectation of life

37. The respondent was awarded Kshs. 100,000/= for loss of expectation of life.
38. The appellants have not challenged this award.
39. This court will therefore uphold the award of Kshs. 100,000/=.

Pain and suffering

40. The deceased died on the spot.
41. The appellants have not challenged this award.
42. This court will therefore uphold the award of Kshs. 20,000/=

Special damages

43. Of special damages, the appellants have stated the special damages were not proven. However, in their submissions, they have urged this court to uphold the award.
44. The respondent testified that he had spent Kshs. 35,000/= as advocate's fees in case no. Narok CMCC Succession cause no. 118 of 2019.
45. The respondent in his plaint pleaded Kshs. 35,000/= as special damages.
46. The trial court awarded Kshs. 35,000/= as special damages proved.
47. The respondents are awarded Kshs. 35,000/= as special damages.
48. In an upshot, this court finds that the appeal herein succeeds, in part. Judgment is entered in favour of the respondents in the following terms;
 - i. The appellants are 70% liable
 - ii. Loss of dependency Kshs. 289,638 / =
 - iii. Loss of expectation of life Kshs. 100,000/=
 - iv. Pain and suffering Kshs. 20,000/=
 - v. Special damages of Kshs. 35,000/=Total Kshs.444,638/=
- Less 30% Kshs. 133,391.40
- Total Kshs. 311,246.60/=
- vi. The respondents are awarded the costs of this appeal.
- vii. Interest on the award from the date of judgment
- viii. Interest on special damages from the date of institution of this suit.



Orders accordingly

**DATED, SIGNED, AND DELIVERED AT NAROK THROUGH THE TEAMS APPLICATION,
THIS 29TH DAY OF JULY, 2024.**

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HON. F. GIKONYO M

JUDGE

In the Presence of: -

C/A: Otolu

Chemnetich for Respondent – Present

Kimondo Gachoka for Appellant - Present

