



Bett & another (Suing as the legal administrators of the Estate of Anna Chepkurui Terer) v Ombui aka Joseline Ombui (Civil Appeal E013 of 2023) [2024] KEHC 13029 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAROK
CIVIL APPEAL E013 OF 2023
F GIKONYO, J
OCTOBER 28, 2024**

BETWEEN

PAUL KIPSANG BETT & ROBERT KIPNGETIC BETT (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF ANNA CHEPKURUI TERER) APPELLANT

AND

JOSEPHINE GECHEMBA OMBUI AKA JOSELINE OMBUI RESPONDENT

(Being an appeal from the judgment and decree of Hon. P.L. Shinyada (S.R.M) delivered on 20.04.2023 in Narok CMCC Suit No. E011 of 2022)

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Chief Magistrate's Court at Narok in Civil Suit No. E011 of 2022 delivered on 20.04.2023 in which the trial court made orders and awards as follows: -
 - a. Liability 80:20
 - b. Pain and suffering Kshs. 70,000/=
 - c. Loss of expectation of life Kshs. 100,000/=
 - d. Loss of dependency Kshs.324,360/=
 - e. Special damages Kshs. 87,850/=Subtotal Kshs. 575,910/=
- Less 20% contributory negligence.....Kshs. 465,768/=



Total award Kshs.465,768/=

2. The appellants vide memorandum of appeal dated 16.05.2023 cited six (6) grounds of appeal which relate to; i) liability and ii) quantum of damages.
3. The respondent vide memorandum of response dated 05.03.2024 denied the grounds raised in the memorandum of appeal and stated that the learned magistrate applied her mind to both facts adduced and the law thereby rightly arriving at her judgment.

Brief facts

4. The suit arose from a traffic accident along Narok-Bomet road on 10.07.2021 involving a motorcycle registration No. KMCG 034C and motor vehicle registration No. KCL 184D. The deceased was a pillion passenger on the suit motorcycle. The suit motor vehicle lost control, swerved, and knocked the deceased thereby causing fatal injuries to her. The deceased was 65 years old.
5. The appellants blamed the respondent driver. The deceased lost his life in the accident. Particulars of negligence were set out against the respondent driver.
6. During the trial, the appellants called one witness.
7. The respondent closed her case without calling any witnesses.

Directions of the court

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

The Appellants' Submissions

9. The appellants submitted that the trial magistrate erred in finding the deceased 20% to blame against the overwhelming evidence that the deceased did all he could to avert the accident.
10. The appellants submitted that the trial court erred in adopting a multiplicand of Kshs. 8,109/= which was too low as the deceased was a businessman in Narok town which is a former municipality and therefore the trial court ought to have adopted the minimum wage of a general labourer which is Kshs. 13,572.90 per month and not Kshs. 8,109/= under the Regulations of Wages (General)(Amendment) Order, 2022.

The Respondent's Submissions

11. The respondent submitted that the trial court directed itself well and therefore this court should not disturb the decision of the trial court. the respondent relied on Section 78 of the *[civil Procedure Act](#)*, Abok James Odera T/A A.J. Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, Butt V Khan [1981] KLR 349, and Mkube V Nyamuro [1983] LLR at 403.
12. The respondent submitted that the appellants did not furnish the court with any proof of the deceased's source of income or existence of the alleged business therefore the proper wage was of Kshs. 8,109 as per the Regulations of Wages (General)(Amendment) Order, 2022 as the deceased resided in Olmekenyu as per burial permit which is not considered as one of the former municipalities. The respondent relied on Patriotic Guards Ltd V James Kipchirchir Sambu [2018] eKLR And Beatrice W. Murage Vs Consumer Transport Ltd & Anor (2014) eKLR.



Analysis and Determination

Duty of court

13. 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*).
14. 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

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

Liability

16. Who is to blame for the accident, and by what proportion if at all? Where does the evidence lead the court?
17. It was not disputed that the accident occurred on 10.07.2021. The motor vehicle and motorcycle involved were also not disputed.
18. PW2-Peter Kipkurui Ruto testified that there were two pillion passengers on the motorcycle plus the rider a total of three people. The motorbike was being ridden towards Narok. The motor vehicle was being driven from Narok headed to Bomet. The motor vehicle was driven into the motorbike's lane. He stated that the rider ought to also look out. He stated that the motor vehicle encroached into the motorbike lane. One of the persons on the motorbike had a helmet.
19. On re-examination he stated that the motor vehicle swerved into the lane of the motor vehicle. The passengers had helmets and reflector jackets on.
20. PW3- PC Gladys Chepkoech based at Ololulunga police station and attached to Ollululnga traffic base. she testified that the accident occurred on 10/07/2021 at about 13.30 hours along the Narok-Bomet area. The rider of the motorcycle was Wilson Terer.
21. She testified that the motor vehicle crossed the motorcycle's path. she blamed the driver of motor vehicle KCL 184D Toyota Wish, Stephen Obere for the accident. She visited the scene after 10 minutes. They found both motor vehicle and motorcycle were off-road on the left side of the road as one faced Narok direction. That from the impact the motor vehicle was at high speed. She produced a police abstract P Exh 5 a, covering report P Exh 5b
22. On cross-examination, she testified that only one rider was wearing a helmet and reflective jacket.
23. On reexamination, she stated that the motorcycle carrying two passengers was not the cause of the accident.
24. The trial court found the respondent driver partly to blame for the accident, and so held the respondent liable in the ratio of 80:20.
25. In the police abstract, the police blame the driver of motor vehicle KCL 184D for the accident.
26. The respondent did not call any witnesses.



Analysis

27. Liability draws upon the evidence. The evidence shows that the driver of the motor vehicle in question knocked the motorcycle on which the deceased was a pillion passenger. As a consequence, the deceased died.
28. The driver of the motor vehicle encroached into the path or lane of the motorcycle hitting the motorcycle; the impact and severe injuries sustained show the motor vehicle was in high speed. The hit was also huge and fatal to all the three on the motorcycle.
29. Evidence also show that the deceased was not wearing a helmet. Other than being a statutory requirement, wearing a helmet serves a noble purpose; protection of the person and mitigation of injuries on the head, and may save a life. Any person riding or aboard a motorcycle without a helmet opens himself or herself to danger. Thus, it is an important consideration which may affect liability as well as quantum in a properly argued case establishing a nexus between the cause of accident and failure to wear a helmet.
30. Reflective jacket is another item which also serves to warn other road users of your presence on the road; it is seen from far, and at night makes you visible on the road. In a properly argued case, failure to wear reflective jacket will affect liability.
31. Nevertheless, there was no evidence in this case establishing such nexus with the cause of the accident. Accordingly, the trial court did err in placing liability at 80:20 against the appellants and the decision thereof is hereby set aside
32. The appeal on liability succeeds and the respondent is found to be 100% liable.

Quantum

33. 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).
34. 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

35. 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

36. 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.
37. 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.
38. The appellant submitted that the awarded general damages were inordinately low as the magistrate erred in using Kshs. 8,109/= as a multiplicand. The trial court adopted Kshs. 8,109/= being the salary of a general laborer. The appellants proposed a multiplicand Kshs. 13,572.90/=
39. 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.
40. It was not disputed that the deceased died at the age of 65 years.
41. 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.
42. Both parties herein agree with the multiplier and dependency ratio. What was challenged is the multiplicand.
43. The tabulation by the trial giving a sum of Kshs. 324,360/= for loss of dependency is reasonable compensation even of one was to adopt a global sum approach.
44. From the foregoing, this court finds Kshs. 324,360/= to be reasonable compensation for loss of dependency.

Loss of expectation of life

45. The appellants were awarded Kshs. 100,000/= for loss of expectation of life.
46. The appellants have not challenged this award. In any event, the award is within acceptable range.
47. This court. Therefore, upholds the award of Kshs. 100,000/=.

Pain and suffering

48. The deceased died on the spot.
49. The appellants have not challenged this award.
50. The award made is also within acceptable range.
51. This court, therefore, upholds the award of Kshs. 70,000/=

Special damages

52. None of the parties have challenged this award.
53. The award was proved as required in law. This court upholds the award of Kshs. 87,850/= as special damages.



54. 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 respondent is 100% liable
- ii. Loss of dependency Kshs. 324,360/=
- iii. Loss of expectation of life Kshs. 100,000/=
- iv. Pain and suffering Kshs. 70,000/=
- v. Special damages of Kshs. 87,850/=
- Total Kshs.575,910/=
- vi. The appellants are awarded the costs of this appeal.
- vii. Interest on the award from the date of this 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 28TH DAY OF OCTOBER, 2024.**

.....

F. GIKONYO M

JUDGE

In the presence of: -

Chelagat for the appellants

Kimani for respondent

Otolo C/A

