



Kamau v Opongo (Suing as Legal Representative and Administrator of the Estate of Elly Opondo - Deceased) ((Suing as Legal Representative and Administrator of the Estate of Elly Opondo - Deceased)) (Civil Appeal E023 of 2023) [2024] KEHC 14576 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E023 OF 2023**

**DK KEMEI, J
NOVEMBER 22, 2024**

BETWEEN

SAMSON NDEGWA KAMAU APPELLANT

AND

EVERLINE AKINYI OPONGO RESPONDENT

(SUING AS LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF ELLY OPONDO - DECEASED)

(Being an appeal from the judgment of the honorable Lina Sarapai (SRM) delivered on 7th November 2022 in Ukwala CMCC No68 of 2021)

JUDGMENT

1. The appeal arises from the judgement of Hon Sarapai (SRM) vide Ukwala PMCC No. 68 of 2021 dated 7/11/2023 wherein the Respondent had filed a claim under the *Fatal Accidents Act* and *Law Reform Act* following a road traffic accident which took place on 6/3/2021 along Kisumu-Busia road wherein the Appellant's motor vehicle registration number KCM 851A rammed onto motor cycle registration number KMEZ 389E then ridden by the deceased herein and who suffered fatal injuries. The Respondent therefore sought for the following reliefs.
 - a. General damage.
 - b. Special damages of Kshs 270, 350/=.
 - c. Interest on general and special damages.
 - d. Any other relief the court deems fit and just to grant.



2. The parties agreed on liability at the ratio of 80:20 in favor of the Respondent. On the aspect of quantum of damages, the trial court awarded as follows:
 - i. Loss of dependency under the Fatal Accidents Act – Kshs 2, 714, 400/=.
 - ii. Pain and suffering under the Law Reform Act- Kshs 20,000/=.
 - iii. For loss of expectation of life under the Law Reform Act- Kshs 100,000/=

TotalKshs 2 834 400/=

Less 20% contribution of Kshs 566 880/=

Total (GD) KSH 2 267 520/=
 - iv. Special damages Kshs 139, 560/=
 - v. Costs
 - vi. Interest on general and special damages at courts rates.
3. Dissatisfied with the trial court’s quantification of quantum of damages, the Appellant lodged five grounds of appeal vide his memorandum of Appeal dated 7/12/2023 which are hereby condensed into two grounds namely:
 - a. That the learned trial magistrate misdirected herself in ignoring the principles, tenets and precedents applicable in awarding quantum of damages as well as the relevant authorities on quantum cited in the written submissions of the appellant;
 - b. That the learned trial magistrate erred in awarding damages that were inordinately high in the circumstances.
4. This being the first appellate court, its duty is well spelt out namely to re-evaluate the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at an independent conclusion as to whether to uphold the decision of the trial court. In *Selle & Another vs Associated Motor Boat Company Ltd & others* [1968] 1EA 123 it was held:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
5. The parties entered into a consent on liability in the ratio of 20% to 80% in favour of the Respondent and that the parties further agreed to receive the evidence of the Respondent on quantum. The evidence before the trial court was as follows:
6. Everline Akinyi Opondo (PW1) testified that she was the mother of the deceased Elly Onyango Opondo who died by road traffic accident. She adopted her statement filed on 18/10/2021 as her evidence in chief. She relied on her documents that had been filed and which were produced by consent as P.Exh a) –h). P.Exh e)- receipts amounting to Kshs 139,560/- towards special damages. She further stated that the deceased was her third born child who was not then married but was a boda boda rider who made Kshs 4000/- per day. She added that she was certain of the said sums since the deceased used to give it her for safe keeping and which was used for the education of his siblings.



On cross examination, she confirmed that she didn't produce the birth certificate or anything to show the age of the deceased or prove that she was the mother. That she had nothing to show court to the effect that the deceased made 4000/- per day. That she did not indicate in her pleadings what the deceased did for a living or what he used to earn. That she did not produce in court the national identity card of her son to confirm his age. That she had no proof that the deceased used to educate his siblings.

Both the Respondent and Appellant closed their respective cases at that juncture.

7. The appeal was canvassed by way of written submissions. Both parties duly complied.
8. The Appellant's counsel vide submissions dated 10/5/2024 submitted that prayers made by the plaintiff ought to be accompanied by evidence to enable the court reach a just and fair decision, and in the instant case the Respondent did not produce anything to prove age or earnings of the deceased or dependency.
9. On the general damages, the appellant submitted that "the award must reflect the trend of previous, recent and comparable awards. Considering the authorities cited and all other relevant factors this court has to take into account and keeping in mind that the award should fairly compensate the injured within Kenyan conditions" as held in *Mbaka Nguru and Another vs James Geoge Rakwar NRB CA Civil appeal no. 133 of 1998 (1998)eklr*
10. On pain and suffering, the appellant submitted that the accident occurred 6th March 2021 as stated by PW1 and on the police abstract PEXB. 4. From the exhibits, the deceased died on the spot and on the same day of the accident as evidenced by PEXB 2 (death certificate) and P.Exh 6 (post mortem report). It was the view of the Appellant that an award of Kshs 10,000/- as damages for pain and suffering should be adequate. On this, the Appellant relied on *Eldoret HCCA no. 163/2011, Suluenta Kenedy Sita & another vs. Jeremiah Ruto (2017)eklr* where a similar award was given under similar facts.
11. On loss of expectation of life, it was submitted that the deceased died at the age of 25 years as captured in the death certificate. On PW1's cross examination, she stated that she had no proof of what the deceased did for a living, no proof of monthly earnings as well as no proof of dependency. The Appellant likewise relied on the case of *Mohamed Abdi Ali v. Paul Muturi Mwangi (2019)eklr Nyeri HCCA no. 1 of 2017* where an award of Kshs 150,000/- was reduced to Kshs 60,000/= since there were no documentation produced at trial to support the claim.
12. For damages under the Fatal Accident Act, the Appellant suggests the minimum wage of Kshs 13572/= to be adopted as multiplicand since no evidence was adduced to support the alleged earnings of 4000/= per day.
13. The Appellant proposed a multiplier of 15 years stating that as a boda boda rider, he would not be so until the age of 60 years but likely 40 years due to risks involved, and vicissitudes of life. He relied on the case of *Hannah Wangaturi Moche & Another v. Nelson Muya Nairobi HCCCNO. 4533 of 1993* as quoted in *P I vs. ZENA ROSES LLTD & another (2015) eklr*.
14. On the dependency ratio, the Appellant proposed 1/3. He relied on the case of *Abdalla Rubeya Hemed v. Kamuya Mvurya & another (2017) eklr*. Thus $13572 \times 12 \times \frac{1}{3} \times 15 =$ Kshs 814,320/=. The Appellant therefore prayed that the appeal be allowed with costs.
15. The Respondent submitted that the appeal be dismissed with costs. The Respondent opposed the appeal and urged the court not to disturb the awards of the trial court. As regards the award of pain and suffering as well as loss of expectation of life, it was submitted that the said awards are reasonable and not excessive. On loss of dependency, it was submitted that the deceased could have lived a sound life for about 35 years and that the multiplier of 25 was reasonable as well as the multiplicand of Kshs 13, 572



subjected to a dependency ratio of 2/3. It was submitted that the deceased had a daughter who relied on him and that his mother also relied on him for support. Reliance was placed in the case of Kabarnet HCCA No. 9 of 2019: Crown Bus Service Ltd Vs Jamila Nyongesa & Amida Nyongesa. Finally, it was submitted that the Appellant's suggestion that the award under the *Law Reform Act* be deducted from those under the *Fatal Accidents Act* should be rejected pursuant to the Court of Appeal decision in Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (deceased) Vs Kiarie Shoe Shores Ltd [2015] eKLR where the court held that the issue of duplication does not arise as a claimant under the *Fatal Accidents Act* and *Law Reform Act*.

16. I have considered the evidence tendered before the trial court as well as the submissions presented. It is noted that the Appellant's appeal is mainly on the issue of quantum since the issue of liability was agreed upon. The appellant basically is appealing on all the heads of damages awarded by the trial court. I find the issue for determination is whether the awards made by the trial court were proper.
17. It is trite law that awards are usually at the discretion of the trial court and that ordinarily an appellate court should be slow to disturb them unless it is shown that the trial court took into consideration some irrelevant factor or that the awards are so excessive as to represent an erroneous estimate of the damages. In *Mkube vs Nyamuro* [1983] KLR, 403-415 it was held:

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
18. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant factor or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly an erroneous estimate of the damages or that it was inordinately low.
19. As regards the award on pain and suffering, it is noted that the accident occurred on 6th March 2021 as stated by PW1 and on the police abstract (PEXB. 4). From the exhibits, the deceased died on the spot and on the same day of the accident as evidenced by PEXB 2 (death certificate) and Pex 6 (post mortem report). In *Eldoret HCCA no. 163/2011, Suluenta Kennedy Sita & Another vs. Jeremiah Ruto* (2017) eKLR an award of Kshs 10,000/- was made. It is instructive that the conventional damages awarded under this head by the courts range from Kshs 10,000/ to Kshs 100, 000/. The deceased herein is reported to have died on the spot and hence he did not experience excruciating pain before breathing his last. I find the sum of Kshs 20, 000/ to be reasonable in the circumstances. I uphold the same.
20. As regards the award on loss of expectation of life, it is noted that the conventional awards made by courts range from Kshs 100, 000/ to 300, 000/ depending on the circumstances of each case. I find the award of Kshs 100, 000/ on this head to be reasonable and I see no need to disturb it.
21. As regards the award on loss of dependency, the death certificate shows that the deceased was aged 25 years at the time of death. It was claimed by the Respondent that the deceased was then a boda boda operator who earned Kshs 400/ per day and that he used to assist her and his siblings. The Respondent on cross-examination admitted that she did not have documentary evidence to support her claims. There was thus no proof of monthly income. It is instructive that dependency is a question of fact and hence the Respondent was under obligation to prove the same. In the case of *Mohamed Abdi Ali v. Paul Muturi Mwangi* (2019) eKLR Nyeri an award of kshs 150,000/- was reduced to kshs 60,000/= since there were no documentation produced at trial to support the claim. In the case of *Jacob Ayiga & Another vs. Simeon Obayo* Court of Appeal No. 167 of 2000 (2005) eKLR the



court held that documentation is unnecessary to prove earnings. Denying a party justice based on lack of documentation to prove earnings is tantamount to an injustice. It is in fact in contravention to Article 159(2)(d) of *the Constitution* which provides that courts should deliver justice without regard to procedural technicalities. In any event, the Appellant both in the lower court and in this appeal has conceded that in view of the absence of proof of earnings, the deceased be deemed as an unskilled labourer and that the same of Kshs 13572/ be used as the multiplicand. That being the position, the Respondent's claim under loss of dependency should be considered.

22. The deceased was a boda boda rider aged 25 years. Due to the risks involved, and vicissitudes of life, he would likely have done that work until around 50 years. The Appellant has proposed a multiplier of 15 years implying that the deceased would have worked up to the age of only 40 years. I find the same to be a bit low even though iam conscious of the fact that mortality rates in Sub- Saharan Africa is still high but which have been mitigated by intervention in the medical field and through Government economic policies. It is also noted that boda boda business has high rates of fatalities in this country and hence it has high risks. I find a multiplier of 25 years is reasonable in the circumstances.
23. As regards the issue of the multiplicand, it was claimed by the Respondent that the deceased earned Kshs 4000/ per day from his business. I find this to be inordinately high in view of the fact that boda boda business usually earn a minimum of between 300/-500/ per day and hence the Respondent's version is outrageous. The Appellant in the lower court did propose a sum of 13, 572/ being on the ground that the deceased was an unskilled labourer. The Appellant in this appeal has also proposed the said sum. Iam in agreement with the proposal by the Appellant that the sum of Kshs 13, 572 be the multiplicand.
24. On dependency ratio, the chief's letter indicated that the deceased was not married but had a child aged four years one Elsie Tamara and that the chiefs letter confirmed that the Respondent is the deceased's biological mother. The Respondent has proposed the ratio of 2/3 while the Appellant is of the view that 1/3 is reasonable. It is noted that the Respondent did not avail any other document in support of the dependency apart from the chief's letter. As noted above, dependency is a question of fact and which must be proved. It would have been prudent to avail such documents as birth certificate, baptismal card/child health card etc. It was claimed that the deceased was unmarried and thus he had few or no dependants thereby warranting a dependency ratio of 1/3. In the absence of these crucial documents, iam inclined to agree with the Appellant that a dependency ratio of 1/3 is suitable. It is also instructive that the deceased was unmarried and that the claim that he supported his siblings was not supported by documentary evidence. Hence, the award under this head is worked out as Kshs 13572 x 12 x 25 x 1/3 = 1, 357, 200/=.
25. Finally, it is noted that the Appellant has raised the issue that the trial court did not deduct the award under the *Law Reform Act* from that under the *Fatal Accidents Act* and thus a double compensation has occurred. It is noted that the Court of Appeal has since settled this issue. In the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (deceased) Vs Kiarie Shoe Stores Ltd [2015] eKLR the court held as follows:

This court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of double compensation does not arise."



Going by the foregoing authority, I find that the beneficiary in both heads of damages is only the Respondent and hence it is necessary to deduct the award under the Law Reform Act and allow the one under the Fatal Accidents Act. It is therefore my finding that the trial court erred when it failed to make the deductions on loss of expectation of life since the same has been catered for under the loss of dependency. To this end therefore, the sum of Kshs 100, 000/ on loss of expectation of life will have to be deducted from the award on loss of dependency so as to prevent double compensation.

26. As regards the award on special damages, it is noted that the Appellant has no problem with it and hence, the sum of Kshs 139, 560/ will be left undisturbed.

27. In the result, it is my finding that the Appellant's appeal partially succeeds. The judgement of the trial court dated 7/11/2023 is hereby set aside and substituted with judgement being entered for the Respondent against the Appellant as follows:

a. Pain and suffering.....Kshs 20, 000/=

b.) Loss of expectation of life..... Kshs 100,000/=

c. Loss on dependency.....Kshs1, 357,200/=

d. Special damages.....Kshs 139, 560/=

Total.....Kshs 1, 616,760/=

Less award on loss of expectation of life 100,000/=

Kshs 1,516,760/=

Less 20% contribution.....Kshs 303,352/=

Net Amount.....Kshs 1, 213,408/=

e) The Appellant is awarded half costs of the appeal while the Respondent will have full costs in the lower court.

Orders accordingly.

DATED AND DELIVERED AT SIAYA THIS 22ND DAY OF NOVEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Mattahfor Appellant

Kabere.....for Respondent

Ogendo..... Court Assistant

