



REPUBLIC OF KENYA



**Abdullah & another v Chari & another (Civil Case E007 of 2021)
[2024] KEHC 16144 (KLR) (20 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 16144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE E007 OF 2021
MA ODERO, J
DECEMBER 20, 2024**

BETWEEN

HAWO SHANKO ABDULLAH 1ST PLAINTIFF

ZAMZAM GOBE GARO 2ND PLAINTIFF

AND

MARSA BEKO CHARI 1ST DEFENDANT

TARI BULE 2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein Hawo Shanko Abdullah And Zamzam Gobe Garo instituted this suit by way of a plaint dated 2nd August 2021 seeking judgment against the Defendants for general and special damages under the Law Reform Act and the Fatal Accidents Act as follows:-

- “(a) Funeral Expenses - Kshs. 100,000
- (b) Pain and Suffering
- (c) Loss of Expectation of life
- (d) Loss of Dependency
- (e) Interest on the above from the date of filing of the suit until payment in full.
- (f) Costs of the suit.”

2. The Defendants Marsa Beko Chari And Tari Bule filed a joint statement of Defence dated 30th November 2021. The matter was heard by way of Vive Voce evidence at the High Court in Nyeri.



Background

3. This suit arises from a Road Traffic Accident which occurred on 19th July 2020. The plaintiffs are the widow and daughter respectively of the late GOBE GARO OCHA (hereinafter 'the Deceased') who lost his life as a result of that accident.
4. The plaintiffs aver that at the material time the 1st Defendant was the registered owner of the motor vehicle Registration No. KCD 256C whilst the 2nd Defendant was the driver of the said vehicle.
5. That on 19th July 2020, the Deceased was travelling as a passenger in the said vehicle along the Karatina-Nyeri road when the 2nd defendant drove the vehicle recklessly and carelessly causing the vehicle to roll off the road in a self involved accident which resulted in the death of the Deceased on the spot. The particulars of the alleged negligence are set out in Paragraph 8 of the Plaint.
6. The plaintiffs blame the 2nd Defendant for causing the accident and ask that the 1st Defendant be held vicariously liable for the accident which led to the death of the Deceased. The injuries, which were sustained by the Deceased are particularized at Paragraph 11 of the plaint.
7. That despite notice of intention to sue the Defendants have neglected to act hence this civil claim for damages.
8. In their joint statement of Defence the 1st Defendant denied being the registered owner of the motor vehicle Registration KCD 256 C and the 2nd Defendant denied that he was the driver of the vehicle at the material time.
9. The Defendants further denied that any accident occurred on 19th July 2020 and put the plaintiffs to strict proof thereof. The Defendants denied any and all allegations of negligence attributed to them. They deny that the Deceased sustained fatal injuries as a result of the accident.
10. In the alternative and without prejudice to the above the Defendants allege that the accident was caused by or was substantially contributed to by the Deceased himself in failing to wear a safety belt and by entering into an overcrowded vehicle.
11. The Defendants state that the plaintiffs suit has no basis and urges the court to dismiss the same with costs.

The Evidence

12. PW1 HAWO SHANKO stated that she was the wife of the Deceased Gobe Garo Ocha and that she currently resides in Moyale in Marsabit County. PW1 told the court that the Deceased was a businessman and was the sole provider for herself and their four (4) children. PW1 relied on her written statements dated 2nd August 2021.
13. PW1 stated that the Deceased had married her and thereafter he educated her. That the Deceased died as the result of injuries sustained in a road traffic accident leaving her as the sole parent to their four children.
14. The witness stated that the Deceased was paying for the education of his first born child in university and was educating the other children in private schools. PW1 urged the court to award her damages as prayed.
15. PW2 Zamzam Gobe Garo is the first born child of the Deceased. She relied on her written statement dated 2nd August 2021. PW2 told the court that her father died as the result of injuries he sustained in



a road traffic accident. That as the result of the demise of the Deceased the entire family has suffered great loss and devastation. She prays that the suit be allowed.

16. PW3 PC ABDI NO. 96251 was an officer attached to Traffic Police Unit. He told the court that on 19th July 2020 at about 4.30pm he went to attend the scene of an accident along the Karatina-Sagana Road.
17. PW3 stated that the accident involved a motor vehicle Registration KCD 256 C loaded with livestock which vehicle was being driven by one KHALID BULE. The driver lost control of the vehicle and veered off the road. That two occupants of the vehicle ABDUALLAHI MOHAMED and ALI GARO were fatally injured. That the driver of the vehicle was also injured. The bodies of the deceased were removed to the Karatina Hospital Mortuary. PW3 stated that a report of the accident was made vide OB No. 7 of 19th July 2020.
18. The Defendants did not adduce any evidence during the hearing. Upon close of oral evidence both parties were invited to file written submissions. The plaintiffs filed the written submissions dated 1st July 2024, whilst the Defendants relied upon their written submissions dated 22nd September 2024.

Analysis and Determination

19. I have carefully considered the plaint before this court, the statement of Defence filed in response thereto, the evidence on record as well as the written submissions filed by both parties.
20. It is trite law that “he who alleges must prove.” In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the Evidence Act Cap 80, Law of Kenya provides as follows:

“Burden of Proof

“107

- (1) Whoever desires any court to give judgment as to any legal 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.”
21. The plaintiffs have brought this suit as the representatives of the estate of the Deceased. The obvious question would be whether the plaintiffs have requisite locus standi in this matter.
 22. Annexed to the Supporting Affidavit dated 2nd August 2021 is a copy of a limited Grant of letters of Administration Ad Litem issued to the two Plaintiffs on 2nd September 2020. The Grant indicates that it was issued for purposes of ‘filing and defending a suit.’ I find that the plaintiffs are the duly appointed as legal representatives for the estate of the Deceased. Accordingly they have locus standi and have authority to file this suit.
 23. PW3 PC Abdi told the court that he did attend the scene of an accident on 19th July 2020. He stated that the accident was self involved and the vehicle was Registration KCD 256 C.
 24. Annexed to the Plaintiffs Supporting Affidavit is the copy of a Police Abstract dated 19th June 2020. The Abstract refers to an accident involving a motor vehicle Registration KCD 256 C. The name of the owner of the vehicle is given as Marsa Beko Chari (the 1st Defendant whilst the driver is named as Tari Bule (the 2nd Defendant herein).



25. The Abstract also indicates that two persons namely Abdullahi Mohamed and Alice Garo were fatally injured. The accident was reported vide OB No. 7 of 19th June 2020.
26. Also annexed to the plaintiffs Affidavit is a copy of a Death certificate Serial Number 0632415 as well as a Burial Permit Serial Number 191280 both relating to Gobe Garo Ocha (the Deceased). The Death Certificate indicates that the Deceased's cause of Death was "Cardio Respiratory Arrest due to severe chest, Abdominal and limb injuries."
27. The plaintiffs have also annexed a copy of a chief's letter dated 18th August 2020 authored by the chief of Manyatta Location confirming the death of the Deceased and confirming that the Deceased was survived by the following persons:-
- (1) Hawo Shanko - Widow
 - (2) Zamzam Gobe Garo - Daughter
 - (3) Adan Gobe Garo - Son
 - (4) Asha Gobe Garo - Daughter
 - (5) Abdullah Gobe Garo - Son
28. Finally the plaintiffs have annexed a copy of the records of the motor vehicle Registration KCD 256 C Mistubishi Lorry which shows that said vehicle is registered to one Marsa Beko Chari (the 1st Defendant herein)
29. The above pieces of evidence have not been challenged/or controverted by the Defendants. I therefore find that an accident did occur on 19th June 2020 which involved a vehicle Registration No. KCD 256 C registered in the name of the 1st Defendant. That one of the victims of the accident who suffered fatal injuries was Gobe Garo Ocha (the Deceased herein).
30. The issues which arise for determination in this suit are the following:-
- (1) Have the plaintiffs proved their claims on a balance of probabilities.
 - (2) What is the liability of the Defendants for the accident.
 - (3) Quantum
31. This being a civil matter the standard of proof required is on a balance of probabilities. In the case of Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court in defining balance of probability stated as follows:-

"The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say;- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; 'we think it more probable than not;' the burden is discharged, but if the probabilities are equal it is not. This proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."



Liability

32. Having proved the fact of the accident and the demise of the Deceased as a result thereof, the next issue for determination would be the question of liability.
33. The evidence of PW3 who visited the scene and the Police Abstract are proof that the Deceased was a passenger in the vehicle. The accident did not involve any another vehicle nor did the vehicle hit another person or object, rather the accident was self-involved. According to PW3 the vehicle veered off the road and rolled.
34. The evidence shows that the 2nd Defendant was driving the vehicle whilst the 1st Defendant was the registered owner of said vehicle. The Defendants have in their Defence have issued mere denials which will not suffice.
35. On vicarious liability the Court of Appeal in the case of *Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & another* [2014] eKLR stated as follows:-
- “The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed.” [Own emphasis]
36. The Defendants claim that the Deceased contributed to his own injuries by failing to wear a seat belt, and by hanging on the vehicle carelessly without regard to his own safety. There is no evidence to prove either of these allegations. The 2nd Defendant who was the driver of the vehicle did not testify to the effect that the Deceased was hanging on the vehicle or that he failed to secure his seat belt. There is therefore no evidence of any contributory role played by the Deceased in sustaining the injuries which took his life. I reject these allegations as untrue.
37. The Court in the case of *Autar Singh Babra & Another -vs- Raju Goundji HCCC NO. 548 of 1998* stated as follows:-
- “Although the Defendant has denied liability in an amended Defence and Counter claim, no witness was called to give evidence on his behalf. That means that not only was the evidence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the claims made by the Defendant in his Defence and Counter claim are unsubstantiated. In the circumstances, the counter-claim must fail.”
38. Given that the accident was self-involved, the only possible explanation is that the driver was negligent. I find that the accident was caused solely by the negligence of the driver of the Mitsubishi Lorry. The Defendants did not call any evidence on their behalf. I therefore apportion liability at 100% against the 2nd Defendant.

Quantum

39. The plaintiffs have sought for damages under the *Law Reform Act* and the *Fatal Accidents Act* as follows:-
- (a) Pain and Suffering - Kshs. 200,000/=
- (b) Loss of Life Expectation - Kshs. 200,000/=



- (c) Lost years/Loss of Dependency - Kshs. 193,228,808.40
(15 years and 12 months x 1,610,240.07 x 2/3)
 - (d) Funeral Expenses - Kshs. 100,000
 - (e) Loss of Consortium - Kshs. 900,000
40. The above figures are derived from the plaintiffs claim that the Deceased was a successful businessman whose business was realising a profit of about Kshs. 300,000 monthly. They have annexed the Bank Statements from DTB Bank in support of these claims.
41. The Defendants on their part opine that since no documentation was produced to show the precise earnings of the Deceased, the Court ought to employ the Minimum Wage (General/Amendment) Order 2017, which set the minimum wage for a casual labourer at Kshs. 6,896.15. Using a multiplier of five (5) years x 12 months on a 2/3 dependency ratio the amount to be awarded comes to Kshs. 275,844.80.
42. The Defendants further made proposals for the following awards;-
- (a) Pain and suffering - Kshs. 10,000/=
 - (b) Loss of Expectation of life - Kshs. 200,000/=
 - (c) Lost years/Loss of dependency - Kshs. 200,000/=
 - (d) Special Damages i.e Funeral Expenses - Nil
 - (e) Loss of Consortium - Nil
43. On the limb of pain and suffering the evidence reveals that the Deceased died on impact at the scene of the accident. He did not suffer a long drawn out and painful death. PW3 told the Court that by the time he arrived at the scene at 4.30 pm the Deceased was already dead.
44. In the case of Sukari Industries Ltd -vs- Clyde Machimbo Juma [2015] eKLR where the Deceased died immediately upon impact the trial court awarded Kshs. 50,000/= for pain and suffering. In upholding this finding on appeal Hon. Justice David Mjanja (Deceased) stated as follows:-
- “On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs. 10,000/= to Kshs. 100,000/- over the last 20 years hence I cannot say that the sum of Kshs. 50,000/- awarded under the head is unreasonable.”
45. In the circumstances I find that an award of Kshs. 50,000/= for pain and suffering is appropriate.

Loss of Expectation of Life

46. I have considered the authorities supplied by the Plaintiffs in support of their prayer for an award of Kshs. 200,000/= under this heading.



47. In this case the Deceased was a middle-aged man at 55 years old. The conventional award for loss of life expectation is Kshs. 100,000 and I find no reason to deviate from this figure.

Loss of Dependency

48. Under this heading the plaintiffs have sought to be awarded the amount of Kshs. 193,228,808.40. The Defendants on their part have proposed a figure of Kshs. 275,844.80.
49. The Plaintiffs have annexed copies of the Bank Statements for an account which the Deceased held with DTB Bank to show the kind of monies that the Deceased was then earning as profit. The Deceased was not an employee earning a monthly salary. He was a businessman dealing in livestock. The plaintiffs claim that the Bank statement provides evidence of the Deceased's monthly earnings which they allege was Kshs. 1,610,240.07.
50. However I do not agree. The Bank statements merely provided evidence of the various transactions carried out by the Deceased in the course of his business. The bank statement included loans advanced to the Deceased which cannot be said to amount to income as such loans were repayable. Indeed there is evidence that the Deceased had obtained a loan of Kshs. 1,500,000 which he was repaying at a rate of Kshs. 70,000/= monthly. As such I am not satisfied that it has been proved that the Deceased was realizing a monthly income of Kshs. 1,610,240/= from his business ventures.
51. Likewise the Defendants proposition that the court ought to set the monthly income of the Deceased at Kshs. 6896 being the minimum wage for a casual labourer in Kenya is equally improbable. The Deceased was a businessman who was able to educate a child in university as well pay fees for three children in private schools and therefore must surely have been realizing a profit more far higher than Kshs. 6,896/=. In the circumstances I find that application of a multiplicand to calculate loss of dependency would not be appropriate.
52. In the case of Frankline Kimathi Maariu & Another -vs- Philip Akungu Mitu Mborothi (Suing as administrator and personal representative of Anthony Mwiti Gakungu (Deceased) [2020] eKLR, the Court held as follows;-
- “In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.” [own emphasis]
53. Similarly in the case of Moses Mairua Muchiri Vs Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina (Deceased) [2016] eKLR, the court held as follows:-
- It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case. [own emphasis]



54. The Deceased was not destitute. He was certainly a man of means who was able to sustain his family out of his business earnings. He took loan and was able to service said loans to the tune of Kshs. 70,000 as well as paying school fees for four children (one in university).
55. The Deceased was a 55 year old man in the prime of his life. He was not in paid employment thus the retirement age of sixty (60) years would not apply. The Deceased was engaged in personal business. There was no evidence of any life threatening illness or chronic condition he may have been suffering from.
56. All things being equal it is my view that the Deceased was quite capable of continuing to run his business for another ten to fifteen years. Given the vicissitudes of life I opine that the Deceased would have continued to run his business for a further ten (10) years. Bearing in mind the above I opine that a global figure (income) of Kshs. 2,000,000/= per year until the age of sixty five (65) years would be reasonable. As such I would award a sum of Kshs. 2.0 million x 10 = 20,000,000/= for loss of Dependency.
57. The Plaintiffs have sought to be awarded Kshs. 100,000/= for funeral expenses. The Dependants retort that funeral expenses are special damages which must be specifically proved.
58. In the case of J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors) [.....] Boys High School [2018] eKLR Hon. Justice Gikonyo stated:-
- “In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased. The court has awarded this where there were no receipts provided. In *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others* [2013] eKLR the plaintiff was awarded Kshs. 30,000/= for funeral expenses. The Court of Appeal in the case of *Jacob Ayiga Maruja & another Vs. Simeon Obayo* [2005] eKLR awarded the plaintiff Kshs. 60,000/-. While in *Lucy Wambui Kihoro (Suing As Personal Representative of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong* [2015] eKLR the plaintiff was awarded Kshs. 50,000/-. I will take a big gamble in view of the circumstances of this case and award a sum of Kshs. 60,000 for funeral expenses over the above the pleaded special damages of Kshs. 40,100. The total shall be Kshs. 100,100 in special damages. It is so awarded.”
59. Further, the Court of Appeal in the case of *Capital Fish Kenya Limited v the Kenya Power & lighting Company Limited* [2016] eKLR, stated that:-
- We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved..... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.
60. From the cited authorities, it is a matter of common notoriety that funeral expenses which include coffin, transport costs, food may not be receipted. To require such receipts would cause inordinate hardship upon a claimant. In light of this, I opine that the award under this heading be Kshs. 50,000/-



Loss Of Consortium

61. The plaintiff pleaded that she has lost a husband, a companion and a lover. She seeks to be awarded Kshs. 900,000 for loss of consortium.
62. Courts have held various differing views over award for loss of Consortium. In *Ketie Makaya Denge - vs- Peter Kipkore Cheserek & Another* [2015] eKLR the Court of Appeal set aside an award of Kshs. 150,000 for loss of consortium holding that such an award was not anchored in any law specifically the *Law Reform Act* or the *Fatal Accidents Act*.
63. In contrast, in HCCC No. 85 of 2000 *Ruth Chepngeno Mutai v Patrick Wajero Oloo & Another*, however, the court was of the view that:-

“As a result of the death of the Deceased, the Plaintiff lost a husband. She told this court that she had no intention to remarry. Taking into account the cited authorities and the circumstances of the Plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium.”
64. Similarly, in *Paul Kioko v Samuel G. Karinga & 2 Others* [2012] eKLR, Kshs. 100,000/= was awarded to a widower for loss of consortium and servitium; while in *Rose Adisa Odari v Wilberforce Egesa Magoba* [2009] eKLR, an award of Kshs. 50,000/= was made to the widow for loss of consortium in a case where the deceased was aged 35 years at the time of his death.
65. In the case of *P B S & Another v Archdiocese of Nairobi Kenya Registered Trustees & 2 Others* [2016] eKLR Hon. Justice Abarili awarded the plaintiff Kshs. 800,000/= for loss of consortium.
66. From the above cited cases, it is clear that there is valid basis for the claim and award of damages for loss of consortium in fatal accident matters. In the case of *Salvadore De Luca v Abdullahi Hemedi Khalil & Another* [1994] eKLR the court of Appeal held that:-

“So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full.”
67. The 1st plaintiffs told the court how the demise of the Deceased who was the Patriarch of the family caused great devastation to her. She has not re-married and is now single mother to their four (4) children. I am inclined to award her for loss of Consortium at Kshs. 500,000.
68. Finally based on the foregoing I find merit in this claim. I allow the Plaintiffs suit and make the following awards against the Defendants;-
 - (i) Pain and Suffering - Kshs. 50,000
 - (ii) Loss of Expectation of Life - Kshs. 100,000
 - (iii) Loss of Dependency - Kshs. 20,000,000



- (iv) Funeral Expenses - Kshs. 50,000
 - (v) Loss of Consortium - Kshs. 500,000
- TOTAL - Kshs. 20,700,000

69. Finally I enter judgment in favour of the Plaintiffs against the Defendants jointly and severally for the sum of Kshs. 20,700,000 plus costs of the suit and interest at court rates from the date of this judgment until payment in full.

DATED IN NYERI THIS 20TH DAY OF DECEMBER 2024

MAUREEN A. ODERO

JUDGE

