



**Oloo v Makokha (Being sued as the administrator of the Estate of the Late Akinneta Awinja Makokha) (Civil Appeal E103 of 2022) [2023] KEHC 18248 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18248 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
CIVIL APPEAL E103 OF 2022**

**PJO OTIENO, J**

**MAY 26, 2023**

**BETWEEN**

**ANTHONY OKELLO OLOO ..... APPELLANT**

**AND**

**NELSON OTIPA MAKOKHA (BEING SUED NELSON OTIPA MAKOKHA  
(BEING SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE  
A AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE AKINNETA  
AWINJA MAKOKHA) ..... RESPONDENT**

*(Being an appeal from the Judgment and decree of Hon. G. A. Ollimo, SRM  
in Butere Civil Case No. 21 of 2019 delivered on 3<sup>rd</sup> November 2022)*

**JUDGMENT**

1. Before the trial Court was a claim lodged by a plaintiff dated 30.4.2019 which sought the recovery of both general damages and special damages of Kshs 60,550.00 on account of fatal injuries sustained by one Akinneta Awinja Makokha (deceased) when she was hit by motor vehicle Registration No KCG 526S, Toyota Premio on 11.12.2018, at Shikhalo area, along Kakamega-Mumias road.
2. Being grounded on the tort of negligence, the Plaintiff then, now Respondent, set out the particulars of negligence as well as the particulars of special damages and those of the dependants on whose behalf the claim was brought.
3. In resisting the claim, the Appellant, as defendant then, filed a statement of defence dated 19.8.2019 which only admitted the description of the parties and registration of the subject motor vehicle but otherwise denied the occurrence of the accident, the allegations of negligence and that the deceased was gainfully engaged prior to death. There was then an alternative pleading that if the accident occurred as pleaded then the same was solely caused by the negligence of the deceased on the use of a public road but no particulars of such negligence were set out.



4. Parties equally filed witness statements and documents to be used at the trial. Of note is the fact that the witness statement filed on behalf of the Appellant, contrary to the statement of defence, admitted the occurrence of the accident on the date and place pleaded in the plaint. When hearing commenced, the Plaintiff called three witnesses while the Defendant called a sole witness.
5. PW1 was a police officer who visited the scene soon thereafter and found the body of the deceased off the road on the left side as one faces Mumias from Kakamega but the motor vehicle was not there. He formed the opinion that the driver of the motor vehicle was to blame but was not aware if he had been charged with a traffic offence.
6. PW2 was the Plaintiff and son to the deceased whose evidence was in the adopted filed witness statement to the effect that he was not at the scene of the accident but at a farm from where he received the news of the accident and death of the deceased and rushed to the scene. He narrated how the deceased body was taken to the mortuary and later interred with him spending Kshs 22,000.00 for transport of the body and Kshs 18,000.00 for coffin. He alluded to having spent Kshs 550 to carry out a search at the registry of motor vehicles and Kshs 20,000.00 to obtain Limited Grant to enable him file the suit. He enumerated the dependants of the deceased to have been five including himself.
7. On occupation and earnings of the deceased, the witness said that the deceased was a business woman and a farmer at the same time earning an average of Kshs 15,000.00 per month. Those facts were reiterated at cross-examination with a concession that he had not demonstrated dependency upon the deceased and that the Chief's letter did not disclose the ages of the children. He also said that there was no document exhibited to show that one Jetrix was schooling just as he did not have evidence of the earnings of Kshs 15,000.00 per month.
8. PW3 was the eye witness who stated in his witness statement that he was driving on the same direction as the defendant's motor vehicle when at Eshikahulo the defendant's motor vehicle overtook him at a high speed, veered off the road on the left and hit the deceased killing her instantly.
9. On cross-examination he said that the driver stopped about 100 meters from the point of impact and he was able to read the number plate.
10. For the Appellant, one Ramadhan Hassan, gave evidence and confirmed having been the driver of the offending motor vehicle but denied having been on phone or at a high speed. He however in cross-examination reiterated that the accident indeed took place and that the motor vehicle he was driving indeed belonged to his employer, the Appellant. He denied overtaking any motor vehicle and that it was the deceased who rammed onto his motor vehicle at the front left headlamp adding that the deceased fell in the middle of the left lane. He stressed that he was never charged for causing the accident. In re-examination, he told the court that the deceased was hit from behind, on the left side of the road as she was walking towards Mumias.
11. After parties filed respective Submissions, the trial Court rendered a ruling in which the Appellant was held liable at 100%, general damages were assessed at Kshs 1,250,000.00 being damages for lost years, loss of expectation of life and pains and suffering while special damages was adjudged at Kshs 60,550.00.
12. The Judgment provoked the current appeal in which the Appellant sets out three grounds of appeal to be:-
  - i) The learned lower Court erred in law and fact by making a finding that the Appellant was 100% liable for the Road Traffic Accident.



- ii) The learned lower court erred in law and fact by failing to appreciate that the Respondent failed to prove loss of dependency and was not as a result subject to the said Award.
  - iii) The learned lower court erred in law and fact by failing to make a Global Award to the estate of the deceased under the circumstances.
13. A determination of the appeal merely seeks answers to the three grounds of appeal. And the answers must be directed at the questions whether the determination on liability was backed by evidence; if there was proof of dependency and lastly if it was a case to apply the multiplier formula or just a global award.
  14. On liability, the evidence by both sides was that the deceased was hit from behind as she walked on the left side of the road as one faces Mumias. It was also the evidence of PW3 who saw the accident happen and PW1 & 2, who arrived at the scene shortly thereafter, that upon being hit the deceased rested on the left side of the road but off the road. That evidence when added to that by DW1 in cross-examination to the effect that the deceased was hit from behind by the left head lamp of the car point to the fact that the deceased was observing road kerb but the driver, DW1, who was in control of a mechanically propelled vehicle with a duty to be observant and be on the lookout at all time, failed in his duty of care by hitting the deceased on her rightful path off the road.
  15. Having reviewed and considered the evidence afresh the Court is unable to interfere with the decision of the trier of facts. The Court finds that the determination was grounded on due and diligent analysis of the evidence and thus wholly unassailable.
  16. On whether dependency was proved, the Court finds that dependency is only a consideration where the Court chooses to award loss of dependency under the *Fatal Accidents Act* and not where, as here, the Court chooses to award damages for lost years under the *Law Reform Act*. While the workings and calculations may be similar, the target beneficiaries are different. Loss of dependency is due to the dependants while lost years go to the estate. It is therefore clear to this Court that the Court chose to proceed under the *Law Reform Act* and dependency was thus not a consideration. I find no merit in the second ground of appeal and determine it to lack merits.
  17. On the appropriate and commensurate award, the trial Court found as a fact that no dependency was proved but did not determine whether or not the pleaded income was proved. It is to this Court established that to employ the multiplier formula, one needs to be satisfied that there was credible evidence on income to be applied to the duration the deceased would have earned. But the multiplier principle is not a rule of law nor a dogma but a formula that gives explanation on how the award is computed. Where there is no certainty on the multiplicand, and here there was no credible evidence on the earnings, the application of the multiplier formula is prone to serve an injustice rather than justice. That is when the Courts' judicious approach to arrive at a just compensation is invited by the discretion to make a global award. The trial Court was thus within the law in the choice to make a global award for lost years rather than lost dependency.
  18. However, in coming to the award of Kshs 1,000,000.00 there was reliance placed on the cited case of *China Civil Engineering & Construction Co. Ltd v Mwanyoba Kazungu* [2019] eKLR where the Court upheld an award for lost dependency of Kshs 700,000.00 for a deceased aged seventy nine (79) years with an established income of Kshs 18,000/=. That decision was not at all on lost years and was thus inappropriately applied.



19. Where there is no evidence on the multiplier, the Court would go for minimum wage and keep it in mind even where it adopts the global award approach. The Court considers the ward to have been too high when all parameters are considered and noting that the deceased was aged fifty two (52) years hence was expected to ease from strenuous engagement in income generation, within not more than ten (10) years.
20. After reviewing the evidence on record the Court finds that a global award of Kshs 600,000/= would be a commensurate compensation to the estate for the loss of the deceased.
21. In conclusion, the appeal on liability is dismissed but the assessment of damages for lost years is set aside and in its place substituted an award of Kshs 600,000/=. The Judgment of the lower Court is therefore adjusted as follows:-
- Lost years - Kshs 600,000.00
- Lost of expectation of life - Kshs 200,000.00
- Pains and suffering - Kshs 50,000.00
- Special damages - Kshs 60,550.00
- Total - Kshs 910,550.00
- The sum attract interest at court rates from the date of the plaint, for special damages, and from the date of the Judgment of the lower Court, on general damages.
22. The costs of this appeal will be borne by each party on their own as the success here is even between the two parties.

**DATED, DELIVERED AND SIGNED AT KAKAMEGA THIS 26<sup>TH</sup> DAY OF MAY 2023.**

**PATRICK J. O. OTIENO**

**JUDGE**

**In the presence of:-**

No appearance for the Appellant

Mr. Wandala for the Respondent

Court Assistant: Polycap

