



Oneya & another v Ogude (Suing as the Administrator of the Estate of Fredrick Odhiambo Sewe - Deceased) (Civil Appeal 161 of 2018) [2023] KEHC 21718 (KLR) (Civ) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21718 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 161 OF 2018

AN ONGERI, J

AUGUST 24, 2023

BETWEEN

OBONYO WALTER ONEYA 1ST APPELLANT

THE STANDARD NEWSPAPER GROUP LIMITED 2ND APPELLANT

AND

JACKLINE ANYANGO OGUDE (SUING AS THE ADMINISTRATOR OF THE ESTATE OF FREDRICK ODHIAMBO SEWE - DECEASED) RESPONDENT

(Being an appeal from the of Hon. G. Mmasi (SPM) in Milimani CMCC no. 7722"A" of 2012 delivered on 27/25/2018)

JUDGMENT

1. The cause of action in this case arose on February 31, 2010 when motor vehicle registration no KBH 362V hit the deceased Fredrick Odhiambo Sewe along Jogoo Road while the deceased was cycling along the road.
2. The respondent filed this suit in her capacity as the personal representative of the deceased seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act* for fatal injuries sustained by the deceased.
3. The respondent in her plaint amended on November 30, 2016 alleged that the 1st appellant who was driving motor vehicle registration no KBH 362V belonging to the 2nd defendant was negligent.
4. The defendants in their defence dated 13/1/2017 denied the respondent's claim.



5. The 2nd defendant denied ownership of motor vehicle registration no KBH 362V and also averred that the respondent did not have locus standi to file the suit.
6. The respondent in her evidence produced letters of administration *Ad Litem*. The appellants did not call any witnesses.
7. The trial court found the appellants 100% liable in negligence and assessed damages as follows;
 - General damages for pain & suffering 500,000
 - Loss of expectation of life 300,000
 - Loss of dependency 960,000
 - Special damages 135,024
 - Total 1,895,024
8. Judgment was entered in favour of the respondent against the appellants jointly and severally in the sum of kshs.1,895,024.
9. The appellants appealed against the decree and the judgment on the following grounds;

That the Trial Magistrate:

 - a. Misdirected herself in awarding excessive damages for pain and suffering before death;
 - b. Erred in fact and law by making a high award for loss of expectation of life contrary to recent comparable awards;
 - c. Misdirected himself in awarding damages for loss of dependency in applying an income that was not proved;
 - d. Erred by failing to appreciate that the Plaintiff had failed to prove its case on a balance of probabilities on damages due to her.
10. The parties filed submissions as follows which I have duly considered.
11. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence and to arrive at its own c.
12. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR, the Court stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

Similarly, in *Peter M. Kariuki –vs- Attorney General* [2014] eKLR , the court held inter alia as follows:-

“We have also, as we are duty bound to do as a first appellate court [to] reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that he conclusions reached by the trial judge are consistent with the evidence.
13. The issues for determination are as follows;



- i. Whether the respondent proved her case on a balance of probabilities.
 - ii. Whether the award of general damages was excessive.
14. On the issue as to whether the respondent proved her case, I find that the appellants did not call any witnesses.
 15. The trial court was right in finding that there was no evidence that the deceased who was a cyclist contributed to the accident in any way.
 16. If the appellants had any evidence to the contrary, they were duty bound to assist the court in apportioning liability. I find that the court was right in finding the appellants 100% liable.
 17. On the issue as to whether the award of damages was excessive, I find that the trial court clearly tabulated how the figures were arrived at.
 18. On general damages for pain and suffering, the trial court found that the deceased died 12 days after the fatal injuries were inflicted on him.
 19. In the case of *Acceler Global Logistics vs. Gladys Nasambu Waswa & another* [2020] eKLR, observed:

“It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in *Rose vs. Ford*. [26]
 20. In the case of *Monica Kakiki v Wasufe Shire Abdo & 2 others* [1990] eKLR, the Court explained the rationale behind the award of damages for pain and suffering as follows;

“In assessing damages on this head, consideration must be given to the fact that the same principles for assessing damages for victims who survive do not apply. Damages are not intended to compensate the deceased for the pain and suffering he succumbed to. They are more or less a windfall to his surviving relations. However, on the other side of the balance it should be borne in mind that a tort feisor should not be permitted to benefit from his wrong doing merely because his victim died.”
 21. In Civil Appeal no 42 of 2018 *Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)* paragraph 21 the Hon Odunga J(as he then was), observed as follows;

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis added).



22. In Civil Case no 56 of 2014 Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another (2016) eKLR the court held as follows;

“As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.” (emphasis added).

23. I find that the award of 500,000 for pain and suffering is reasonable since the deceased died 12 days after the accident.

24. I also find that there was undisputed evidence that the deceased was a welder earning kshs 50,000 per month. He was 52 years old and the court adopted a multiplicand of 10 years and a multiplier of 12,000/=.

25. On the issue of damages for loss of expectation of life, I am guided by the rationale laid out in Benham v Gambling [1941] AC 157 where it was held that-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.” (emphasis added).

26. I do find that the award of kshs 300,000 in respect of loss of expectation of life reasonable.

27. The only time when an appellate court would interfere with an award of damages is where the trial court applied the wrong principle's and arrived at an erroneous decision or where the sum awarded is too high or too low as to warrant interference.

28. I find that the award herein is reasonable in the circumstances of this case.

29. I dismiss the appeal for want of merit with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

