



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CIVIL APPEAL NO. 87 OF 2019**

**BETWEEN**

**OMONDI OWUOR & VINCENT ASUKE  
OWUOR.....APPELLANTS**

**AND**

**JOSHUA OTIENO NUNDU** (Suing as the legal representatives of the estate  
of

**GLADYS ADOYO NUNDU-DECEASED)**

**.....RESPONDENT**

*(Being an Appeal from the judgment and decree in Oyugis Principal Magistrate's PMCC No. 112 of 2017 by Hon. J.P Nandi –Principal Magistrate).*

**JUDGMENT**

1. Omondi Owuor & Vincent Asuke Owuor the appellants herein were defendants in Oyugis Chief Magistrate's PMCC No. 112 of 2017. This was a claim that arose from a road traffic accident involving motor vehicle KCA 550W and motor vehicle KCC 116X. The deceased was a passenger in motor vehicle KCA 550W. After trial the appellants were held 100% liable. General damages of Kshs.420,000/= were awarded.
2. The appellants were aggrieved by the said judgment and filed this appeal through the firm of Mose, Mose & Milimo & Company Advocates. Eight grounds of appeal were raised as follows:
  - a) The learned trial magistrate erred in fact in making a finding of damages and liability against the defendants based on hearsay evidence when the matter ought to have been dismissed.
  - b) The learned trial magistrate erred in fact and in law in holding the defendants 100% liable based on hearsay evidence as no eye witness was called by the respondent to testify.
  - c) The learned trial magistrate erred in fact and in law in awarding unreasonable loss of dependency of Kshs 300,000/= without taking into consideration the vagaries of life.
  - d) The learned trial magistrate erred in fact and in law in failing to appreciate the impeccable defence of the defendants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to net damages of Kshs. 420,000/=
  - e) The learned trial magistrate erred in fact and in law in failing to appreciate the long established

principle of *stare decisis*, precedent in law thus bringing law into confusion and thereby deriving an erroneous finding /conclusion in particular relating to damages.

f) The learned trial magistrate erred in fact and in law in failing to appreciate that the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

g) The learned magistrate erred in fact and law in entering judgment in favour of the plaintiff's against the defendants despite of the plaintiff's miserable failure to establish her case more especially on quantum.

h) The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability without fault. The court award is unsustainable and baseless in the circumstances.

3. The appeal was opposed by the respondent through the firm of Geoffrey O. Okoth & Company Advocates on the ground that it lacks merit.

4. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

5. Victor Awour Asuke was the driver of motor vehicle KCA 550W. In his statement of defence said in part:

**Upon reaching Oyugis-Kisumu road at Ober, Mikai area or thereabouts, I realized I had passed the place where we were heading. I made a U-turn then stopped and indicated so as to make a right turn and exit the road. Suddenly, I heard a loud bang. I lost consciousness and awoke to find myself at Oyugis Level III Hospital in bed.**

From this narration coupled with the other evidence on record, the learned trial magistrate was justified to find him 100% liable for the accident. He cannot be heard to blame the other motorist for an accident he authored.

6. The defence tendered was hollow and mere denial of the accident.

7. The appellants have contended that the award of loss of dependency of Kshs 300,000/= was unreasonable and without taking into consideration the vagaries of life. They had proposed a global sum of Kshs.250,000/= in the trial court. It is trite law that an appellate court will only interfere with an award of the trial court if certain circumstances are satisfied. In **Butt vs. Khan [1981] KLR 349** at **page 356 Law JA** stated:

**...an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low.**

8. In the instant case, I find no reason whatsoever to interfere with the award by the learned trial magistrate. The appeal is dismissed with costs.

**DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022**

**KIARIE WAWERU KIARIE**

**JUDGE**