



REPUBLIC OF KENYA



**Magari Africa v Odongo & another (Suing as the legal representatives
of the Estate of Aloice Ogallo Ondiek (Deceased)) (Civil Appeal
E026 of 2021) [2022] KEHC 16965 (KLR) (28 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16965 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E026 OF 2021
RE ABURILI, J
DECEMBER 28, 2022**

BETWEEN

MAGARI AFRICA APPELLANT

AND

PETER OLEMO ONDIEK 1ST RESPONDENT

LILIAN ACHIENG ODONGO 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ALOICE
OGALLO ONDIEK (DECEASED)**

*(An appeal from the judgement and decree of Hon L. Akoth. R.M in
Kisumu CMCC No. 217 of 2019 delivered on 25th February, 2021)*

JUDGMENT

1. The appellant Magari Africa was aggrieved by the trial magistrate's award stemming out of a road traffic accident which occurred on December 25, 2017 when the deceased Aloice Ogallo Ondiek was knocked while walking along the Kisumu-Kakamega road when the appellant's driver negligently drove and or handled motor vehicle registration number KCH 507T causing the same to hit the deceased from behind. The deceased succumbed to the injuries a day later. In the action before the trial court, the respondents sought damages pursuant to the *Law Reform Act* and the *Fatal Accidents Act*, special damages and costs of the suit.
2. After hearing the matter, the trial magistrate found the appellant 100% liable for the accident and awarded Kshs 30,000/= for pain and suffering, Kshs 100,000/= for loss of expectation of life, Kshs 438,000/= for loss of dependency and Kshs 20,000/= in special damages.



3. Briefly, the evidence adduced before the trial court was as follows: PW-1 Lilian Achieng Odongo testified that on the material day of December 25, 2017, the deceased, her husband left home for work in the morning in the company of their children. That at around 7.45 pm, she received communication that her husband had been involved in a road traffic accident. She rushed to the scene and found that he had already been rushed to Kisumu Specialist Hospital and later Jaramogi Hospital from where he succumbed the following day of December 26, 2017 at about 11.00 am.
4. PW-2, CPL Musonga Mutua testified that the accident occurred on December 25, 2017 at about 7.00 pm involving a vehicle which was being driven by a person who fled the scene immediately. That the deceased passed on the following day while undergoing treatment.
5. PW-3 Robert Owino Oganda witnessed the truck hit the deceased after losing control wherein he took the deceased to the hospital. He stated that the deceased had been walking ahead of him and that the truck hit him from behind.
6. Duncan Nyaranga testified as DW-1 and stated that he was in possession of the truck having been assigned to him by his employer Nokia Kenya Ltd and leased from Magari Ltd. He stated that on that material day, while he was away in Rwanda with his family, he received a call from his caretaker that the vehicle had been involved in an accident. That upon further inquiry, he suspected the vehicle to have been stolen. That he had not authorized anyone to drive the said vehicle on that day.
7. The appellant's appeal is premised on the following nine grounds:
 - i. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before her superficially and consequently coming to a wrong conclusion.
 - ii. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the appellant.
 - iii. The learned trial magistrate grossly misdirected herself in treating the evidence and the submissions on quantum before her superficially and consequently coming to a wrong conclusion on the same
 - iv. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant
 - v. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before her in totality and in particular the evidence presented on behalf of the appellant
 - vi. The learned trial magistrate erred in failing to hold that the respondent had failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent
 - vii. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable
 - viii. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that it represented an entirely erroneous estimate vis-à-vis the respondent's claim
 - ix. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.



8. The appeal was canvassed by way of written submissions but only the appellant complied.
9. Relying on section 107 and 109 of the *Evidence Act*, the appellant submitted through its counsel that the suit motor vehicle was owned by the appellant and leased to Nokia Africa at the time of the accident. That DW-1 who had been assigned the motor vehicle was not in the country at the time of the accident and was therefore not in control of the vehicle. That it was therefore the respondent's duty to prove that the appellant was actually negligent. That the stranger who was in control of the vehicle at the time was not the appellant's agent and vicarious liability cannot therefore apply in the circumstances. Reliance was placed on the case of *Joseph Cosmas Khayigila v Gigi and Co Ltd & another*, Civil Appeal 119 of 1986-CA.
10. On the issue of special damages, the appellant submitted that the respondent is entitled to the sum if only it can be proved that it was liable for the accident. On pain and suffering, it is submitted that Kshs 20,000/= is sufficient since the deceased died after 24 hours of the accident. On loss of expectation of life, it was proposed that the sum of Kshs 50,000/- is adequate given the deceased was 65 years with no identifiable source of income. This argument is buttressed by the decision in *Livingstone Mwambugu & anor v Sarah Anyango Jaoko* [2016] eKLR.
11. On the head of loss of dependency, it was submitted that the deceased had surpassed retirement age and no evidence was tendered showing he was engaged in employment and the award should therefore be dismissed.

Analysis and determination

12. The duty of a first appellate court was rightly stated in *Selle & another v Associated Motor Boat Co Ltd* (1968) EA 123 where the court held that:

I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.
13. The first issue in this appeal revolves around liability. The events preceding the accident are that the truck belonging to the appellant but leased to Nokia Company and assigned to DW1 lost control and hit the deceased who was walking along the road. The truck was being driven in a zigzag manner before running over the deceased as narrated by PW-3 who witnessed the accident. This account was not controverted. There is no evidence that the deceased was negligent and thereby causing the accident. It was uncontroverted that the vehicle lost control, went out of the road and hit the deceased who was walking by the roadside. The appellant adduced no evidence of the steps the deceased ought to have taken to evade the accident or mitigate the injuries sustained as a result of the accident.
14. It is trite that there is no liability without fault. The appellant was duty-bound to demonstrate the steps the deceased ought to have taken to evade the occurrence of the accident.



15. It is not controverted that the accident motor vehicle was owned by the appellant. The appellant contended that the vehicle had been stolen and that the person who was purportedly driving at the time was not authorized as the usual driver (DW-1) had allegedly travelled out of the country.
16. There was however no evidence of a formal report made to the police to validate this assertion and for proper investigations to be undertaken on who was driving the vehicle at the time. It was claimed that there was a caretaker over the house at the time the vehicle was allegedly stolen. The said caretaker was however not called as a witness.
17. This court's attention is also drawn to the accident investigator commissioned by the appellant's insurer. The investigator is MC C Henry Loss Assessor and Investigators. At clause 10.0 of its report which was produced as exhibit DEX2 by DW1, the investigator states as follows:

“10.0 In view of the statements attached, information gotten from the police and Observations taking into account conditions prevailing at the time of this accident we had Analysis the following comments to make: -

- and Findings
- That this accident occurred as reported in your offices.
 - That this Motor vehicle was leased by the insured to Nokia Company Ltd who thereafter allocated it to their employee as per their agreement.
 - That Nokia Co. Ltd Employee in his recorded statement stated that he had left his motor vehicle parked at his home while he was away in Rwanda and that he never authorized anyone to drive it.
 - That though the Motor vehicle custodian managed to get the unauthorized drivers personal documents including the driving license he has not been able to direct the Police at the location of this unauthorized driver so that he can be arrested and arraigned in court with the accompanying charges.
 - That there is breach of the policy conditions when a motor vehicle is driven without authorization.
 - That though the Motor vehicle custodian claims not to have given permission to the unauthorized driver to drive this motor vehicle at the time it creates curiosity on how this person knew at the where in the house the Motor vehicle ignition keys were placed and how the motor vehicle custodian managed to get his person documents.

11.0 Taking into account all the information gathered, observations at the accident Conclusion, interview conducted and police records, we confirm that this accident occurred however the motor vehicle custodian states in his recorded statement and with the traffic police that this Motor vehicle being driven without his knowledge and authorization prior to the occurrence of this accident and this would be in breach of the Policy conditions however unless handled purely on humanitarian grounds due the family/dependants of the deceased Pedestrian.”[Emphasis added]

18. The investigator doubted the theory propounded by DW1. I have no reason to believe him either in view of the underlined statement that the DW1 managed to submit all documents including the driver's licence of the so-called unauthorized driver to the insurance company but he could not tell where this person was even for the police to trace him and charge him with a traffic offence. There



was no evidence of break into the house of DW1 and the truck keys stolen therefrom or that the unauthorized driver used any other means other than the use of the keys which DW1 allegedly left into his house to drive off with the truck. I find that DW1 was not truthful in his testimony.

19. In sum total, I have considered the argument and I am inclined to find that the defence was not believable. I consequently find the appellant liable for the accident at 100% as found by the trial court.

20. My finding above is fortified by the provisions of section 107(1) of the *Evidence Act* which provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

21. These provisions were interpreted in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, wherein the Court of Appeal held that:

“As a general proposition under section 107 (1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the *Act*.”

22. In the circumstances of this appeal, I find that the appellant having introduced the issue of the vehicle having been stolen. The burden of proving the fact lay on the appellant though in the circumstances, the appellant did not adduce sufficient evidence to persuade the court to make such a finding. I therefore find this argument to be implausible and is hereby rejected.

23. On the question of damages as awarded by the trial court, the circumstances under which an appellate court can interfere with an award of damages is now well settled. In *Sheikh Mustaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KLR 457 it was held that:

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself “what figure would I have made?” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own...”

24. As regards the damages awarded for pain and suffering, the appellant proposes Kshs 20,000/= since the deceased died after 24 hours. It is a principle of assessment of damages that the longer the period of pain, the higher the sum and vice versa.

25. The deceased herein was hit at around 7pm on 25th December and passed on the following day around 11.00 am. The justification and the parameters for the award was stated by Majanja, J in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs 50,000/= for pain and suffering. On appeal, the court stated:

“... 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 nevertheless pain for



which the deceased's estate 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.”

26. In *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR it was held that:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/- while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

27. I have examined similar awards by the High Court and I am satisfied that the award of Kshs 20,000/= is reasonable in the circumstances.

28. On loss of expectation of life, the appellants before the trial court proposed the sum of Kshs 50,000/= while the respondent proposed Kshs 140,000/=. After reviewing the authorities supplied by the parties, the trial magistrate found it befitting to award Kshs 100,000/=. There is no dispute the deceased was aged 65 years at the time and of good health. The uncertainties of life however have to be considered while computing damages under this head.

29. The rationale for awarding damages under this head was stated in *Benham v Gambling* (1941) AC 157 where it was held:

“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.”

30. In *John Muchiri Njoroge & another v Monicab Asami* [2021] eKLR, the court upheld an award of Kshs 100,000/= where the deceased was 65 years old.

31. Taking all the circumstances into account, I am inclined to affirm the award of Kshs 100,000/= under this head.

32. On the issue of loss of dependency, evidence shows that the deceased was survived by a widow and 3 children aged 12, 8 and 4 years respectively. She stated that he worked as photographer of over 30 years earning Kshs 4,500/= per day and variable fee for events. She also testified that the deceased made income from farming in the sum of Kshs 171,000/- per year.

33. There was no formal and or documentary evidence of his earnings. He had ordinarily surpassed his retirement age had he been engaged in formal employment.

34. In *Philip Musyoka Mutua v Veronica Mbulo Mutiso* [2013] eKLR, the high court awarded the sum of Kshs 100,000 in a matter where the deceased was 65 years as in the instant case. A similar award was made in *Philip Wanjera & another v Ahmed Liban & Shukri Ahmed Liban (suing for and on behalf of*



the Estate of Habiba Liban) [2016] eKLR where the appellate court set aside an award of kshs 750,000/= and substituted it with Kshs 100,000/- in a case where the deceased was aged 65 years.

35. In arriving at the award of Kshs 438,188/-, the trial court in this case adopted the multiplier of 5 years and the multiplicand of 4,500/= and the ratio of 2/3.
36. Given the fact that production of formal documents is not the only proof of income as stated in *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR, I find the adoption of the multiplicand and the multiplier to be unsafe in the circumstances for want of evidence in support thereof.
37. The circumstances under which the multiplier approach would be applicable was summarized by Ringera, J in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 where he stated:

“...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

38. As earlier stated, the fact of the deceased’s earnings, net expenditure and the length of dependency being unknown, or rather having not been tabled, the deployment of the method was impractical.
39. Accordingly, I find and hold that a global approach was appropriate in the circumstances and as established by case law, I find an award of Kshs 100,000/- in the circumstances to be appropriate and sufficient in the circumstances.
40. The trial court similarly awarded Kshs 20,000/- in special damages. This sum was awarded as sums for obtaining letters of administration. Two receipts were produced in court and were not objected to by the appellant. As such, I affirm final analysis, I make the following orders:
41. I affirm judgment on liability. The award of damages is interfered with only under the head of pain and suffering and loss of dependency.

Thus:

Liability 100%

Damages for pain and suffering Kshs 20,000/=

Loss of expectation of life Kshs 100,000/=

Loss of dependency Kshs 100,000/=

Specials damages Kshs 20,000/=

Total Kshs 240,000/=

42. Since the appeal is partially successful on quantum of damages, only, each party shall bear their own costs on the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 28TH DAY OF DECEMBER, 2022



**RE ABURILI
JUDGE**

