

9. Being the first appellate court, I am obliged to re-evaluate all the evidence on record.
10. The Plaintiff called 3 witnesses, whilst the defendant called 1 witness.
11. **PW1** is the Plaintiff, Hellen Akech Okudho. She did not witness the accident. She was informed of the accident and she then went to the scene after the incident took place.
12. **PW1** testified that the deceased used to earn Kshs.7,000/= monthly from his job as a watchman.
13. She said that the deceased used to assist her in educating his sister, Jane Adhiambo. As the said Jane lived with **PW1**, the financial support for her was remitted to **PW1**.
14. During cross-examination **PW1** said that the deceased was knocked down at the side of the road. It was her view that the point of impact was on the left side of the road, where the body of deceased was found lying down, after the accident.
15. **PW2, PETER OWITI YOGA**, was the only eye-witness. He said that he was along the Chemelil-Muhoroni road on the material day, when he saw the tractor being driven at a high speed.
16. **PW2** also testified that the deceased was walking off the road, when the tractor hit a pot-hole resulting in the driver losing control.
17. When the driver lost control, the tractor went off the road, and it hit the deceased.
18. It was the opinion of **PW2** that the driver of the tractor was to blame for the accident, as the tractor knocked down the deceased, off the road.
19. He explained that the deceased was hit from behind, as he was walking on the pedestrian path.
20. When being cross-examined, **PW2** categorically denied the suggestion that he and the deceased had been hiking a lift on the trailer.
21. **PW3, PC BWIRE WANJALA**, was a police officer who was attached to the Traffic Section at the Chemelil Police Post.
22. He testified that the driver of the tractor was charged with a traffic offence, and that the case was before the Tamu Law Courts.
23. When he was being cross-examined, the officer denied the appellant's suggestion that he had come to the conclusion that it was the pedestrian who was to blame for the accident.
24. In my considered opinion, when the appellant suggested to **PW3** that the pedestrian was to blame for the accident, that implied that the appellant had conceded the fact that the deceased was a pedestrian, at the material time.
25. Obviously, he cannot have been both a pedestrian as well as a passenger on the trailer, at the same time.
26. Furthermore, the deceased met his death at the place where the rear wheel of the trailer crashed him. He did move at all, after being crashed. Therefore, I find that the opinion expressed by the prosecution witnesses, concerning the point of impact, was correct. In effect, the deceased was crashed whilst he was walking off the road.
27. In the circumstances, I find that the deceased was not at all contributorily negligent. The driver of the tractor was wholly to blame for the accident.
28. Therefore, I uphold the trial court's finding, that the appellant was 100% liable for causing the accident.
29. On the issue of the quantum of compensation awarded by the trial court, the appellant urged me to find that the deceased died instantly, on the spot.
30. First, that submission supports the court's finding that the deceased, whose body lay off the road, must have been crashed at the spot where his body was found.
31. As the deceased died on the spot, the appellant submitted that the deceased died without enduring any pain.
32. The learned trial magistrate held that although the deceased died on the spot, he must have suffered pain, even if it be for a short period of time.
33. The appellant reasoned that the deceased died instantly, and that there was therefore no lapse of time between the time of the accident and the time of death.
34. In the case of **HENRY OMWERI OROO & ANOTHER Vs SAMUEL MUNGIA KAHIGA & ANOTHER HCCC NO. 76 OF 2013 NAKURU**, the court expressed itself thus;

“The deceased died on the spot. He had no awareness of pain and suffering before he succumbed to the injuries. I shall award NIL damages on this sub-head.”

35. On the other hand, the Respondent has reasoned that the deceased did not die instantly, as he was first hit on his shoulder, by the trailer, before the rear tyre of the said trailer crashed his head.

36. In my considered opinion, the fact that a person dies at the spot where he was at the time when the fatal injuries were inflicted, does not necessarily mean that the death was instantaneous.

37. It is possible to be immobilized by the injuries, which leads to death after either a short or a long interval.

38. In this case, there is no clear evidence about the duration of time between the time when the deceased was hit by the trailer and the time when he met his death.

39. However, taking into account the Respondent’s evidence, concerning the speed at which the tractor was being driven, I find that the duration between the time when the deceased was first hit by the trailer and the time when he met his death, was nominal.

40. Nonetheless, it cannot possibly be said that the death was painless.

41. Accordingly, I hold the view that an award of Kshs.10,000/= is sufficient compensation for Pain and Suffering.

42. In the event the sum which was awarded under this head is reduced from Kshs.30,000/= to Kshs.10,000/=.

43. In respect to Loss of Expectation of Life, the trial court awarded Kshs.100,000/=.

44. The appellant submits that an award of Kshs.80,000/= is sufficient.

45. It is well settled that an appellate court would only interfere with an award of damages if it was either so high or so low that it must be deemed that the trial court had applied the wrong principles of law when calculating it.

46. First, the gap between the sum awarded and the sum proposed by the appellant is so small as to be indicative of the absence of the application of a wrong principle.

47. I therefore find no reason in law, to warrant an interference with the award of Kshs.100,000/= for Loss of Expectation of Life.

48. In relation to the award for Loss of Dependency, the appellant invited the court to use a multiplier of 20 years, as opposed to the 25 years which the trial court awarded.

49. The appellant submitted that there was no guarantee that the deceased would have lived to be 60 years old.

50. I find that when the trial court used the multiplier of 25, it did not hold that there was any guarantee that the deceased would have lived to see his 60th birthday.

51. The deceased was 29 years at the time of death. That means that when a multiplier of 25 was used, the presumption would be that he would, possibly, have lived to the age of about 54 years.

52. In my considered opinion the presumption applied by the trial court was therefore very reasonable. I find no reason to interfere with it.

53. In the result, save for the award for Pain and Suffering, which has been reduced to Kshs.10,000/=, I find no merit in the rest of the appeal.

54. It therefore follows that the sum awarded to the Plaintiff is Kshs.850,100/=.

55. The appeal having been successful to a very small degree, I order that each party will bear his own costs of the said appeal.

DATED, SIGNED and DELIVERED at KISUMU This 27th day of November 2018.

FRED A. OCHIENG

JUDGE