



REPUBLIC OF KENYA



Onundu v Akumu & another (Suing as the legal representative of the Estate of Peter Akumu Adera - Dcd) (Civil Appeal E085 of 2022) [2025] KEHC 2874 (KLR) (3 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2874 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E085 OF 2022
AB MWAMUYE, J
FEBRUARY 3, 2025**

BETWEEN

GEORGE OTIENO ONUNDU APPELLANT

AND

**MARY AUMA AKUMU & FREDRICK OMONDI AKUMU (SUING AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF PETER AKUMU ADERA -
DCD) RESPONDENT**

*(Being an appeal from the Judgment and decree of Honourable F. Rashid
(PM) delivered on 8th July, 2022 in Winam CMCC No. E153 of 2019)*

JUDGMENT

1. The Appellant herein has approached this court aggrieved by the Judgment of the Trial Court delivered on 8th July, 2022 in Winam CMCC No. 153 of 2019. The Memorandum of Appeal dated 29th July, 2022 has four Grounds of Appeal which revolve around two issues, liability and quantum. The Trial Court found both parties were to blame for the accident that occurred on 2nd August, 2018 and apportioned liability equally at 50:50 percent. The Appellants main grievance is who is to blame for the accident.
2. In the Appellant's written submissions dated 12th April 2024, the Appellant argues that there were several discrepancies with the Respondents case and claims the Respondent did not prove its case on a balance of probabilities. The Appellant submitted that the PW2, Timothy Onyango Awiti, an eye witness was not truthful as he testified that the motor vehicle was driven at high speed when it lost control and hit the pothole on the right side of the road however during cross examination he stated that the pothole was in the middle of the road and not on the right side he also stated that the vehicle was not speeding and denied having recorded a statement with the police or that the accident occurred at 7.00 p.m. He further stated that he was a neighbor to the deceased not his grandson.



3. The Appellant further stated that PW3, Police Constable Ndeima stated he visited the scene three weeks later. He further stated that the eyewitness, PW2 came to the station to report the accident involving his grandfather, the deceased accompanied with PW1 three days later after the occurrence of the accident on 3rd August 2018. The Appellant submitted that based on the evidence, the Respondent and the rider are the ones to blame for the accident.
4. The Respondent's written submissions dated 11th March, 2024 argued that apportionment of liability is purely a matter of discretion unless the Appellant demonstrates that the direction taken was wrong. They further stated that submissions are not evidence and cannot substitute pleadings or evidence adduced before a trial court. The Respondent relied on the case of Hussein Omar Farah v Lento Agencies [2006] eKLR, Avenue Car Hire & Another vs Slipha Wanjiru Muthegu Civil Appeal No. 302 of 1997, Nance v British Columbia Electric Railway C. Ltd, KEMFRO Africa Limited t/a Meru Express Service Gathogo Kanini vs Lubia and Olive Lubia (1982-1985) 1 KAR 727 among others.
5. I have considered the Parties' submissions on record alongside the relevant authorities cited. As is the legal requirement for a court sitting on a first appeal, I have re-evaluated the material and evidence which was placed before the trial Court. It is clear that the appeal revolves around two issues for determination namely;
 - i. Whether the learned magistrate erred in holding the Appellant 50% liable in negligence; and
 - ii. Whether the learned trial magistrate erred in using the wrong principles on assessment of damages thereby arriving at an erroneous decision.
6. On the first issue, it is the Appellant's position that he blamed the deceased because he was drunk and was not balanced on the bicycle and also blamed the rider for having lost control of the bicycle. The Respondent on the other hand blamed the Appellant submitting that the eyewitness stated that the driver swerved to the left to avoid a pothole in the middle of the road knocking down the bicycle and running over the deceased.
7. From the evidence tendered by the parties before the Trial Court and this court sitting on appeal, it is clear that there is no dispute an accident happened between motor vehicle registration number KAP 517Q and the bicycle which was carrying the deceased as a pillion passenger. It is also not in contention that the Appellant hit the deceased and bruised his right hand.
8. The issue of contention is who is to blame for the accident with both parties giving different versions of what happened. On the issue of credibility the Court in the case of Continental Petroleum Products Ltd vs Scotia DBG Investment Ltd (2016) JMSC Civ 219 held:

“In accessing credibility, as between two(2) witnesses, one of whom is telling the truth in important respect and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives in a case involving disputed facts.”
9. The Appellants alleged that the deceased was drunk and that is the reason he was hit. No evidence was adduced in support of the same not even a medical report to show that the deceased was intoxicated in addition, the rider of the bicycle jumped off leaving the pillion who was not in control of the bicycle leading to him falling off the bicycle and as a result was hit by the motor vehicle. The Police officer in his evidence stated that upon visiting the scene of the accident he verified that there was a pot hole in the middle of the road. There being inconsistencies with the evidence of the eye witness, I agree with



the lower court that I am unable to determine who caused the accident and apportion the liability at 50%:50% based off the evidence adduced by the investigating officer.

10. On the second issue, assessment of damages are matters that are within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised. This was expressed in the Court of Appeal in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenya) v Kiarie Shore Stores Limited* [2015] eKLR where the court stated,

“As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent erroneous estimate. It must be shown that the Judge proceeded on wrong principles that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The court must be satisfied that either the judge in assessing the damages, took into account an irrelevant factor or left out of account a relevant one or that, short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages”

11. In the present case I do find the need to disturb the award by the lower court especially on the loss of dependency. The trial court erred in using the multiplier method in awarding damages that had no applicability in this case yet the global sum approach is more appropriate.
12. In the plaint, the Respondents pleaded that the deceased was aged 68 years prior to his death. It was also alleged that the deceased was a farmer supporting his family. No evidence was adduced to support the allegation that the deceased was a peasant farmer, and had 5 dependents or even ascertain his age. It is also not ascertainable on the amount of money the deceased earned, if any, from her peasant farming as alleged by the Respondents.
13. In *Frankline Kimathi Maaru & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representatives of Antony Mwiti Gakungu deceased)* [2020] eKLR the court was dealing with a similar issue and it held:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be a suitable replacement that correctly fits the gap.”

14. For the above reasons, I find that this would have been an appropriate case to use the global sum approach rather than the multiplicand method used by the trial court. I find that the trial court proceeded on wrong principles and considered irrelevant factors in arriving at the award for damages and as such call for interference by this appellate court. I thus place aside the award of damage for loss of dependency by the trial court and proceed to consider the quantum of damage awardable to the Respondent.
15. In the case of *China Civil Engineering & another v Mwanoyoha Kazungu Mweni & another* [2019] eKLR the court upheld a global sum award of Kes. 700,000.00 for loss of dependency where the deceased was 79 years old. Also in the case of *Moses Maina Waweru v Esther Wanjiru Githae (suing as the personal representative of the estate of the late David Githae Kiririo Taiti)* [2022] eKLR the court



made an award of Kes. 800,000.00 for loss of dependency where the deceased was 68years old and had 1 dependent.

16. Comparing the above awards and considering the circumstances of this case I find that the global award of Kes. 700,000.00 is reasonable for loss of dependency under the *Fatal Accidents Act*.
17. Consequently, I find that this appeal partially succeeds. I uphold the trial court's finding on liability at 50%. I however set aside the award and substitute the same with the following awards:
 - a. Loss of expectation of life Kes. 70,000.00
 - b. Pain and suffering Kes. 80,000.00
 - c. Loss of dependency Kes. 700,000.00
Total Kes. 850,000.00
Less 50% contribution (Kes. 425,000.00)
Amount payable Kes. 425,000.00
 - d. The Respondent is awarded half the costs of this Appeal plus interest on the above sums from the date of judgment in the lower court.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 3RD DAY OF FEBRUARY, 2025.

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BAHATI MWAMUYE
JUDGE

