Okoma v Imbova (Suing as the Administrator of the Estate of the Late Vincent Mbaya Imbova) (Civil Appeal 67 of 2023) [2025] KEHC 3741 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3741 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 67 OF 2023

SC CHIRCHIR, J

MARCH 20, 2025

BETWEEN

AMOS OMONDI OKOMA ..... APPELLANT

AND

GABRIEL AMULABU IMBOVA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE VINCENT MBAYA IMBOVA) ..... RESPONDENT

(An appeal from the judgment and decree of Honourable J.N Maragia delivered on 15/2/2023 in Kakamega Civil Suit No. E106 OF 2021)

JUDGMENT

1. The respondent (then plaintiff) sued the Appellant (as defendant), for general and special damages suffered by the Estate and dependants of Vincent MMbaya Imbova (Deceased) , who sustained fatal injuries as a result of a road accident which occurred on 27th October 2020. The accident involved Motor Cycle Registration Number KMEN 191F(Motorbike) and Motor Vehicle Registration Number KCR 610 E (Motor Vehicle) . The deceased was a pillion passenger in the motorbike.

2. At the conclusion of the hearing, the trial court delivered judgment in favour of the respondent herein and awarded damages as follows: Kshs.2,000,000/= as loss of dependency, Kshs. 50,000/= for pain and suffering, Kshs.150,000/= on loss of expectation of life and Kshs.65,000/= as special damages. The trial Magistrate further found the rider of the motor bike and the driver of the vehicle equally liable for the accident.

3. The respondent went back to the trial court seeking for review of the judgment on grounds that there was an error on the face of the record as the court failed to apportion damages of 50%/50 %basis. The trial magistrate in a ruling delivered on 22/3/2023 clarified that she never entered Judgment against the deceased but as between the Rider and the motorist and therefore declined to discount the award by 50%

Memorandum of Appeal

4. Aggrieved by the Judgment, the appellant filed the present Appeal and has set out the following grounds:

    a. The learned Magistrate erred by failing to subject the damages payable by the defendant to 50% contribution as per the findings in the court's judgement

    b. The learned Magistrate erred in law by failing to discount Kshs.100,000/= being loss of expectation of life from the final tally thereby rewarding the plaintiff twice

    c. The honourable Court fell into error when it awarded the plaintiff Kshs. 2,000,000/= under loss of dependency when the same was not pleaded or claimed in the plaint

    d. The honourable Court erred in law when it used a wrong and inapplicable method (the multiplier method) when the facts and circumstances do not favor the application of that and ended up with an award that is so high in the circumstances.

5. The Appeal was prosecuted by way of written submissions.

Appellant's submissions

6. It is the appellant's submission that the trial court erred when it failed to reduce the award by 50%, despite its finding on liability. That although the honorable court had at the beginning of the judgement, mentioned that liability had been apportioned between the plaintiff and the defendant to the extent of 50%, at the conclusion, she did not apportion the award accordingly.

7. The appellant further submits that the award of Kshs. 100,000/=on loss of expectation of life and Kshs. 50,000/= for pain and suffering under the *Law Reform Act*, ought to have been deducted from the total award since all the beneficiaries under both Acts would ordinarily be the same hence it would amount to double compensation.

8. The appellant further submits that that the deceased was aged 27 years, doing menial jobs, and earning approximately Kshs. 200/= per day. That taking into consideration that there was no satisfactory proof of the monthly income, it is their submission that the global sum approach or the minimum wage would be appropriate mode of assessing loss of dependency. However to the Appellant a global award of Kshs. 600,000/= would be sufficient.

9. It was the appellant's final submission that the trial court erred in awarding inordinately high damages.

Respondent's submissions

10. The respondent contends that the trial court was right in not subjecting the pillion passenger to 50% contributory negligence since the passenger had no control of the motor cycle and there was nothing he could have done to prevent or cause the said accident.

11. On the deductions of the award under the *Law Reform Act*, it is the respondent's submission that there is no legal requirement for the court to deduct the amount awarded under the said Act from the award made under the *Fatal Accidents Act*.

12. The respondent finally submits that the trial court did not err in awarding a global sum of Kshs. 2,000,000/= in respect of loss of dependency, and no wrong principles of law was applied in the assessment of damages.

Analysis and determination

13. It is the duty of this court, as the first appellate to :- reconsider the evidence, evaluate it itself and draw its own conclusion, though it should always bear in mind that it has never seen nor heard the witnesses and should make due allowance in this respect" (Ref:Gitobu Imanyara & 2 Others Vs Attorney General (2016) eKLR

14. I have considered the memorandum of Appeal, the record of appeal as well as the rival submissions of the parties. I have identified the following issues for determination:

    a). whether the trial court should have reduced the award by 50%

    b). Whether the award based on the *Law Reform Act* should have been discounted from the award founded on *fatal Accidents Act*.

    c) Whether the trial court erred in awarding damages on loss of dependency and whether the same was excessive.

Whether liability should have been reduced by 50 %

13. I have carefully read the judgment of the trial court. The paragraph containing apportionment, referred to by the Appellant, is found page 63 of the record of Appeal. Towards the last two lines of paragraph *2* the trial Magistrate stated as follows: " They were both overtaking when it was not safe to do so. They are both equally to blame. I apportion liability in the ratio of 50: 50 between the defendant and the cyclist."

14. However the motor cyclist was not a party to the suit. The imperative question is whether blame should have been apportioned to a party who was not a party to the suit. Can one be condemned unheard? The right to be heard is a core right . It is a component of the right to fair trial and pursuant to the provisions of Article 25 of *the constitution*, this right in unlimited.

15. In the case of Kiai Mbaki & 2 others vs Gichuhi Macharia& Ano(2005) e KLR the court held : " The right to be heard is a valued right. It would offend all notions of Justice if the rights of a party were to be prejudiced of affected without the party being given an opportunity to be heard.

16. To the extent therefore that the cyclist was not a party to the suit , that finding per se was wrong. No blame should have been apportioned to the cyclist without him being brought into the proceedings and given a chance to defend himself.

17. To the Appellant however the liability of the Appellant should then have been to the extent of 50%. Only. When clarification was sought, the trial magistrate stated:- " I would wish to clarify to the parties that there is no error apparent on the face of the record. This is because , unlike the plaintiff in the sister file , the plaintiff herein was a pillion passenger . He was not the person in control of the Motorcycle involved in the accident . In my decision regarding liability , I apportioned 50: 50 between the motor vehicle driver and the cyclist and not between the motor vehicle driver and the plaintiff herein.

18. To the above clarification , my observation is that while the trial magistrate made it clear that she had not found any blame on the part of the deceased, she was not alive to the error she made in her statement appearing on page 63 of the record of Appeal. In other words she was right as a matter of principle , because she could not apportion damages to a third party who was not a party to the suit but she did not lay a basis on why the apportionment could not be done.

19. Nevertheless, the Appellant's witness when he testified blamed the Rider for overtaking when it was not safe to do so. The Appellant however did not seek to join the motor cyclist in these proceedings. My view is that, it was incumbent upon the Appellant to bring the cyclist to the suit by way of third party proceedings , which he failed to do . In the circumstances the Appellant must shoulder the entire blame. I consequently hold him liable for the accident .

Whether the award under the *law reform Act* should be deducted from the award under *Fatal Accidents Act*.

20. The principles upon which an Appellate court can interfere with the assessment of damages by a trial court were set out in the court of Appeal decision in But vs Khan (1982 – 88) KAR 1 where the court 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 arrived at a figure which was either inordinately high or low."

21. On the fate of damages assessed under the *law Reform Act* the case of Hellen Waruguru Waweru (suing as the legal representative of peter Waweru Mwenja (deceased))v Kiarie shoe stores limited [2015] eKLR, provides the needed clarity. The Court of Appeal stated:-

> " This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-". An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
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> .The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death ....."

22. I need not say anything further. The award of damages under loss of expectation of life and pain and suffering are not deductible from the award under *fatal accidents Act*.

Whether the trial court erred in making an award under loss of dependency and whether the same was excessive in any event

23. Contrary to the Appellant's assertion, loss of dependency was pleaded under paragraph7 of the plaint. Granted the term used in the paragraph is not " loss of dependency" but the plaintiff did claim under

the *fatal Accidents Act* ,and the deceased's father was listed as a dependant. I note that the plaint is wanting in drafting but to give undue regard to form ,is to sacrifice substantive justice at the altar of procedure. I decline to do that. It is therefore my finding that the plea on loss of dependency as it appears on the plaint ,was sufficient

24. On the issue of whether the same was excessive, the trial court adopted the global approach and awarded 2,000,000/= . This mode of assessing damages, as well as the multiplier approach, are both acceptable modes, and the trial court was at liberty to use any.

25. The Appellant's complaint in this regard is that the award was too excessive. He has proposed an award of ksh. 600,000 but without laying a basis for it. The guiding principles in assessment of damages are well settled, and briefly stated: "comparable injuries should attract comparable awards"(ref: Jacktone Ouma Moureen Achieng(2016) e KLR

26. The deceased herein was 30 years old (not 27 years as stated by the Appellant).In the case of Zachary Abusa Magoma vs Julius Asiago (2020) e KLR the high court reduced the lower court award to ksh,1,500,000. In Alice & Ano vs Shitakwa (2022) KEHC 16196 (KLR), the high court reduced an award of ksh. 3,000,000 to ksh. 1,700,000. The deceased was 26 years. Based on the above decisions plus considerations of inflation from the time the above decisions were made,I do not consider the award of ksh. 2,000,000 too excessive to warrant the intervention of this court.

27. In the end , the judgement of the trial court is hereby upheld, and the Appeal is hereby dismissed ,with costs to the respondent.

DATED , SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO THIS 20TH DAY OF MARCH 2025.

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi – Court Assistant

Ms .Shibanda for the Respondent .