



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gumo & another v Kiptalai & another (Suing on Behalf of the Estate of Philip Kimaiyo Talal – Dcd) & 2 others (Civil Appeal 16 of 2020) [2025] KEHC 6086 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEHC 6086 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL APPEAL 16 OF 2020**

**RK LIMO, J  
MAY 15, 2025**

**BETWEEN**

**CHARLES OMULO GUMO ..... 1<sup>ST</sup> APPELLANT**

**WAMIYA DICKSON ..... 2<sup>ND</sup> APPELLANT**

**AND**

**SUSANA KIMAIYO KIPTALAI & ANOTHER (SUING ON BEHALF OF THE  
ESTATE OF PHILIP KIMAIYO TALAL – DCD) ..... 1<sup>ST</sup> RESPONDENT**

**OSHO CHEMICAL INDUSTRIES LTD ..... 2<sup>ND</sup> RESPONDENT**

**STEPHEN WAITHAKA GITHU ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal against the judgment delivered on 14/7/2020 vide  
Kitale CMCC No.173 of 2014 by Hon. C.M. Kesse (SRM))*

**JUDGMENT**

1. This is an appeal against the judgment delivered on 14/7/2020 vide Kitale CMCC No.173 of 2014 by Hon. C.M. Kesse (SRM). In that case the 1<sup>st</sup> Respondent sued both the appellants on tort of negligence arising from a fatal road traffic accident on 8/3/2012 along Webuye-Kitale road. The accident motor vehicle Reg. No.KAE 520R was driven by the 1<sup>st</sup> appellant while owned by 2<sup>nd</sup> appellant and motor vehicle Reg No.KBK 660Z Toyota Probox car was driven by 3<sup>rd</sup> Respondent and owned by 2<sup>nd</sup> Respondent. The two vehicles collided and the impact caused motor vehicle KBK 660Z to hit the deceased Philip Kimaiyo Talai, a police officer who was performing traffic duties along the road at the scene of the accident.
2. The 1<sup>st</sup> Respondent sued on behalf of the estate of the deceased police officer. After trial, the trial court found that the appellants were liable for causing accident and held them 100% liable. The trial magistrate then made the following awards to the 1<sup>st</sup> Respondent.



- a. Loss of expectation of life - Kshs.100,000/-
  - b. Pain and suffering - Kshs.100,000/-
  - c. Loss of consortium - Kshs.100,000/-
  - d. Special damages - Kshs.48,726/-
  - e. Loss of dependency -Kshs.1,196,880
- Total 1,545,606/-
3. The appellants felt aggrieved and filed this appeal raising the following grounds namely;
    - i. That the trial magistrate erred by awarding excessive damages under *Fatal Accidents Act* and *Law Reform Act*.
    - ii. That the award of Kshs.1,545,606 was excessive in the circumstances.
    - iii. That the trial court erred by awarding the deceased's wife damages for loss of consortium as a claim on its own without a proper basis.
    - iv. That the trial court erred in law by failing to evaluate the evidence in totality and taking into consideration the submissions and authorities filed.
    - v. That the learned magistrate erred by not considering cases of similar nature thus arrived at erroneous conclusion/finding.
    - vi. That there was no proper basis laid for the assessment of damages.
  4. In their written submissions through counsel dated 29/11/2023, the appellants fault the trial court for what they term as excessive award under both *Law Reform Act* and *Fatal Accidents Act*. The appellants contend that the trial court did not take into account the guiding principle of "restitution in intergrum" which is a Latin phrase (restoration to original condition) meaning that monetary compensation on damages should not be more than the actual loss.
  5. They submit that the deceased died on the spot and did not suffer for long. In their view an award of Kshs.100,000/- for pain and suffering was excessive. They submit that an award of between 10,000/- and 30,000/- under that head would have been reasonable.
  6. They also fault the trial court for making an award under loss of dependency which they feel was excessive pointing out that adopting gross earning as a multiplicand was erroneous. They also contend that using a multiplier of 6 years was erroneous and that it led to an excessive award.
  7. They contend that the deceased died at the age of 56 years and that the gross earning was subject to statutory deductions. According to the appellants a multiplier of 2 years would have been reasonable because the deceased would have retired at 60 years.
  8. They submit that the loss of consortium was not proved and therefore no basis was laid for an award in that regard. They rely on unreported case of Innocent Ketie Makaya Denge –vs- Peter Kipkore Cheserek & Anor ( Eldoret HCC No.96 of 2013).
  9. They further submit that the trial magistrate failed to exercise her discretion judiciously when making the awards on pain and suffering, loss of dependency and loss of consortium.
  10. The 1<sup>st</sup> Respondent has opposed this appeal vide written submissions by learned counsel Nyekwei & Co Advocates dated 14/3/2024. She asserts that the issue for determination in this appeal in light of



the grounds filed is whether this court should interfere with the lower court's discretion on the awards of damages under pain and suffering and loss of dependency.

11. On pain and suffering the 1<sup>st</sup> respondent supports the award made of Kshs.100,000/- contending that the same was not erroneous or excessively high. She relies on a decision in *Sukari Industries Ltd –vs- Clyde Machimbo Juma* (2016)eKLR where Justice Majanja upheld an award of Kshs.50,000/- for pain and suffering where the deceased died immediately after an accident.
12. On loss of dependency, the respondent submits that the trial court used the gross salary of Kshs.24,935/- as a multiplicand. She submits that the only deductions to be made are statutory deductions of P.A.Y.E of Kshs.2329.80 and NHIF of 320 totaling Kshs.2649.
13. On loss of consortium, the 1<sup>st</sup> respondent contends that she lost her husband and the trial court was justified to award her Kshs.100,000/- under that head. She relies on the case of *Salvatore De Luca – vs- Abdullahi Hemed Khalil & Anor* (1884)eKLR and *Martha Muthoni Ndege –vs- Antony Kamau Kambiriri* (2019)eKLR to buttress her submissions.
14. This court has considered this appeal and the response made. The role of this court as a first appeal court is to re-evaluate the evidence tendered with a view to drawing own conclusions.
15. This appeal is basically on quantum. The appellants are only contesting the trial court's award on damages in 3 heads namely;
  - a. Award under pain and suffering.
  - b. Award on loss of consortium
  - c. Loss of dependency

I will consider the 3 awards separately with a view to determine if the trial court exercised her discretion well given that award on damages is a discretionary issue.

### **Pain and suffering**

16. The trial court under this head made an award of Kshs.100,000/- which the appellants feel is too high. An award under this head depends on the length of time or the period between the occurrence of an accident and the time of death. The longer the time, the longer a victim is assumed to have suffered pain and suffering before succumbing to the injuries.
17. From the evidence tendered the accident occurred some few minutes after 8am. The 1<sup>st</sup> appellant's own account is that the accident occurred at 8am as he drove to deliver milk in Town. The police abstract (PExhibit 4) tendered in evidence indicates that the accident occurred at 8.50am. From the post mortem report, the deceased died at 9am.
18. It is hard to pin point with certainty the time or period it took the deceased to succumb to the injuries sustained but what is clear is that he either died on his way to hospital or on arrival. It is the finding of this court that the trial court evaluated the evidence well with respect to pain and suffering and used her discretion well to make an award of Kshs.100,000/-. This court finds no basis to interfere.

### **Award on loss of consortium**

19. This court has perused through the plaint by the 1<sup>st</sup> respondent filed in the lower court and I find that she pleaded loss of consortium as one of the losses and upon which she was seeking damages.



20. During trial she tendered a marriage certificate as proof that she was a spouse/wife to the deceased. It is therefore clear that she suffered loss of a companion as a result of the accident and one would be quite insensitive to fault her claim of damages under that head. This is a widow who lost not just a bread winner and a husband as a result of an accident. She was entitled to the damages awarded by the trial court. As held in Martha Muthoni Ndege –vs- Antony Kamau Kambiriri (2019)eKLR damages for loss of consortium is legal and is meant to give a token of compensation to victims for loss of companionship. I say a token because losing a lifelong companion is difficult to quantify in monetary terms. Suffice to say that the trial court in this matter was well guided to award the 1<sup>st</sup> respondent Kshs.100,000/-. I do not find basis to interfere.

### **Loss of dependency**

21. The 1<sup>st</sup> respondent tendered a pay slip indicative that the gross salary of the deceased was Kshs.24,935/-. The appellants contend that the trial magistrate erred by using gross pay as a multiplicand but they are mistaken. A person's earning is pegged on gross pay. It is always important that loss of dependency where one is employed and has a pay slip, what counts is what is reflected as income or gross pay. The trial court was properly guided to go by the gross pay. The net pay is a figure that keeps shifting and cannot be used even when one is going on retirement.

22. On the question of multiplier, I note that the trial court used 6 years because the pay slip indicated that he was 54 years at the time. The retirement age of the deceased was to be pegged on the records by his employer which was reflected on his pay slip. He was to retire at 60 years and so the multiplier used by the trial court was justified.

In sum this court finds no merit in this appeal for the aforesaid reasons. The award given to the 1<sup>st</sup> respondent by the trial court was modest, fair and reasonable. I do not have any reason to interfere with the discretion by the trial court because the same was sound and justified. The awards made under various heads are upheld.

This appeal is dismissed with costs to the 1<sup>st</sup> respondent.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 15<sup>TH</sup> DAY OF MAY , 2025.**

**HON JUSTICE R.K. LIMO**

**KITALE HIGH COURT**

Judgment delivered in open court

In the presence of;

Esikuri holding brief for Kipnyekwei for 1<sup>st</sup> Respondent

Ominde for Appellant

Nyabuto for 2<sup>nd</sup> & 3<sup>rd</sup> Respondents

Duke/Chemosop – court assistants

