



Omulindi (Suing as the Administratrix of the Estate of the Late Jeffrey Martin Okumu - Deceased) v Kitsao & another (Civil Case 135 of 2015) [2024] KEHC 2507 (KLR) (Civ) (8 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 135 OF 2015

CW MEOLI, J

MARCH 8, 2024

BETWEEN

DORIS ASUMWA OMULINDI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE JEFFREY MARTIN OKUMU - DECEASED) . PLAINTIFF

AND

EVERLYN KITSAO 1ST DEFENDANT

KEVIN NYASANI 2ND DEFENDANT

JUDGMENT

1. Doris Asumwa Omulindi (hereafter the Plaintiff) instituted this suit in her capacity as the administratrix of the estate of Jeffrey Martin Okumu (hereafter the deceased). The suit was commenced via a plaint dated 7th April, 2015 naming two defendants, namely, Everlyn Kitsao and Kevin Nyasani (hereafter the 1st and 2nd Defendants, respectively). The claim was for general damages under the Law Reform Act and the Fatal Accidents Act, *inter alia* and arose from a road traffic accident which resulted in the death of the deceased. The 1st Defendant was sued in her capacity as the registered owner of the motor vehicle registration number KAU 255U (the subject motor vehicle) while the 2nd Defendant was sued as the driver/beneficial owner thereof.

2. It was alleged that on or about 7th April, 2012 the deceased was lawfully travelling aboard the subject motor vehicle along Mombasa Road near Capital Centre when the 2nd Defendant so carelessly, negligently and/or recklessly drove, managed and or controlled the subject motor vehicle that it was involved in a road traffic accident as a consequence of which the deceased sustained fatal injuries. The particulars of negligence against the Defendants were as follows:

Particulars of negligence of the 1st defendant



- a. Permitting an unqualified driver to driver to drive her motor vehicle registration No. KAU 255U.
- b. Permitting a defective motor vehicle to be driven on the road.
- c. Leaving her motor vehicle in the hands of an unqualified driver.
- d. Failing to regularly service Motor Vehicle Registration No. KAU 255U.
- e. Leaving her motor vehicle in the hands of a drunken driver. (*sic*)

Particulars of negligence of the 2nd defendant

- a. Driving at an excessive speed in the circumstances.
 - b. Failing to take sufficient and/or due regard to the safety and welfare of the passengers.
 - c. Driving while under the influence of alcohol and/or drugs.
 - d. Failing to observe traffic rules and/or the highway code.
 - e. Driving the motor vehicle without any/or sufficient care and attention.
 - f. Driving a defective motor vehicle on the road.
 - g. Causing the fatal accident.
 - h. Failing to act as a reasonable human being in the circumstances. (*sic*)
3. It was further pleaded that at the time of his death, the deceased was aged 32 years and enjoyed good health with high prospects. That the deceased worked as an engineer, and supported his dependents, namely Doris Asumwa Omulindi (wife) and JZA (daughter, minor).
 4. The 1st Defendant entered appearance and filed the statement of defence dated 11th May, 2015, therein denying the key averments in the plaint and liability against her. More particularly, the 1st Defendant denied having authorized or consented to the transportation of the deceased by the 2nd Defendant, aboard the subject motor vehicle.
 5. Concerning the 2nd Defendant, upon his failure to enter appearance and to file a statement of defence, the Plaintiff obtained an interlocutory judgment against him on 3rd June, 2015.
 6. The Plaintiff and the 1st Defendant both participated in the trial that commenced on 18th September 2017. PC Issac Muthama Muneeni (PW1) testified that he had been attached to Industrial Area Police Station at the material time. Confirming the occurrence of the accident, he produced an extract of the Occurrence Book as an exhibit. The police officer stated that the accident was self-involving in nature and that on the fateful date, the subject motor vehicle was being driven by the 2nd Defendant, while the deceased was a passenger therein. That the 2nd Defendant lost control of the subject motor vehicle before veering off the road and hitting a tree. It was PW1's evidence that the deceased was admitted to hospital before eventually succumbing to his injuries. In cross-examination, the police officer admitted that he did not personally visit the scene of the accident.
 7. The Plaintiff testifying as PW2 identified herself as the widow of the deceased. She adopted her witness statement filed on 7th April, 2015 as her evidence-in-chief and produced the bundle of documents filed on the same date as P. Exhibits 2-13. During cross-examination, the Plaintiff stating that her deceased



- husband and the 2nd Defendant were friends, said that on the material date, the 2nd Defendant contacted her to inform her of the accident, and the fact that he was in the company of the deceased when the accident happened. Further to that she said the 2nd Defendant was the driver thereof and that the two people were headed for Mombasa Road. She said she was unaware that part of the deceased's medical bills had been settled by the insurance company.
8. PC Caroline Mwaura, who was PW3 produced the police abstract relating to the accident as P. Exhibit 1 and testified that the said accident involved the subject motor vehicle, at the time being driven by the 2nd Defendant. The police officer testified that while the 2nd Defendant sustained slight injuries, the injuries suffered by the deceased proved fatal. In cross-examination, she stated that she did not visit the scene of the accident and was relying purely on the contents of the OB and the police abstract. That from her knowledge, the accident was self-involving in nature but was unaware that anyone was charged with any traffic offence in relation to the accident. This marked the close of the Plaintiff's case.
 9. The 1st Defendant testified as DW1. Adopting her signed witness statement filed on 26th April, 2016 as her evidence-in-chief, she also produced her bundle of documents filed on like date and on 25th May, 2016 as D. Exhibits 1-4. She then proceeded to testify that the subject motor vehicle was purchased through a loan and registered in her name as the person responsible for servicing the loan. However, the said vehicle was always in the possession and custody of the 2nd Defendant at all material times, and he used it at will. She further testified that the 2nd Defendant was her husband until the couple divorced in the year 2015.
 10. Under cross-examination, the 1st Defendant stated that she purchased the subject motor vehicle and prior to her separation and divorce from the 2nd Defendant, the latter used it with her authority. That upon their separation in the year 2011 the 2nd Defendant retained possession of the subject motor vehicle but that after the accident she surrendered the logbook to Kenya Revenue Authority (KRA). That she learned of the accident through a third party and received information that the 2nd Defendant received compensation from the insurer upon the subject motor vehicle being written off.
 11. At the close of the hearing, the parties were directed to file and exchange written submissions. The Plaintiff's counsel submitted two issues, namely, liability and quantum of damages. On liability, it was submitted that it had been proved by the Plaintiff that the accident and death of the deceased were the direct result of negligence on the part of the 2nd Defendant, especially under the doctrine of *res ipsa loquitur*. Reference was made to the decisions in [Julius Muriithi & 11 others v Stephen Musyoka Iyai](#) [2020] eKLR and [Gachanja Thagana v Mwangi Wanjohi](#) [2020] eKLR where the drivers in the respective cases were found liable for negligence resulting in injuries sustained by lawful passengers aboard their motor vehicles.
 12. Regarding the vicarious liability of the 1st Defendant, counsel argued that by virtue of her ownership of the subject motor vehicle, and in the absence of any evidence that she lacked control of the use of the said vehicle by the 2nd Defendant, she ought to be held vicariously liable. To buttress his point here, counsel cited among others, the decisions in *Karisa v Solanki*, [1969] EA 318 and [Kenya Bus Services Ltd v Dina Kawira Humphrey](#) [2003] eKLR where the owners of motor vehicles which were involved in accidents were held liable under the principle of vicarious liability. On those grounds, the court was urged to find the Defendants jointly and severally liable.
 13. On quantum, it was reiterated that the deceased was aged 32 years at death and that a substantial share of his income was used to support his family, including the Plaintiff. Concerning the prayer for general damages for pain and suffering, a sum of Kshs. 250,000/- was proposed, counsel citing the case of [Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu](#) [2021] eKLR where the court



awarded the sum of Kshs. 100,000/- under this head, and *Citi Hoppa Bus Limited & another v Maria Clara Rota* [2021] eKLR. On the claim for loss of expectation of life, a sum of Kshs. 300,000/- was sought with reliance being placed inter alia, on the just cited case of *Citi Hoppa Bus Limited & another v Maria Clara Rota* (*supra*) where the court awarded a sum of Kshs. 200,000/- under that head.

14. Concerning loss of dependency, the court was urged to apply a dependency ratio of 2/3 together with a multiplicand of Kshs. 65,109/- arising out of the deceased's earnings as an engineer and a multiplier of 33 years to be tabulated as follows: $65,109/- \times 33 \times 12 \times 2/3 = \text{Kshs. } 17,188,776/-$. Counsel further urging the sum of Kshs. 200,000/- for loss of consortium. On specials, counsel submitted that the Plaintiff is entitled to the sum of Kshs. 1,673,326/- thus bringing the total award to the sum of Kshs. 19,612,102/-.
15. The 1st Defendant's counsel also filed submissions dated 7th July, 2023, therein contending that while it was not in dispute that the subject motor vehicle was registered in the name of the 1st Defendant as at the time of the accident, liability arising from the accident ought not to extend to her. Because at the time of the accident, she and the 2nd Defendant had been living separately since March, 2011 prior to their divorce in the year 2014. That the 2nd Defendant always had possession and control of the subject motor vehicle since purchase and during the couple's separation. That the 2nd Defendant could not therefore have been her agent/servant; rather, he was a beneficial owner thereof and hence he ought to bear sole liability for the accident. Counsel relying on the decisions in *Samuel Mukunya Kamunge v John Mwangi Kamuru* [2005] eKLR; *Nancy Ayemba Ngaira v Abdi Ali* [2010] eKLR; and *Jared Magwaro Bundi & another v Primarosa Flowers Limited* [2018] eKLR. On those grounds, the court was urged to dismiss the case against the 1st Defendant.
16. The court has considered the pleadings filed and the evidence tendered at the trial, as well as the rival submissions and authorities cited therein. As earlier mentioned, interlocutory judgment was entered against the 2nd Defendant and save for assessment of damages, what remains for consideration at this juncture is the question whether the Plaintiff has made her case against the 1st Defendant. The court therefore proposes to deal seriatim with the issues of liability and quantum.
17. It is trite law that the burden of proof rested with the Plaintiff to prove her case against the 1st Defendant, on a balance of probabilities. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”
18. Moreover, the evidential burden of proof which is captured in Sections 109 and 112 of the same *Act* stipulates that:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”



19. The abovementioned provisions were discussed in *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal rendered 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*.”

20. There is no dispute that the subject motor vehicle was at all material times registered in the name of the 1st Defendant who was the wife of the 2nd Defendant. Similarly, the fact of the occurrence of the material accident involving the said motor vehicle, at the time driven by the 2nd Defendant and in which the deceased was a passenger, is not in dispute. Further, there is no dispute that the deceased sustained severe injuries as a result of the accident and was admitted in hospital for about 11 days before he succumbed.

21. The key question arising now is whether on the facts tendered, vicarious liability may be found against the 1st Defendant for the actions of the 2nd Defendant. This issue was contested; the Plaintiff asserting that the 1st Defendant was vicariously liable while the said Defendant disclaimed any such liability asserting that the 2nd Defendant was the beneficial owner of the vehicle at the material time. It is significant here that the admitted relationship between the Defendants is not the classic master servant or other such relationship between an owner and a third party. Rather it was a marital relationship while the subject vehicle was registered in the name of the 1st Defendant, and at the material time in the possession of the 2nd Defendant.

22. Assertions by the 1st Defendant that the 2nd Defendant had always retained possession and control of the subject vehicle during marriage and hence the beneficial owner thereof were not backed up by any evidence. Besides, it is not unusual in families, whether by express or tacit agreement and for mutual convenience, for one spouse to exercise more control and possession of a family vehicle. It would be absurd and unreasonable to expect the spouse in control of the vehicle to seek express authorization of the other spouse on every occasion before taking a third party as a passenger on such a vehicle. The 1st Defendant's suggestion that during their marriage, the 2nd Defendant had exclusive control of the vehicle while she serviced the loan is not only unsupported by other evidence but also sounds implausible.

23. Equally, the claim by the 1st Defendant that she had been separated from the 2nd Defendant in material time and that he solely had control of the vehicle was not supported by any cogent evidence, whether documentary or oral. Ordinarily, separation of a married couple is not a private matter between them, and at the minimum family members and friends would be aware. As the person servicing the loan, and in whose name the vehicle was registered, the 1st Defendant would know for instance who between her and her husband had insured the vehicle in the material periods. While suggesting in her testimony that the 2nd Defendant received compensation for the subject vehicle even though the logbook was still in her name, she failed to furnish any proof in that regard. Beneficial ownership is a matter of fact, and the fact that the 2nd Defendant had in his possession the subject motor vehicle at the material time cannot, without more, translate into beneficial ownership displacing any liability against the 1st Defendant as the registered owner of the vehicle.

24. The surrender by the 1st Defendant of the logbook to NTSA (via the letter dated 27th October 2014, produced as D. Exhibit 4) happened after the accident. The couple's divorce pursuant to the decree



nisi (D. Exhibit 2) happening three years after the accident is not proof of alleged earlier separation, which in any event could not have severed their legal union. Nor somehow determined the authority to the 2nd Defendant to use the vehicle, and the 1st Defendant did not adduce any evidence to that effect. Matters involving the couple's union and use, or control of the subject vehicle were facts especially within the knowledge of the 1st Defendant and under section 112 of the *Evidence Act*, the burden of proving them rested on the said Defendant. After all, she was the registered owner of the vehicle.

25. In the court's view, claims that the 2nd Defendant always had exclusive control of the subject vehicle or that the Defendants were separated in the material period have not been borne out by way of evidence. On the contrary, it seems that despite perhaps experiencing the usual marital challenges, the Defendants were at all material times a married couple, and as happens between couples, they acquired a vehicle on a loan serviced by the wife, but whether driven by one or the other spouse, the vehicle must have been intended for family use and mutual benefit. And with ostensible authority.
26. In *Karisa & Anor v Solanki & Anor* [1969] EA 318 the Court of Appeal for East Africa while considering an almost similar situation stated that:

“The third point is whether the car owner is responsible for the negligence of the car driver. The law on this matter is concisely and clearly set out in the judgment of Sir Clement De Lestang, V-P; in *Selle v Associated Motor Boat Co. Ltd* [1968] EA at p. 128, where he said:-

“Where, however, a person delegates a task or duty to another, not a servant, or employs another, not a servant, to do something for his benefit or the joint benefit of himself and the other, whether the other person be called agent or independent contractor, the employer will be liable for the negligence of that other in the performance of the task, duty or act as the case may be”.

... Where it is proved that a car has caused damage by negligence then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see *Barnard v Sully* [1931], 47 TLR 577). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by evidence that the car was lent to the driver by the owner, as there the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver... The inference could, of course, be rebutted by credible evidence to the contrary, but at no stage was any evidence given as to the circumstances in which the car was lent to the driver. Thus, the presumption to which I have already referred that the owner of a car is liable for the negligence of the driver has not been rebutted....”

See also the decision of the Court of Appeal in *Robert Njoka v Alice Wambura Njagi & 3 Others* [2013] eKLR reiterating the above dicta.

27. Implicit in the presumption above is the inference that the person who caused damage through negligent driving is an authorized driver, hence the owner's vicarious liability. Similarly, in this case the evidence presented raised the inference that the 2nd Defendant was at the material time, which was during coverture, a driver authorized by the 1st Defendant, then his wife. Leading to the presumption that she was liable for his negligent acts, which presumption is strengthened by the proven marital relationship existing between the parties at all material times. The rebuttal evidence of the 1st Defendant in the court's view lacks cogence and is insufficient to displace the presumption. Accordingly, the court



finds that the 1st Defendant was vicariously liable for the negligence of the 2nd Defendant. The two Defendants are therefore wholly liable for the accident.

28. Turning now to the issue of quantum under the *Law Reform Act* and the *Fatal Accidents Act*, as well as special damages, the court firstly rejects the claim for general damages for loss of consortium canvassed at the submissions stage. In any event, this head of the claim is not included in the category of damages payable to the estate of a deceased person under the Acts above.
29. On general damages for pain and suffering, the evidence demonstrates that the accident occurred on or about 7th April, 2012 whereas the deceased died 11 days thereafter, on 18th April, 2012. The Plaintiff's proposal in the sum of Kshs.250,000/- has been considered against other comparable past decisions. In the case of *Hildab Wanjira Karigo v Value Pak Foods Limited* [2017] eKLR the court awarded a sum of Kshs. 150,000/- to the estate of a person who died 9 days after the accident, and in the case of *Mayfair Holdings Limited v Christine Rutto (suing on her own behalf and on behalf of the Dependants of the estate of Christopher Kibitok, Deceased)* [2020] eKLR the court awarded the sum of Kshs.200,000/- at the instance of a person who died within 8 days of the date of accident. Consequently, the court is persuaded to award the sum of Kshs.200,000/- for pain and suffering.
30. Regarding general damages for loss of expectation of life, the evidence on record shows that the deceased died aged 32 years and was in good health prior to death. Superior courts have typically awarded the conventional sum of Kshs.100,000/ under this head. Upon considering the conventional award of Kshs.100,000/ made in the case of *Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another* [2018] eKLR and the case of *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR the court is of the view that a similar award of Kshs.100,000/- would be adequate damages under this head of damages.
31. In respect of general damages for loss of dependency, the death certificate (P. Exhibit 2) shows that the deceased died at the age of 32 years. The Plaintiff suggested a multiplier of 33 years, citing the case of *Bash Hauliers v Dama Kalume Karisa & another* [2020] eKLR where the High Court sitting on appeal upheld use of a multiplier of 20 years in the case of a deceased person aged 32 years. Given that the deceased in that case died at the same age as the deceased herein, the court is of the view that a multiplier of 20 years is reasonable in the circumstances.
32. Regarding the dependency ratio, the Plaintiff has demonstrated that the deceased had a wife and minor child at the time of his death, and that both totally depended on the deceased's financial support. The dependency ratio of 2/3 proposed by the Plaintiff therefore appears reasonable.
33. The Court of Appeal in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR held that:

“In the case of *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the *Fatal Accidents Act* which we cite in part as follows:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which



must then be capitalized by multiplying by a figure representing so many years' purchases. (Emphasis added)

As emphasized above, the net income determines the multiplicand, and it is only net of statutory deductions.”

34. The Plaintiff tendered the deceased's pay slip for the month of March 2021 as P. Exhibit 11 to support the averment that the deceased earned a monthly net salary of Kshs. 65, 109/- at the time he died. The court will apply this sum as the multiplicand in assessing damages. Consequently, the award under the head of loss of dependency will be calculated as follows: $Kshs. 65,109/- \times 20 \times 12 \times 2/3 = Kshs. 10,417,440/-$.

35. I note in this case that the deceased's only child JZA, born in May 2012 is still a minor. Based on this fact and pursuant to the specific duty imposed on the court by Article 53(1) of the *Constitution* as read with Section 8 of the *Children Act* and by section 4(1) of the *Fatal Accidents Act*, the court will allocate the sum of Kshs. 4,000,000/- (Four Million Shillings) as the minor's share of the damages awarded under this head. This sum is to be invested for the benefit of the minor until she becomes of age, in a suitable interest earning scheme in a reputable banking/investment institution, in the joint names of the Plaintiff and the Deputy Registrar of this Court.

36. Moving on to special damages, the law is that special damages must be specifically pleaded and strictly proved. This was reaffirmed by the Court of Appeal in *David Bageine v Martin Bundi* [1997] eKLR when it stated thus:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v Jackson M. Nyambu t/a Sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabhani v City Council of Nairobi* [1982-88] IKAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter v. Hyde Part Hotel Limited* [1948] 64 TLR 177 thus;

“Plaintiff must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.”

37. The following constitute the special damages both specifically pleaded and strictly proved by way of receipts:



RECEIPT	AMOUNT IN KSHS.
Dated 13 th April, 2012 for transportation	5,500/-
Various general receipts	2,000/- 550/-
Towards part payment of hospital bill for MP Shah Hospital	275,000/- 10,000/- 400,000/- 100,000/- 100,000/-
Dated 21 st April, 2012 for post-mortem	20,000/-
Dated 21 st April, 2012 & 24 th April, 2012- funeral expenses	5,000/- 3,000/-
Dated 26 th April, 2012 & 1 st May, 2012-coffin	10,000/- 35,000/-
Dated 1 st May, 2012 & 3 rd May, 2012-hearse hire & transportation	3,500/- 65,000/-
Obituary advertisement	24,750/-
Copy of records	500/-
Dated 2 nd May, 2012-embalming	7,500/-
TOTAL	1,067,300/-

38. Consequently, and subject to the court's direction at paragraph 35 above regarding the share of damages due to the minor JZA, judgment is hereby entered in favour of the Plaintiff against the 1st and 2nd Defendants, jointly and severally as follows:

Liability - 100%

- a. General damages
 - Pain and suffering - Kshs. 200,000/-
 - Loss of expectation of life - Kshs. 100,000/-
 - Loss of dependency - Kshs. 10,417,440/-
- b. Special damages - Kshs. 1,067,300/-/-



Total Kshs. - 11, 784,740/-

39. The costs of the suit and interest are awarded to the Plaintiff.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of:-

For the Plaintiff: Mr. Kaminza

For the 1st Defendant: N/A

C/A: Carol

