



REPUBLIC OF KENYA



**Mogire & another v Ome & another (Suing as Personal Representatives
and Administrators of the Estate of Evans Kioko Ndeti - Deceased) (Civil
Appeal E004 of 2022) [2024] KEHC 5693 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL APPEAL E004 OF 2022**

F GIKONYO, J

MAY 9, 2024

BETWEEN

DOMINIC OBARE MOGIRE 1ST APPELLANT

JAMES OCHIENG ODHIAMBO 2ND APPELLANT

AND

EUPHENCIA KEMUMA OME 1ST RESPONDENT

ANTHONY NDETI KITIBU 2ND RESPONDENT

**SUING AS PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF EVANS KIOKO NDETI - DECEASED**

*(Being an appeal from the judgment and decree of Hon. W. K. Kitur
(SRM) delivered on 06/09/2020 in Kilgoris SPMCC No. 37 of 2019)*

JUDGMENT

Impugned judgment

1. This appeal challenges the judgment of the Senior Principal Magistrate's Court at Kilgoris in Civil Suit No. 37 of 2019 delivered on 06.09.2020 in which the trial court made awards as follows: -
 - a. Liability 100%
 - b. Pain and suffering Kshs. 30,000/=
 - c. Special damages Kshs. 40,000/=
 - d. Loss of expectation of life Kshs. 120,000/=
 - e. Loss of dependency Kshs. 2,016,000/=



- f. Costs of the suit plus interest from the date of judgment
Total =2, 206,000/=
2. The memorandum of appeal dated 15.09.2020 cited ten (10) grounds of appeal which relate to; i) liability and ii) quantum of damages.

Background

3. The suit arose from a road traffic accident, which occurred along Kilgoris- Kisii road on 28.09.2019 involving a motor vehicle registration no. KBS 106R Toyota probox. The deceased was traveling in the said motor vehicle as a fare-paying passenger. the said motor vehicle lost control in the Poroko area and rolled. The respondent blamed the driver of the appellants. The deceased lost his life in the accident. Particulars of negligence were set out against the driver of the appellants. The deceased was 39 years old.
4. The respondent during the trial called two witnesses- Euphencia Kemuma Omae and PC Patrick Mwangi.
5. The appellant closed their case without calling any witnesses.

Directions of the court

6. The application was canvassed by way of written submission.

Appellants' Submissions

7. The appellants reiterated and relied on their submissions filed in the trial court.
8. The court wishes to say something about relying in the appeal, on submissions filed in the lower court.
9. 'Every appeal to the High Court shall be in the form of a memorandum of appeal...' (Order 42 rule 1(1) of the CPR). And, 'The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively' (Order 42 rule 1(2) of the CPR).
10. An appeal shall contain the grounds on which the appeal is made. Whereas the appellate court will consider the record of the trial court, in well-established practice of the court, appellants substantiate their arguments in support of each ground of appeal, and this may not be particularly achieved by merely referring to submissions made in the lower court which did not address 'errors in principle or exercise of discretion by the trial court' of which forms an integral part of the appeal.
11. Another important observation about this practice is that; in an appeal a party may not merely repeat arguments that did not succeed at trial, unless the rejection of those arguments constituted the thrust of the appeal for which the intervention of the appellate court is urged.
12. Reference to the entire corpus of the submissions made in the lower court may also involve matters which are not subject of appeal, or arguments which were erroneous or wholly indefensible, from which, on hindsight, the concerned party wishes to depart. Confusion may also inadvertently ensue in that kind of practice.
13. To say the least, the practice may also portend laziness.
14. Back to the submissions by the appellant.



15. The Appellants submitted that the deceased never wore a seat belt and therefore partially to blame for his misfortune. He urged this court to reassess contributory negligence and apportion liability in ratio 50:50. The appellants relied on the cases of *Jones v Livox Quarries Ltd* [1952] 2 QB608, *Defrias v Rodney* 1998 BDA LR 15, *Mohammed Kassim & 2 Others v Salim Fumo Bwanamkuu* [2019] eKLR, *Sally Kibii and Another v Francis Ogaro* [2012] eKLR, *Gichuhi Mwaura Githinji v Greensteds School & Another* [2009] eKLR.
16. The appellants submitted that the award of Kshs. 120,000/= for loss of expectation of life was on the higher side. The appellants proposed Kshs. 100,000/=. The appellants relied on the case of *Kanga v Manyoka* [1961] EA 705, 709,713 & *Lukenya Ranching and Farming Coop Society Ltd v Kavoloto* [1979] EA, *Paul Kipsang & Anor v Titus Osule Osore* [2013] eKLR.
17. The appellants submitted that the trial court erred by awarding a global figure of Kshs. 12,000 and adopting the same as his salary yet the deceased's income or employment at cereal board was not proved. The minimum wage as of 1st May 2017 was Kshs. 6,415.55/=
18. The appellants submitted that no certificates of birth were produced to prove that the deceased had minor dependants. The appellants therefore urged this court to use the ratio of 1/3. The appellants relied on the cases of *Joseph Kahiga Gathii & Paul Mathaiya Kahiga (Suing as the administrators of the estate of the late Lydia, Wanjiku Kahiga & Elizabeth Murugi Kahiga both deceased v World Vision Kenya & 2 Others)* [2014] eKLR and *Roger Dainty V Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004* [2004] eKLR.
19. The appellants submitted that a 16-year multiplier was reasonable considering the vicissitudes of life the deceased would have lived up to 55 years. The appellants relied on the case of the Board of Governor of *Kangubiri Girls High School & Another V Jane Wanjiku*.
20. The appellants submitted that no receipts were produced to support any award of special damages. The appellants relied on the cases of *Maritim & Ano v Anjere* [1990-1994] EA 32 at 316, *Zacharia Waweru Thumbi v Samuel Njoroge Thuku* [2006] eKLR.

The Respondents' Submissions

21. The respondents reiterated and relied on their written submissions filed in the trial court dated 04/05/2022 together with the attached authorities filed in the lower court on 10/05/2022.
22. The respondents submitted that the trial court's finding on liability was reasonable, just, fair, and in line with a proven set of facts and evidence on record. The respondents relied on the cases of *Stella Nasimiyu Wangila & Another v Raphael Oduro Wanyamah* [2016] eKLR, *Viviane Anyango Onyango & Another v Charity Wanjiku* [2017] eKLR, *Nakuru HCCA No. 11 of 2013*.
23. The respondents submitted that the trial magistrate's finding on the quantum on the loss of dependency was reasonable, just fair adequate, and commensurate, and comparable to similar awards on loss of dependency considering that the deceased was 39 years old at the time of his death. He had 3 issues and five dependants who survived him. The respondents relied on the cases of *Kemfro Africa Ltd T/A Meru Express Serive Gathogo Kanini v AM Lubia and Olive Lubia* [1982-88] 1KAR 727 *Arrow Car Ltd Vs Elijah Shamalla Bimomo 7 2 others* [2004] eKLR, *Gicheru v Morton and another* [2005] 2KLR 333, *Beatrice WMinage Vs Consumer Transport Ltd & Another* [2014] eKLR, *Charles Oriwo Odeyo v Appollo Justus Andabwa & Another* [2017] eKLR, *George Kinyanjui t/a Climax Coaches & Anor Vs Hassan Musa Agoi* [2016] eKLR, *crown bus services Ltd & 2 Others v Jamilla Nyongesa and Amida Nyongesa 9 legal representatives of Alvin Nanjala (deceased)* [2020] eKLR.



24. The respondents submitted that an award of Kshs. 120,000/= for loss of expectation of life was sufficient. The respondents relied on the case of *Crown Bus Services Ltd & 2 Others v Jamilla Nyongesa and Amida Nyongesa* (legal representatives of Alvin Nanjala (deceased)) [2020] eKLR.
25. The respondent submitted that the award of special damages was based on pleadings and proof of costs of the petition for ad litem which receipt was produced in court.

Analysis And Determination

Duty of court

26. The appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein (Section 78(2) of the *Civil Procedure Act*).
27. The first Appellate Court should, therefore, evaluate the evidence afresh and make its conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of *Selle & Anor –Vs- Associate Motor Boat Co. Ltd* 1968 EA 123.

Issues

28. This court has been called upon to determine liability and the quantum of damages.

Liability

29. Who is to blame for the accident, and by what proportion if at all?
30. The trial court found the driver of the appellant's vehicle solely to blame for the accident, and so held the appellants liable.
31. The appellant ought for contributory negligence on a 50:50% basis.
32. Where does the evidence lead the court?
33. The road traffic accident herein occurred along Kilgoris -Kisii road on 28.09.2019 at 11.30 p.m. It involved motor vehicle registration no. KBS 106R Toyota probox. According to the evidence, the driver of the said vehicle lost control at the Poroko area and the vehicle rolled.
34. PW2-PC Patrick Mwangi testified that the accident was self-involving and the driver disappeared after the accident. He however did not visit the scene. The scene was visited by Cpl Manyara. He produced a police abstract as P Exh 4.
35. On cross-examination he stated that the vehicle was on the left side of the road as you headed to Kisii. He confirmed that the deceased was a passenger in the said motor vehicle.
36. In the police abstract, the police blame the driver of motor vehicle KBS 106R for the accident.
37. Liability draws upon the evidence. The evidence shows that the driver of the motor vehicle in question lost control of the vehicle and the vehicle rolled.
38. However, the appellant has implored the court to find the deceased liable for contributory negligence in the proportion of 50-50%. The reason given was on the basis that PW2 stated that the body of the deceased was behind the motor vehicle implying he was not wearing a seat belt.
39. The appellant alleges contributory negligence.



40. Contributory negligence refers to the negligence of the claimant which contributed to or wholly caused the harm.
41. Today, the harsh common law rule which barred recovery by a claimant who has contributed to his injury has been relaxed; the claimant recovers damages less his contribution.
42. The appellant bears the burden of proof on a balance of probabilities of contributory negligence by the deceased.
43. The claim made by the appellant was that the deceased had not put on the seat belt, thus contributing to his harm. These claims are quite specific and should be so proved by evidence. There are two aspects here. One, the appellant must prove the fact that the deceased did not wear a seat belt at the time of the accident- and of course show that, the seat belt had been provided and was in working condition. Two, the appellant must establish a causal link between the failure to belt-up and how it contributed to the harm.
44. Merely that the body of the deceased was found behind the vehicle does not of itself mean he was not wearing a seat belt at the time of the accident. The position of the body of the deceased may be due to variety of reasons especially following a violent accident. The appellant did not prove that the deceased was not wearing a seat belt at the time of the accident.
45. The appellants did not also establish how the deceased contributed to the accident. The claim for contributory negligence fails.
46. The evidence by PW2 supports that the appellants' driver was solely to blame for the accident.
47. Accordingly, the trial court did not err in placing liability at 100% against the appellants based on vicarious liability. The appeal on liability fails and is dismissed.

Quantum

48. An appellate court will only interfere with the trial court's discretion in the assessment of damages where; i) there is an error in principle; and or ii) the award of damages is so inordinately high or low as to represent an entirely erroneous estimate of damages (*Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR).
49. This claim was founded on the [Law Reform Act](#) and Fatal Accident Act. These laws provide for loss of expectation of life, funeral expenses and other special damages, pain and suffering, and for lost years-loss of dependency.

Loss of Dependency

50. Section 4 [Fatal Accidents Act](#) provides as follows: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parents and child if the person, whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgement shall find and direct.”



The concepts of multiplicand and multiplier

51. Simply, the formula for dependency, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.
52. See Ringera J (as he then was) in the case of Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988.
53. The appellants submitted that the deceased died at the age of 39 years and certificates of birth of the minor dependants were not provided. The appellants also contend that the respondents did not provide any documents to support their income claim. They suggested that, in the absence of proof of income minimum wage be applied to the deceased. According to them, a sum of Kshs. 6,415.55 is applicable. Therefore; $6,415.55 \times 16 \times \frac{1}{3} \times 12 = \text{Kshs.}410,595.2/=$
54. On loss of dependency, the respondents submitted that the deceased had dependants and worked at a cereal board though PW1 did not have documents to support her claim that he was employed.
55. PW1 produced chief's letter dated 01/04/2019 as P Exh 5(a). The chief's letter lists two minors, one adult, and two parents of the deceased, as dependants. The wife of the deceased is said to have left after the burial of the deceased.
56. This court finds that even without certificates of birth of the minors the letter from the chief is sufficient and serves the purpose of determining the dependants of the deceased. In the circumstances, this court find a dependency ratio of $\frac{2}{3}$ to be appropriate.
57. PW1 testified that the deceased worked at the cereal board but did not have the documents to support the same. Minimum wage for the year 2019 offer assistance. The award of Kshs. 12,000/= was sufficient and reasonable in the circumstances.
58. PW1 produced a certificate of death as P Exh 3. The deceased died at the age of 39 years.
59. In light of the possibility that the deceased would probably work until he was 60 years old, this court finds the multiplier of 21 years reasonable.
60. From the foregoing, this court finds no reason to disturb the award of Kshs. 2,016,000/= for loss of dependency.

Loss of expectation of life

61. The appellants urged this court to award Kshs. 100,000 for loss of expectation of life.
62. This court finds the award of Kshs. 120,000/= was reasonable.

Pain and suffering

63. The deceased died on the spot.
64. The appellants have not challenged this award.
65. This court will therefore uphold the award of Kshs. 30,000/=

Special damages

66. Of special damages, the appellants have stated the special damages were not proven



67. The respondents in their plaint pleaded Kshs. 31,540/= as special damages.
68. The trial court awarded Kshs. 40,000/= as special damages proved.
69. PW1 produced a receipt of Kshs. 500/= for obtaining a copy of records. She stated that the expenses for the funeral were about Kshs. 30,000/= but she did not produce any receipts.
70. In *Jacob Ayiga & Anor v Simion Obayo* [2005] eKLR, the court had awarded funeral expenses despite lack of proof, by way of receipts, on grounds that funeral expenses must be incurred in every case where someone died and there are arrangements and meetings for the funeral.
71. The Court of Appeal, in *Premier Diary Limited v Amarjit Singh Sagoo & another* [2013] eKLR, stated that:

“We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”

72. In light of the foregoing jurisprudence, the award of funeral expenses in the circumstances of this case was properly made. The respondent pleaded Kshs. 30,000/= for funeral expenses. This court awards Kshs. 30,000/= for funeral expenses.
73. The respondents are awarded Kshs. 30,550/= as special damages.
74. In an upshot, this court finds that the appeal herein succeeds, in part. Judgment is entered in favour of the respondents in the following terms-;
 - i. The appellants are 100% liable
 - ii. Loss of dependency Kshs. 2,016,000/=
 - iii. Loss of expectation of life Kshs. 120,000/=
 - iv. Pain and suffering Kshs. 30,000/=
 - v. Special damages of Kshs. 30,550/=
 - Total Kshs. 2,196,000/=
 - vi. The respondents are awarded the costs of this appeal and the suit at the trial court
 - vii. Interest on the award from the date of judgment
 - viii. Interest on special damages from the date of institution of this suit.
75. Orders accordingly



Appellant was duly served with notice of judgment. Copy of Judgment be transmitted to the respective email address of legal counsel for the parties.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH THE TEAMS APPLICATION,
THIS 9TH DAY OF MAY, 2024.**

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HON. F. GIKONYO M

JUDGE

In the Presence of:

Parties - Absent

C/A - Leken

