



**Onik Enterprises Limited v Vincent & another (Both Suing on
Behalf of the Estate of Richard Weire - Deceased) (Civil Appeal
E007 of 2023) [2024] KEHC 9009 (KLR) (16 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CIVIL APPEAL E007 OF 2023
GMA DULU, J
JULY 16, 2024**

BETWEEN

ONIK ENTERPRISES LIMITED APPELLANT

AND

KASALIRE VINCENT 1ST RESPONDENT

ATUHAIRE SARA 2ND RESPONDENT

**BOTH SUING ON BEHALF OF THE ESTATE OF RICHARD WEIRE -
DECEASED**

*(From the Judgment in Civil Case No. E044 of 2022 delivered by Hon.
A. M. Obura (Mrs.) (CM) on 13th February 2022 at Voi Law Courts)*

JUDGMENT

1. In a judgment delivered on 13th February 2023 the learned trial Magistrate on agreed ratio of liability of 15%:85% awarded the plaintiff total damages of Kshs. 2,899,452/= plus costs and interest at court rates, against the defendant, now appellant.
2. Dissatisfied with the decision of the trial court on the quantum of damages, the appellant who was the defendant in the trial court, has come to this court on appeal through counsel Murimi, Ndumia & Muchela Advocates on the following grounds:-
 1. That the learned trial Magistrate erred and misdirected herself in law by assessing damages that were manifestly excessive and incompatible with the current judicial awards for analogous injuries.
 2. The learned trial Magistrate erred in law in failing to appreciate and apply the principles applicable in assessment of damages.



3. The learned trial Magistrate erred in law and fact in failing to take into account relevant factors in evaluating the evidence on record on quantum.
 4. The amount of general damages awarded were inordinately high as to represent an entirely erroneous estimate and in reaching such high figure, the learned trial Magistrate must have acted on wrong principles of law.
 5. The learned trial Magistrate erred in law in only analysing the submissions of the respondent without considering the appellant's submissions and authorities relied on in their entirety.
3. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant's counsel, as well as the submissions filed by the respondent's counsel.
 4. This being an appeal against the quantum of damages awarded, this court has to be guided by the legal principle that the function of assessing damages is an exercise of discretionary power of a trial court, and that an appellate court can only interfere if the trial court took into account irrelevant factors, or failed to take into account relevant factors; or short of that the award is so inordinately high or so inordinately low that it must be a wholly erroneous estimate of the damage, or the court applied the wrong principles – see *Butt = Versus = Khan* (1981) KLR and *Catholic Diocese of Kisumu = Versus = Tete* (2004) eKLR.
 5. The appellant's counsel Murimi, Mbago, Muchela advocates in the written submissions has challenged each head of damages, though in the petition of appeal they appear to contest the general damages awarded. The respondent's counsel Njoroge Mwangi & Company on their part have asked this court to uphold the award.
 6. At the trial, only one witness PW1 Atuhaire Sarah the wife and administrator of the deceased Richard Weire testified. She produced many documents, including police records, and doctors reports without any contest. She was cross-examined by counsel for the appellant. The appellant did not tender any evidence but parties counsel filed written submissions on quantum of damages, as liability had been recorded by consent at 15%:85%
 7. On appeal, the appellant's counsel has submitted that the award of Kshs. 50,000/= for pain and suffering was an error as the deceased died instantly. In my view however, for a person who was awake and conscious at the time of the accident, it cannot be said that he did not suffer anxiety and momentary pain. I uphold the award.
 8. With regard to the award for loss of life expectancy, counsel did not challenge this in their submissions. In my view, the award of Kshs. 100,000/= assessed by the trial Magistrate was reasonable.
 9. Coming not to the award for loss of dependency, the respondent (PW1) testified that the deceased earned Kshs. 8,500/= per trip for 3 driving trips in a month. The trial Magistrate however applied Minimum Wages Guidelines of 18,109.90 for a truck driver, but counsel for the appellant has contended that the minimum wages at that time was Kshs. 7,240.95 per month. In my view the difference of the two amounts cannot be said to an error on the part of the Magistrate, as the minimum wages relied upon by counsel was for an unskilled person and not a deceased driver as in this case.
 10. With regard to the multiplier, the trial Magistrate used a multiplier of 20 years for a person who died at 39 years of age. Though the appellant's counsel has proposed a multiplier of 11 years, in my view that is a particularly short period and unjustified multiplier, for a driver by profession with no known medical ailment. I will thus uphold the award on loss of dependency as assessed by the Magistrate.



11. With regard to damages for funeral expenses, and special damages totalling Kshs. 230,000/= in my view, the award was within the discretion of the trial court and not inordinately high for a body that was to be transported from Coast Province in Kenya to Uganda for burial.
12. I now come to the award for loss of consortium. In my view, the cases cited by the trial Magistrate of Salvatore De Luca =versus= Abdullahi Hemed Khalil & Another (1994) eKLR and Motrex Company Ltd =versus= Anna Jelimo & Taraley Cheruto, show that this is a discretionary award depending on the facts and circumstances of each case.
13. The appellant's counsel has, on appeal, submitted that such award can only be made when a spouse is injured and incapacitated but not when the spouse died, and relied on the English case of Best =versus= Samuel Fox & Company Ltd ALL ER 394, and the Kenyan case of Innocent Keti Makaya Denge =versus= Peter Kipkore Cheserek & Another (2015) eKLR where it was held that such award can only be made where the victim is injured, but not dead.
14. I note that this claim of loss of consortium was pleaded in the plaint, and prayers.
15. In my view, there are conflicting decisions by superior courts in Kenya as to whether loss of consortium can be awarded when a spouse is killed in an accident. Thus it cannot be said that the trial Magistrate did not exercise her discretion according to the law, in this case where the award was specifically pleaded, and there is no evidence tendered to show that the marriage between PW1 and the deceased was not a loving relationship. I will thus uphold this award.
16. Consequently and for the above reasons, I find no merits in the appeal. I dismiss the appeal and uphold the damages awarded by the trial court. The appellant will pay the costs of this appeal to the respondents.

DATED, SIGNED AND DELIVERED THIS 16TH DAY OF JULY 2024 IN OPEN COURT AT VOI VIRTUALLY.

GEORGE DULU

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JUDGE

In the presence of:-

Alfred/Trizah – Court Assistants

Ms. Atieno for Appellant

Mr. Kazungu for the Respondent

