



Onzee (Suing as Legal Representatives of the Estate of Gabriel Onzee - Deceased) v Mutuku & 2 others (Civil Case 45 of 2018) [2024] KEHC 10723 (KLR) (16 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10723 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL CASE 45 OF 2018
FR OLEL, J
SEPTEMBER 16, 2024**

BETWEEN

DENNIS ODUOR ONZEE (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF GABRIEL ONZEE - DECEASED) APPELLANT

AND

JOYCE SYELENGE MUTUKU 1ST RESPONDENT

PUNJAB TRADING COMPANY LIMITED 2ND RESPONDENT

MESHACK KIOKO MUSYIMI 3RD RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT OF THE HONOURABLE
I.M. KAHUYA, PRINCIPAL MAGISTRATE DELIVERED ON
12TH APRIL 2018 IN MACHAKOS CMCC NO.956 OF 2013)***

JUDGMENT

A. Introduction

1. The Appellant herein was the Plaintiff in the primary suit, where he had sued the respondent's claiming special damages, general damages under the *Law Reform Act* and *Fatal Accidents Act*, loss of expectation of life, punitive/exemplary damages for occasioning an accident that fatally injured the deceased, plus costs and interest.
2. The Appellant vide his amended plaint averred that cause of action arose on the night of 11.11.2011 where the deceased, who was the Appellants brother, was lawfully walking off the Machakos-Kangundo road, when the 2nd and 3rd respondent's authorized driver, servant and/or their agents negligently drove and carelessly managed motor vehicle registration number KBQ 587F Toyota Probox (hereinafter referred to as the suit motor vehicle) that he allowed the said motor vehicle to veered off the road and knocked down the deceased causing him fatal injuries.



3. The 2nd respondent upon service, filed his statement of defence denying all the contents pleaded in the amended plaint and in the alternative alleged that if the accident did occur, then the same was caused solely and/or significantly contributed to by the negligence of the deceased, who therefore had to share blame for the said accident. He urged the court to dismiss the claim with costs.

B. Evidence

4. The Appellant called two witnesses while the respondent's called one witness. PW1 PC Tomlo stationed at Machakos police station-Traffic base, testified that on 11.11.2011, they received a report that an accident had occurred along Machakos- Kangundo Road at about 6.45 pm involving motor vehicle KBQ 547 F Toyota Probox and a pedestrian by the name Gabriel Onzee. The suit motor vehicle was being driving from Machakos to Kangundo direction and had hit the pedestrian while he was crossing the road. The said pedestrian had been rushed to Machakos level 5 hospital but was pronounced dead on arrival. PW1 produced the police abstract and in cross examination clarified that after the incident was reported, they went to the accident scene and rushed injured pedestrian to hospital, but who was pronounced dead on arrival at the said hospital.
5. PW2 Dennis Onzee, adopted his witness statement, where he stated that he was the legal administrate of the estate of deceased. The deceased was his younger brother and he had been involved in road traffic accident and as a result had succumbed to the injuries sustained. He blamed the respondent's driver for speeding and failing to maintain proper and effective control of the suit motor vehicle and should have been able to stop, swerve, brake or slowdown in order to avoid the occurrence of the said accident. At the time of the said accident, the deceased was a third year student at University of Nairobi perusing a degree in commerce and would have had a bright future had his life not been brutally cut short by the said accident
6. PW2 produced all his claim supporting documents, and further urged the court to award them special damages to the tune of Kshs.120,000/= for funeral expenses and Kshs.30,000/= for processing letters of administration and general damages under the *law reform Act* and *Fatal Accidents Act*. Upon cross examination, PW1 confirmed that from the chief's letter produced before court, he was recognised as a guardian and had no evidence to prove that the deceased was a student at Kenyatta University. He also did not know who was to blame for the accident, which had occurred. Further, as at the time the accident occurred, the deceased was unemployed and fully relied on him (PW2) for upkeep and maintenance.
7. DW1 Stephen Mutua relied on his witness statement, where he confirmed that he was a profession driver and had been driving from 1998. The suit motor vehicle belonged to his employer one Shadrack Muindi and was operated as a PSV Taxi operating within Machakos town and its environs. On 11.11.2011 he was driving the suit motor vehicle from Machakos town to Lita Area. He was driving at about 60km/hr and there were several motor vehicles by passing going in the opposite direction. The deceased emerged from behind a canter being driven in the opposite direction and abruptly cross the road from right side to the left side at very close range. He swerved to avoid the accident but the pedestrian was too close and as a result he was knocked down. The pedestrian hit his head against the suit motor vehicle windscreen and fell down unconscious. The police were called and the suit motor vehicle driven to the police station for inspection.
8. Upon cross examination, he admitted that he was charged with the offence of careless driving but had not been found guilty, though he did not have court proceedings to prove the same. DW1 asserted that he was driving on his correct, left lane but in order to avoid knocking down the deceased, he had served on the right side of his lane in order to avoid hitting other pedestrians/crowd of people standing by the



road side. Further he stated that the accident occurred too suddenly and he did not have time to brake before it occurred. Upon re-examination, DW1 reiterated that he had avoided swerving to the left side as there were many pedestrians on the said side and had he done so, he would have rammed into many people/pedestrians. The deceased too, had cross the road too fast and he did have an opportunity to spot him on time so as to avoid the accident which occurred.

9. The Trial court after hearing the parties and considering the submissions made, issued a judgment in favour of the Appellant as a follow;

- a. Liability at 70: 30 as against the 2nd Defendant
- b. Pain and suffering Kshs 60,000/=
- c. Loss of expectation of life Kshs 150,000/=
- d. Special damages Kshs 70,100/=
- e. Total Kshs. 280,100/=

Less 30% contribution Ksh. 84,030/=

Net total Ksh. 196,070/=

The same was to be distributed as follows;

1. Dennis Oduor Onzee Ksh.65,356/=
2. Billy Peter Onzee Ksh.65,356/=
3. Ann Eleen Watende Ksh.65,356/=

Plus cost and interest of the suit.

B. The Appeal

10. Being dissatisfied by this judgment, the appellant filed his memorandum of appeal on 15.06.2018. The same was premised on the grounds that;

- a. The learned Trial Magistrate erred in law upon finding the plaintiff had not proved his case.
- b. The learned Trial Magistrate erred in law by not awarding general damages, special damages and future medical expenses considering the injuries sustained by the Plaintiff.
- c. The learned Trial Magistrate erred in law and in failing to consider the Appellant's evidence in respect to dependency.
- d. The learned Trial Magistrate erred in law and in fact when she determined that although the deceased passed away as a direct consequence of a fatal road accident, damages pursuant to the Law Reform Act and Fatal accidents Act were not applicable and therefore could not be awarded.
- e. The learned Trial Magistrate erred in law in totally ignoring the Appellant's counsel submissions on issued of law and evidence and thereby arrived at an erroneous determination.
- f. The learned Trial Magistrate erred in failing to apply relevant and pertinent judicial comparable and trends regarding similar causes of action.



- g. The learned Trial Magistrate misapprehended the evidence pertaining to dependency in all material respects thus arriving at a completely wrong, grossly erroneous and unfortunate determination.
11. The Appellant urged this court to find that the respondents were solely liable for the accident that occurred, and proceed to set aside the judgement of the trial court both on liability and quantum. The appellant further urged the court to factor in and award the Appellant damages under loss of dependency, which the trial court had failed to award.
12. The Appeal was canvassed by way of written submissions.

B. Submissions

13. The Appellant filed submissions on 19.09.2023 and submitted that the trial court erred in failing to award damages under the heading of loss of dependency. The deceased died at a prime age of 26 years was an exemplary student, who had graduated from the university and at the time of his demise worked as a hotel attendant in Mombasa. The basic minimum wage for a cook in Nairobi, Mombasa or Kisumu under the Regulation of wages (General), (Amendment) Order 2017 was KShs.13,960.00/= and the same should have been used to assess their level of dependency. Reliance was placed on the case of Peggy Francis Heyes and others Vs Chunibhai J Patel and another cited by the court of Appeal of Eastern Africa in the case of Radhakrishen M Khemaney vs Mrs Lachba Murlidar (1958) EA where the formula to calculate wages was given.
14. The 2nd Respondent on the other hand filed submissions on 18.10.2023 and submitted that the Appeal as filed lacked merit and should be dismissed with costs. Regarding liability, it was submitted that it was settled law that the burden of proving negligence laid on the person who so alleged. It had been proved that the deceased was knocked down while crossing the road, and no contrary evidence had been presented to disapprove the same. The trial court in its wisdom still heaped more blame on the respondent's driver and this finding on apportionment of liability was fair and therefore the court was urged to uphold the same. Reliance as placed on the cases of Jones Vs Livox Quarries Limited [1952] 2 QB 608, Guadalupe Fathers & another vs Joseph Mukare Sakon [2008] e KLR and Mary Nabwire Omalla vs David Wachira & 2 others [2011] e KLR.
15. As regards Quantum, it was submitted that PW2 never proved the deceased was working as a hotel attendant in Mombasa nor was the appellant entitled to damages for loss of dependency as he was the deceased brother and therefore not a beneficiary of the deceased estate under section 4(1) of the *Fatal Accidents Act*. The Respondent relied on the case of Kenya Power Limited vs James Matata & 2 others (suing as the legal representatives of the estate of Nyange Masaga(deceased))[2016] e KLR and FMM & Another Vs Joseph Njuguna Kuria & Another [2016] e KLR.
16. On special damages, the 2nd Respondent submitted that only the receipts with revenue stamp were payable and those still had to be specifically proven. The trial court had awarded the Appellant special damages of KShs 70,100/= as per the receipts produced and the court was urged to uphold the same.

B. Analysis And Determination

17. I have considered this appeal, submissions and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it



did not see the witnesses as they testified and give due allowance for that. (see *Selle v Associated Motor Boat Co Ltd & Others* [1968] EA 123).

18. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held:

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

19. In *Nkube v Nyamiro* [1983] KLR 403, the same court stated that :

“A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion”.

20. This court has considered the grounds raised in the Memorandum of Appeal, the Trial Court record and the submissions of the parties and finds the main issues for determination herein is Whether the appellant was entitled to an awarded for loss of dependency and who should ultimately pay for costs of this Appeal.

21. The essence of the appellants claim was that the deceased had meet his death through a wrongful/ reckless act by the respondent’s driver which resulted in his brothers demise and for which his estate was entitled to compensatory damages. The Appellant listed himself, Billy Peter Onzee and Anna Eleen Watende as the as beneficiaries of the deceased Estate and also relied on the Assistant chief’s letter dated 20.06.2012, which introduced him as the guardian/ brother of the deceased. In his pleadings and evidence before the trial court, the Appellant stated that the deceased was 29 years old was a third-year university of Nairobi student, pursuing a decree in commerce and if his life had not been cut short by the said accident, he would have had a bright future ahead of him.

22. Unfortunately for the Appellant, he did not adduce any iota of evidence to show that the deceased was still a university student at 29 years, and/or that they depended on the deceased income to supplement their daily sustenance. To the contrary it was the appellant evidence on record that the deceased depended him and he used to support the deceased meet his daily needs. Further the Appellant without any basis in his submissions did contend that the deceased was a cook/hotel attendant in Mombasa but never provided proof of the same during trial. The evidence tendered to prove dependency was therefore extremely underwhelming and for that reason, the appellant failed to discharge the burden of proof expected of him.

23. The court further noted that Section 4 of the Fatal Accident’s Act provides that;

“

“(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.”

24. The appellant is not amongst the persons entitled to claim for dependency under the said Section 4(1) of the *Fatal Accidents Act* and the trial magistrate rightly did not award him damages under the said heading. In the case of *Moses Mairua Muchiri vs Cyrus Maina Macharia* (Suing as the Personal Representative of the Estate of Mercy Nzula Maina (Deceased) [2016] eKLR, the court therein held as follows: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

38. The Respondents were in support of the Trial Court award based on the global award. Based on the above decisions, this Court was convinced that the Trial Court did not err in principle to apply the global award method instead of a multiplier approach. This was because Kevin Onzere Lwegado (hereinafter referred to as “PW 1”) the deceased was aged nineteen (19) years at the time of the accident and was still a student in Form 2 in Bungasi Secondary School. The court noted that the Plaintiff had indicated that the deceased was a student in Form 3. Be that as it may, no document was tendered in evidence to prove that indeed the deceased was a student.
39. It would be difficult to determine what he would have turned out to be in life without speculating. Indeed, it would not have been practically possible to determine whether he would have lived to the age of 60-80 years or if he would have successfully completed his education or if after successful completion of his education he would have been employed or if would have been engaged business or what position he would have held if he was employed or what profession he would have ended up in or what he would have earned as an employee or how much he would made in business.
40. As his life was cut short due to the negligence of the Respondents and/or its driver and/or agent and/or servant and under circumstances, his beneficiaries were entitled to reasonable compensation. In a case like the instant one, a global award would have been most suitable to calculate the award for loss of dependency or loss years.
41. The same would have to be justifiable and based on some sort of rationale that can be followed and understood by all and sundry. Indeed, all court decisions must be reasoned in line with Order 21 Rule 4 of the Civil Procedure Rules, 2010. The same provides as follows:-“Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision (emphasis court).



.....

It was therefore clear that the Trial Court also erred in having awarded damages under the *Fatal Accidents Act* as the 1st Appellant and his sister were outside the purview of the beneficiaries envisaged in Section 4(1) of the *Fatal Accidents Act*.”

E. Determination

25. Having considered all the grounds raised in this Appeal, I do find that the Appellant and his siblings do not fall within the purview of the beneficiaries envisaged under Section 4(1) of the *Fatal Accidents Act* and therefore were not entitled to the award of loss of dependency.
26. Accordingly, the Appeal fails and the same is dismissed.
27. The respondents are awarded half costs of this appeal assessed at Kshs.75,000/= all inclusive.
28. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF SEPTEMBER, 2024.

In the presence of: -

Mr. Kilonzi for Appellant

Mr. J. Gakuya for Respondent

Susan/Sam Court Assistant

