



**Musembi & another v Okumu & another (Legal Representative of the Estate of Margaret Awiti Onunga) (Civil Appeal E871 of 2022) [2024] KEHC 12939 (KLR) (Civ) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12939 (KLR)

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

**CIVIL**

**CIVIL APPEAL E871 OF 2022**

**JN NJAGI, J**

**OCTOBER 24, 2024**

**BETWEEN**

**DANIEL KIMATHI MUSEMBI ..... 1<sup>ST</sup> APPELLANT**

**KAMILI PACKERS LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DOREEN OUMA OKUMU ..... 1<sup>ST</sup> RESPONDENT**

**BARACK ODHIAMBO ODONGO ..... 2<sup>ND</sup> RESPONDENT**

**LEGAL REPRESENTATIVE OF THE ESTATE OF MARGARET AWITI  
ONUNGA**

*(Being an appeal from the judgment and decree of Hon. E. Wanjala, Principal Magistrate, in Nairobi CMCC No. 3169 of 2020 delivered on 30/9/2022)*

**JUDGMENT**

1. The Respondents herein brought suit against the appellants in their capacity as the legal representatives of the estate of the late Margaret Awiti Onunga (herein referred to as the deceased) seeking general and special damages after the deceased was killed in a road traffic accident involving a vehicle belonging to the 2<sup>nd</sup> appellant which at the time of the accident was being driven by the 1<sup>st</sup> appellant. The respondents blamed the 1<sup>st</sup> appellant for occasioning the accident and the two appellants being liable in damages. After a full trial, the trial magistrate found the appellants wholly liable for the accident and awarded damages to the respondents that included:

Loss of expectation of life .....Ksh.100,000/=



Loss of dependency .....Ksh.271,458/=

Funeral Expenses .....Ksh.260,560/=

2. The appellants were aggrieved by the decision of the trial Magistrate and filed the present appeal wherein they raised the following grounds;
  1. While the respondent did not adduce evidence attributing negligence on the appellants, the Honourable court erred in finding the appellants liable for the suit accident;
  2. The Honourable court erred in holding that the appellants did not rebut the respondents' evidence on the accident, whereas the respondents were not eye witnesses to the accident and they did not adduce any evidence showing negligence on the appellant's part;
  3. The Honourable court proceeded on wrong principles while determining the issue of liability for the accident.
  4. The Honourable Court erred in awarding excessive sum for damages for loss of expectation of life and unreasonable sum for funeral expenses;
  5. The Honourable Court erred court in awarding damages for loss of dependency whereas dependency on the deceased was not proved;
  6. The Honourable Court erred in failing to take into account relevant factors and in proceeding on wrong principles while determining the issue of damages for loss of dependency and assessed an excessive sum.
3. The appellants prayed that the judgment of the trial court be set aside and or varied as the court deems fit and the appellants be awarded costs.
4. The appeal was disposed of by way of written submissions.

#### **Appellant's submissions**

5. The appellants submitted that the only witnesses called by the respondents were the son and the granddaughter of the deceased who did not witness the accident. Therefore, that their testimony cannot serve as evidence of allegations of negligence against the appellants.
6. The appellant submitted that the respondents' pleadings of negligence remained mere allegations without substantiating evidence. Reliance was placed in *CMC Aviation Ltd vs. Cruiser Ltd (No. 1) (1978) KLR 103; [1976-801] 1 KLR 835* to urge that mere allegations without supporting eye witness accounts or conclusive documentation are insufficient to establish liability.
7. It was submitted that although the police abstract demonstrated an accident had occurred, it did not apportion liability. The court was urged to set aside the trial's court decision on liability.
8. On the assessment of damages for loss of dependency, the appellant submitted that there was no proof that the deceased's children and grandchildren were dependant on the deceased nor was there evidence that the deceased paid school fees for her grandchildren or that she supported her middle-aged son. The appellant cited the case of *Chania Shuttle v Mary Mumbi (2017) eKLR* where the court held that:

In this case, there was nothing that was placed before the Trial Court to demonstrate that the deceased's children were dependent on the deceased. As they were African adult children, it was not unreasonable to have expected that they were the ones who were actually assisting the deceased and not the deceased assisting them. This court was therefore agreed with the



Appellant that the Respondent did not prove dependency of her adult children on the deceased prior to his death and that her assertion that he used to pay school fees for them was a misrepresentation and untenable.

9. The appellant urged this court to dismiss the award.

### **Respondent's submissions**

10. The respondents on their part submitted that the accident was caused solely due to the negligence of the appellants who hit the deceased while she was off the road.
11. It was submitted that the police abstract produced solely put the blame on the appellants' motor vehicle. That other than general denials the appellants did not challenge the evidence of the respondents' witnesses one of whom arrived at the scene a few minutes after the accident and confirmed that the deceased was not on the road but off the road at a petrol station.
12. On loss of dependency, the respondents submitted that the lower court was right in giving the minimum wages. That the court should take judicial notice that 70% of the Kenyan workforce in the informal sector are unable to prove income. Reliance was placed in the case of *Peter Wainaina & Jimcab Services Ltd vs. Lucia Ndulu Muindi & Peter Mulei Muindi Makueni HCCA No. 77 of 2019* to support this position.
13. In support of the multiplier of 5 years, counsel referred this court to the case of Wachira Joseph & 2 others vs. Hanna Wangui Mkumi & Another, Civil Appeal 29 of 2019.
14. Counsel submitted that the deceased was a well-known and appreciated member of the community with children, relatives and grandchildren that depended on her in one way or another. It was urged that the court dismisses the appeal with costs.

### **Analysis and Determination**

15. The appeal is on liability and on quantum of general damages.

### **Liability**

16. The respondents in their plaint pleaded that the deceased was a lawful pedestrian beside the road along Enterprise Road at Petrol Station when the 1<sup>st</sup> appellant drove motor vehicle registration No. KAZ 828B negligently that it lost control, veered off the road and knocked down the deceased causing her fatal injuries. The appellants on the other hand stated in their statement of defence that the accident occurred when the deceased attempted to walk through a busy petrol station without due care and attention and knocked herself against the appellants' motor vehicle.
17. Neither the respondents nor the appellants called any eye witness as to how the accident took place. Though both respondents testified in the case they were not eye witnesses to the accident. The appellants on the other hand did not call any evidence in the case.
18. The trial magistrate held that the appellants were wholly to blame for the accident on the basis that they did not tender any evidence in the case thereby leaving the respondents' case unchallenged.
19. In view of the fact that the respondents did not tender evidence on how the accident occurred, there was no basis of the trial magistrate holding that the respondents' evidence was unchallenged. It has severally been stated by this court that pleadings are not evidence. That a party is required to substantiate its pleadings in court during the hearing by way of evidence. Having not substantiated its



- pleadings, the pleadings of the respondents remained mere assertions. The court could not rely on such mere assertions to find the appellants wholly liable for the accident. The trial court erred in that respect.
20. There is no dispute that the deceased was hit by a motor vehicle belonging to the appellants. Neither side adduced evidence as to how the accident took place. In such a scenario, it is difficult to determine as to which party was to blame for the accident. It is trite that where it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident, both should be held equally to blame – see *Hussein Omar Farah v Lento Agencies* [2006] eKLR. For the reasons given above, I find that both parties were equally to blame for the accident. The finding of liability by the trial court is therefore set aside and substituted with a finding that both parties were equally to blame for the accident.

## Quantum

21. The principles which guide the court in determining whether or not to disturb an award of damages made by a lower court are well settled. The same were stated by the Court of Appeal in *Bashir Ahmed Butt –vs- Uwais Ahmed Khan* (1982 – 88) KAR 5 that:-
- “An Appellate court will not disturb an award of damages unless it is as inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material aspect and so arrived at figure which was inordinately high or low.”
22. The appellants submitted that there was no proof that the deceased’s children and grandchildren were dependent on the deceased nor was there proof that she paid school fees for her grandchildren.
23. The respondents on the other hand submitted that the evidence that the deceased had dependants was not challenged. The respondents cited the case of *Peter Wainaina & Jimcabs Services Ltd v Lucia Ndulu Muindi, Peter Mulei Muindi, Makueni HCCA No.77 of 2019* where the court held that:
- ...the fact of the children of the deceased being adults, alone does not mean that there can be no dependency, as a wife and even adult children, can still be dependants and the award of dependency herein cannot thus be faulted.
24. The respondents submitted that the deceased remained active even after the age of 70 years. The respondents supported the multiplier of 5 years applied by the trial court and relied on the case of *Wachira Joseph & 2 others v Hannah Wangui Makumi & another, Nyahururu, HCCA No.29 of 2019* where the court held that some work like that of a cobbler can be done by persons above the age of 70 years. It was submitted that selling fish can be done even past the age of 80 years.
25. I have considered the arguments raised on the award of damages. The appellants’ submissions were only confined to the award on loss of dependency. Though the appellants in their memorandum of appeal stated that the award on loss of expectation of life was excessive, there were no submissions made in that respect. The trial court awarded Ksh.100,000/= for loss of expectation of life. I find the award to have been within the acceptable range for an award on loss of expectation of life.
26. On dependency, it is trite that dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed Vs Kayuma Mvurya & Another* [2017] eKLR as follows:-
- “Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence.



Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

27. The 1<sup>st</sup> respondent testified that he was a son to the deceased. That the deceased died at the age of 74 years. That she was a businesswoman involved in the business of selling fish. That she was earning Ksh.30,000/= per month. She used to support him financially by paying school fees for his children and buying food stuff as he was a casual labourer. He said that his sister died and left three children under the care of the deceased.
28. The other beneficiaries named in the plaint are grandchildren of the deceased - Doreen Ouma Okumu (the 2<sup>nd</sup> respondent) aged 30 years, Fredrick Otieno aged 37 years, Fabian Awiti aged 19 years and Gilbert Otieno aged 13 years. Doreen testified in court that the deceased was her maternal grandmother. That the deceased was in the business of selling fish. That she used to help her parents pay school fees for her at Nairobi Industrial Institute where she was then studying and at Mariwa secondary and Mariwa primary schools where her younger brothers, Fabian and Gilbert were then studying. She stated in cross-examination that she had not produced any documents to show that the deceased used to pay school fees for them.
29. Though the deceased was said to be in the business of selling fish, no documents were produced to prove so. It is however trite that the estate of a deceased should not be denied loss of dependency on the basis that the deceased never kept records to prove his/her occupation. In *Jacob Ayiga Maruja & Another V Simeon Abayo, Civil Appeal No.167 of 2002*, the Court of Appeal stated that;
- “We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”.
30. The 1<sup>st</sup> respondent stated that he was a casual labourer and that the deceased who was his mother used to assist him in paying school fees for his children and buying them foodstuff. The 2<sup>nd</sup> respondent told the court that the deceased was her grandmother and she would assist to pay her school fees and that of her siblings, Fabian and Gilbert. I accept the evidence of the two respondents that the deceased was a fish seller. It is acceptable in an African family set up that a mother would assist to pay school fees for her grandchildren where her son/daughter does not have adequate resources to do so. I am satisfied in this case that the deceased used to assist in paying school fees for her grandchildren. I therefore find that the two respondents herein and the deceased’s grandchildren, Fabian and Gillbert, were dependants of the deceased. There was however no evidence that Fredrick Otieno, aged 37 years, was dependent on the deceased.
31. The respondents claimed that the deceased was earning Ksh.30,000/= per month. The trial magistrate in his judgment said that there was no evidence to prove the earnings of the deceased and in the absence of the same, he was impelled to be guided by the minimum government wage guidelines which in 2019 was Ksh.13,572.90 for a casual worker. He adopted a multiplier of 5 years and calculated the award for loss of dependency as follows –
- $$13,572.90 \times 5 \times \frac{1}{3} = 271,458.$$
32. The deceased died at the age of 74. In the case of *Beatrice W Murage v Consumer Transport Ltd & another* [2014] eKLR, the court applied a multiplier of 4 years where the deceased died at the age of



74 years. I find the multiplier of 5 years used by the trial court to have been reasonable. Similarly, I find the multiplicand of Ksh. 13,572.90 used by the trial court to have been reasonable. In view of the fact that the deceased was only assisting to meet the family responsibilities, the dependency ratio adopted by the trial magistrate of 1/3 is not to be faulted. In the final end, I do confirm the loss of dependency awarded by the trial court.

### **Special damages**

33. The appellants faulted the award of Ksh.260,560/= in funeral expenses as being unreasonable. The trial court stated in its judgment that the special damages were proved by way of receipts. I have looked at the claim on funeral expenses. The same were itemized and supported with receipts. The appellants did not point out the particular item that they were objecting to in that list. I do not find the award on funeral expenses to have been excessive or unreasonable.

### **Disposition**

34. In view of the foregoing, the appeal succeeds only on the finding of liability. The finding of the trial court on liability is set aside and substituted with a finding that liability is apportioned in the ratio of 50:50 between the appellants and the Respondents. The rest of the grounds of appeal are dismissed.

35. Since the appeal has partially succeeded, I order each party to bear its own costs to the appeal. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Kamau for Appellants

Mr. Mukamani holding brief for Mr Nyareru for Respondents

Court Assistant - Amina

30 days Right of Appeal

