



**Wanyanga & another (Suing as the Legal Administrators of the Estate of Christopher Chieng Otiende-Deceased) v Ndora & another (Civil Case 236 of 2019) [2023] KEHC 2532 (KLR) (Civ) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2532 (KLR)

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

**CIVIL**

**CIVIL CASE 236 OF 2019**

**JK SERGON, J**

**MARCH 22, 2023**

**BETWEEN**

**SHEILA MAXELLEN ADHIAMBO WANYANGA & WALTER AMOLO OTIENDE (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF CHRISTOPHER CHIENG OTIENDE-DECEASED) ..... PLAINTIFF**

**AND**

**SIMON MWAURA NDORA ..... 1<sup>ST</sup> DEFENDANT**

**IBRAHIM ABDULLAHI ADAN ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Sheila Maxellen Adhiambo Wanyanga & Walter Amolo Otiende, the plaintiffs herein and the legal administrators of the estate of Christopher Chieng Otiende (“the deceased”) instituted a suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants by way of the plaint dated 30<sup>th</sup> October, 2019 and sought for general damages under the *Law Reform Act*, Cap. 26 Laws of Kenya and the *Fatal Accidents Act*, Cap. 32 Laws of Kenya, special damages in the sum of Kshs.572,750/= plus costs of the suit and interest thereon.
2. The 2<sup>nd</sup> defendant is sued in his capacity as the registered/ beneficial owner of motor vehicle registration number KBB 652G (“the subject motor vehicle”) at all material times while the 1<sup>st</sup> defendant is sued in his capacity as the driver of the subject motor vehicle at all material times.
3. The plaintiffs pleaded in the plaint that sometime on or about the 2<sup>nd</sup> day of December, 2016 the deceased was traveling as a lawful passenger aboard the subject motor vehicle along Mombasa Road when the 1<sup>st</sup> defendant negligently drove the subject motor vehicle, causing the deceased to fall off near Eka Hotel in an attempt to alight, resulting in fatal injuries to the deceased. The particulars of negligence are set out under paragraph 5 of the plaint.



4. It is pleaded in the plaint that the deceased who was a young man aged 32 years and enjoying robust health prior to his death has left behind the following dependants:
  - i. Sheila Maxellen Adhiambo Wanyanga Widow
  - ii. CKW Son (4 years)
5. Upon the request by the plaintiffs, the court entered an interlocutory judgment on 14<sup>th</sup> February, 2020 against the defendants for failing to enter appearance and/or file their statements of defence despite having been served with summons. Consequently, the matter proceeded for formal proof
6. At the hearing, the 1<sup>st</sup> plaintiff testified, and called one (1) additional witness.
7. The 1<sup>st</sup> plaintiff tendered her signed witness statement as her evidence-in-chief and further produced her list and bundle of documents as exhibits.
8. The 1<sup>st</sup> plaintiff testified that she was married to the deceased and that together they had a son aged 6 years at the time of her testimony.
9. The 1<sup>st</sup> plaintiff further testified that prior to his death, the deceased worked with UBA Bank as a Relationships Manager and earning a monthly salary in the sum of Kshs.250,000/=.
10. Simon Odongo who was PW2 also adopted his signed witness statement as evidence.
11. Upon close of the formal proof hearing, the plaintiffs were directed to put in written submissions.
12. On liability, the plaintiffs submit that they had tendered evidence to prove on a balance of probabilities that the defendants are entirely to blame for the material accident which resulted in the death of the deceased.
13. On quantum, the plaintiffs contend that they are entitled to an award on general damages for pain and suffering and propose the sum of Kshs.50,000/= with reference to the case of *Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong* [2015] eKLR where the court awarded the sum of Kshs.20,000/= under this head.
14. The plaintiffs also propose that the estate of the deceased be awarded the sum of Kshs.200,000/= on damages for loss of expectation of life, citing the case of *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba* [2019] eKLR in which the High Court sitting on appeal upheld a similar award made under that head.
15. In respect to damages under the head of loss of dependency, the plaintiffs propose use of a multiplier of 29 years, a multiplicand of Kshs.240,000/= and a dependency ratio of 2/3 to be tabulated as follows:
 
$$\text{Kshs.240,000} \times 12 \times 29 \times \frac{2}{3} = \text{Kshs.55,680,000/=}$$
16. On special damages, the plaintiffs urge this court to award the sum of Kshs.572,750/= pleaded in the plaint.
17. Upon considering the evidence on record, the submissions and authorities relied upon by the parties, I established that the twin issues for determination are liability and quantum.
18. On the first limb to do with liability, following my examination of the evidence on record, both oral and documentary, it is clear that an accident took place on the material date and at the place pleaded in the plaint, the result of which the deceased lost his life.



19. On the subject of ownership of the subject motor vehicle, the plaintiffs tendered a copy of records as an exhibit, indicating that the 2<sup>nd</sup> defendant was the registered owner of the subject motor vehicle at all material times.
20. In the absence of evidence to the contrary, I am of the view that the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of Section 8 of the [Traffic Act](#), Cap. 403 Laws of Kenya which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.
21. Furthermore, the plaintiffs tendered the police abstract relating to the accident as an exhibit, the contents of which I also considered. According to the police abstract, the 1<sup>st</sup> defendant was indicated as being the driver of the subject motor vehicle on the date of the accident.
22. In the absence of any contrary evidence, a police abstract is deemed to be conclusive proof of ownership. This was the reasoning taken by the Court of Appeal in the case of [Wellington Nganga Muthiora v Akamba Public Road Services Ltd & another](#) (2010) eKLR as referenced in the case of [Lochab Transport \(K\) Limited & another v Daniel Kariuki Gichuki](#) [2016] eKLR that:
 

“Where police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a *prima facie* evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiffs would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary”
23. From the foregoing, I am satisfied that the plaintiffs have proved on a balance of probabilities that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were at all material times the driver and registered owner of the subject motor vehicle, respectively.
24. On the subject of negligence, in addition to the documentation tendered as exhibits, the plaintiffs pleaded the doctrine of *res ipsa loquitur* to further support their claim for negligence against the defendants.
25. The above doctrine was aptly discussed in the authority of [Susan Kanini Mwangangi & another v Patrick Mbithi Kavita](#) [2019] eKLR with reference to the case of East African Court of Appeal’s decision in [Embu Public Road Services Ltd. v Riimi](#) [1968] EA 22 where the following was enunciated:
 

“The doctrine of *res ipsa loquitur* is one which a plaintiffs, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiffs, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant...The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”



26. From the foregoing, I observed that once pleaded, the *res ipsa loquitur* doctrine presupposes that a plaintiff has discharged his or her burden of proof and in order to escape liability, a defendant is required to demonstrate that there was either no negligence on his or her part, or that there was contributory negligence.
27. In the present instance, it is apparent that the plaintiffs having discharged the burden of proof by pleading the doctrine, it fell upon the defendants to disprove the same but they did not.
28. In the premises, I am satisfied that the plaintiffs have made their case against the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and I hereby enter a finding of 100% liability against the defendants, jointly and severally, upon finding the 2<sup>nd</sup> defendant vicariously liable.
29. Having settled the first issue, I turn my attention to the second issue on quantum and which I shall address under the following heads.

### **General damages**

#### **Pain and suffering**

30. From the pleadings and evidence, it is apparent that the accident took place on or about the 2<sup>nd</sup> day of December, 2016, with both the autopsy report and the death certificate further confirming that the deceased died on the date of the accident while receiving treatment at the Mater Hospital.
31. Upon my consideration of the award in the sum of Kshs.50,000/= suggested by the plaintiffs, I am persuaded to award the sum of Kshs.30,000/= upon taking into account the case of *Lucy Wambui Kiboro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong* [2015] eKLR relied upon by the plaintiffs and where the court awarded the sum of Kshs.20,000/= under this head at the instance of a deceased person who died on the date of the accident.

#### **Loss of expectation of life**

32. The evidence on record shows that the deceased died at the young age of 31/32 years. There is nothing to indicate that he was of ill health.
33. Upon taking into account the sum proposed by the plaintiffs, I am persuaded to award the sum of Kshs.200,000/= sought, with reference to the authority of *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR cited in the plaintiffs' submissions and where a similar award was upheld.

#### **Loss of dependency/lost years**

34. Going by the evidence which I have examined, I note that the plaintiffs tendered the offer of employment dated 30<sup>th</sup> October, 2016 to support the averments that the deceased worked with UBA Bank at all material times in the capacity of Relationships Manager and earning a gross salary of Kshs.240,000/=. It however remains unclear what his net salary amounted to.



35. It is trite law that the net income is applied in calculating the multiplicand. This position was succinctly stated by 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 when it held thus:

“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’ purchase. (Emphasis added)

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

36. Furthermore, the court in the case of in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR reasoned that:

“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.”

37. In the absence of anything to indicate the deceased’s net earnings, I am of the view that a global mode of assessment would be more suitable and pragmatic than a multiplier approach.

38. Upon my consideration of the evidence tendered to indicate that the deceased was aged 32 years at the time of his death, I further considered the case of *Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased))* [2021] eKLR where the High Court sitting on appeal upheld the global sum of Kshs.2,000,000/= awarded under this head to the estate of a person who died aged 40 years. I also considered the case of *Mwai Kibaki Foundation v Alice Wanjiru & another (Suing as personal representatives of David Kibungu Murugi - Deceased)* [2019] eKLR where the High Court sitting on appeal upheld application of a global sum of Kshs.1,600,000/= awarded to the estate of a deceased person aged 33 years.

39. Taking into account the age of the deceased herein, the number of years he would have worked and the nature of his profession, inflation rates and the uncertainties of life, I will award a reasonable figure of Kshs.2,000,000/= under this head.

### Special damages

40. It is trite law that special damages must be both specifically pleaded and strictly proved. upon my examination of the pleadings and evidence, I find that the plaintiffs only availed receipts totaling the sum of Kshs.392,550/= to prove funeral and other related expenses incurred as well as costs incurred



in obtaining the copy of record and expenses incurred towards legal fees. I can therefore only award the above sum.

41. Consequently, I hereby enter judgment in favour of the plaintiffs and against the 1<sup>st</sup> and 2<sup>nd</sup> defendants jointly and severally in the manner hereunder:

Liability 100%

- a. General damages
    - i. Pain and suffering Kshs. 30,000/=
    - ii. Loss of expectation of life Kshs. 200,000/=
    - iii. Loss of dependency Kshs.2,000,000/=
  - b. Special damages Kshs. 392,550/=
- Total Kshs.2,622,550/ =
- c. Costs of the suit are awarded to the plaintiffs. The plaintiffs shall also have interest at court rates on the special damages from the date of filing of the suit until payment in full and interest at court rates on the general damages from the date of judgment until payment in full.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22<sup>ND</sup> DAY OF MARCH, 2023.**

**J. K. SERGON**

**JUDGE**

In the presence of:

Achola for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

No Appearance for the 1<sup>st</sup> Defendant

No Appearance for the 2<sup>nd</sup> Defendant

