



Chelule ((Suing as Legal Representatives of the Estate of Peter Kipkirui Cheruiyot - Deceased)) v Kipruto & another (Civil Suit E001 of 2022) [2023] KEHC 4116 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEHC 4116 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E001 OF 2022
RN NYAKUNDI, J
MAY 10, 2023**

BETWEEN

**WILLY CHERUIYOT CHELULE PLAINTIFF
(SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF PETER
KIPKIRUI CHERUIYOT - DECEASED)**

AND

**MATHEW KIPRUTO 1ST DEFENDANT
ELIJAH KIBIWOT 2ND DEFENDANT**

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 12th January 2022 seeking the following reliefs;
 1. General damages
 2. Special damages (Kshs. 206,887/-)
 3. Costs of the suit
 4. Interest
2. Any other relief deemed fit to grant by this Honourable Court.
3. The cause of action arose from an accident that occurred on 20th December of 2020. The plaintiff claims that on the said date at 2245 HRS at Shell Petrol station along Eldoret - Kapsabet road, Dr. Peter Kipkirui Cheruiyot (deceased) was lawfully riding his motorcycle registration number KMDV 662F when the 1st Defendant, drove the said motor vehicle KBK595E so negligently, recklessly and/or carelessly at a high speed without any due care, regard and/ or attention that he caused the vehicle to lose control and caused an accident.



4. The defendants failed to enter appearance or file a defence to the suit. They were served with summons dated 26th January 2022, evidenced by an affidavit of service dated 15th July 2022. The plaintiff subsequently filed a request for judgement on 15th July 2022 seeking interlocutory judgement.
5. The matter then proceeded by way of formal proof. The plaintiff filed submissions on 18th April 2023. Learned counsel for the plaintiff submitted that it is clear that from the documentary evidence produced by the Plaintiff that the Defendants are liable for accident. He relied on the Police Abstract which confirms that an accident occurred on 20th December, 2020 at 22.45 Hrs at shell Petrol Station along Eldoret - Kapsabet Road. He urged that the police investigated the death of the deceased and found the 1st defendant culpable, charging him with the offence of causing death by dangerous driving before the Chief Magistrate Eldoret Law Courts. Counsel submitted that the court take Judicial Notice that the 1st defendant is facing Criminal Charges for the offence of causing death by dangerous driving and the particulars of negligence as pleaded in the plaint.
6. It is the plaintiff's case that the injuries sustained by the deceased as a result of the accident were severe and was rushed to Moi Teaching and Referral Hospital for treatment. The deceased, Dr. Peter Kipkirui Cheruiyot underwent several treatments in efforts to save his life but he succumbed to the injuries sustained and was pronounced dead at 10:30 am.
7. Learned counsel for the plaintiff submitted that the plaintiff seeks the following in form of damages;-
 - a) Damages under Law Reform Act and Fatal Accidents Act.
 - b) Special damages of Kshs 206,887/=.
 - c) Costs of the suit
 - d) Interest in a and b above
 - e) Any other further relief that the court may deem fit and just to grant
8. He urged that he has tendered proof of the expenses in support of the amount sought for special damages.
9. The plaintiff sought compensation under the Fatal Accident Act, premising the claim on the fact that the deceased was aged 29 years and in good health at the time of his death. That he was a medical doctor and a registrar surgeon at Moi Teaching and Referral Hospital and undertaking his studies in Master of Medicine in General Surgery. He was earning Kshs. 254,560/= per month, 2/3 of which went to the plaintiff and other family members for their upkeep.
10. During his testimony, PW1 confirmed the surviving dependants. The deceased was survived by father, mother and three siblings who were affected. Counsel urged that the Multiplicand and/or the Multiplier approach employed is dependent on the number of years that the deceased would have worked. The deceased, being a medical doctor and a registrar surgeon at Moi Teaching and Referral Hospital, the deceased would have possibly worked to a retirement age of 60 years.
11. Under the law reform act, counsel submitted, the heads of damage claimed are under the heads of pain and suffering and loss of expectation of life. He urged that the deceased was rushed to hospital and taken to casualty. He was then taken for some radio-logical investigations and lost consciousness shortly after. He was resuscitated for about 1 hour or more and regained vital functions after which he was taken Intensive Care Unit then to theatre. He then succumbed to his injuries on 21st December at around 10:30 am. Counsel urged the court to award Kshs. 100,000/- for pain and suffering as the deceased passed on shortly after the accident.



12. Under the head of loss of expectation of life, counsel submitted that the defendant was 29 years old and prayed the court award a conventional sum under this head. A sum of Kshs. 150,000.00/= reflects the current awards by the Courts. With respect to the special damages, counsel submitted that the same were specifically proved and evidenced by the Plaintiff. In the Plaintiff, the Plaintiff had pleaded a total of Kshs. 206,887 and the same supporting documents produced by the plaintiff. As for funeral expenses, counsel submitted that the mourners had to be fed during the burial and assign a figure thereof of Kshs. 30,000.00. he cited the case of Nore vs Masika (2004) eKLR in support of this submission.
13. Learned counsel for the plaintiff submitted that the damages payable in this case should be as follows;
14. The damages under the *Law Reform Act*, the deceased shortly after the accident, damages payable for pain and suffering be a figure of Kshs. 100,000/= and for loss of expectation of life, a figure of Kshs. 150,000/=;

The damages payable under the *Fatal Accidents Act* for loss of dependency, taking a multiplier of 31 years and a dependency ratio of 2/3 would likely be calculated as follows:

$$254,560 \times 12 \times 31 \times \frac{2}{3} = 63,130,880/=$$

Which yields a total sum of Kshs 63,130,880/=.

Special Damages Kshs 206,887/=.

Food Expenses during Funeral Kshs 30,000/=

Analysis & Determination

15. The main issue for determination is whether the plaintiff has satisfied this court that he is entitled to the relief sought by way of formal proof.
16. In *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, Emukule J observed: -

..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

17. In *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

18. The upshot of the foregoing is that the court has to consider the testimony of the witnesses and the evidence tabled before court to determine whether the plaintiff has proved its case beyond a balance of probabilities.



19. The crucial evidence to be considered is that which apportions liability on the part of the defendants. I have considered the witness statements and the evidence of the plaintiff's witnesses and none of them witnessed the accident occur therefore they cannot give direct evidence on the same.
20. I have perused the documentary evidence and my attention is drawn to the police abstract that was filed on 23rd December 2020. From the abstract, it is deductible that the deceased was involved in an accident with motor vehicle registration KBK 595E. The question that arises therefrom is on the ownership of the motor vehicle as this would establish the parties liable for the accident. It is trite law that the ownership of motor-vehicle is to be proved by the registration of a person as the owner of the motor vehicle unless proved otherwise.
21. The Court of Appeal in the case of; Joel Muga Opinja -vs- East African Sea food limited (2013) eKLR stated that

‘we agree that the best way to proof ownership would be to produce to the court a document from the Registrar of Motor-vehicle to show who the registered owner is, but when the abstract is not challenged and is produced in court without any objection the contents cannot later be denied.’
22. The police abstract lists the owner of the vehicle as the 1st defendant. As the same was not challenged, it is my strong view that the nexus between the defendants and the accident was sufficiently proved and therefore the defendants are liable for the accident.

Quantum

23. The next issue for determination is the quantum of damages.

Special damages

24. It is trite law that special damages must be specifically pleaded and proved. The plaintiff prayed for special damages amounting to Kshs. 206,887/-. The plaintiff produced an in-patient invoice dated 28th December 2020 for Kshs. 186,587.00. There is also a receipt for mortuary and hearse services for Kshs. 20,200/-. There is a police abstract on record and therefore, it is my considered view that the special damages were pleaded and proved. The plaintiff is entitled to special damages of Kshs. 206,887/-.

Awards under Fatal Accident Act

Loss of dependency

25. The formula for dependency is calculated by 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.
26. The deceased was aged 29 years at the time of his death therefore, considering all vagaries and vicissitudes, he would have lived to a retirement age of 60 years thus putting the multiplier at 31 years. His annual net income, evidenced by his payslip was Kshs. 254,560 x 12 = 3,054,720/-. The dependency ratio as per the testimony of PW1 was 2/3. It follows that the award under the Fatal Accident Act would be calculated as follows;

$$3,054,720/- \times 31 \times 2/3 = 63,130,880/-$$



Damages under Law Reform Act

27. Courts have often awarded a global sum for pain and suffering, premised on the time the deceased suffered before passing away. In Civil Case No. 56 of 2014 Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another (2016) eKLR Hon. P. Nyamweya observed:-

As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.”

28. The plaintiffs have proposed a figure of Kshs. 100,000/- and I accordingly award the same under this head.
29. On loss of expectation of life, the plaintiff proposed a figure of Kshs. 150,000/-. In this regard, courts often award a global sum of Kshs. 100,000/-. In Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) eKLR and in Civil Appeal No. 113 of 2012 Makano Makonye Monyanche v Hellen Nyangena (2014) eKLR the Learned Judge R.N. Sitati held:-

I find no reason to interfere with the award on loss of expectation of life under Law Reform Act as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries.” I have considered the circumstances of the case and the deceased being a medical doctor; and I find that an award of Kshs. 150,000/- shall suffice.

30. The plaintiff claimed funeral costs of Kshs. 30,000/- being the cost of food for the mourners. I note that the same was not pleaded in the plaint. In the case of JNK (Suing as the Legal Representative of the Estate of MMM (Deceased) vs Chairman Board of Governors Boys High School [2018] eKLR Gikonyo J. held:-

In spite of lack of receipts, this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”

31. In Premier Diary Limited vs Amarjit Singh Ssagoo & Another [2013] eKLR the Court of Appeal took the view 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 or otherwise inter that their 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.”



32. It is my considered view that the plaintiff is entitled to the sum sought for funeral expenses as it is not an unreasonable amount with regards to the same. The court is alive to the fact that the bereaved had to bury the deceased and they must have incurred costs in the circumstances.
33. The upshot of the foregoing is the claim succeeds in its entirety. I hereby enter judgment as against the defendants as follows;
- Liability: 100%
- Special Damages: 206,887/-
- Damages under the *fatal accidents act*;
- Loss of dependency 63,130,880/-
- Damages under *law reform act*
- Pain and suffering: 100,000/-
- Loss of expectation of life: 150,000/-
- Funeral expenses 30,000/-
- Total: 63,617,767/-
- Costs and interests of the suit

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 10TH DAY OF MAY 2023.

.....

R. NYAKUNDI

JUDGE

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In the Presence:

Kirwa Koskei & Company Advocates

Mathew Kipruto

