



Muriithi & another (Legal Representative of the Estate of John Macharia Njoki - Deceased) v Rentco East Africa Limited & another (Civil Case E006 of 2023) [2024] KEMC 186 (KLR) (18 September 2024) (Judgment)

Neutral citation: [2024] KEMC 186 (KLR)

**REPUBLIC OF KENYA
IN THE LAMU LAW COURTS
CIVIL CASE E006 OF 2023
FM MULAMA, RM
SEPTEMBER 18, 2024**

BETWEEN

JANE WAMBUI MURIITHI AND HALIMA JUMA TABU (LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN MACHARIA NJOKI - DECEASED) PLAINTIFF

AND

**RENTCO EAST AFRICA LIMITED 1ST DEFENDANT
THE HON ATTORNEY GENERAL 2ND DEFENDANT**

JUDGMENT

A. Introduction.

1. By a plaint dated 18th January 2023 the plaintiffs seek the following prayers from the court.
 - a. General damages under the Law Reform and Fatal Accident Act.
 - b. Burial expenses as proved at the hearing.
 - c. Special damages for Kshs.36,550/=
 - d. Costs of the suit
 - e. Interests on (a),(b),(c) and (d)
 - f. Any other relief as this honourable court may deem fit and just to grant.
2. The suit is opposed by both defendants vide their respective statements of defence dated 12th and 11th May 2023 respectively.



Plaintiff's case

3. The plaintiff stated that on 14/4/2022 received a call from a nurse from Mokowe health centre who informed her that her nephew the deceased was at their facility following a road traffic accident and he is to be referred to King Fahad county hospital for treatment as he was in critical condition.
4. He was further informed by the police that the accident happened when the deceased was lawfully cycling his bicycle from Hindi heading towards Mokowe on the left side while facing Mokowe and upon reaching Kiongoni area motor vehicle registration number GKB 579U came from behind at a high speed and overtook the deceased and there was an oncoming motor vehicle from the opposite direction and the driver of GKB 579U swerved back to avoid hitting the oncoming vehicle and as a result hit the deceased.
5. She stated that she blames the driver of motor vehicle registration number GKB 579U for driving the said motor vehicle a very high speed in the circumstances and generally driving carelessly.
6. Pw 2 Paul Charo an eye witness stated that on the material day and place he was walking as a pedestrian from Hindi heading to Kiongoni and in front of him there was a pedal cyclist who was heading to Mokowe general direction and suddenly motor vehicle registration number GKB 579U came from behind at high speed.
7. The driver of the said motor vehicle then while overtaking the pedal cyclist realized there was an oncoming motor vehicle and to avoid a head on collision with the oncoming motor vehicle the driver quickly came into the way of the pedal cyclist lost control and hit the pedal cyclist.
8. Pw 2 rushed to the scene and found the injured now deceased was a person known to him and a neighbour and stayed there until the police came and he was taken to hospital and later he was informed that the deceased had succumbed to his injuries.
9. Pw 2 blamed the driver of the motor vehicle registration number GKB 579U for the accident as the driver was at a high speed and was driving carelessly that led to the vehicle losing control and that he overtook when it was not safe for him to do so.
10. Pw 3 No. 77730 CPL George Nyamwaya the IO in the matter produced the police abstract and, in his evidence, indicated that he primarily blamed the pedal cyclist.

Defence case.

11. Dw 1 PC Edward Obungu the driver of the motor vehicle registration number GKB 579U stated that the pedal cyclist was heading the same direction as him and he was in front of him and he suddenly came onto his way and there was an oncoming motor vehicle and the pedal cyclist was too close to him and he hit him and later on that evening he heard that he had succumbed to his injuries.
12. The defence intending to call the police officer who testified as Pw 3 opted to adopt the evidence of Pw 3 as their evidence.

B. Issues For Determination

13. The following issues commend themselves to me for determination.
 - a. Who is liable for the accident?
 - b. What is the quantum awardable to the claimant if any.



- c. Who bears the costs of the claim.

C. Analysis And Determination.

Who is liable for the accident?

14. In *Stapley vs Gypsum Mines Limited (2) (1953) A.C 663 at P. 681* Lord Reid had this to say;
- “ to determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid, logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it... the question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one sole cause but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can apply generally”
15. The facts speak for themselves that an accident indeed occurred on 14th April 2022 and reported and the same is proved by the Police abstract dated 17/5/2022.
16. The plaintiff has pleaded particulars of negligence on the part of the driver of the suit motor vehicle. The defendants on the other hand deny liability for the accident and blame the deceased for the accident.
17. Pw 2 an eye witness gave an account of how the accident happened. It was his testimony that the suit motor vehicle was being driven at high speed and upon reaching the scene of the accident, it overtook the deceased and since was an oncoming motor vehicle heading the opposite direction, the driver came back to his lane suddenly without ensuring he had completely passed the deceased and as a result he hit him.
18. Pw 3 in his testimony and cross examination stated that he blames the pedal cyclist for the accident. He never said what made him have that conclusion and counsel for the Plaintiff did not further interrogate that statement.
19. I do not believe the evidence of Pw3 in the absence of any explanation as to how he arrived at that conclusion. He admitted that he never recorded the statement of Pw 2 or interrogate him over the accident yet he was the only independent eye witness.
20. Pw 2 was cross examined over his testimony and in my view there was nothing much to otherwise poke holes in his testimony and it is my considered view that he gave a proper account of how the accident happened.
21. It was his evidence that the vehicle was being driven at a high speed and he could tell since he is also a driver but most importantly he saw the manner in which it was being driven and the fact that it caused the accident as it tried to avoid a head on collision with the oncoming motor vehicle and in a bid to avoid that it came back to its lane without ensuring it had completely overtaken the rider before returning to its lane and as a result of the hurry to avoid the head on collision it came back to its lane and hit the deceased with the rear-side of the car.



22. The driver of the suit motor vehicle in my view had 2 options to avoid the accident in the circumstances. One he would have waited for the oncoming motor vehicle to pass so that he would overtake when it was safe to do so or secondly since he had made the decision to overtake he would have alerted the oncoming motor vehicle to reduce speed so as to allow him overtake the rider. In doing any of the 2 he would have avoided the accident.
23. The accident in my view was avoidable and Dw 1 could have done either of the 2 options I have alluded to to avoid the accident. He caused the accident by his negligence and he is to be blamed for the accident. It is therefore my finding and I so hold that the defendants are 100% for the accident jointly and severally the 1st defendant being vicariously liable for the acts of the 2nd defendant.

What is the quantum awardable to the claimant if any.

24. The plaintiff has prayed for general damages under the law reform and fatal accident Act.
Damages under the *Law Reform Act*

Pain and Suffering.

25. From the record it is clear that the accused did not die instantly after the accident. He was first rushed to Mokowe Health centre before being referred to King Fahad referral hospital. He surely must have undergone excruciating pain before his death.
26. In *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 the court observed that-
“The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”
27. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows-
“As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.” (emphasis added).
28. No amount of money can be commensurate with the pain the deceased underwent but under this head and guided by the 2 aforementioned authorities I award Kshs.30,000/= under this head.

Loss of expectation of life.

29. Most courts when awarding damages under this head have opted to adopt the conventional award and once such case was the case of *Hyder Nthenya Musili* case(supra).



30. Similarly I adopt the conventional award for loss of expectation of life and I award Kshs.100,000/= under this head.

Damages under the *fatal accidents Act*

Loss of Dependency.

31. Damages under this head have over time posed a challenge to courts especially in instances where the deceased earnings cannot be ascertained with 2 schools of thought emerging from superior courts.
32. One is the multiplier and multiplicand approach whereas the other is the lump sum award approach. Superior courts seem to suggest that the multiplier approach should be resorted to in instances where the earning of the deceased can be ascertained and when that is not possible then the lump sum approach to be used. Some of them had this to say;
33. In *Albert Odawa vs. Gichimu Gichenji* [2007] eKLR), cited with approval the case of *Mwanzia vs. Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another*, where Hon. Ringera, J took the view that:
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do.”
34. This reasoning was adopted in *Mary Khayesi Awalo & Another - Vs- Mwilu Malungu & Another* ELD HCCC NO. 19 of 1997 [1999] eKLR where Nambuye J., stated that: -
- “As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”
35. Similarly, in *John Wamae & 2 others v Jane Kituku Nziva & another* [2017] eKLR, the court held as follows:
- “It is therefore not clear as to what the deceased did for a living. In my view, allocating the deceased an occupation on which to base the minimum wage would amount to speculation.... I am of the considered view that the award of the trial Court should be set aside. A lump sum of Kshs. 400,000/= as general damages will be sufficient in the circumstances of this case.”
36. Guided by the authorities cited above and the fact that the plaintiff admitted to have not produced evidence of deceased earning, taking the multiplicand approach in the circumstances would amount to mere conjecture as observed by the court in *Mary Khayesi Awalo* case, therefore in the circumstances I award a lumpsum figure of Kshs.500,000/=



Funeral expenses.

37. The plaintiffs have also prayed for Kshs.120,000/= being the total expenses incurred during the final send off of the deceased and the same catered for mortuary fees, purchase of the coffin, postmortem, transportation as well as dressing the deceased.
38. From the expenses listed I do not see any expense incurred towards food and water and hiring of tents, seats and sound system which are synonymous with funerals and in their absence and considering the deceased was buried after a week, I do not think the expenses that are listed by the plaintiff could have gotten to Kshs.120,000/=.
39. In the circumstances I will disturb the amount pleaded and award Kshs. 70,000/= under this head.

Special damages of Kshs.36,550/=

40. It is trite law that special damages have to be specifically pleaded and proved.
41. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that:

“The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
42. Similarly, in *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
43. The plaintiff has pleaded Kshs. 36,550/= made out as follows; Kshs. 35,000/= as fees paid to counsel for the grant ad litem, Kshs.1,000/= being fees paid for the ad litem application and Kshs.550/= for obtaining the motor vehicle copy of records.
44. My perusal of the record indicates that only courts fees for grant and the amount paid for motor vehicle search have been proved by way of receipts. There was no receipt of advocates fees for the grant and as such that particular expense though pleaded has not been proved and the same is disallowed. In the end under special damages I only award Kshs.1,550/=

Who bears the costs of the claim.

45. Having found that the Plaintiff is the successful party in this matter and the fact that costs follow events, he is awarded costs of the suit.



D. Conclusion And Disposition.

46. The upshot is that the suit is allowed in favour of the plaintiff as against the defendants jointly and severally in the following terms;

Liability 100%

Pain and Suffering Kshs.30,000/=

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

Loss of Dependency Kshs. 500,000/=

Funeral expenses Kshs.70,000/=

Special damages Kshs.1,550/=

Total Ksh.701,550/=

47. The plaintiff is also awarded costs of the suit and interest on general damages from the date of this judgment and that of special damages from the date of filing of the suit until payment in full.

48. Orders accordingly.

DATED, DELIVERED AND SIGNED AT LAMU LAW COURTS THIS 18TH DAY OF SEPTEMBER 2024.

FLAVIAN M.MULAMA

RESIDENT MAGISTRATE

In the presence of

Court Assistant:- Fathiya Loo.

Ms. Were for the Plaintiff

Ms. Onkoba for the 1st Defendant

Mr. Ojwang for the 2nd defendant.

