



Nyabwari (Suing as the Administratrix of the Estate of the Late Evan Ogendo Morebu - Deceased) ((Suing as the Administratrix of the Estate of the Late Evan Ogendo Morebu - Deceased)) v Charles (Civil Case 408 of 2017) [2022] KEMC 45 (KLR) (1 July 2022) (Judgment)

Neutral citation: [2022] KEMC 45 (KLR)

**REPUBLIC OF KENYA
IN THE KIAMBU LAW COURTS
CIVIL CASE 408 OF 2017
SK MOTARI, RM
JULY 1, 2022**

BETWEEN

**LILIAN BOSIBORI NYABWARI PLAINTIFF
(SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE EVAN
OGENDO MOREBU - DECEASED)**

AND

RIUNGU NJERU CHARLES DEFENDANT

JUDGMENT

1. The Plaintiff instituted this matter by way of Complaint dated 18/08/2017 and filed 24/08/2017 seeking inter alia general and special damages on behalf of the estate of the deceased under the Law Reform Act and the Fatal Accident Act due to an accident that is said to have occurred on or about 22/10/2016 involving the deceased who is said to have been riding his motorcycle reg. no. KMCZ 572H TVS and motor vehicle reg. no. KBK 284E along Gachie Karura Road in Kiambu whereby the deceased suffered fatal injuries.
2. The Defendant filed Memorandum of Appearance dated 05/02/2018 on the same date and a Statement of Defence dated 09/02/2018 on the 13/02/2018 in which he denied the allegations in the Complaint stating that he was a good Samaritan who took the deceased to hospital.
3. At the hearing of this matter the Plaintiff called two witnesses to testify, namely PW1 (Police) and PW2 (Plaintiff). The Plaintiff case was then closed. The defense called two witnesses namely DW1 (Defendant) and DW2(defense witness).
4. Plaintiff filed submissions dated 11/01/2022 on 19/01/2022 in support of her case. The Defendant also filed undated submissions on 16/02/2022 to support his case. On 27/05/2022 the Plaintiff further filed Supplementary submissions dated 26/05/2022.



5. I have considered the pleadings, testimony, exhibits produced and submissions filed by the parties in this matter. I note that this is a fatal claim case. The issues for determination are; Who is to blame for the accident in question? Whether the Plaintiff is entitled to the prayers sought in the Plaintiff?
6. I proceed to determine the foregoing issues under the following headings.

Liability

7. PW1, who was not the Investigating Officer of this case, testified in accordance to the contents of the Police Abstract and O.B Extract from Karuri Police Station. The Police Abstract (P-Exhibit 1) indicates that an accident occurred on 22/10/2016 at 5.45pm along Gachie Karura road, involving deceased Evans Ogendo Murebu, motor cycle KMCZ 572H and motor vehicle reg. no. KBK 284E. the owner of motorcycle reg. no. KMCZ 572H is recorded as Evans Ongendo, the deceased in this matter. PW1 testified that the no report of the accident was made and there was no report of inspection at the station. That it was the Plaintiff (deceased's wife) who reported the incident and not the Defendant. Initially the owner of motor vehicle KBK 284E could not be ascertained but he later appeared and reported that he was just a good Samaritan ferrying the deceased to hospital. PW1 testified that the initial report indicated that there was contact between the deceased and motor vehicle KBK 284E and the Defendant came long after that report. During cross examination PW1 confirmed that police did not visit the scene of the accident. he also indicated that the O.B states that the motorcyclist slipped and fell on the road and the motor vehicle ran over him. PW1 further denied knowledge of whether the accident in question was reported at Kihara Police Post which is near their station and near the scene of the accident.
8. PW2 is the widow of the deceased and she confirmed she was not at the scene of the accident, and thus could not know how the accident occurred.
9. DW1 (the Defendant) testified that at the time of the subject accident, he was alone in his motor vehicle reg. no. KBK 284E. He stated that the deceased was coming from the opposite direction at a high speed, hit a bump and rolled over and finally landed next to the rear of his vehicle but still on the right side of the road at which time he had stopped the vehicle. DW1 testified that he took the deceased to Kihara Police Post and reported the accident and then to hospital together with two volunteer pedestrians not known to him. DW1 denied running over the motorcyclist. According to DW1 the next day he was called by Mr Ombati from Karuri Police Station who told him he was involved in a hit and run of which he denied. He presented himself to the police station in the company of Mr John Machira whereby his vehicle was inspected and found to have no accident related dents. The next day he went back to the Karuri Police Station in the company of Francis Micheni and saw DTO Mr Kangat who also inspected the subject motor vehicle and released him. He also recorded a witness statement.
10. DW2, Franklin Muchemi, testified to have accompanied the Defendant to the police station for inspection of the motor vehicle but confirmed not having been present when the accident in question occurred.
11. The burden of proof in this matter lies with the Plaintiffs in the first instance without a doubt to prove that the Defendant was negligent and that the estate of the deceased suffered damages as a result. This is a statutory duty enshrined in Sections 107, 108 and 109 of the *Evidence Act* Cap 80 Laws of Kenya. The question therefore is whether the Plaintiff discharged her burden of proof on the issue of liability and whether the evidential burden of proof ever shifted to the Defendant. In the case of *Quest Resources Limited v Japan Port Consultants Limited* [2015] eKLR, the High Court in making



a determination on the law on legal burden of proof and evidential burden of proof made reference to the case of Winfred Nyawira Maina vs. Peterson Onyiego Gichana where the court stated that:-

“I think the foregoing justifies a little rendition on evidential burden for a fuller understanding of the decision of the court in this matter. The way I understand the law, the term Burden of proof, entails the Legal burden of proof and evidential burden. The two terminologies are most of the time misunderstood; albeit distinct. I am concerned mostly with the evidential burden which initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. See HALSBURY’S Laws of England, 4th Edition, vol. 17. Therefore, the Applicant must first lay prima facie evidence against the Respondent if evidential burden is to be created on the shoulders of the Respondent. In simple terms see what the Supreme Court said in the case of Raila Odinga vs. IEEBC & 3 Others [2013] eKLR that:-

“...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden(emphasis mine)”.

12. In my analysis of the testimony and exhibits produced in court in this matter, I find that the Plaintiff discharged their legal burden of proof. The Plaintiff’s case is that there was an accident involving the deceased who was a motorcyclist and motor vehicle reg. no. KBK 284E and a result he sustained fatal injuries. PW1’s testimony and P-Exhibit 1 (Police Abstract) supports this claim. For this reason, the evidential burden of proof did shift to the defense.
13. The defense case is that there was no contact as between the deceased and the Defendant’s motor vehicle, and that in fact the Defendant was just a good Samaritan that took the deceased to the Kihara police post to report accident and to hospital for treatment. That his motor vehicle was inspected at the Karuri Police Station and found to have no accident dents. However, according to the testimony of PW1, there is no such record of the Defendant reporting the accident, or his vehicle being inspected.
14. DW1 referred to an O.B No. 16.22/10/16 during cross examination of PW1 under which he allegedly reported the accident in question. However, the defense did not produce the said O.B Extract or call a police officer to testify in regards to it. In fact, the defense did not produce any exhibit in support of the Defendant’s case but only called DW2 to testify on his behalf.
15. I find that the evidence of DW2 does not have weight in terms of the issue of liability as he was not present at the scene at the time of the subject accident and thus cannot testify in regards to the issue of liability. For these reasons the Defendant did not discharge their evidential burden of proof.
16. In conclusion therefore I find that the Plaintiff has proved her case against the Defendant on the issue of liability and thus I proceed to find the Defendant 100% liable for the subject accident.

Quantum

General Damages.

17. This is a fatal injury claim brought under the Fatal Accident Act and the *Law Reform Act*. The measure of damages in action under the *Fatal Accidents Act* is the pecuniary loss occasioned to the dependents by the death and in estimating the damages the reasonable expectation of pecuniary advantage which the dependents had from the deceased and the probable pecuniary loss sustained by his death are taken to account.



a. Pain and Suffering.

18. Damages for pain and suffering are awardable under the [Law Reform Act](#) for pain suffered as a result of injury sustained by the victim of an accident. The damages for pain and suffering are assessed on the basis of the period from the time injury was sustained and the death of the victim. The longer the period, the greater the award.
19. The Certificate of Death of the deceased (P-Exhibit 5) indicates the date of death as 27/10/2016 at Riara Hospital- Gachie. The accident in this matter is said to have occurred on 22/10/2016. The deceased thus died 5 days after the accident in question. However, I note as per the testimony in court by PW2, the deceased died on the same date of the accident.
20. The Plaintiff submitted that Kshs 50,000 be awarded under the head of pain and suffering while relying on the case of Cecilia Rachier & Esther Olwalo vs Floyd Peter Raval [2001] KLR. The Defendant submitted that the claim for pain and suffering should fail.
21. Indeed, whether to take the PW2 testimony on time of death or the statement in the Certificate of Death, one thing is clear. The deceased did not die on the spot. He must have therefore suffered pain due to the injuries sustained.
22. I find that an award of Kshs 50,000 for pain and suffering in the circumstances is reasonable. I proceed to make an award accordingly.

b. Loss of Expectation of Life.

23. The practice of the Kenyan Courts has over the years been to award a conventional sum under this head. As per the Certificate of Death, the deceased was 29 years old at the time of the accident in question.
24. The Plaintiff submitted that an award of Kshs 150,000 is sufficient under this head. He has relied on the case of R K O & Another vs Kenya Power & Lighting Company Ltd [2015] KLR. Defendant failed to guide the court on the issue of loss of expectation of life as he did not address the issue of loss of expectation of life in his submissions.
25. I am inclined to make an award of Kshs 100,000 under this head. I am guided by the case of Gilbert Kimatare Nairi & another (Suing as personal representative of the Estate of Jackline Sein Lemayian (Deceased) v Civiscope Limited [2021] eKLR whereby the High Court upheld the award of Kshs 100,000 for loss of expectation of life for a deceased who was 31 years at the time of demise.

c. Loss of Dependency.

26. The Plaintiff produced a Certificate of Death as exhibit 5 which stated that the deceased was 29 years old at the time of death. He is said to be depended upon by the widow, 2 sons and 2 daughters all minors. PW2 testified that the deceased supplied items for Kill more online under Jet Fly and earned a commission according to the sales. PW2 stated that the deceased earned Kshs 63,000 per month as a commission. The Plaintiff however did not produce any exhibit apart from the oral evidence to prove the earnings of the deceased.
27. Having considered the foregoing, I find that there is no dispute that the deceased was working and had a wife and four minor children who depended on him. However, no evidence has been availed to prove the sums stated as his earning. I find that the multiplier approach is not suitable in the current case for the simple reason that the deceased's earnings were not proved. Using the global approach would be much appropriate.



28. In *Albert Odawa -Vs- Gichimu Githenji; Nakuru HCCA No.15 of 2003 (2007)*, eKLR Justice Ringera expressed himself as follows;
- “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.”
29. The next issue is what global amount would be sufficient award under the head of loss of dependency in this case.
30. According to the Plaintiff, a global sum of Kshs 3,000,000 would be sufficient under loss of dependency. The Defendant submitted that the claim for loss of dependency, pain and suffering and special damages should fail. I find that the award submitted by the Plaintiff is on the higher side and not justifiable in this case, taking into consideration the nature of work the deceased is said to have undertaken and the fact that his earnings was through commission.
31. In my determination I have further referred to the case of *Put Sarajevo Gen. Eng. Co.Ltd v Esther W. Njeri & Johnson Mwangi Gucha* (Suing as the Legal Representative of the Estate of Sylvester Muhia Gucha (Deceased) & 2 others [2014] eKLR where the deceased was 29 years old and supported his wife, brother and two children aged 4 and 2 years. There was no proof of earnings. The Court reduced an award of Kshs 1,280,000/= which had been arrived at using the multiplier approach and gave a global award of Kshs 1,000,000/=.

Special Damages

32. The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of our Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal – Kneller, Nyarangi JJA, and Chesoni Ag. J.A. – held:-
- “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 decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”
33. The Plaintiff pleaded special damages under paragraph 8 of his Plaint as follows;
- a. Police Abstract Kshs 100
 - b. Mortuary expenses (Post mortem cost) Kshs 12,500
- Total Kshs 12,600
34. At the hearing of this suit, PW2 produced as P-Exhibit 3 an Invoice No. 36706 from University of Nairobi Enterprises Services Ltd for storage of the deceased amounting to Kshs 12,500. The Plaintiff however did not produce a receipt to prove having incurred Kshs 100 for acquiring the Police Abstract. The claim for the said amount thus fails.



35. In total I thus find that the Plaintiff specifically pleaded and strictly proved special damages amounting to Kshs 12,500, which I proceed and award.

Conclusion

36. The upshot therefore is that I hereby enter judgment for the Plaintiff against the Defendant as follows;

- a. Liability 100% against the Defendant
- b. Pain and suffering Kshs. 50,000
- c. Loss of expectation of life Kshs. 100,000
- d. Loss of dependency Kshs. 1,000,000
- e. Special damages Kshs. 12,500
Total Kshs.1,162,500
- f. The Plaintiff shall also have costs of this suit and interest at court rates.

It is so ordered.

DATED AND DELIVERED AT KIAMBU THIS 1ST DAY OF JULY, 2022

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S.K. MOTARI

RESIDENT MAGISTRATE

In the presence of:-

