

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
CIVIL APPEAL NO. E258 OF 2024

MOSES OTIENO OPONDO & LORDVICK ONYANGO OPONDO (Suing as the legal administrators & personal representatives of the estate of **MONICA ATIENO NGOHA** (DCD)) **APPELLANTS**

- VERSUS -

JOHN MAINA WAMAE **1ST RESPONDENT**

EDWARD KAMBO KARIUKI **2ND RESPONDENT**

BOLLORE TRANSPORT & LOGISTICS (K) LTD **3RD RESPONDENT**

(Being an appeal from the judgment and decree of Hon. M. Nyigei (PM) delivered on the 12/11/2024 in Kisumu CMCC No. 251 of 2019, Moses Otieno Opondo & Anor (Suing as the legal administrators & personal representatives of the estate of MONICA ATIENO NGOHA (Deceased)) v John Maina Wamae & Others.)

J U D G M E N T

1. The appellants filed the primary suit on behalf of the estate of **MONICA ATIENO NGOHA** vide a plaint that was amended on the **5/9/2023**. In it, they sought general and special damages following a fatal road traffic accident that occurred on the **6/11/2017** involving motor vehicle registration no. **KBS 136T/ZD9531** on which she was travelling.
2. Despite service, the 1st and 2nd respondent never entered appearance or defended the suit. The 3rd respondent entered appearance and filed a statement of defence dated **26/6/2019** in which it denied the allegations made by the appellants and put them to strict proof. It claimed contributory

negligence on the part of the deceased and that it could not be held liable for the accident as the same occurred outside its scope and/or control.

3. The matter proceeded to trial and by a judgment delivered on **12/11/2024**, the trial court decreed that: -

a) The 1st and 2nd defendant were 100% liable.

b) Pain and suffering Kshs. 100,000/-

c) Loss of expectation Kshs. 100,000/-

d) Loss of dependency Kshs. 289,636/-

e) Special damages Kshs. 887,642/-

f) Total = Kshs. 3,173,950 less 30% contribution = Kshs. 2,221,765/-.

g) The case against the 3rd respondent was dismissed.

4. Being dissatisfied with the said Judgment/decreed, the appellants lodged this appeal vide the Memorandum of Appeal dated **10/12/2024** raising four (4) grounds of appeal as follows: -

a) The trial court erred in law and fact in making an award on general damages under the head of loss of dependency that was inordinately too low as to amount to an erroneous estimate of the loss or damage suffered by the estate of the deceased.

b) The trial court in awarding a sum of Kshs. 289,636/= which amount was inordinately too low as damages for loss of dependency which was against the weight of evidence adduced as regards the deceased's earnings.

- c) The trial court misdirected itself in arriving at a wrong decision that the 3rd respondent had produced documents of bailment contract to show that it had no control over the suit motor vehicle at the time of the accident thereby dismissing the suit against it.*
- d) The trial court erred in assessing general damages by failing to apply the principle applicable in award of damages and comparable awards.*
5. The appeal was disposed of by written submissions. The appellants submitted that in awarding damages, the court ought to assess the general picture, circumstances, the effect of the injuries, the particular person concerned and uniformity.
6. That the trial court thus erred in finding that the plaintiff needed to have tendered more evidence of her earnings such as a bank statement or even Mpesa statement and thus erred in arriving at an award that was inordinately low.
7. That whereas the 3rd respondent was sued as the beneficial owner of the suit motor vehicle at the time of the accident, it failed to avail the alleged contract of bailment that would aid the court in making a determination by looking at the terms thereof whereas the insurance cover produced by the plaintiffs showed that the 3rd respondent was the owner.
8. Reliance was further placed on the testimony of **PW4** who testified that she knew the suit motor vehicle belonged to the 3rd respondent as there was a large labelling of its name on the side of the vehicle thus the trial court erred in dismissing the suit against the 3rd respondent.

9. On the other hand, the 3rd respondent submitted that ownership of the motor vehicle is proven by the registration of a person as the owner unless proved otherwise. That in this case, the official search of the suit vehicle produced by the appellants showed that 1st and 2nd respondents were the registered owners of the suit vehicle.
10. That there was no insurance sticker produced before court showing that it was the beneficial owner of the suit vehicle. That the sticker on the side of the suit vehicle clearly indicated that the 3rd respondent had hired the suit vehicle to perform a specific task.
11. That in relying on the police abstract to prove ownership, the appellants failed to reach the burden of proof placed upon them and consequently, there was no evidence linking it to the ownership of the suit vehicle.
12. That its assertions that there existed no employer – employee relationship between it and the driver of the suit vehicle remained unchallenged and neither was there evidence to establish vicarious liability on its part.
13. On loss of dependency it was submitted that the appellants failed to produce evidence to show the deceased's earnings and the only document relied on, the delivery note, was not sufficient proof. Reliance was placed on the case of **Sukari Industries Limited v Ismael Ombaka Omar & Another [2017] eKLR.**
14. That the court ought to consider and adopt the minimum wage of Kshs. 7,240.95 provided in ***The Regulation of Wages (General) (Amendment) Order 2018*** for unskilled employees in other areas as a multiplicand as was held in the case of **Vincent Kipkorir Tanui (Suing as the administrator**

and/or Personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co Ltd & Another [2018] eKLR.

15. On the multiplier it was submitted that a multiplicand of 10 years was appropriate considering the age of the deceased, the balance of earning life, the age of dependants and other factors as was held in the case of **Nixon Asava Mukisa & Another v Michael Chomba Mburu [2021] eKLR.**
16. That dependency is a matter of fact and must be proved by evidence as was held in **Abdalla Rubenya Hemed v Kayuma Mvurya & Another [2017] eKLR** and the appellants failed to provide any documents that the deceased maintained them immediately prior to her death. That the award of **Kshs. 289,636/-** for loss of dependency as awarded by the trial court ought to be upheld.
17. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions but at all times having in mind that it did not see the witnesses testify. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**
18. In **Gitobu Imanyara & 2 others v Attorney General [2016] eKLR,** the Court of Appeal held that: -

“This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own

conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

19. The evidence before the trial court was as follows; **PW1 Moses Otieno Opondo** testified that the deceased was her mother. He adopted his statement dated **16/5/2018** as his evidence in chief. That he did not witness the accident but was informed about it. That the deceased operated business between Uganda and Kenya from which she earned over **Kshs. 100,000** per month and thus supported them. That he was employed so he supported himself.
20. **PW2 No. 70993 PC Mohammed Barie** produced the police abstract filled on the **11/1/2018** regarding the accident. That he was not the investigating officer and neither did he visit the scene nor fill the police abstract.
21. **PW3 Josephine Akinyi Deya** testified that she witnessed the accident. That the trailer was over speeding before it got the accident. That she knew the deceased as she used to buy cereals from her. That she saw the name “Bollore” on the side of the suit vehicle.
22. **Maurice Lukadiru** testified as **DW1** on behalf of the 3rd respondent. He adopted his witness statement dated **12/10/2020** as his evidence in chief and his list of documents dated **12/5/2023** as **DExh1 – 6**. He testified that the 3rd respondent not being the owner of the suit vehicle, the case against it be dismissed. That the copy of records showed that the 1st and 2nd defendant were the owners of the suit vehicle and it had only sub contracted them. That the stickers placed on the side of sub-contracted vehicles are for security as it has its own trucks.

23. From the foregoing, the grounds of appeal may be summarized into two as follows: -

a) That the trial court erred in dismissing the suit against the 3rd respondent.

b) That the trial court erred in giving an award for loss of dependency that was inordinately low.

24. On the first ground was that the trial court erred in dismissing the suit against the 3rd respondent, the appellants' alleged that the 3rd respondent was the beneficial owner of the suit vehicle and as such ought to have been held liable for the accident. In support of this assertion, they relied on the testimony of **Pw4** who testified that she saw the 3rd respondent's name written on the side of the suit vehicle, Copy of Records produced by **Pw1** as **PExh 4a & 7a** that showed the 1st & 2nd respondent alongside NIC Bank as the owners of the suit vehicle and a police abstract produced by **Pw2** that showed the 3rd respondent as the owner of the suit vehicle.

25. Juxtaposed against this was the evidence presented by the 3rd respondent through **Dw1**. That it had subcontracted the suit vehicle to deliver some goods on its behalf and that it usually put stickers on vehicles it subcontracted for security reasons to distinguish them from other vehicles it owned.

26. The law is settled, that, he who alleges must prove. **Section 107 of the Evidence Act (cap 80) of the laws of Kenya** provides: -

“1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

27. It was therefore incumbent upon the appellants to prove that the 3rd respondent was the beneficial and/or insured of the subject motor vehicle.

28. The law on ownership of a motor vehicle is well stipulated under ***section 8 of the Traffic Act (Cap 403) Laws of Kenya*** which provides that: -

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

29. As such the proprietorship particulars in the logbook is sufficient proof of ownership of motor vehicle unless there is other compelling evidence to the contrary as was held by the Court of Appeal in ***Ignatius Makau Mutisya v Reuben Musyoki Muli [2015] eKLR*** where the Court stated that: -

“This Court adopted the interpretation above in the case of Securicor Kenya Ltd vs Kyumba Holdings Civil Appeal No. 73 of 2002 (Tunoi, O’Kubasu’ Deverell JJA) and held that;

‘Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed

to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.'

Also recently, this Court in the case of Joel Muga Opinja v. East Africa Sea Food Ltd [2013] eKLR restated this position as follows: -

'We agree that the best way to prove ownership would be to produce to the Court a document from the Registrar of Motor Vehicles showing 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.'

All this goes to show that the presumption that the person registered as owner of a motor vehicle in the log book is the actual owner is rebuttable. Where there exists other compelling evidence to prove otherwise, then the Court can make a finding of ownership that is different from that contained in the log book. Each case must however be considered on its own peculiar facts. As observed by this Court in the case of Francis Nzioka Ngao vs Silas Thiani Nkunga, Civil Appeal No.92 of 1998,

"whether the property in a chattel being sold has or has not been passed to the buyer is a question of fact to be determined on the facts of each individual case."

30. Further, in **Muhambi Koja v Said Mbwana Abdi [2015] eKLR**, the Court held that a police abstract can be used as proof of ownership to rebut the logbook and stated thus: -

“In a nutshell, a police abstract report or any other form of evidence will be proof of ownership of a vehicle and will displace the registration (log) book if it is demonstrated that the person named in the registration (log) book has since transferred and divested himself of its ownership to the person named in the abstract report or in that other form of evidence.” (Emphasis added)

31. Therefore, a police abstract can be adequate evidence in proof of ownership. However, before the police abstract is accepted, it must be demonstrated that the persons named in the log book have since divested themselves of the ownership of the subject vehicle.
32. It is the considered opinion of this Court that, reliance on the particulars in the police abstract is an exception to the rule that, the log book is the primary evidence of proof of the ownership of a particular motor vehicle. As such the party that relies on the details in the police abstract to prove ownership of a motor vehicle, must explain why that party cannot rely on the evidence of records from the Registrar of Motor Vehicles (NTSA).
33. Consequently, a party to a suit cannot just fail to adduce evidence of who is the registered and/or beneficial owner of a vehicle as per the particulars of the log book or records from the Registrar of Motor Vehicles and simply rely on the particulars in the police abstract peremptorily. If that, were to be the case, it would render the statutory provisions of ***section 8 of Traffic Act*** superfluous and open up an arena for abuse.
34. In the present case, the appellants produced a Copy of Records showing that the 1st and 2nd respondent were the registered owners of the suit vehicle. However, they sought to rely on a police abstract showing that the 3rd

respondent was the owner of the suit vehicle and stated that this was based on the Insurance of the suit vehicle. The insurance certificate or a copy thereof was never produced in evidence.

35. The 3rd respondent put up a spirited defence in rebuttal. Its defence was however, not controverted by the appellants.

36. In the given circumstances, it is the finding of this Court that, the appellant's case was not proved on the balance of probability and hold that, the alleged liability attributed to the 3rd respondent was not established. As such the trial court's finding on liability is hereby upheld.

37. The second limb of this appeal relates to the award on loss of dependency. On whether or not an appellate court should disturb a Trial Court's finding on quantum, the Court of Appeal in **Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727** expressed itself thus: -

“The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”

38. It should be noted that assessment of damages is in the discretion of the trial Court. An appellate court cannot interfere with the exercise of this discretion except where the court is satisfied that the said assessment is contrary to the principles enunciated in *Kemfro Africa Ltd v A. M. Lubia & Another*

(*Supra*). In that, the trial court committed an error in principle or made an award that was inordinately high or so inordinately low as to be wholly erroneous estimate of damages.

39. In **Ezekiel Barng'entuny v Beatrice Thairu HCC No. 1638 of 1988,**

Ringera J held thus: -

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the Court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents’ and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature.”

40. On the issue of loss of dependency, the trial court assessed the same as provided under the provisions of **section 4 of the Fatal Accidents Act**. It utilized the multiplicand approach as opposed to the global/lump sum approach.

41. The appellants argued that the trial court erred in requiring them to have tendered more evidence of the deceased’s earnings such as a bank statements

or even Mpesa statement and thus erred in arriving at an award that was inordinately low instead of relying on a delivery note.

42. First and foremost, I reiterate that the law is settled that he who alleges must prove. In that regard, it was up to the appellants to prove the income of the deceased as pleaded. It is not for the court to take judicial notice of previous precedent of previous transactions.

43. Even then, it cannot be argued that the Court of Appeal in the case of **Titus Ndungu Njuguna & Another v Hannah Waruguru Gichuhi & Another (2019) eKLR** dispensed with the burden of a claimant to prove his case to the required standard. The understanding of what the Court of Appeal stated in that case is that, there are very many ways of proving income other than production of the documentary evidence. It is not clear as to whether the deceased was earning the money through any payslip or otherwise and whether she ever deposited the same in a bank account, Mpesa or otherwise to support the income.

44. In this Court's considered opinion, the appellants were casual in adducing evidence to support the income of the deceased and the trial court was therefore well guided in adopting the minimum wage regulation. This was the only aspect of the award on loss of dependency that the appellants challenged. This Court therefore declines to interfere with the finding of the trial court in that regard.

45. Accordingly, the Court finds the appeal to be without merit and dismisses the same. There will be no order as to costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **14th** day of **November, 2025**.

A. MABEYA, FCI Arb

JUDGE