

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KILGORIS**

**CIVIL APPEAL NO. E007 OF 2025**

**(CORAM: HON. CHARLES KARIUKI – J)**

**ALIMA KANG'AZI AVOGA.....1<sup>ST</sup> APPELLANT**

**HUMPHREY NDINDI ONDITI.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**ELIA ORONDO ACHAR.....1<sup>ST</sup> RESPONDENT**

**TRANSMARA SUGAR CO. LIMITED.....2<sup>ND</sup> RESPONDENT**

***(Being an Appeal from the Judgment of the Hon. M.I.G. Moranga, Senior Principal Magistrate in Kilgoris Civil Suit No. E012 of 2022, dated and delivered on 13th September 2023)***

**JUDGMENT**

1. The appellants filed suit in Kilgoris Civil Case No. E012/2022 against Respondents seeking General and Special Damages Kshs. 357,000/= costs and interests, and after hearing the case, the court awarded the Plaintiff/Appellant Kshs. 421,464/= - this being loss of expectation of life, pain and suffering, and special damages, less apportionment of 20% Kshs. 105,366/= from the global figure Kshs. 526,830/= leaving a balance of Kshs. 421,464 plus interest and costs.
2. Aggrieved by the said Judgment. The Appellant appealed and raised 7 grounds: -
  - 1) **That the Learned Trial Magistrate erred in law and fact in finding the Plaintiff's claim for General damages could not be sustained, thereby failing to award General damages to the Plaintiffs/Appellants when the same was pleaded in the Plaintiff's pleadings on record.**
  - 2) **That the Learned Trial Magistrate erred in law and fact in failing to assess the General damages payable to the Plaintiffs/Appellants are required, notwithstanding her finding the Plaintiffs were not entitled to the same.**
  - 3) **The court clearly considered the Submissions, issues, and authorities, ensuring the decision was well-founded and fair to the parties.**

- 4) **That the Learned Trial Magistrate erred in law and fact in failing to appreciate the degree, extent and fatality of the injuries incurred by the deceased, and their effect on the deceased's family.**
  - 5) **The Learned Trial Magistrate failed to adequately evaluate and consider the documents on record, evidence and testimonies provided by the Appellants during trial, thereby arriving at a decision that was erroneous and unsustainable.**
  - 6) **That the Learned Trial Magistrate erred in law and fact in failing to evaluate and appreciate the Appellant's documents on record and oral testimonies on the particulars of the deceased's dependents, and evidence in totality in relation to their prayer for General damages.**
  - 7) **That the Learned Trial Magistrate erred in law and in fact in writing a Judgment which is at variance with Appellants' pleadings, prayers and the weight of evidence on record, and is contrary to precedents.**
- 2) The Plaintiff Witness (PW1) testified after liability was agreed at a rate of 80%:20% in favour of the claimant; thus, the Plaintiff Witness testified and produced documents.
  - 3) The summary of the evidence is set out in pages 13 – 15 of the record of appeal.

**Plaintiff's Case:**

- 4) PW1 Chief Inspector Andrew Omolo Swa, of Kilgoris Police, referred to the police abstract, which he said was issued after an accident that occurred on 29/10/2021 was reported at the station.
- 5) According to the report, the 1st Defendant had reversed the tractor, trailer and squeezed (between the trailer and tractor) the deceased, which led to his death. He blamed the tractor driver for the accident. He produced the police abstract prosecution Exhibit 1. He, however, did not have the OB and police file. He observed that, as the Investigation Officer in the matter, the tractors were ready to offload sugarcane from the trailers. He clarified that registration No. 7228 was in error. It was intended that the 1st Defendant be charged with the offence of causing death by dangerous driving.
- 6) PW2 Manasseh Kiruri Muingi testified that on 29/10/2021, he and the deceased had varied sugarcane with lorries bearing registration numbers KAY 164P and KBB 684A, respectively. At around 1900 hours, after offloading the sugarcane, the 2nd Defendant driver, who was driving motor vehicle registration number KTCB 317M. Hauling trailer registration number ZE7228 hit, ran over, knocked, or sandwiched the deceased

between motor vehicle registration number KTCB 317M. Hauling trailer number ZE7228 and a stationary KTCB 056M hauling tractor registration number ZE7226. He recalled that the deceased died on the spot and police took his body to Kilgoris Saint Joseph Mission Hospital Mortuary. He later recorded his statement on 30/11/2021. He blamed the 2 first two defendants.

7) PW3 Alima Kang'azi Avoga, the 1st Plaintiff, testified on behalf of the 2nd Plaintiff. The deceased's husband had gone to work. At 19.30 hours, her brother-in-law, Duncan Esudi, a truck driver, called to inform her about the deceased's death. She met PW2, who explained to her what had transpired.

- **She produced the following Exhibits: -**
- **Prosecutor Exhibit 2 – the ID card for the deceased.**
- **Prosecutor Exhibit 3 – certificate of death.**
- **Prosecutor Exhibit 4 – The post-mortem report.**
- **Prosecutor Exhibit 5 – Motor vehicle search certificate and receipts.**
- **Prosecutor Exhibit 6 – A letter from the chief.**
- **Prosecutor Exhibit 7 – Receipts for special damages amounting to Kshs. 140,000/=.**
- **7 (a) – Kshs. 72,200/=**
- **7 (b) – Kshs. 249,140/=**
- **7 (c) – Kshs. 5,000/=**
- **Prosecution Exhibit 8 – Copy of grant Ad Litem dated 21/3/2022.**
- **Prosecution Exhibit 9 – Notice of intention to sue dated 18/8/2022.**
- **Prosecution Exhibit 9 (b) Demand letter addressed to the 1st Defendant dated 22/2/2022.**
- **Prosecution Exhibit 9 (c) Demand letter to the 2nd Defendant dated 22/2/2022.**
- **Prosecution Exhibit 10 – Receipts for Ad Litem for Kshs. 30,000/=.**
- **Prosecution Exhibit 11 – Contract of employment between G.K. Mwangi and Gideon Onditi Omamu dated 18/7/2018.**

8) She noted they had 8 children together. She noted he earned a sum of Kshs. 25,000/= per month and would pay fees for the children aged 23, 17 and below who were the three children dependent on the deceased.

9) The parties entered into a consent of liability in the ratio of 20%:80% in favour of the Plaintiff.

- 10) The parties have filed their submissions, which the court has considered, and case law has been cited in support of the proposed damages.
- 11) The only issue arising from the grounds, evidence, and pleadings in court was whether the Plaintiff was entitled to be awarded damages under the Fatal Accidents Act, Cap 32, Laws of Kenya. The claimants are entitled to seek compensation for the loss of a loved one due to a wrongful act by the Respondent. The award includes loss of dependency, which is a compensation for financial support lost years due to the victim's death, calculated based on the deceased's income, dependency ratio and expected years of work.
- 12) Further, claimants are entitled under the same act to funeral expense reimbursement for funeral costs incurred by the family. Loss of expectation of typically around Kshs. 100,000/=. The claimant is obligated under the same act to demonstrate the deceased's income and financial contributions to the family.
- **The dependency ratio of the claimants.**
  - **The deceased's age and expected years of work.**
  - **Proof of negligence of the wrongful act by the Respondent.**
  - **The claimant is obliged to provide evidence such as medical reports, witness statements and receipts for expenses.**
- 13) In the case of **Patricia & Another -vrs Samwel Opot Omondi & Another 2014**, the court awarded Kshs. 7,972,272/= for loss of dependency using the dependency ratio of 2/3. Patricia Mona case (Supra) indicated that the deceased's income dependency ratio and expected years of work are to be pleaded and particulars of dependency.
- 14) The Plaintiff in the trial court did not plead as required by law, nor did it claim damages under the Fatal Accidents Act. The principle that parties are bound by their pleadings means that they must adhere to the facts and claims stated in the pleadings (Plaint, Defence, Reply, etc.).
- 15) Courts generally will not consider issues not raised in the pleadings. Parties cannot introduce new claims or defences not pleaded. Courts decide cases based on pleaded issues. Exceptions are where issues are tried with implied consent or by amendment of pleadings. Reliance made on **Eastern Produce K. Limited -vrs- James Nderitu Njuguna (2018)**, where the court held that no evidence outside pleadings was considered. **Mukasa -vrs- Mukasa (1977)** Judgment must be based on the pleaded issues. Also, **KPL Company Limited -vrs- Newton Mwangi (2017)**, the court

cannot grant relief not pleaded. The trial court found as much, thus declining to award a claim under the Fatal Accident Act on the head of loss of dependency.

16) This court agrees with the trial magistrate and thus finds the appeal has no merit. Thus, the court makes the orders that:

- I. The appeal is dismissed.**
- II. Parties to bear their own costs.**

**DATED AND DELIVERED AT KILGORIS VIA MICROSOFT TEAMS**

**THIS 6TH DAY OF FEBRUARY 2026**

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**CHARLES KARIUKI**

**JUDGE**