

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT HOMABAY
CIVIL APPEAL NO. E026 OF 2024

BARRACK OWINO OWAGA.....1ST
APPELLANT
STEPHEN BUNDE.....2ND
APPELLANT

VERSUS

SYPRIAN OCHIENG JIMBO aka CYPRIAN (Suing as the
Legal Representative of the Estate of
SHERYL GOLDA OCHIENG)
RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.Jacinta Orwa (CM)
in Homabay Civil Suit No. E023 of 2020 delivered on 3rd April, 2024)

JUDGMENT

Background of the Appeal

1. By the plaint dated 18th November 2020, the Respondent instituted a suit against the Appellants, seeking general damages, special damages in the sum of Kshs. 7,050/-, together with costs of the suit and interest on the damages and costs.
2. The Respondent's case was that on or about 20th December 2019, the deceased, then aged two (2) years, was a lawful passenger aboard motor vehicle registration number KCK 766T when, upon reaching the Rangwe-Oyugis Road near the Nyawita area, the Appellants, either by themselves and/or through their agents, negligently drove the said motor vehicle, thereby causing an accident which resulted in the death of the deceased.

3. In their statement of defense dated 27th April 2021, the Appellants denied ownership of motor vehicle registration number KCK 766T, denied the occurrence of the alleged accident, and denied any negligence on their part. They further pleaded that, if the accident did occur, it was caused by the negligence of the deceased's mother, who allegedly failed to take adequate precautions for the safety of the deceased, left the deceased unattended while on board the vehicle, and failed to ensure the safety belts provided by the Appellants were fastened, among other particulars.
4. In a judgment delivered on 3rd April 2024, the learned trial magistrate found the Appellants jointly and severally 100% liable for the accident. The Respondent was awarded damages for pain and suffering in the sum of Kshs. 50,000/-, damages for loss of expectation of life of Kshs. 100,000/-, damages for loss of dependency of Kshs. 800,000/-, special damages of Kshs. 10,000/-, together with costs of the suit and interest at court rates from the date of judgment.
5. The decision aggrieved the Appellants who then lodged the present appeal by way of a Memorandum of Appeal dated 19th April 2024, seeking orders that the judgment and decree of the learned magistrate be set aside and the suit be dismissed as against the Appellants, and/or that the same be substituted with an appropriate

finding on the reassessment of the quantum of damages. The Appellants further pray that the appeal be allowed with costs.

6. The appeal is anchored on some nine grounds. : -

a) The learned trial magistrate erred in law and in fact by failing to consider and appreciate the applicable principles in assessment of damages and thereby arrived at an excessive and unjustified award.

b) The learned trial magistrate erred in law and in fact by awarding kshs. 960,000/- as general damages under the Fatal Accidents Act, an amount that was inordinately high, unjustified and contrary to the evidence on record.

c) The learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of kshs. 50,000/- for pain and suffering while not considering the deceased died shortly after the accident.

d) The learned trial magistrate erred in law and fact in awarding the estate of the deceased a sum of kshs. 100,000/- for loss of expectation of life an amount which was excessive and unjustified.

e) The learned trial magistrate erred in law and fact by awarding the estate of the deceased a sum of kshs. 800,000/- for loss of dependency that was so

excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

f) The learned trial magistrate erred in law and in fact by ignoring and/or failing to consider the appellant's submissions on quantum and legal authorities relied upon in support thereof.

g) The learned trial magistrate erred in law and in fact in relying on extraneous circumstances not supported by the evidence on record.

h) The learned trial magistrate erred in law and in fact by overly relying on the respondent's submissions which were not relevant and without addressing his mind to be circumstances of the case.

i) The learned trial magistrate erred in law and in fact in failing to consider conventional awards in cases of similar nature.

7. The appeal was directed to be canvassed by way of written submissions but as at the time of drafting this judgment, only the Appellants had filed their submissions. Default by the respondents does not in any way give undue advantage to the appellant nor visit any prejudice upon the respondent because the courts mandate remains unshifted.

Appellants' Submissions

8. The Appellants reiterate that their appeal is confined solely to the issue of quantum of damages. Regarding the award under the head of pain and suffering, the Appellants submit that the police abstract indicates that the accident occurred on 20th December 2019 at 5:00 PM, and the postmortem report similarly records that the deceased died on 20th December 2019 at 5:00 PM, implying that the deceased succumbed instantly following the accident and did not suffer pain prior to death. Accordingly, the Appellants contend that an award of Kshs. 10,000/- would constitute adequate compensation in lieu of the Kshs. 50,000/- awarded by the trial court.
9. In support of that position, the appellants rely on **Julius Ngobito Muriungi v John Gichunuku Mairoki [2021] eKLR**, where the court awarded Kshs. 10,000/- in circumstances where the deceased died instantly.
10. Regarding the award under the head of loss of expectation of life, the Appellants submit that the death certificate indicates that the deceased was aged 2 years at the time of death, and no evidence was adduced to show that the deceased was in perfect health prior to the accident. They propose a sum of Kshs. 60,000/-, relying on **P.I v Zena Roses Ltd & Another, Eldoret HCCA No.**

126 of 2009, where the court awarded Kshs. 80,000/- for a deceased child aged six years.

11. regarding the award under the head of loss of dependency, the Appellants urge the Court to adopt a global award rather than applying a multiplier approach, arguing that the deceased was only 2 years old at the time of death and no evidence was tendered regarding schooling or future prospects. They contend that it would be speculative to assume what the deceased would have become had he reached maturity. In support, they rely on **KM v Francis Mwongela Nabere [2017] eKLR**, where the court awarded Kshs. 100,000/- as a global sum under the Fatal Accidents Act for a deceased child aged seven years.

Issues, Analysis, And Determination

12. as said before, even though the grounds of appeal have been severally split into nine, the sole issue for determination in this appeal is whether the quantum of damages assessed and awarded by the learned trial magistrate was commensurate or high and excessive. This is the principal point of contention raised by the Appellants, who allege that the awards under the three heads; pain and suffering, loss of expectation of life, and loss of dependency were excessive, unjustified, and not supported by the evidence on record.

13. It is settled law that the assessment of damages is a matter of judicial discretion, and appellate interference is warranted only where it is shown that the trial court acted on wrong principles, relied on irrelevant factors, or arrived at an award so inordinately high or low as to amount to a wholly erroneous estimate. In **Butt v Khan [1981] KLR 349**, the Court of Appeal held that interference is justified where the award is manifestly excessive or made without proper regard to the circumstances of the case.
14. The Court of Appeal in **Kemfro Africa Ltd t/a Meru Express Services & Another v A.M. Lubia & Another [1982-88] 1 KAR 727** reiterated that while damages cannot be mathematically precise, they must fairly compensate the claimant for pain, suffering, and loss, taking into account comparable decisions. Similarly, in **William J Butler v Maura Kathleen Butler [1984] KECA 34 (KLR)**, the Court emphasized that awards must balance the effect of the injuries on the claimant with a degree of uniformity in local judicial practice.

On the Award of Pain and Suffering

15. The guiding principle for awarding damages under this head was addressed in **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as Administrator and Personal Representative of the Estate of James Julaya Sumba) [2019] eKLR**, where the court held:

“Damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of injuries in the period before death.”

16. PW1, the deceased’s mother, testified on cross-examination that the deceased died on the same day the accident occurred. The police abstract, adopted into evidence by PW1, indicated that the accident occurred on 20th December 2019 at 5:00 PM, consistent with the postmortem report dated 21st December 2019, which recorded the deceased’s death at 5:00 PM, indicating that death occurred immediately following the accident.

17. In **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR**, the court observed that nominal damages are generally awarded for pain and suffering where death follows immediately after an accident. The court was guided further by **Chege & Another v Jeremy & Another (Suing as Legal Representative of the Estate of Jeremy Rukaria Maua- Deceased) Civil Appeal E340 of 2023 [2025] KEHC 4055 (KLR)**, where it was held:

“It is natural that any person who suffers injury as a result of an accident will experience some form of pain. The pain may be brief and fleeting, but it is nonetheless compensable. Nominal damages are appropriate where

death occurs immediately after the accident, with higher damages awarded if pain is prolonged. Comparable awards in the High Court over the last 20 years have ranged from Kshs. 10,000/- to Kshs. 100,000/-."

18. Considering the above authorities and the evidence, the Court finds no reason to interfere with the trial court's award of Kshs. 50,000/- for pain and suffering.

On the Award of Loss of Expectation of Life

19. The Appellants contend that the deceased was 2 years old at the time of death, and no evidence was adduced to show that the deceased was in perfect health prior to the accident, proposing a sum of Kshs. 60,000/- under this head.
20. The trial court, in awarding Kshs. 100,000/-, relied on **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another** (*supra*), where it was observed:

"Very nominal damages are awarded for loss of expectation of life and pain and suffering where death occurs immediately after the accident. Conventional awards for loss of expectation of life are Kshs. 100,000/-, with pain and suffering ranging from Kshs. 10,000/- to Kshs. 100,000/-, higher if suffering is prolonged."

21. Having regard to the above, and noting that the trial court properly relied on binding decisions on comparable awards, this

Court finds no reason to interfere with the award of Kshs. 100,000/- for loss of expectation of life.

On the Award of Loss of Dependency

22. The Appellants challenged the trial court for allegedly applying a multiplier approach, arguing that a global award would be more appropriate given that the deceased was only two years old. However, a careful reading of the judgment reveals that the trial magistrate did in fact apply the global award approach.

23. In support, the Court refers to **TB v MOO & Another (Suing as Legal Representatives of the Estate of the Late LM - Deceased) Civil Appeal 79 of 2021 [2025] KEHC 3520 (KLR)**, where it was held:

“The use of a multiplier approach is not appropriate for a minor who does not have an income. A global award suffices. In the circumstances, a child of two years will attract a global award of Kshs. 800,000/-.”

24. The foregoing submissions reflect the true position of the law but based on evidence led. It is equally the position of the law that dependency is a question of facts to be proved by evidence. A dependant is he who relies on another as a benefactor. It is easy to imagine that a child would assist the parents with domestic chores

depending on the age. It is equally easy to take it that parents generally, in African set ups, expect that the children provide support generally and the support may be material and financial when they grow up and begin to generate income. It is however in the province of evidence at trial to establish what kind of support the child offered or was expected by parents to be offered.

25. In this matter the evidence was tendered with unbelievable amount of ambivalence. While the witness statement relied upon as evidence in chief alleged that the respondent had lost a mother and a wife, on cross examination, he turned round and asserted that the deceased was a child aged 2 years. In the entire statement and in the oral evidence no attempt was made at showing any dependency upon the deceased by the respondent and the persons named as dependants. Without evidence, there was no basis upon which the trial court made the award. It is not enough that liability had been settled in another matter. Even after liability is settled a claimant continues to bear the burden of proving the loss. The court finds that there was no evidence of dependency and the award was thus erroneous and must be set aside.

26. In conclusion having considered the evidence on record, the grounds of appeal, and the relevant authorities, the Court upholds the awards for pains and suffering as well as loss of expectation of

life but sets aside the award for lost dependency. The appeal thus succeeds partially to that extent.

27. Because the success is only partial, each party shall bear own costs.

Dated, signed and delivered at Lodwar this 13th day of February 2026.

Patrick J O Otieno

Judge

Original