

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIVASHA
HIGH COURT CIVIL CASE NUMBER E023 OF 2024

SAMSON KIPTOO CHEMJOR-----1ST
APPELLANT

ALMAS BEVERAGES LIMITED-----2ND
APPELLANT

ALMAS BOTTLERS LIMITED-----3RD
APPELLANT

VERSUS

GRACE NYAKIO OWINO & AND PETER NJUGUNA (suing as
legal Representatives of the estate of JOHN ALI
MWANGI)---RESPONDENT

(Being an appeal arising from the judgment of Honorable

J. Karanja (SPM) delivered on 6th March 2024 vide

Naivasha CMCC No. E367 of 2021)

JUDGMENT

1. By a plaint dated 17th June 2021, the plaintiffs sued the defendants seeking for judgment against the defendants for the following orders: -

a) General damages under the Law Reform Act and

Fatal Accident Act,

b) Special damages;

c) Costs of the suit and interest at court rates

d) Any other relief the Honorable Court will think

just and expedient to award.

2. The plaintiffs' case is that on or about 12th February 2021, the deceased plaintiff (herein "the deceased") was traveling as a lawful passenger aboard motor vehicle registration number KCM 068S. That, the motor vehicle was being driven along Gilgil- Nakuru road.

3. That when the motor vehicle reached Soy Sambu area it was involved in an accident with another motor

vehicle registration number KCL 748E owned by the 2nd and 3rd defendants and driven, managed and controlled by the 1st defendant, in the course of his employment.

4. The plaintiffs blame the 1st defendant for negligently driving, managing and/or controlling his motor vehicle by encroaching on the lane on which motor vehicle KCM 068S as a result of which he caused the accident causing and fatally injured the deceased.
5. The particulars of negligence attributed to the 1st defendant are that he drove the motor vehicle at a high speed or excessive speed in the circumstance of this case, failed to; keep proper lookout and have sufficient regard to other road users, stop, swerve, slow down, brake or in any way control the said motor vehicle, give way to any or give adequate warning or

signal to other road users, adhere to the provisions of the Highway Code.

6. The plaintiffs rely on the doctrine of Res Ipsa Loquitor.
7. The plaintiffs further plead that at the time of the deceased demise he was sixty-seven (67) years old, working as a Research officer and earning approximately Kshs 184,000 per month and in good health.
8. That as a result of the accident, the deceased's family has suffered loss and damage. The particulars of special damages in the sum of Kshs 179, 265 are tabulated at paragraph 7 of the plaint. It is further pleaded that despite demand and notice for the defendants to admit liability they have declined to do so resulting in the suit herein.
9. However, the plaintiffs' claim was opposed by the defendants with a joint statement of defense dated

19th July 2021 and save to admit the description of the parties as stated in the plaint, the defendants all the allegations in the plain.

10. In particular, the defendants denied being the registered and/or beneficial owners of the subject motor vehicle, that the deceased was a passenger in the said motor vehicle at the time of the accident, that the 1st defendant was driving the subject motor vehicle as the servant or agent of the 2nd and 3rd defendants. The particulars of negligence attributed to the 1st defendant were also denied.

11. However, in the alternative and without prejudice basis, the defendants averred that if the accident ever occurred, although denied, then it was either solely caused and/or contributed to by the negligence of the deceased.

12. The particulars of negligence attributed to the deceased are that; he distracted the driver by engaging him in idle talk while the driver was driving, failed to fasten his safety belt while aboard the motor vehicle, jumped out of the moving motor vehicle, was traveling under the influence of drugs, encouraged the driver to drive faster in the circumstances of the case, talking loudly and making signs while aboard the motor vehicle.

13. The defendants also attributed the cause of the accident to the driver of motor vehicle registration number KCM 068S, in that he failed to take reasonable care and attention to avoid the accident and/or managed his motor vehicle in a reckless manner. Further that he failed to pay due attention to other road users and one's surroundings, drove at

excessive speed in the circumstances of the case and drove on the wrong side of the road.

14. The defendants urged the court to dismiss the plaintiffs suit with costs.

15. However, the plaintiffs filed a response to the defense dated 1st December 2021, generally reiterating the averments in the plaint and denying any particulars of negligence attributed to the deceased.

16. The case proceeded to hearing wherein the plaintiffs' case was supported by the evidence of the 1st plaintiff; PW1, Grace Nyakio Owino, the deceased's wife. She adopted her witness statement and produced documents which included, medical reports in the form of x-ray, post-mortem report, birth certificates of their children and receipts in support the amount claimed as special damages.

17. In cross-examination, she confirmed that she was the beneficiary of the deceased's estate alongside others. However, she admitted that she did not have any evidence to prove that the deceased had a second wife by the name of Hannah and three children. She reiterated that she and her children depended on the deceased and that at the time he died he was 67 years old.

18. The plaintiffs' case was also supported by the evidence of No. 90678 PC Paul Ngugi Maina, attached to Gilgil Police Station who produced a police abstract confirming that the deceased was involved in the accident and so were the other two motor vehicles. However, he conceded that he was not the investigating officer but insisted that the findings of the police investigations blamed the 1st defendant

who was charged with the offence of, causing death by dangerous driving.

19. The defense case was supported by the evidence of the 1st defendant; Samson Kipto Chemjeon who confirmed that the accident occurred while he was overtaking the vehicle ahead of him but also contributed the cause of the accident to the driver of the motor vehicle where the deceased was travelling, by alleging that he too was overtaking another vehicle and therefore the two motor vehicles collided. He prayed liability be apportioned at 50:50% between the both drivers.

20. However, he admitted in cross examination that he had been charged with causing death by dangerous driving albeit that the case has not been finalized. The parties then filed their submissions. It is notable however that the record of appeal does not contain

the submissions that were filed by the plaintiff in the trial court.

21. Be that as it may, by a judgment dated 6th March 2024, the trial court entered judgment in favour of the plaintiff as against the defendants at 100% liability against the defendants. On quantum the trial court made the following award: -

a) pain and suffering -----Kshs 50,000

b) loss of expectation of life-----Kshs 100,000

c) loss of dependency-----Kshs 8,193,894

d) special damages-----Kshs 179. 265

Total-----Kshs 8, 523, 249.

The plaintiffs were also awarded costs of the suit and interest at court rates,

22. However, the defendants (herein “the appellants) are aggrieved by the decision of the trial court and appeals against it on the following grounds that: -

- a) *The trial Magistrate erred in law and in fact by failing to take into account the weight of the evidence adduced before court thus making wrong conclusion;*
- b) *The trial Magistrate erred in law and fact by awarding damages which were inordinately too high in the circumstances.*
- c) *The trial Magistrate applied wrong principles of law in the entire judgment awarding amounts not pleaded and proved.*
- d) *The trial Magistrate erred in law and in fact by not considering the parties' submissions in his judgment.*
- e) *The trial Magistrate erred in law and in fact by not considering the evidence standard thus awarding damages which were too high in the circumstances.*

f) The judgment of the trial court is in the circumstances unfair and unjust.

23. As a result of the afore said the appellants pray that the judgment of the subordinate court be set aside and;

a) The appeal be herein be allowed;

b) The judgment and decree of Honourable. J, Karanja (SPM) dated 6th March 2024 be set aside and proper findings be made to this by this Honourable court; and

c) Costs of the appeal be provided for.

24. The appeal was disposed of vide filing of submissions, the appellants submitted that the bone of contention is the amount awarded for loss of dependency. That dependency is a matter of fact that must be proved by evidence.

25. That the deceased was survived by a wife and four children who were all adults and who should be working, yet the respondents did not sufficiently prove how the deceased supported the family.

26. Further the death certificate indicates that the deceased was 57 years old, that he was working in a state corporation and due to retire at age 60 years. Therefore, he had only 3 years left. As such the multiplier of 8 years is not proper but considering the uncertainties of life a multiplier of 5 years is appropriate. Furthermore, the deceased's pay slip showed that he earned a net of Kshs 128, 031.00 and that should be adopted. Consequently, loss of dependency should be calculated as follows:

$$\text{Kshs. } 128, 031, 00 \times 12 \times 5 \times \frac{1}{3} = \text{Kshs. } 2, 560, 620$$

27. That regards liability, the police officer who testified did not produce a sketch plan to prove the 1st

defendant was to blame. As such liability be apportioned among the drivers of the vehicles involved equally.

28. The respondents on the other hand submitted that, the 1st defendant admitted in cross examination that he was overtaking another vehicle when the accident occurred. However, he did not identify that vehicle nor commence any 3rd party proceedings against the 3rd party. Furthermore, he confirmed that he has been charged with the offence of causing death by dangerous driving a motor vehicle.

29. That the respondent having pleaded to the doctrine of Res Ipsa Loquitor the appellants were bound to disprove it or show how the respondent contributed to the accident. That as such the appellants are 100% liable for the accident.

30. That regard quantum, the respondent proved she was married under Kikuyu customary law and they were blessed with four (4) children as stated in the pleadings and proved through birth certificates produced. That the respondents also testified that the deceased had another wife Hannah with three (3) children.

31. That the deceased used to cater for their basic need and urged the court to calculate loss of dependency as follows:

$$\text{Kshs } 184,000 \times \frac{2}{3} \times 12 \times 8 = \text{Kshs. } 11,776,000$$

32. Pursuant to the afore arguments of the parties and considering the evidence adduced in the trial court and the submissions tendered, I note that the role of the 1st appellate court as stated by the Court of Appeal in the case of; Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123, is to re-

evaluate the evidence afresh and arrive at its own conclusion.

33. Furthermore, the circumstances under which the appellate court will interfere with an award of quantum by the trial court are settled. That while assessing damages at the appeal stage, the appellate court will not interfere with the trial court's decision on quantum unless in exercising that discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; Mbogo & another Vs Shah (1968) EA and Mkube -vs - Nyamuro 1983 KLR 403.

34. To revert back to the matter herein, the respondent blamed the 1st defendant for causing the accident, the respondents supported the averments by producing

the police abstract for and stated that the 1st defendant was charged with the offence of causing death of the deceased by dangerous driving although the matter was still pending in court

35. It is clear from the aforesaid that at no time was the deceased blamed for causing the accident. In any case as a passenger he was not in control of any of the vehicles involved in the accident.

36. On the other part, the 1st defendant blamed the deceased attributing various particulars of negligence against him but did not produce any shred of evidence to prove those particulars. In any case the 1st defendant was not in the same vehicle with the deceased to have proved all those particulars

37. Furthermore, in his pleadings the appellants blame a 3rd party's vehicle for causing and/or contributing to the accident and totally failed to file 3rd party

proceeding against the alleged party. More still, the 3rd defendant admitted the accident occurred while he was overtaking another vehicle and in the circumstances went on the lane of the overtaking vehicle.

38. Consequently the deceased did not contribute to the causation of the accident and the finding of the trial court that the defendants are 100% liable for the accident is upheld.

39. As regards, quantum, I note that the only issue in dispute is the award on loss of dependency and in particular the issue of eight (8) years and 2/3 adopted in calculating the award.

40. As regard the eight (8) years adopted by the trial court, it notable that the trial court did not substantiate the same. Notably whereas the respondent stated through out that the deceased was

67 years old, the appellants stated that he was 57 years old.

41. If the court were to adopt the respondents' submissions the deceased would have retired under the statutory retirement age but evidence reveals he was still in employment consequently he was probably 57 years with three (3) years to retirement. As such the eight (8) years adopted is not tenable. Generally, three (3) years would be sufficient but the appellants have proposed five (5) years which I find reasonable and adopt it.

42. As regard the ratio of 2/3 again I find that all that the trial court stated is that the deceased supported his family members but failed to address several issues raised in the submissions. The first issue was whether the deceased had another wife and children.

43. The court notes that the 1st respondent admitted in cross examination that she did not produce any evidence to prove the same and neither is the age of the said children stated and therefore the second wife and children remained unproved and therefore not available for consideration.

44. Further the respondent averment that the deceased supported his family members required prove. The provisions of section 107 of Kenya's Evidence Act (Cap 80) Laws of Kenya, establishes the fundamental principle of the burden of proof: that the person who asserts a fact, and wants the court to rule on its existence (like claiming a right or liability), must prove that those facts exist.

45. Consequently, if someone claims any legal right, they must prove their claim, following the maxim "he who asserts must prove". It sets the initial stage for who

needs to present evidence for a fact to be considered proven, especially in civil cases where the burden typically rests on the party making the assertion.

46. In the instant matter, the respondents failed completely to adduce evidence as to whether deceased's adult children were still in learning in any institution or in employment to enable the court ascertain whether they were depending on the deceased for support.

47. The respondents squandered an opportunity to have the ration of dependency assessed at $\frac{2}{3}$ and as such the $\frac{2}{3}$ ratio was not justifiable. It is the finding of this court that $\frac{1}{3}$ is sufficient and set aside the $\frac{2}{3}$ ratio and substitute it with a ratio of $\frac{1}{3}$.

48. Finally, the submissions by the respondent that the deceased was earning Kshs 184, 000 is not tenable as that was not the net salary.

49. As a result, the calculation of the award for loss of dependency is calculated as follows: Kshs
 $128,031 \times 12 \times 5 \times 1/3 = \text{Kshs } 2,560,620.$

50. The rest of the awards are not contested and the final award is as follows:

a) Pain and suffering -----	Kshs
50,000	
b) Loss of expectation of life -----	Kshs
100,000	
c) Loss of dependency-----	Kshs
2,560,620	
d) Special damages-----	<u>Kshs</u>
<u>179,265</u>	
Total amount-----	<u>Kshs</u>
<u>2,889,885</u>	

51. The respondents will have costs of the suit in the trial court plus interest on all sums of money awarded from the date of judgment in the trial court until payment in full. Each party will bear costs of appeal

52. It is so ordered.

Dated, delivered and signed on this 10th day of March 2026.

GRACE L. NZIOKA
JUDGE

In the presence of:

Ms. Odhiambo H/B for Mr. Nyachiro for the appellants

Mr. Kairu for the respondents

Ms. Hannah: court assistant

