



**Lake Victoria North Water Services Board v Oduo & another (Suing
as the admin of the Estate of Joyce Opondo - DCD) (Civil Appeal
E016 of 2023) [2025] KEHC 3836 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3836 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E016 OF 2023
WM MUSYOKA, J
MARCH 26, 2025**

BETWEEN

LAKE VICTORIA NORTH WATER SERVICES BOARD APPELLANT

AND

ERNEST OTSIENO ODUO 1ST RESPONDENT

GEORGE OPONDO OLAYO 2ND RESPONDENT

SUING AS THE ADMIN OF THE ESTATE OF JOYCE OPONDO - DCD

*(An appeal arising from the judgement of Hon. TA Madowo, Senior Resident
Magistrate, SRM, delivered on 30th September 2022, in Busia CMCCC No. 196 of 2020)*

JUDGMENT

1. The suit, at the primary court, was initiated by the respondents, against the appellant, for compensation for loss and damage arising from a road traffic accident, which allegedly happened on 7th December 2013, which resulted in the death of the late Joyce Opondo, hereafter referred to as the deceased. The deceased was a pillion passenger on an unidentified vehicle, according to the plaint, which was hit by motor vehicle registration mark and number KBW 036V, said to belong to the appellant. The case by the respondents was that the said motor vehicle was so recklessly or negligently driven that it caused an accident, leading to the death of the deceased.
2. The appellant filed a defence, in which it denied everything pleaded in the plaint. It pleaded, in the alternative, that the accident was due to negligence on the part of the deceased.
3. An oral hearing was conducted, where 2 witnesses testified for each side. Judgment was delivered on 30th September 2022. Liability was assessed at 50%:50%. The court awarded Kshs. 2,000,000.00 under the



Fatal Accidents Act, Cap 32, Laws of Kenya; Kshs. 10,000.00 for pain and suffering; Kshs.100,000.00 for loss of expectation of life; and Kshs. 145,000.00 for special damages.

4. The appellant was aggrieved, hence the instant appeal. The grounds of appeal, in the memorandum of appeal, dated 30th October 2023, revolve around the trial court treating the evidence and submissions on liability superficially; the court ignoring the applicable principles and the written submissions presented by the appellant; the court not sufficiently taking into account the evidence tendered by the appellant; the court proceeding on wrong principles when assessing damages; the court making an inordinately high award of damages which signified an erroneous estimate; and the court failing to apply itself judicially on the law applicable and the evidence adduced.
5. Directions were given on 20th May 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
6. The appellant has submitted only on quantum. It is submitted that the claim by the respondents could not be established or had no evidentiary backing as it was not proved that the deceased was married, had children, was in business, the pathologist did not testify, and special damages were not subjected to contribution. Joseph Kimanthi Nzau vs. Johnson Macharia [2019] eKLR (Odunga, J) is cited in support. It is submitted that general damages are assessed by way of the court taking into account comparable injuries and awards, and Stanley Maore vs. Geoffrey Mwenda [2004] eKLR, Bashir Ahmed Butt vs. Uwais Ahmed Khan [1982-88] KAR 5, West (H) & Son Limited vs. Shepherd [1964] AC 345 (Lords Reid, Tucker, Morris of Borth-y-Gest, Devlin and Pearce) and Denshire Muteti Wambua vs. Kenya Power & Lighting Co. Ltd [2013] eKLR (GBM Kariuki, Kiage & Murgor, JJA) are relied upon.
7. On loss of dependency, it is submitted that no evidence was presented to establish that the deceased had a daughter who was dependent on her, with it being argued that dependency is a matter of fact to be proved by evidence. Section 4(1) of the *Fatal Accidents Act*, section 29 of the *Law of Succession Act*, Abdalla Rubeya Hemed vs. Kajumwa Mvurya & another [2017] eKLR (PJ Otieno, J), Kenya Power & Lighting Company Limited vs. Nathan Karanja Gachoka & another [2016] eKLR (Janet Mulwa, J) and Moses Wetangula & another vs. Eunice Titika Rengetiang [2018] KEHC 1038 (KLR) (C. Kariuki, J) are cited.
8. It is submitted that an award of Kshs. 500,000.00 should have been made under the *Fatal Accidents Act*, Kshs. 100,000.00 for loss of expectation of life and the special damages should have been subjected to contribution. On costs, it is submitted that costs follow the event, and section 27 of the *Civil Procedure Act*, Cap 21, Laws of Kenya, Matigari General Merchants Limited & another vs. Nelly Wairimu & another; Rose Wamuyu Wandaka (Interested Party) [2021] eKLR (Odunga, J) are cited.
9. The respondents, in their written submissions, largely support the findings, holdings and orders by the trial court. On the liability of passengers, they cite Ndatho vs. Chebet [2022] KEHC 346 (KLR) (Gitari, J) and West (K) Limited vs. Lillian Auma Saya [2020] eKLR (Njagi, J), to make the point that a passenger cannot be liable when a vehicle is involved in an accident. Section 112 of the *Evidence Act*, Cap 80, Laws of Kenya and William Kabogo Gitau vs. George Thuo & 2 others [2010] eKLR (Kimaru, J) are cited on burden of proof in civil cases.
10. AINU SHAMSI HAULIERS LIMITED vs. MOSES SAKWA & ANOTHER (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] KEHC 4971 (KLR) (N. Mwangi, J), MOSES MAIRUA MUCHIRI vs. CYRUS MAINA MACHARIA (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR (Ngaah, J) and Southern Engineering Company Limited vs. Mutia [1985] KLR 730 (Hancox, Nyarangi JJA & Gachuhi, Ag JA), are cited on assessment of damages, particularly with respect to adoption of a global award in assessment of damages for loss of dependency.



11. Section 29 of the *Law of Succession Act* and In re Estate of Mukhobi Namonya (Deceased) [2020] KEHC 9045 (KLR) (Musyoka, J) are referred to on proof of dependency. Hashim Mohamed Said & another vs. Lawrence Kibor Tuwei [2018] KEHC 450 (KLR) (H. Omondi, J) and Bayusuf & Sons Limited vs. Samuel Njoroge Kamau [2008] eKLR (Mugo, J) are relied on, for the proposition that special damages should not be subjected to liability.
12. The appeal turns on 2 items: assessment of damages for loss of dependency and special damages.
13. Loss of dependency is recoverable under the *Fatal Accidents Act*. Claims under the *Fatal Accidents Act* are brought by or on behalf of the dependents or dependants of the deceased, that is individuals who were dependent on the deceased person during his lifetime. They would cover claims for loss of financial support, being compensation for the financial support that the dependants would have continued to receive had the deceased stayed alive. They would also cover loss of the services that the dependants were receiving from the deceased, say household chores, childcare, consortium, etc. See EA Growers Limited vs. Charles Ng'ang'a Ngugi [2015] KEHC 5067 (KLR) (Ngaah, J).
14. It would also include bereavement damages, usually a fixed sum awarded for the grief and emotional distress caused by the death, which would be concurrent to the loss of expectation of life, under the *Law Reform Act*. It would be, in respect of claims under the *Fatal Accidents Act*, that issues about the age, income or earnings of the deceased, employment or activities, multiplicand, multiplier, dependency ratio, dependants, etc, would arise.
15. In the plaint, the particulars pursuant, to the *Fatal Accidents Act*, are pleaded in paragraph 5. Under loss of dependency, the dependants are said to be the 2 respondents, who are described as brother and brother-in-law of the deceased, and Janet Wesonga, described as a daughter of the deceased. The respondents brought the suit on their own behalf and on behalf of the daughter of the deceased. The deceased was said to have died at age 38 years, was healthy, in business, earning Kshs. 1,600.00 per day, which she used to support her daughter and sustain the family.
16. In assessing loss of dependency, the trial court found and held that there was inadequate proof of income, and, because of that, opted to adopt the global approach to assess the compensation payable. The court expressed itself to be guided by AINU Shamsi Hauliers Limited vs. Moses Sakwa & another (suing as the Administrators of the Estate of the late Ben Siguda Okach (Deceased) [2021] KEHC 4971 (KLR) (N. Mwangi, J), in awarding Kshs. 2,000,000.00.
17. In disagreeing with the trial court, the appellant raises 3 issues; that there was no proof that the deceased was survived by a daughter, there was no proof that the persons listed as dependants were dependent on the deceased, and the quantum with respect to a 38-year-old deceased person.
18. Let me start with the issue of proof that the deceased had a daughter. Dependency is about family members who were dependent on the deceased during his or her lifetime. The preamble to the *Fatal Accidents Act* states that it is designed for compensating the families of persons killed in accidents. Section 4 defines the individuals for whose benefit the action may be brought, and it talks of the wife, husband, parent and child of the person whose death was so caused. Section 2 is also relevant, it defines parent and child as including son, daughter, grandson, granddaughter, stepson or stepdaughter, father, mother, grandfather, grandmother, stepfather or stepmother, and it includes illegitimate and adopted children. These definitions of categories of beneficiaries would exclude siblings and siblings-in-law of the deceased, which would mean the respondents herein would not be entitled, but a daughter of the deceased would.
19. Was there proof that the deceased had a daughter? The persons testifying for the respondents were 1 of the respondents, who testified as PW1, and a person who claimed to have had been a co-pillion



passenger with the deceased. Only the evidence of PW1 would be relevant here. He stated that he was following up the case on behalf of the daughter of the deceased. He produced a Chief's letter, where it is disclosed that the deceased was survived by a daughter. Other than the Chief's letter, nothing else was produced as proof of parentage. The usual way of proving parentage would be a certificate of birth. None was produced. The court was satisfied with the Chief's letter.

20. I have looked at the notes on the cross-examination of PW1, by the Advocate, who represented the appellant at trial, and I have noted that proof that the deceased had a daughter was not made an issue at cross-examination on 24th August 2021. I have also looked at the written submissions that the appellant lodged at the trial court, on 7th July 2022, dated 6th July 2022. That issue was not raised in the written submissions. It was, therefore, not an issue before the trial court, hence the trial court did not make a determination on it, which could be the subject of appeal herein, as the trial court was not invited to make a decision on it.
21. The second issue is about proof of dependency. The argument is that the trial court should award damages for loss of dependency upon proof of dependency. Section 4(1) of the *Fatal Accidents Act* is cited. I have read and re-read that provision, and I see nothing there which requires proof of dependency. Abdalla Rubeya Hemed vs. Kajumwa Mvurya & another [2017] eKLR (PJ Otieno, J), however, does state that dependency is a matter of proof, and some evidence ought to be adduced to show that the person was dependent on the deceased, and to what extent.
22. One cannot be a dependant without having been dependent on the deceased. For assessment of damages to be done, the age of the dependant would be relevant, and so should the dependency ratio. Of course, the dependency ratio would be most relevant where assessment is founded on the multiplicand/multiplier approach, but that is not to say that evidence on dependency would not be a requirement where the global award approach is adopted. Assessment of damages following either approach should be preceded by evidence that the claimant was a dependant in the first place. Where there is no proof of dependency, the journey to assess loss of dependency would be needless.
23. I note that the parties hereto have both cited the provisions of section 29 of the *Law of Succession Act*, Cap 160, Laws of Kenya, which defines dependants. That provision is intended for the limited purpose of Part III of the *Law of Succession Act*, with respect to proceedings under that Part, in applications for reasonable provision, under section 26 of that Act. That definition is not of universal application. Dependand, for the purposes of proceedings under the *Fatal Accidents Act*, should be as defined in section 4 of that Act, as read with section 2.
24. Was there evidence that the daughter of the deceased was dependent on the deceased? The age of the alleged dependant is critical, for parents only have a duty to provide for children who are under the disability of minority. That duty is imposed by the *Children Act*, Cap 141, Laws of Kenya. The duty is that to provide food, shelter, education, medical care, among others, as set out in section 32(2) of the *Children Act*. Dependency can be extended beyond the age of minority, where, upon attaining majority, the dependant is still in school or college. See JMK & another vs. EKM [2013] eKLR (Wendoh, J) and EMK alias A vs. SSS [2022] KEHC 154 (KLR)(Onyiego, J). Adults can be dependant, say parents in old age, or adult children with severe mental or physical disability. See section 35 of the *Children Act*. There would be need then to disclose the age, for anyone under 18 would be a dependant, by virtue of the *Children Act*. Anyone above 18 would have to prove dependency.
25. In the instant case, the age of the alleged daughter of the deceased was not disclosed. There was no telling, therefore, whether she was a minor or an adult. There was no mention whatsoever whether the said daughter was in school or college or working. An adult young person in school or college would be a dependant, by dint of the *Children Act*, upon extension of parental responsibility, but such a young



- adult would still require leading evidence to prove the circumstances of his dependency and its extent. A young adult starting his career would still be a dependant until they are able to stand on their own 2 feet, but they would have to prove the extent of dependency. Evidence or information on the age of the alleged daughter of the deceased was critical. Without it, there would be no proof of dependency, to provide basis for the court to make an award of loss of dependency.
26. The appellant has submitted around there being no proof that the deceased was married, and about the pathologist, who did post-mortem on her remains, not testifying. I do not understand the point sought to be made through these submissions.
 27. It was not pleaded, in the plaint, that the deceased was married, nor that she had been survived by a widower. At trial, PW1 described her as his sister-in-law, being the widow of his late brother. Whether she was or was not married was of little moment, to the issues at hand. The pathologist, who carried out autopsy on the body of the deceased, would only be relevant in the matter if the issue of cause of death arose. The appellant did not make it an issue, in its defence, by, for instance, pleading that the death of the deceased had nothing to do with the accident. PW1 was not tested on that, when he testified at the trial.
 28. On the quantum of compensation awarded by the trial court, the issue is not with the approach that the trial court adopted, the global award, but rather the argument is that the award was high. What would guide a court in making the global award would be the age of the claimant, for the age would assist to determine the level of dependency. Children still going through education would be more needy, than young adults who have just completed schooling or who have just started working. The figure to be awarded in such cases would depend on their needs.
 29. A proper assessment of the amount awardable could not, in this case, be properly made where the age of the daughter was unknown, as her level of dependency, if at all, was unknown. It would be noteworthy that the decision the trial court relied on, *Ainu Shamsi Hauliers Limited vs. Moses Sakwa & another* (suing as the Administrators of the Estate of the late Ben Siguda Okach (Deceased) [2021] KEHC 4971 (KLR) (N. Mwangi, J)), the deceased had been survived by 2 children, aged 6 and 4 years, and a widow aged 29.
 30. On special damages, I note that the appellant has dropped that ground, for it is not argued in its written submissions. The respondents have, however, addressed it. I agree with the respondents, the prevailing convention is that special damages are not subjected to liability or contribution, and the decisions, in *Hashim Mohamed Said & another vs. Lawrence Kibor Tuwei* [2018] KEHC 450 (KLR) (H. Omondi, J) and *Bayusuf & Sons Limited vs. Samuel Njoroge Kamau* [2008] eKLR (Mugo, J), state the correct position.
 31. There is an issue that the appellant has not raised in its appeal, but the respondents have addressed it, in their written submissions, on the liability being assessed at 50% against the deceased, yet she was a mere passenger on the accident motorcycle, and, therefore, she was not in control of the vehicle. It is an important point of law. However, I note that the respondents have not cross-appealed, and, therefore, that issue is not before me. I shall not tax my mind on it.
 32. In this case, the pleadings in the plaint and the evidence adduced by the respondents did not provide adequate material upon which loss of dependency could be assessed. I shall, accordingly, allow, as I hereby do, this appeal. The final order shall be that the award, made in the suit by the respondents, in *Busia CMCCC No. 196 of 2020*, with respect to loss of dependency, is hereby set aside. All the other awards shall remain intact.



33. The appellant has argued that costs should be awarded to it, on the basis that costs follow the event. It is quite true and correct that costs follow the event. However, it is also true and correct that costs are awarded at the discretion of the court. See *Morgan Air Cargo Limited vs. Evrest Enterprises Limited* [2014] eKLR (Gikonyo, J), *Punchlines Limited vs. Joseph Mugo Kibaria & 10 others* [2018] eKLR (Waki, Nambuye & Kiage, JJA) and *DGM vs. EWG* [2021] eKLR (C. Kariuki, J). In the area of fatal and personal injury claims litigation, where a suit is dismissed, discretion is often exercised in favour of the victim of the accident, the subject of the suit, notwithstanding that he or she has lost the case, for there would be no need to add to their pain and sorrows. Let each party bear their own costs in this case. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Advocates

Mr. Menezes, instructed by LG Menezes & Company, Advocates for the appellant.

Ms. Achala, instructed by Abalo & Company, Advocates for the respondents.

