



Francis & 2 others v Miruka & another (Suing as personal representatives and legal administrators of the Estate of Felgona Auma Young) (Civil Appeal E006 of 2020) [2024] KEHC 1906 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1906 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E006 OF 2020
MS SHARIFE, J
FEBRUARY 29, 2024**

BETWEEN

**OTIENO FRANCIS 1ST APPELLANT
TERESA AUMA OUMA 2ND APPELLANT
JECKONIA OMONDI OUMA 3RD APPELLANT**

AND

**JUSTICE ONYANGO MIRUKA 1ST RESPONDENT
GWENDOLINE ATIENO MIRUKA 2ND RESPONDENT
SUING AS PERSONAL REPRESENTATIVES AND LEGAL ADMINISTRATORS
OF THE ESTATE OF FELGONA AUMA YOUNG**

*(An appeal from the Judgment and decree of Hon. R. S. Kipngeno (SRM)
in Nyando SPMCCC No. 64 of 2017 delivered on 5 th May, 2020)*

JUDGMENT

A. Case Background:

1. The Respondent (Plaintiff in the subordinate court) sued the Appellants for general and special damages from a road traffic accident which claimed the deceased's life who was travelling as a pillion passenger.
2. The Respondent pleaded that the Appellant's motor vehicle registration number KBW 405K was driven in careless and negligent manner thus the accident and that as a result of the accident, the deceased's estate suffered loss and damage.



3. The Appellants entered appearance and filed their statement of defence denying the claim, averred that the road conditions were poor and they cannot be blamed for the accident, that the rider carrying the deceased was negligent and or the deceased contributed to the occurrence of the accident.

B. Evidence:

4. The matter was set down for hearing. Justice Onyango Miruka testified as PW1 by stating that the deceased was at the time of her death aged 67 years and retired a teacher. That the deceased was his mother.
5. PW-2, Joshua Ochieng Ajuang witnessed the accident that occurred outside his compound. He stated that the motor vehicle and the motor cycle were heading in the opposite direction and that the deceased was hit off the road and trapped under the motor vehicle which dragged her until it was stopped by trees.
6. PW-3 PC Fredrick Matunda produced into evidence a police abstract indicating the accident occurred on 15/4/2016. A traffic offence charge was preferred against the driver of the motor vehicle in court.
7. PW-4 Dr. Agwanda Anfield produced a post mortem report for the deceased.
8. The Appellants closed their case without calling any witness.

C. Judgment:

9. The court after considering the evidence on record entered 100% liability against the Appellants and awarded; Kshs.30,000/- for pain and suffering, Kshs.100,000/- for loss of expectation of life, Kshs.300,000/- for loss of dependency and Kshs.16,225 in special damages.

D. Appeal:

10. The Appellants being aggrieved filed this appeal vide memorandum of appeal dated 1st October, 2020 raising the following grounds;
 - a. The learned trial magistrate held the appellants 100% liable without giving reasons for that finding of fault on part of the appellants (defendants). The learned magistrate did not even inquire into contributory negligence although it was pleaded.
 - b. The learned trial magistrate erred in law by giving damages for loss of dependency to the deceased's children who were all above 18 years and who did not depend on the deceased financially.
11. The appeal was canvassed by way of written submissions. Both parties complied and their respective contentions have been considered.

E. Analysis and determination:

12. This being a first appeal, the duty of the court is as was held in Mark Oiruri Mose vs. R (2013) eKLR thus;

....the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.



13. The issues in this appeal are on liability for the accident and that of quantum of damages awardable in the circumstances.
14. On the issue of liability, the Appellants in their plaint alleged that the Respondent's motor vehicle was being driven in a reckless and or careless manner. The specific instances of negligence were listed in paragraph 5 of the plaint.
15. In their evidence before the trial court, the Respondents witnesses more particularly PW-1, PW-2 and PW-3 brought out the aspect of negligence attributable to the appellants. PW-2 was categorical that he witnessed the accident which occurred outside his gate while he was outside. PW-3 being the investigating officer testified that after conducting investigations, they charged 3rd Appellant and as at the time of testifying in the subordinate court, the matter was ongoing.
16. The Appellants did not call any witness in the trial court despite their statement of defence stating that the deceased and or the rider contributed to the occurrence of the accident.
17. Section 107 of *Evidence Act* provides: -

“ 107

- (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) Where the person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceedings lies in the person who would fail if no evidence at all were given in either side.

18. Before the trial court, the trial magistrate did not discuss the issue of contribution but this being a first appellate court, it is my duty to re-evaluate the evidence and come to own conclusion.
19. Going by the provision of Sections 107 and 108 above, it was the appellants' duty to adduce evidence that would sufficiently show that the deceased and or the rider contributed to the accident. In this case, no evidence was adduced on their behalf and it is my finding that contributory negligence was not established and the trial court cannot be faulted for that.
20. On the issue, I find guidance in the decision in *Sinohydro Corporation v Joel Odhiambo Obonyo* [2017] eKLR where Riechi J held;

This provision of the *Evidence Act* lays the burden of proof of the existence of a fact on the person who alleges. The burden of prove of the existence of contributory negligence in the suit, therefore lay on the Appellant.
21. Above said, I therefore find no evidence of contributory negligence and hold that the trial magistrate cannot be faulted for not making a finding on contributory negligence.
22. The second ground of appeal challenges the trial court's award of loss of dependency to the deceased's children who had all attained the age of 18 years.
23. From the evidence on record, the trial magistrate awarded a global nominal sum of Kshs.300,000/- under this head. Case law has established that this head of damages is awarded.



24. The Appellants fault this award for reason that there was no evidence that the deceased's children depended on her and cited the decision in *JNT V JWO & another (2019)eKLR*. The Respondents on their part submitted that the issue of parental responsibility did not arise in both parties pleadings and cannot be an issue at this stage.
25. There is no doubt the deceased was aged 67 years and a retiree. The Respondents asserted that she made a monthly income of Kshs.30,000/- from counselling, motivational speaking and farming. They produced the deceased's pay slip for August, 2003 showing she earned Kshs.9,462/-
26. The evidence adduced before the trial court does not show what the deceased earned and in the circumstances, a global sum approach was the best in the circumstances as held in *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR* that:
- [23]. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
- [24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”
27. As a cardinal principle of awarding damages, the decision on whether to interfere with the award was stated in *Rahima Tayab & others v Anna Mary Kinanu (1983) KLR 114*, that:
- “But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.”
28. The issue of whether a deceased person of advanced age ought to benefit from this head of damages was discussed in *China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR* where Nyakundi J while considering a person aged 79 years held;
- I cannot resist stating that there was no medical evidence that would proof that the deceased prior to the wrongful act was not enjoying good health and engaged in income generating activities for his benefit and dependant. A man in good health able to make a living from his business or farming activities and is killed due to the negligence ought to be fairly and adequately compensated for the benefit of his estate.
29. Taking cue from the above decision, I find no reason to fault the trial magistrate's award under this head. The amount so awarded was sufficient and represented a fair assessment of damages due to the deceased's estate.



F. Conclusion:

30. The upshot of the above is that this appeal is devoid of merit and is hereby dismissed with costs to the Appellant.

31. Orders accordingly.

DELIVERED, DATED, AND SIGNED AT KISUMU THIS 29TH DAY OF FEBRUARY 2024

MWANAISHA S. SHARIFF

JUDGE

