



**Vehicle and Equipment Leasing Limited v Omurunga (Suing as the administrator  
of the Estate of Teddy Mashisia Omurunga - Deceased) (Civil Appeal  
E473 of 2022) [2024] KEHC 6122 (KLR) (Civ) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6122 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E473 OF 2022**

**HI ONG'UDI, J**

**MAY 30, 2024**

**BETWEEN**

**VEHICLE AND EQUIPMENT LEASING LIMITED ..... APPELLANT**

**AND**

**BEATRICE MAKOKHA OMURUNGA (SUING AS THE ADMINISTRATOR  
OF THE ESTATE OF TEDDY MASHISIA OMURUNGA -  
DECEASED) ..... RESPONDENT**

*(Being an appeal from the Judgment by Hon. C.K. Cheptoo Principal Magistrate  
in Nairobi Milimani MCCC E3552 of 2020 delivered on 20th May, 2022)*

**JUDGMENT**

1. The respondent who was the plaintiff in the lower court sued the appellant seeking general damages under the *Fatal Accidents Act* and *Law Reform Act*, plus special damages costs and interest arising out of a fatal road accident which claimed the life of Teddy Mashisia Omurunga. The respondent sued on behalf of the estate of the deceased. The appellant in its defence denied the claim and the matter proceeded to full hearing. Thereafter the trial court delivered Judgment in favour of the respondent at 100% liability, loss of dependency Ksh 7,840,000/=, special damages 105,220/=, pain and suffering Ksh 150,000/= loss of expectation of life Ksh 100,000/= plus costs and interest.
2. Being aggrieved by the Judgment the appellant filed this appeal citing the following grounds:
  - i. The learned magistrate erred in fact and in law in awarding manifestly excessive and undeserved general damages to the respondent under the *Fatal Accidents Act*.



- ii. The learned magistrate erred in fact and in law in failing to consider conventional awards established precedent in cases of similar nature in awarding general damages.
  - iii. The learned magistrate erred in fact and in law by admitting and considering substantive evidence that violated the provisions of section 35 and 48-54 of the *Evidence Act* as well as section 24 and 12 (c), (d) of the VAT Act as read with Regulation 4(1) of the said statute law.
  - iv. The learned magistrate erred in fact and in law by failing to appreciate the appellant's contentions, arguments and submissions.
  - v. The learned magistrate erred in fact and in law by disregarding the evidence on record thus arriving at an erroneous decision.
  - vi. The learned magistrate misdirected herself by considering erroneous facts and evidence hence reached a wrong conclusion of law, and
  - vii. The learned magistrate's judgment consequently occasioned a miscarriage of justice.
3. In the trial before the lower court the respondent testified as PW1 confirming that she is the mother of the deceased who died through a road traffic accident. She produced letters of administration ad litem authorizing her to file the suit on behalf of the deceased's estate (EXB 16). It was her evidence that the deceased was a third-year student in the School of Mathematics College of Biological and Physical Sciences University of Nairobi (EXB 8). She only received a report of the accident on 3/03/2020 and went to the Kenyatta National Hospital where he had been rushed. The deceased died the following day from a head injury. The Post-mortem report confirms that (EXB7).
  4. PW2 No. 71077 PC Joseph Mwema attached to Nairobi area Government vehicle accident Investigation department was the investigating officer in the matter. On 3/03/2020 at 1400 hrs he received a report from the driver of motor vehicle GKB 007R Isuzu Canter in respect of a road traffic accident which had occurred along University Way involving his vehicle and a pedestrian (deceased). After investigations were done, the driver was found to blame for the accident, and was charged in court, and the case was finalized. He produced the police abstract confirming the accident.
  5. The appellant did not call any witness.

## SUMBISSIONS

### Appellant's submissions

6. These were filed by Diro Advocates LLP and are dated 12/03/2024. On liability counsel submitted that the respondent sued the appellant as the registered owner of the vehicle but failed to sue the driver and also failed to prove the employment, agency or express instructions on use of the vehicle. Reference was made to the case of *Morgans V Launch bury and others* [1971] 2 ALL ER 606. He argued that in the circumstances the appellant could not be held liable for negligence.
7. Additionally, he submitted that from the police abstract the deceased suddenly crossed the road i.e University Way around Shell Petro Station which is not a designated crossing area for pedestrians. He relied on the case of *Peter Okello Omondi V Clement Ochieng* [2006] eKLR to support the argument that the deceased owed a duty of care to other road users. He thus urged the court to apportion liability in the ratio of 50:50.
8. On quantum he urged that this was discretionary and the court must exercise it judiciously. He cited the case of *Kimaru Maina V Boniface Onyango Aliwa* [2021] eKLR in support. He further submitted



that as held in the case of Joseph Kimani Githaga & Another V Dickson Ndungu Njoroge [2019] eKLR the court in assessing general damages ought to consider comparable awards, depending on the circumstances of each case. Also referred to on this are the cases of Taita V Rugu & Maritim (suing on their own behalf and as the administrators of the estate of the Cosmas Kipserem Kipkoech) (Civil Appeal E009 of 2021) [2022] KEHC and Kenya Power & Lighting Company Ltd & another V Zakayo Saitoti Naingola & Another [2008] eKLR.

9. Counsel submitted that the Judgment on future earnings was purely speculation and unsupported by the evidence. He argued that in the Taita Taveta University case (supra) the deceased was 23 years old and a first-year student in college. The court awarded Ksh 2,000,000 for loss of dependency. The court stated thus:

“No one can say with certainty what he future held for him or how long he would have lived or worked. No one can say whether he would have successfully completed his college or when he would have secured a job. Taking into account the vicissitudes of life, no amount of speculation can yield a clear answer to these questions”.

10. Finally, counsel submitted that the special damages were not proved to the required standard. That only the motor vehicle search payment met the threshold of proof as per the *Stamp Duty Act* and section 12 of the VAT Act and Regulation 4(1) which make it a mandatory requirement that ETR receipts should be attached to invoices to prove payment. He thus proposed the following:
- a. Global sum approach of Ksh 1,500,000/= for loss of dependency.
  - b. Loss of expectation of life Ksh 100,000/=
  - c. Pain and suffering Ksh 20,000/=
  - d. Special damages Ksh 55,000/=
  - e. Liability at 50:50

### **Respondent's submissions**

11. These were filed by Mirara & associates and are dated 22<sup>nd</sup> March, 2024. Counsel submitted that the appellant as was noted by the trial court did not call any witness to shake the respondent's evidence. Therefore, that evidence remained unchallenged. He urged the court to uphold the decision of the lower court on liability. Reference was made to the cases of:
- i. Milimani HCCA No. E559 of 2022 Richard Wachira Gitiche Vs Haron Wanjohi Wanjui Adian Gonji
  - ii. Moses Theuri Ndumia V I. G. Transporters Limited & Another [2018] eKLR
  - iii. Kenya Power & Lighting Co. Ltd V Pamula Awino Agunyo Civil Appeal No. 315 of 2012 among others.
12. On quantum he submitted that he associated himself with the findings of the trial court on all the items.

### **Analysis and Determination**

13. This being a first appeal this court has a duty to re-consider and re-evaluate the evidence and arrive at its own independent conclusion. It has to bear in mind that it did not see nor hear the witnesses and give and allowance for that. This has been stated in several decisions among them:



- i. *Selle & Another V Associated Motor Boat & others* 1968 EA 123
- ii. *Gitobu Imanyara & 2 others V Attorney General* [2016] eKLR where the Court of Appeal stated:

“An Appeal to this court from a trial court by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”.

14. Having considered the grounds of appeal, record of appeal, submissions and authorities by both parties and the law I find the issues falling for determination to be as follows:
  - i. Whether the learned trial magistrate’s finding on liability was an error.
  - ii. Whether the award on general damages was too high

**Issue No. (i) Whether the learned trial magistrate’s finding on liability was an error.**

15. In addressing this issue, I refer to the Court of Appeal in *Michael Hubert Kloss & Another V David Seroney & 5 Others* [2009] eKLR where it stated

“The determination of liability in a road traffic accident is not a scientific affair, Lord Reid put it more graphically in *Stapley V Gypsum Mines Ltd (2)* (1953) A.C 663 at pg 681 as follows

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide .....

The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally”.

16. Further, in *Farah V Lento Agencis* [2006] 1 KLR 124, 125, the Court of Appeal held that:

“Where there is no concrete evidence to determine who is to blame between the two drivers, both should be held equally to blame. As no side could establish the fault of the opposite party, liability for the accident could be equally on both the drivers. Therefore, each driver was to blame”.

17. Guided by the above cited authorities it is my view that in determining liability this court must consider the facts of the case and establish what mainly contributed to the cause of the accident. The court will always consider the manner of driving, conduct of the pedestrian and identify the person who was at



fault and place the blame on him/her. Where the facts and circumstances are such that it is not clear who was at fault and who was to blame, the court will apportion liability.

18. From the evidence on record there is no dispute that the deceased was hit by the appellant's vehicle registration No. GKB 007R. PW2 informed the court that the driver of the said vehicle reported to him while he served at Nairobi area government vehicle accident Investigation Department. This driver was a police officer. A police abstract which has all details was also produced as an exhibit. Counsel for the appellant has submitted that the driver ought to have been sued as nothing was produced to connect him to the appellant. I find this argument to be a bit absurd because the driver of the vehicle reported and after investigations he was charged, and the case was finalized.
19. The Motor accident Claim Form for 2018 has the full details of the driver (Daniel Mutai Rank APC Force No. 223377 based at Uhuru Camp). In the unlikely event that this was not the person assigned to drive the subject vehicle what prevented the appellant from availing evidence of their driver before the trial court? Alternatively, driver Daniel Mutai could have been summoned on the request of the appellant to come and refute the claim that he was the authorized driver for the appellant.
20. Counsel has also submitted that the deceased crossed the road abruptly. Secondly that the scene on University Way around Shell Petrol Station was not a designated crossing area for pedestrians. Again, this is evidence which ought to have been presented to the trial court. It cannot be brought before this court as a submission. There is nothing on the police abstract showing that the deceased suddenly crossed the road as submitted by the appellant.
21. Upon analyzing all the evidence my finding is that investigations conducted revealed that the driver of the motor vehicle GKB 007R was wholly to blame for the accident. He was charged and the case was finalized. I am convinced that the appellant is aware of the outcome. My finding therefore is that the trial court did not err in finding the appellant to be 100% liable for the accident, as the owner of the motor vehicle GKB 007R.

#### **Issue No (ii) Whether the award on general damages was too high**

22. It is not disputed that the deceased was 22 years old at the time of his death (EXB 5). He was a 3<sup>rd</sup> year student at the University of Nairobi. It's not clear how long the course he was taking would last for him to attain the first degree, Masters degree, PHD and then gaining the title of Professor.
23. In assessing lost years, the trial court used the salary of a professor. Given the unavailability job situation in Kenya, I find this to be laying too much unsupported job expectation in the market. Getting a Masters degree and PHD degree is not so obvious. The deceased's academic performance was not supported by any documentation. Life's vicissitudes must also be considered while dealing with cases like this one. The above being the position I find it not practical to assess the lost years by use of a multiplier and multiplicand.
24. I am persuaded on this by the case of Marko Mwenda V Bernard Mugambi & another Nairobi HCCC No. 2343 of 1993 where Ringera J (as he then was) stated:

“In adopting a multiplier, the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lumpsum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a results of the death



of the deceased..... The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, insist on the multiplier approach would be to sacrifice justice on the alter of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case”.

25. Being guided by the above decision and in view of what I have already indicated, I find the option of a global sum to be more appropriate in the circumstances of this case. Besides the level of joblessness in Kenya I have also considered life preponderables and vicissitudes that can shorten one’s life besides the accident. I find an award of Ksh 4,500,000/= for lost years to be sufficient in the circumstances of this case.
26. The respondent pleaded special damages in the sum of Kshs 105,220/=. The law is that special damages must not only be pleaded but must be proved. The particulars of the special damages are at paragraph 7 of the plaint. I have perused all the documents produced as P EXB 1 -16. The only receipt produced is the one at pg 18 of the record of appeal. That is the receipt for the motor vehicle search for Ksh 550/= and that is what the court will award as special damages.
27. For pain and suffering it is not disputed that the deceased did not die at the scene. He went through a lot of pain. The award of Ksh 150,00/= for this is reasonable loss of expectation of life at Ksh 100,000/= is also reasonable.
28. The upshot is that the Appeal partially succeeds. The Judgment by the lower court is hereby set aside. I enter Judgment for the respondent and make the following orders:
  - i. Liability at 100% in favour of the respondent against the appellant.
  - ii. Pain and suffering Kshs 150,000/=
  - iii. Loss of expectation of life Kshs 100,000/=
  - iv. Lost years – Kshs 4,500,000/=
  - v. Special damages Ksh 550/=

TOTAL Ksh 4,750,550/= (Four Million, seven hundred and fifty thousand five hundred and fifty shillings only) plus costs and interest at court rates from the date of Judgment.

29. Orders accordingly

**DELIVERED VIRTUALLY, SIGNED AND DATED THIS 30<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU**

**H. I. ONG’UDI**

**JUDGE**

