



Ombati & another (Suing as legal representative of the Estate of Daniel Ongangi Ogechi (Deceased)) v Nyaroki & another (Civil Suit 248 of 2017)
[2023] KEHC 23095 (KLR) (Civ) (24 August 2023) (Judgment)

Neutral citation: [2023] KEHC 23095 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL SUIT 248 OF 2017
DO CHEPKWONY, J
AUGUST 24, 2023

BETWEEN

CHRISTOPHER OGECHI OMBATI 1ST PLAINTIFF
GRACE NYANGARA OGECHI 2ND PLAINTIFF
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL ONGANGI OGECHI (DECEASED)

AND

JAMES NYAROKI 1ST DEFENDANT
DAMARIS ANGWENYI 2ND DEFENDANT

JUDGMENT

1. By way of a Plaintiff dated December 21, 2017, the Plaintiffs initiated this suit against the Defendants seeking for the following prayers;
 - a. Special damages of Kshs. 745,435/=
 - b. General damages for pain and suffering before death.
 - c. General damages for loss of dependence under the Fatal Accident Act.
 - d. General damages for loss of expectation of life.
 - e. General damages for lost years under the Law Reform Act.
 - f. Costs of this suit.



g. Interest on a, b, c, d, e and f above at court rates.

2. In their Plaintiff, the Plaintiffs pleaded that on or about December 30, 2014, the deceased was a lawful passenger in Motor Vehicle Registration Number KAU 210V and in the process of alighting at a Matatu bus stop along Landhies road in Nairobi area, the 1st Defendant negligently drove, managed, controlled and or handled the said motor vehicle so that before the deceased could completely alight, he drove off and or suddenly and violently caused the said motor vehicle to move on causing the deceased to fall down and was crashed it.

3. The Plaintiffs pleaded negligence on the part of the 1st Defendant as particularized under Paragraph 5 of the Plaintiff. In summary the plaintiffs state as follows;

- a. Failing to keep any or any proper lookout.
- b. Failing to maintain adequate control over the said motor vehicle.
- c. Driving the same without due care and attention.
- d. Failing to ascertain that all passengers and particularly the deceased had alighted before driving off.
- e. Failing to stop or in any other way to control the said motor vehicle so as to avoid the accident.
- f. Moving the vehicle in haste and failing to accord the deceased sufficient time to alight.
- g. Negligently, suddenly and violently taking the Motor Vehicle Registration Number KAU 201V in motion thus causing the same to throw the deceased out of the bus causing him to suffer severe injuries from which he later died.
- h. Failing in his duty of care towards the deceased to ensure his safety whilst getting on board, while on board and while alighting.
- i. Failing to foresee that his action of suddenly and violently taking off while the deceased was alighting would result in severe harm and injury to the deceased.
- j. Failing to ensure that the deceased had safely alighted from the Motor Vehicle Registration Number KAU 210V before driving off from the stage.
- k. Hastily and negligently driving off without checking all passengers wishing to alight had already done so.
- l. Failing to give the deceased any warning or heed his presence.
- m. Failing to maintain or exercise proper or effective control of the said vehicle.
- n. Failing to have sufficient regard for his passengers.
- o. Failing in his duty of care towards the deceased to ensure that he had alighted safely from the Motor Vehicle Registration Number KAU 210V.

4. According to the Plaintiffs, the 2nd Defendant is vicariously liable, hence both Defendants are liable for the accident. As a result of the said accident, the deceased suffered severe injuries from which he later died and his estate suffered loss and damage for which they claim loss of expectation of life, pain and suffering and lost years.

5. The deceased died at the age of 26 years and had enjoyed good health. He had graduated from the University of Nairobi with B.A degree in Sociology and Psychology in December 2012. He had also



graduated with a Diploma in Information and Networking in September, 2013. And the time of his death he was pursuing a post graduate course in Higher Diploma in Human Resource Management.

6. The Plaintiffs aver that the deceased would have completed his training and been able to secure employment whereby he would be earning a monthly salary of Kshs. 150,000/= or thereabout. By his death, the Plaintiffs have lost the support they would have enjoyed and as dependents, they have suffered loss and damage and claim for damages under the *Fatal Accidents Act*. They also claim special damages as particularized in Paragraph 6 of the Plaintiff amounting to Kshs. 745,435/=.
7. The Defendants were served with summons but failed to enter appearance or file a defence. The Plaintiffs filed an application for request for Judgment dated January 18, 2019.
8. On August 28, 2019, the Deputy Registrar of this court being satisfied that the defendants were served with summons but failed to enter appearance or file defence within the requisite period, and on application by the plaintiffs, entered interlocutory Judgment in favour of the Plaintiffs.
9. The matter was listed down for formal proof hearing on February 27, 2020, whereby the Plaintiffs called evidence of three (3) witnesses. In his testimony, PW1-Christopher Ogechi Ombati, the Plaintiff stated that he is an administrator in the Estate of the deceased. He recorded a witness statement dated February 21, 2020 and which he adopted as his evidence in chief. He filed a list of documents and bundle of documents on December 27, 2017 together with a supplementary list and bundle of documents, which he produced as Plaintiff Exhibits in support of the claim.
10. PW2-David Ouma Omollo also sought the court to adopt his statement dated December 21, 2017 as his evidence in chief.
11. PW3-Christopher Siambe recorded his statement that he is a Certified Public Accountant and on October 6, 2021 he was working with Kinanu and Associates. He stated that in 2016, he was requested to carry out a survey on remuneration for fresh graduates in areas of Human Resources, ICT or Insurance. And in his findings, he indicated that fresh graduates are offered a consolidated pay that ranges from Kshs. 75,000/= and Kshs. 200,000/= per month.
12. The Plaintiffs filed their written submissions dated October 4, 2022 which I have read through alongside the pleadings which will be considered in the final analysis and determination of this case.

Analysis and Determination

13. I have considered the pleadings, the evidence and the written submissions filed by the Plaintiffs and find the following issues condensed for determination:-
 - a. Whether the plaintiffs have proved their case to warrant grant of the prayers sought.
 - b. What remedies can this court grant in the circumstances.
14. On the first issue, the relevant provision on burden of proof is embodied under the *Evidence Act*. Section 107 (1) and (2) of the *Evidence Act*, states as follows:
 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. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



15. Section 109 of the Act provides that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

16. Further, Section 112 provides that;

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

17. A similar position was enunciated by the Court of Appeal in the case of Kirugi & Another vs Kabiya & 3 Others (1987) KLR 347, where it stated as follows:-

“The burden on a Plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The Plaintiff must adduce evidence which in the absence of rebuttal evidence by the Defendant convinces the court that on a balance of probabilities it proves the claim.”

18. As to whether the Plaintiffs have proved their case, it is noted that the Defendants did not file enter appearance or defence and the suit proceeded for hearing by way of formal proof whereby their evidence was unchallenged. In the case of Kirugi & another vs Kabiya & 3 others (1987) KLR 347, the Court of Appeal held that:-

“The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. The plaintiff must adduce evidence which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

19. On general damages for pain and suffering, Counsel for the Plaintiffs submitted that the deceased suffered pain following the accident and the delayed treatment at Kenyatta National Hospital as the deceased did not pass away instantly. Counsel has urged that an award of Kshs. 300,000/= as general damages for pain and suffering would be appropriate. On loss of expectation of life, it was submitted that his life was cut short at the age of 26 years and Counsel submitted that the appropriate award for loss of expectation of life would be Kshs. 200,000/=. On general damages for lost years under the Law Reform Act, counsel submitted that taking into account taxation pegged at 30% of his income and a deduction of living expenses which the 1st Plaintiff had estimated to be about Kshs. 40,000/=, the sum due to the estate would be Kshs. 65,000/= per month as savings.

20. As regards the appropriate multiplier counsel cited several authorities of Mombasa Maize Millers Ltd vs W.I.N where the deceased was aged 34 and the court applied a multiplier of 20 years; the case of Naomi Nyambura Karanja & Another vs Zachariah Mutera Kadunga & Another (2017)eKLR, where the deceased was aged 34 and court applied a multiplier of 24 years and PNM & Another vs Telkom Kenya Ltd & Others (2015)eKLR, where the deceased was 26 years and court applied a multiplier of 30 years. Counsel urged this court to use a multiplier of 35 years and award Kshs. 27,300,000/= as general damages for lost years under the Law Reform provision. On special damages, counsel submitted that the plaintiffs proved each and every item set out as special damages. He urged the court to award a sum of Kshs. 745,435/= under this head.



21. A reading through the record and from the certificate of death, the Court notes that the accident occurred on December 30, 2014 while the deceased passed on December 31, 2014. It is therefore clear that the deceased must have suffered considerable pain before he died. In the case of Mercy Muriuki & another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court stated that;

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

22. Upon consideration of the authorities relied upon and the circumstances of this case, where the deceased died several hours after the accident, an award of Kshs. 100,000/= for pain and suffering and Kshs. 100,000/= for Loss of expectation of life is reasonable.

23. On loss of dependency, this court is guided by the case of Ishmael Nyasimi & Another v David Onchang’u Orioki (Suing as personal representative of Antony Nyabando Onchang’o (Deceased) [2018] eKLR, where the High Court while dealing with a similar set of facts where the deceased had graduated as an engineer though unemployed expressed itself as follow;

“Thus there is no reason why the trial court could not rely on the salary of a graduate engineer from a public firm employing graduate engineers to determine the multiplicand”

24. Again, in the case of Leonard Ochar Otieno –vs- Mathews Mwanza Wanga (Suing as the legal administrator of the estate of Kennedy Owino Wanga (deceased) [2020] eKLR, where the deceased was at the time of the accident a student at Egerton University aged 21 years, studying to be a high school teacher, the court in adopting the salary of a secondary school teacher held that;

“The court ought to have considered the salary applicable to teaching profession. In the circumstances, it is my finding that the amount of Kshs. 38, 000/= based on the decision above, would have been the sufficient multiplicand in the circumstance”

25. Further in the case of Steve Tito Mwasya & Another (both suing as legal representatives of the estate of S K T (Deceased) –vs- Rosemary Mwasya, NRB HCCC No.221 of 2011 [2015] eKLR, the court observed as follows:-

“As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs.118, 546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation and other compulsory statutory deductions.”

26. Lastly, the Court of Appeal in the case of Roger Dainty –vs- Mwinyi Omar Haji & Another, MSA Civil Appeal No.59 of 2004 [2004]eKLR, expressed itself thus;

“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the



kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”

27. In the instant case, the deceased died at the age of 26 years having graduated from the University of Nairobi with B.A degree in Sociology and Psychology in December, 2012. He had also graduated with a Diploma in Information and Networking in September, 2013 and at the time of his death he was pursuing a post graduate course in Higher Diploma in Human Resource Management.
28. PW3 Christopher Siambe produced evidence that he conducted a survey and confirmed that fresh graduates are normally offered a consolidated pay package that range between Kshs. 75,000/= to Kshs. 200,000/= per month in 2016. In their submissions the Plaintiff submitted that the sum due to the estate is a sum of Kshs. 65,000/= per month after tax deductions.
29. This court has considered the submissions and the authorities cited notes that the deceased having died at the age of 26 years, would have 34 years to the retirement age under our law. Based on the evidence submitted, the deceased would earn Kshs. 75,000/= as starting and upon subjecting the same to 1/3 statutory taxation left a balance of Kshs. 50,000/= as the applicable wage. Upon using a multiplier of 34 years, the calculations on Loss of dependency are Kshs. $75,000/ \times 12 \times 34 \times 1/3 = \text{Ksh.} 10,200,000/$
30. On special damages, though there was no response from the Defendants in this matter, it is trite law that special damages must be specifically pleaded and proved by production of receipts or invoices other evidence confirming expenditure. The plaintiffs have asked for a sum of Kshs. 754,435/= but this court is not convinced that the item on food which is a sum of Kshs. 397,500/= was proved and hence declines to grant it.
31. In the circumstances of this case, the court proceeds to allow the plaintiffs' suit and issue the following award;
 - a. General damages for pain and suffering- Kshs. 100,000/=
 - b. Loss of expectation of life- Kshs. 100,000/=
 - c. Loss of dependency- Ksh.10,200,000/=
 - d. Special damages- Kshs. 347,935/= Total Kshs.10, 747,935/=

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 24TH DAY OF AUGUST , 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party

Court Assistant - Martin

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