



Kinuthia v Kiugu (Suing as the Legal Representative of the Estate of Oscar Muthomi Kithinji-Deceased) (Civil Appeal E165 of 2022) [2024] KEHC 9515 (KLR) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9515 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E165 OF 2022**

LW GITARI, J

JULY 30, 2024

BETWEEN

WILLY MUIRU KINUTHIA APPELLANT

AND

KITHINJI DAVID KIUGU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF OSCAR
MUTHOMI KITHINJI-DECEASED**

JUDGMENT

1. The respondent filed suit vide a plaint dated 28th March, 2022 against the appellant seeking for Kshs 110,550 special damages as pleaded, general damages for pain and suffering, loss of dependency and loss of expectation of life, interest on (1) and (2) at court rates till payment in full and costs of the suit.
2. The respondent pleaded that at all material times relevant to the suit the 1st defendant was the driver of motor vehicle registration number KCN 648 M while the 2nd defendant was and is still the registered owner of motor vehicle registered number KCN 648 M. That on or around 14th January 2022 at Maara River area along Kiagwa-Chogoria road, managed and/or controlled motor vehicle registration number KCN 648M so negligently, carelessly and negligently that the motor vehicle veered off the road and hit Oscar Muthomi Kithinji who was walking along the pedestrian lane as a result of which the said Oscar Muthomi Kithinji suffered fatal injuries.
3. The respondent enumerated particulars of the 1st defendant negligence as driving motor vehicle registration number KCN 648M too fast and carelessly in the circumstances, driving, managing and/or controlling motor vehicle registration number KCN 648M without due regard of other road users and in particular the deceased, failing to keep a proper look out or maintain adequate control over the said motor vehicle, driving Motor Vehicle reg.No. KCN 648M without due care and attention, failing



- to stop, swerve or act in any other diligent or reasonable way so as to avoid the said accident and causing an accident.
4. The respondent averred that as a result of the road traffic accident on 14th January 2022 one Oscar Muthomi Kithinji was seriously injured. That the respondent holds the appellant's authorized agent and/or driver liable for the acts, omission and commissions which caused the occurrence of the accident. That the 2nd defendant is vicarious liable for the torts committed by its authorized driver and/or agent who was acting in course of his duty when the accident occurred.
 5. The respondent pleaded that as a result of the occurrence of the accident the deceased estate suffered damages. The respondent further enumerated particulars under the Law Reform Act & Fatal Accidents Act that at the time of his demise the deceased was of good full health, that the deceased was a bright student of Egerton University studying for a Degree course in Bachelor of Science in Actuarial Sciences in the faculty of Science and that the deceased was expected to get gainful employment and provide for his siblings and his parents.
 6. The respondent avers that as a result of the said accident the deceased estate suffered further loss and damages which he holds the Appellants liable to compensate. The respondent particularized loss and damages as Kshs 550 purchase of copy of records of motor vehicle registration number KCN 648M, Kshs 10,000 cost of demand notice, Kshs 10,000 advocate's fees for seeking grant of letters of administration ad litem, kshs.30,000 charges for mortuary fees, Kshs 30,000 charges for food and drinks on the funeral day and Kshs 30,000 charges for hire of seats, tents and sound system which totals Kshs 110,550.
 7. The respondent contends that the Appellant is wholly to blame for the occurrence of the accident of 14th January 2022.
 8. The Appellant filed a defence dated 22nd April 2022 wherein he denied the respondent's claim. The Appellant pleaded that at all material times to the suit the defendant was the driver of motor vehicle registration number KCN 648M. The Appellant denied that an accident occurred on or about 14th January 2022 along Kiagwa-Chogoria road in the manner and/or in the circumstances as alleged by the respondent.
 9. The Appellant avers that he denies in toto the allegations of negligence attributed to the defendant. In the alternative and without prejudice to all the foregoing the Appellant states that if any accident occurred on or about 14th January 2022 as alleged by the respondent which is denied then the same was wholly caused and or substantially contributed to by the respondent.
 10. The Appellant enumerated the particulars of negligence as walking without due care on the road, failing to keep proper look out, failing to take any and all precautions to avoid the accident, failing to take any evasive action to avoid the accident, blocking motor vehicle registration number KCN 648M on its rightful path, walking on the rightful path of motor vehicle registration number KCN 648M, Voluntarily exposing himself to risk by blocking the rightful path of the motor vehicle registration number KCN 648M, standing on the rightful path of motor vehicle registration number KCN 648M, subjecting himself to risk and danger and causing the accident.
 11. The Appellant avers that he shall in so far as is applicable place reliance on the doctrine of volenti non fit injuria in furtherance of their defence.
 12. The Appellant avers that he denies the particulars of damages as pleaded and set out in paragraph 9 (i-iii). That the extent of loss and damages as set out in paragraph 10 (i-iv) is denied and the respondent was put to strict proof.



13. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the respondent against the Appellant as follows:

1. Liability -70:30

- a. Pain and suffering- Kshs 10,000/=
 - b. Loss of expectation- Kshs 100,000/=
 - c. Loss of dependency- Kshs 3,000,000/=
 - d. Special damages- Kshs 110,000/=
- Less double entitlement- Kshs 100,000/=
- Total Kshs 3,120,550/=Less 30 %
- Net Total Kshs 2,184,385/=

14. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds-;

1. The learned Trial Magistrate erred in Law and fact in awarding the Respondent Kshs 3,000,000/ in general damages for loss of dependency which are inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of Law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
2. The Learned Trial Magistrate erred in Law and fact in awarding the respondent Kshs 10,000 in general damages for pain and suffering which are inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
3. The Learned trial Magistrate erred in Law and fact in awarding the Respondent Kshs 100,000 in general damages for loss of expectation in life loss of expectation in life which are inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties, the principles of law and the applicable judicial precedents, therefore the same are erroneous and have occasioned a miscarriage of justice.
4. The learned trial Magistrate erred in Law and fact in awarding Kshs 110,000/=special damages by failing to consider that the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps.
5. That the Learned Trial magistrate erred in fact and in law by failing to consider the Appellant's authorities in their submission on quantum hence arriving to an erroneous decision.
6. That the Honourable trial magistrate erred in fact and in law in failing to consider the Appellant's documents that were filed and produced in court.
7. That the Honourable trial magistrate misdirected himself as to the facts of the case thus arriving at an erroneous decision.
8. That the Honourable trial magistrate's judgement as a whole is not supported by the evidence that was tendered in court by the parties.

15. The appellant prays for the following orders that the appeal be allowed and the judgement on quantum delivered on 14th November 2022 by Hon. J.M Njoroge be set aside, the court proceeds and enter its



own judgement on quantum in terms of their pleadings and submissions, the court proceeds and set aside the award on general damages for loss of dependency and reduce the same, the court proceeds and set aside the award on general damages for loss of expectation in life and reduce the same, the court proceed and set aside the award on general damages for pain and suffering and reduce the same, the court to proceed and set aside the award on special damages and reduce the same and the costs and interest of the subordinate court and the appeal be awarded to the appellant.

16. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 13th May, 2024 through the firm of Kiruki & Kayika & Advocates while the respondent filed his dated 28th April 2023 through the firm of Muthomi Gitari & Co. advocates.

Appellant's Submissions

17. The appellant submitted on a brief introduction of facts and laid out the duty of the Appellate Court as enshrined in section 78 of the *Civil Procedure Act* Cap 21. The Appellant relied in the cases of Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR and Butt v Khan [1978] eKLR.
18. The appellant submitted that he identified two issues for determination whether the trial magistrate's award of compensation was based on wrong principles and if so how should damages be quantified and how should costs be apportioned.
19. The Appellant submitted that in the impugned judgement the trial magistrate awarded:
- a. General damages for pain and suffering- Kshs 10,000/=
 - b. General damages for loss of expectation- Kshs 100,000/=
 - c. General damages of loss of dependany- Kshs 3,000,000/=
 - d. Less double entitlement- Kshs 100,000/=
 - e. Add Special
- Sub Total Kshs 3,120,550/=Less 30%(936,165/)
- Net Total award Kshs 2,184,385/=
20. The Appellant submitted that the trial magistrate's award of compensation/quantum was erroneous and inordinately high. That they noted that the trial magistrate agreed with trial submission on the awards of general damages under the *Law Reform Act* for pain & suffering and loss of expectation of life and they abandoned any challenge to those awards.
21. It is the Appellant's submission that ground 1 of the Memorandum of Appeal challenges the award of Kshs 3,000,000 in general damages for lost dependency as being inordinately high and wholly unsupported by the facts of the case and principle of law.
22. The Appellant submitted that the damages under lost dependency are quantified under 2 different approaches, being the multiplier approach and the global sum approach. That they also note that both parties made submissions at the trial court in favour of the multiplier method and the trial court adopted the same and as such the global sum approach was uniformly rejected.
23. The Appellant further submitted that as to the award of damages for lost dependency, the learned magistrate applied a sum of Kshs 30,000/ for multiplicand a figure of 25 years for multiplier and a ratio of 1/3 for dependency ratio to bring the final calculation to Kshs.3,000,000/.



24. It is the Appellant's submission that on dependency ratio the Appellant has no contention with the figure used and indeed support the same as being appropriate with the circumstances of the case where the deceased was not married, had no children and was survived by his father who was his caregiver and therefore urge the 1/3 dependency ratio be upheld.
25. The Appellant submitted that on multiplier the Appellant opposes the learned magistrate's application of 25 years and reiterate their submission from the trial court.
26. It is the Appellant's submission that the multiplier relates to the remaining work life dependency the deceased's survivors could reasonably and legally expect had the deceased not perished. That the deceased died on 14th January 2022 aged 24 years and left behind a father (the respondent and siblings).
27. The Appellant submitted that the respondent's age is not disclosed but due to his ID number in the Chief's letter they reasonably concluded that he is elderly and within the 50s age bracket. That the prevailing life expectancy of men in Kenya is 63 meaning he can only expect to live 13 more years.
28. It is the Appellant's submission that as such any dependency awarded beyond the life expectancy is arbitrary and a function of unrestrained discretion than legal justification making the learned magistrate's multiplier of 25 years openly excessive as it means the respondent would be expected to live and be recipient of dependency into his mid-70s without any justification for such long life in Law.
29. The Appellant submitted that as for the siblings they are automatically disqualified by Section 4 (1) of the *Fatal Accidents Act* which explicitly limits this claim for the spouse, children and parents of the deceased. The Appellant relied in the case of *John Kariuki & another v Kaibei Kangai Ndethiu & 2 others* (2020) eKLR.
30. The Appellant submitted that the learned magistrate erred in law and fact in ignoring that the primary consideration is the work life expectancy which alters if either the deceased or the dependents were elderly and as such the learned magistrate's decision to grant 25 years multiplier is too excessive.
31. It is the Appellant's submission that compensation under general damages seeks to restore a victim to a semblance of what they are legally anticipated to have lost through the impugned action but are not meant to enrich the victim above legal fore sight.
32. The Appellant urged the court to limit damages within a reasonable period of 12 years meaning the deceased's father could expect dependency until he reaches almost 70 years. The Appellant relied on the case of *Tobias Odoyo Oburu v Callen Kwamboka Okemwa & another* (Suing as the legal representatives of Obed Okemwa Obwoye (Deceased) (2018)eKLR.
33. It is the Appellant's submission that on the multiplicand or monthly income of the deceased the appellants argue the deceased income was impossible to prove since he was a full-time ongoing university student hence the income of kshs 30,000 was speculative and arbitrary.
34. The Appellant submitted that the respondent claimed that since the deceased was a 3rd year student studying actuarial science he would have graduated in another year then get employed and earn an average monthly salary of kshs 100,000/. That it has also not been alleged that the deceased was in part time employment or engaged in a side business thus all his hopes were in the route of formal education and employment.
35. It is the Appellant's submission that it is common knowledge that Kenya is currently experiencing a joblessness crisis where over 60 % of the population is reported to be unemployed majority of whom are the youth of all educational backgrounds and also it is also common for many students to fail to graduate just at the tail end of their case.



36. The Appellant submitted that it is therefore unreasonable to conclude just because the deceased was studying he would complete his degree and/or get employed soon thereafter and earn the ambitious salary of Kshs.100,000/ as a fresh graduate. That the entire foundation of the principal for considering vicissitudes of life is to factor in those tragedies of life not only to life expectancy but also wasted education nor opportunities.
37. The Appellant further submitted that without a formal source of income and any future guaranteed employment, the reasonable path is for court to apply minimum wage provisions in accordance with the decision in Tobias Odoyo Oburu v Jane Kerubo Miruka & another (Suing as the legal representatives of John Onyoki Sanganyi (Deceased) & another (2018) eKLR.
38. It is the Appellant's submission that the regulation of Wages (General Amendment order 2018 gives the applicable minimum wage of a general labourer living away from a city or municipality is set at Kshs. 7,241/=.
39. The Appellant submitted that they concurred with the trial magistrate that income must be subjected to statutory deductions of 1/3 giving a multiplicand of Kshs 4,827 and further urged the court to substitute the learned magistrate's multiplicand of Kshs 26,667 with Kshs 4,827/=.
40. The Appellant further submitted that all factors being established the resulting calculation for loss of dependency would tabulate thus Annual income (Kshs 4,827x12 months)x multiplicand (12 years)x dependency ratio (1/3)= Kshs. 231,696/- and urge the court to substitute the award of Kshs. 3,000,000 in lost dependency with Kshs 231,696/-.
41. It is the Appellant's submission that they agree with the trial court that the said damages for lost dependency should factor in the duplication of award of loss of expectation of life.
42. The Appellant submitted on ground 4 of the memorandum of appeal that the learned trial magistrate erred in awarding special damages of Kshs. 110,000. That it is trite law that special damages must be specifically claimed and specifically proved. The Appellant relied in the case David Bagine vs Martin Bundi (1997) eKLR.
43. It is the Appellant's submission that the impugned judgement the trial court found that the entire Kshs.110,000 pleaded was proved. The Appellant opposed the conclusion and submitted that the respondent failed to supply supportive receipts compliant with the need for revenue stamp and an electronic tax invoice under the VAT Act [2013] and the VAT (ETI) Regulations [2020].

Respondent's Submission

44. The respondent submitted on the synopsis of the case and further stated that the Appellant alleged that the sum is unreasonably high which they disagreed. The respondent relied in the case of Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No/2)1985 eKLR and Catholic Diocese of Kisumu v Tete [2004] eKLR.
45. The respondent submitted that they will endeavor to demonstrate to the court that there is no reason to interfere with the award of the trial court.
46. It is the respondent's submission that evidence was tendered to the effect that the deceased was a young man full of potential and exemplary academic qualities. That he was a 3rd year student pursuing Bachelor of Science in Actuarial Science at Egerton University Njoro campus-Nakuru. That at the trial, the respondent produced a list of documents which had inter alia ;
 - i. Death certificate showing deceased died at the tender age of 24 years.



- ii. The deceased's KCSE academic transcript showing exemplary performance
 - iii. Deceased's admission letter to Egerton University and academic results from Egerton University showing he was a 3rd year student pursuing Bachelor of Science in Actuarial Science.
47. The Respondent's counsel submitted that the deceased's father testified in his statement that he had invested a lot of resources in his son's academic journey and he had great hopes that the son would have graduated a year later and get good employment as an actuarial scientist and help them as a family. That in our Kenyan society parents regularly invest in their children and sometimes denying themselves not only luxuries but also some necessities of life in order that they may attend good schools and attain necessary qualifications in order eventually to secure good jobs through which such children may maintain them in their old age.
48. The respondent submitted that at the age of 24 and in 3rd year of university education, the deceased's adult life was clearly well set and he was expected to be a largely successful person in life. The respondent relied in the cases of *MMG v Muchemi Teresa* [2015] eKLR, and *Ishmael Nyasimi & Another v David Onchang Orioki* [2018] eKLR and *Rosemary Mwasya v Steve Tito Mwasya & another* [2018] eKLR.
49. It is the respondent submission that the pay scale which is a global human resource firm with the largest repository of salary data in the world shows that the average salary of an actuarial analyst (graduate in actuarial science) in Kenya is Ksh 1,200,000 a year, which is roughly Ksh 100,000 a month and the respondent in his list of documents attached documentation from pay scale to show the same.
50. The respondent submitted that with an undergraduate degree from a reputable institution as Egerton University, the deceased would have secured a reasonable job in the field of Actuarial science that would have earned him a monthly salary (less tax and statutory deductions) of about KShs 50,000/. That by the time he would have secured employment he would probably be 25 years old. He would have a full working life to about 60 years of age.
51. It is the respondent's submission that the learned magistrate applied the correct principle in assessing the damages under all the heads and the award of Ksh 2,184,385 is not so inordinately high as to be wholly erroneous estimate of the damages in the circumstances of this case.
52. The Appellant submitted that the appeal be dismissed with costs to the respondent.

Analysis & Determination

53. This being the first appellate court, the duty of the court is to consider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make an allowance in this respect. [See the case of *Selle & Another v Associated Motor Boat Co. Limited & Others* [1968] EA 123].
54. The issues for determination as I can deduce are:
- i. Whether awarding the respondent Kshs 3,000,000/= in general damages for loss of dependency was inordinately high and wholly unsupported by the facts of the case, the evidence tendered by the parties and the principles of Law.
 - ii. Whether the trial court awarding Kshs. 110,000/ special damages by failing to consider the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps was erroneous.



Whether awarding the respondent kshs 3,000,000/= in general damages for loss of dependency was inordinately high and wholly unsupported by the facts of the case and principles of Law.

55. This court is guided by the Court of Appeal in *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982-88] KAR where the Court set out the parameters under which an appellate court will interfere with an award in general damages and held that: -“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”
56. In the case of *Southern Engineering Co. Ltd v Musungi Mutia* [1985] KLR 730, the court held that:“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case...”Whether the trial court erred in awarding an inordinately high award for loss of dependency
57. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another vs. P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:
- “The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.”
58. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji Nku Hcca No.15 of 2003* [2007] eKLR, where the court made the following observation; “The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”
59. In the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of *Mercy Nzula Maina* (deceased) [2016] eKLR, held as follows-“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”
60. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of *Antony Mwititi Gakungu* deceased [2020] eKLR where the court was dealing with a similar issue, it stated:(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. 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.”

61. On quantum of damages, the applicable principles in making an award for loss of dependency under the Fatal Accident Act were well stated in the case of *In Ezekiel Barng’entuny v Beatrice Thairu HCC No. 1638 of 1988* where Justice Ringera (as he then was) held thus; -

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents’ and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature.”

62. Of importance to note, is the fact that what is contest is the quantum of damages awarded by the trial court.

63. In regards to HCCA E026 of 2022 and looking at awards made under loss of expectation of life, the Court in the case of *Rose v Ford [1937] AC 826*, held that damages for loss of expectation of life can be recovered on behalf of a deceased’s estate and in *Benham v Gambling [1941] AC 157* it was held that-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.”

64. The conventional award for loss of expectation of life ranges from Kshs. 100,000 to 200,000 as per comparable authorities. I am guided by the decision of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where the court observed 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 Kshs. 100,000/-

[Also See *Joseph Gatone Karanja v Michael Ouma Okutoyi & 2 Others [2022] eKLR*].

65. In the case herein, it is quite evident that the deceased died on the same day that the accident herein occurred and as such, I hold the view that an amount granted by the trial court should be appropriate. I do note in the Appellant submission that they abandoned any challenge to those awards.

66. On dependency it was submitted that the award of Kshs 3,000,000 in general damages for lost of dependency is inordinately high and wholly unsupported by the facts of the case and Principle of Law.



67. In the instant matter the respondent pleaded that the deceased was 24 years old at the time of death which was depicted on the death certificate; further, it is outright that death occurred on 14.01.2022 while the accident happened on the same day. That the deceased would have lived longer had his life not been suddenly cut short as evidenced in the certificate of death and therefore, an amount of Ksh. 100,000.00 was urged to be apt since the deceased was pursuing Actual Science which is perceived to be highly marketable.
68. On dependency it was submitted was survived by his father who was his care giver. In the instant case I hold the view that given that no proof of earning was provided and the law is that where there is no evidence of income the court is free to resort to the minimum wage and it matters not that the work is informal or menial (*Petronila Muli v Richard Muindi Savi & Catherine Mwendu Mwindu* (2021) eKLR). Further, the deceased was not in employment and therefore there is a possibility that he would have worked for more than 60 years but taking into consideration the uncertainties of life, I hold the view that 20 [See *Benedeta Wanjiku Kimani v Changwon Cheboi & Anor* (supra) years would be appropriate as the multiplier.
69. There are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.
70. In *Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another NRB HCC 1638 of 1998(UR)* Ringera J (as he then was) stated: “The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”
71. In *Emmanuel Wasike Wabukesa suing for BWW a Minor Deceased v Munena Ndiwa Durman C.A. Eldoret C.A. No. 10 of 2017 [2019] e KLR* where the High court set aside an award of loss of dependency which had been made by the trial court using a multiplier where the deceased was an infant and where an award of KShs.1, 260,000 was substituted with a global award of KShs.200,000. The Court of Appeal cited several of the past decisions where it made awards on loss of dependency using global sums i.e. *Kenya Breweries Ltd v Saro* [1991] e KLR where the Court of Appeal awarded KShs.100,000 for loss of dependency to a parent of a child and stated that: “damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution.”
72. The Respondent and the Appellant are in support of the Trial Magistrate award based on the multiplier method however the Appellant is disputing the age of the deceased and also the fact the deceased was not working it become difficult to ascertain how much he would have earned as an actuarial scientist. Based on the above decisions, the court is convinced that the Trial Magistrate erred in principle to apply the multiplier method instead of awarding a global sum.
73. I am guided by the decision in *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the court was dealing with a similar issue, it stated: 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.

74. In this case, there is no evidence of any income being made by the deceased. The basis for the multiplier and the multiplicand in this case had no basis at all. I thus find that the global approach would have been ideal in the circumstances.
75. Looking at comparable awards, I have considered the authority in *Maingi Celina v John Mithika M'itabari* suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR where the court awarded Kshs 2,000,000. In *Zachary Abusa Magoma* (supra), Ndung'u J awarded Kshs 1,500,000/- for a deceased who was set to write her final examinations in a bachelor of education course.
76. Guided by the above, I hereby find the award of Kshs 3,000,000/- to be excessive in the circumstances and further, the adoption of Kshs 100,000/ as monthly income to be speculative and not supported by any evidence. The same must be interfered with. I find the sum of Kshs 2,000, 000/ as reasonable in the circumstances under the head of loss on dependency.

Whether the trial court awarding Kshs. 110,000/ special damages by failing to consider the receipts produced were illegible and did not bear the mandatory stamp duty revenue stamps was erroneous.

77. It is trite law that special damages must be specifically pleaded and strictly proved. The respondent claimed for special damages amounting Kshs 110,000/- which was disputed by the Appellant. I find the Appellant's claims unsubstantiated on the issue of stamp duty it is neither here or there. I agree with the trial court that the respondent proved the expenses and was therefore entitled from the receipts availed before the trial court.
78. In the end, the Appeal partly succeeds. I accordingly enter judgment for the respondent as follows: -
- i. Loss of expectation of life - Kshs. 100,000.00
 - ii. Pain and suffering - Ksh 10,000.00
 - iii. Loss of dependency -Kshs. 2,000,000.00
 - iv. Special damages - Kshs. 110,000.00
- Grand Total Kshs. 2,120,550.00
- The appellant to get half the costs of the appeal.

79. It is so ordered.

DELIVERED DATED AND SIGNED AT MERU THIS 30TH DAY OF JULY, 2024

L.W. GITARI

JUDGE

30/7/2024

Judgment read out virtually.

L.W.GITARI



JUDGE

