



**Nkirote & another (Suing as the Administrator and/or Personal Representatives
of the Estate of Luka Kimathi Mbaabu - Deceased) v M’rwaya (Civil Appeal
E135 of 2022) [2024] KEHC 11578 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11578 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E135 OF 2022
LW GITARI, J
SEPTEMBER 26, 2024**

BETWEEN

DORIS NKIROTE 1ST APPELLANT

JACKSON MURITHI AYUBU 2ND APPELLANT

**SUING AS THE ADMINISTRATOR AND/OR PERSONAL
REPRESENTATIVES OF THE ESTATE OF LUKA KIMATHI MBAABU -
DECEASED**

AND

BENJAMIN MWONGERA M’RWAYA RESPONDENT

JUDGMENT

1. The Appellants filed a suit vide a plaint dated 2nd June, 2021 against the respondent seeking for:
 - a. General damages under the *Law Reform Act*, *Marriage Act* and *Fatal Accidents Act* for pain and suffering, loss of expectation of life, loss of dependency and loss of consortium and servitium.
 - b. Special damages aforesaid.
 - c. Costs of this suit.
 - d. Interest at court rates.
2. The Appellants pleaded that on or about 21st February, 2021 Luka Kimathi Mbaabu(hereafter referred to as the deceased was lawfully travelling along the Meru-Maua Road as a lawful passenger in motor vehicle registration number KCF 674M Toyota CBE- NCP51V station Wagon when the Defendant and/or his authorized driver so negligently drove and/or controlled it that it rolled several times as a result of which he was seriously injured. That the deceased later on the 24th day of February



- 2021 succumbed to the injuries while receiving treatment at the Komarock Modern Healthcare at Kathwana.
3. The Appellants enumerated particulars of negligence against the defendants and/or authorized driver as driving at a speed that was far too excessive given the circumstances, driving without due care and attention, driving on the wrong side of the road, failing to take any steps to avoid the accident, failing to keep any or any proper look out, failing to keep and maintain any or any effective control of motor vehicle registration number KCF 674M Toyota CBE-NCP51V S. Wagon, driving a defective motor vehicle, failing to pay regard for the safety of his passengers particularly the deceased, losing control of motor vehicle registration number KCF 674M Toyota CBE-NCP51V S. Wagon and failing to maintain motor vehicle registration number KCF 674M Toyota CBE-NCP51V S. Wagon.
 4. The Appellants pleaded that as far as may be applicable they rely upon the doctrine of *res ipsa loquitur*, the Highway Code and the provisions of the [Traffic Act](#).
 5. The Appellants further pleaded that they bring the suit as the Administrators and/or Personal Representatives of the estate of the deceased on behalf of the estate and for the benefit of the following dependents of the deceased under the [Law Reform Act](#), the [Marriage Act](#) and the [Fatal Accidents Act](#). The Appellants avers that the dependents were her son PM aged 7 years and her and she is aged 31 years.
 6. The Appellants pleaded that the nature of the claim is that at the time of his demise, the deceased was aged 39 years enjoying robust health. That he was a mason, a miraa farmer and a trader earning a net monthly income of kshs.50,000 and would spend a big chunk of that income in maintaining his young family. That as a result of the accident, the deceased lost expectation of life, he also endured a lot of pain before he succumbed to the injuries.
 7. The Appellants avers that further by his death, his dependents who relied wholly on him for support have lost means of support. That the estate of the deceased has similarly suffered loss.
 8. The Appellants avers further that the widow has lost the love and companionship of the deceased while the children have lost love, care and devotion of their father.
 9. The Appellants enumerated particulars of special damages of an advocate's instruction fees to institute Tigania Miscellaneous Succession Cause No. E48 of 2021 for kshs 40,000 funeral expenses to be specified, mortuary and post-mortem charges to be specified, court filing fees for Tigania Miscellaneous Succession Cause No. E48 of 2021 and medical expenses to be specified. The total was kshs. 40,930.
 10. The Appellant pleaded that the plaintiffs claims damages under the [Law Reform Act](#), [Marriage Act](#) and the [Fatal Accidents Act](#).
 11. The respondent denied the Appellants claim and denied being the registered owner, insured and/or beneficial owner of the motor vehicle registration no. KCF 647M Toyota probox as alleged by the Appellants and in the alternative without prejudice to the foregoing the defendant by way of defence states that if at all the accident occurred as alleged which is denied the same was substantially attributed to and/or was wholly caused by a tire burst which was completely out of control of the defendant since he did all he could under the circumstances thereon.
 12. The respondent pleaded that he relies on the doctrine of contributory negligence and vehemently denies the application of the doctrine of *Res Ipsa Loquitur* as alleged by the plaintiff.
 13. After considering the evidence adduced, the learned trial magistrate awarded the judgement for the Appellants against the respondent as follows:



1. That judgement on liability be and is hereby entered for the plaintiffs against the Defendant at 100%.
2. That judgement on quantum of damages be and is hereby entered for the plaintiffs against the Defendant as follows:
 - a. General damages for pain and suffering.....Kshs.30,000
 - b. General damages for loss of expectation of life ..Kshs.100,000
 - c. General damages for loss of dependency.....kshs 926,841.60
 - d. Special damages.....Kshs.930
 - e. Total.....Kshs.1,057,771.60
3. That the plaintiffs are also awarded costs of the suit and interest at court rates.
14. The appellant was dissatisfied with the said decision and filed this appeal on the following grounds;-
 1. That the learned trial magistrate erred in Law and fact in finding that the deceased died on the same day contrary to the evidence on record and as a consequence arrived at an award for pain and suffering that is so inordinately low that it is a wrong estimate of the damages that the Appellants were entitled to.
 2. That the learned trial magistrate erred in law and fact in finding that the Appellants had not proved the deceased's income when there was overwhelming evidence to prove it.
 3. That the learned trial magistrate erred in law in using the minimum wage of a general labourer as the multiplicand when there was evidence before the court that the deceased was a mason, miraa farmer and a trader.
 4. That the learned trial magistrate erred in law in applying the minimum wage of a general laborer in other areas when the evidence on record shows that the deceased's last known place of residence was at Maua which is a former municipality.
 5. That the learned trial magistrate erred in law in applying a multiplier of 16 years which was too low given the age and occupation of the deceased.
 6. That the learned trial magistrate erred in law in denying the Appellants damages for loss of consortium.
 7. That the learned trial magistrate applied wrong principles in assessing damages.
15. The appellant proposed that the appeal be allowed, the court set aside the trial court's awards for pain, suffering and loss of dependency and do reassess them, that the court do award the Appellants damages for loss of consortium and the costs of the appeal be awarded to the Appellant.
16. The appeal was canvassed by way of written submissions. The appellants filed their submissions dated 17th March, 2023 through the firm of Nkunjia & Company Advocates while the respondent filed his submissions dated 29th November 2024 through the firm of Mithega & Kariuki Advocates.



Appellants' Submission

17. The Appellants submitted on brief facts of the case and submitted that they seek the court to set aside the trial court's award for pain, suffering and loss of dependency and to reassess them and also award the Appellants damages for loss of consortium.
18. The Appellant relied on the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123 which outlines the duties of an Appellate court to review the evidence adduced at the trial to establish if the resulting judgement was justified.
19. The Appellant submitted that for the court to interfere with quantum of damages awarded by the trial court it has to observe the well settled principles set out in *Butt vs Khan*(1977)1KAR.The Appellants also relied in the case of *Kenya Breweries Ltd vs Saro*(1991)eKLR.
20. The Appellants submitted that they urged the court to be guided by the above principles when addressing the issues framed for determination.
21. The Appellants submitted on the first issue on loss of consortium. That during the hearing the 1st Appellant testified that she had not remarried and that by the death of her husband she had lost the companionship, love, affection, comfort, mutual services and sexual intercourse from her late husband. The Appellants relied in the case of *Salvadore De Luca vs Abdullahi Hemedi Khalil & Another*(1994)eKLR.
22. The Appellants submitted that going by the above facts and case law an award under the head of loss of consortium is justified. The Appellants relied in the case of *Fauzia Shaban vs Sheila Properties Limited & Another* (2020)eKLR. They urged the court to award kshs 100,000.
23. The Appellants submitted on the second issue of pain and suffering. It was submitted that According to the police abstract the date of the accident was the 21st day of February 2021.That the death certificate shows the date of death was the 24th February 2021 at Komarock Modern HealthCare where the deceased had been admitted for treatment. That this is 4 days after the accident.
24. It is the Appellant's submission that post-mortem form shows that the deceased sustained several cuts on the head, which were sutured and that he had died from traumatic brain injury resulting in intracranial bleeding. The Appellants relied in the case of *Sukari Industries Limited Vs Clyde Machimbo Juma* [2016] eKLR.
25. The Appellants submitted that that pain and suffering in this matter was prolonged as the deceased died after 4 days. The Appellants urge the court to set aside the award of Kshs 30,000 made by the trial court and instead award the Appellants Ksh 200,000 under that head. The Appellants relied on the case of *Eliud Muchuru Ruga (Suing as the personal representative of the estate of the deceased Ephantus Mbugua)vs Ndungu John & Another* [2018] eKLR.
26. The Appellants submitted on the third issue on loss of dependency.It was submitted that according to the death certificate produced before the court, the deceased was 39 years of age. He was a mason, miraa farmer and businessman.
27. It was the Appellants' submission that as regards the deceased's income the 1st Appellant told the court that the deceased was a mason, farmer and businessman and also told the court that he was making a monthly average income of kshs.50,000 from his economic activities which he would use to support his family, which evidence was not shaken in cross -examination. The Appellants relied in the case of *Jacob Ayiga Maruja & Another v Simeone Obayo* CA Civil Appeal No.167 of 2002 (2005)eKLR, *Annalisa Muigai & another vs Beatrice Waithera Gitiri& Another* (2020)eKLR, Joseph



Gatone Karanja vs John Okumu Soita & Esther Chepkorir (Suing as the administrators of the estate of Bernard Soita Nyongesa (DCD) (2022)eKLR and Irene Mucira vs Timsales Holdings Ltd & Another (2018)eKLR, Fredrick Ochieng Odero vs Nakuru Teachers Training College (2018)eKLR.

28. The Appellants submitted that the minimum wage for an ungraded artisan working in the former municipalities as per the Regulation of Wages (General) (Amendment) Order, 2018 which was the applicable order at the time of the deceased's death was Kshs. 16,907.90. That he urged the court to set aside the multiplicand of Ksh 7,240 used by the trial court and apply Kshs 16,907.90 as the multiplicand.
29. The Appellants further submitted on the issue of the multiplier that the deceased was not formally employed thus was not bound to retire at the age of 60 years and would have continued working until he was 70 years. The Appellants submitted therefore and urge the court to use a multiplier of 21 years guided by the cases of Adbimana Abdiwahab & Another Vs Janet Njeri Wambui (Suing as the Legal Representatives of the estate of Jane Wambui Kungu - Deceased) [2021]eKLR and Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 others [2022] eKLR
30. It is the Appellants submission that the 1st Appellant also testified that she was married to the deceased and that they were blessed with children. That She also testified that the deceased was also taking care of his parents. That they submitted that 2/3 would be the appropriate dependency ratio. As such, they urge the court to set aside the award for loss of dependency by the trial court and make an award as follows:

$$2/3 \times 21 \times 12 \times 16,907.90 = \text{kshs. } 2,840,527.2$$

31. The Appellants submitted that in view of the foregoing, they urged the court to allow the appeal, set aside the judgement of the lower court in regard to damages for pain and suffering and loss of dependency and also award the Appellant damages for loss of consortium.
32. The Appellants further submitted that they also urge the court to award the Appellants costs of the appeal. Consequently, they urge the court to enter judgement for the Appellants as follows:
- c) General damages for loss of dependency. Ksh 2,840,527.20
 - d) General damages for loss of consortium. .Ksh 100,000.
 - e) Special damages .Ksh 930 Total.
- Total..... Ksh 3,241.457.20
- f) Costs of the appeal

Respondent's Submissions

33. The respondent submitted on the brief background of the matter and identified four issues for determination. The first issue for determination was whether the award on pain and suffering is inordinately low.
34. It was submitted that the Appellants produced several documents that have failed to ascertain with absolute certainty when the deceased passed away. That the death certificate produced PEX-07 indicates that the deceased passed away on 24th February 2021. That further the bill settlement agreement at clause 1.2 produced as PEX 06 as well as the post mortem form produced as PEX-5 indicate that the deceased passed away on the 23rd February 2021 at 11.00 am.



35. The respondent submitted that the date of death as indicated on the death certificate is erroneous and ought to be disregarded. The respondent submitted further that the court ought to rely on the post mortem report as well as clause 1.2 of the bill of settlement agreement since it's a document from the hospital where the deceased was admitted before he passed away and find that the deceased passed away on 23rd February 2022 at 11.00 am.
36. It is the respondent's submission that since the accident occurred on 21st February 2022 at 11.50 hrs as per the police abstract produced as PEX-8, the deceased was alive for less than two days and not four days as submitted by the Appellants.
37. The respondent submitted that the trial court awarded the sum of kshs.30,000 under pain and suffering. That the award was reasonable and fair in the circumstances and they invite the court to uphold the same.
38. The respondent relied in the case of Moses Koome Mithika & another v Doreen Gatwiri & another (Suing as the legal representative and Administrator of the estate of Phineas Murithi (deceased) (2020)eKLR.
39. The respondent submitted that they invite the court to find that the award by the trial court was reasonable and fair thereby uphold the same.
40. The respondent submitted on the second issue on whether the claim on loss of dependency was proved.
41. It is the respondent's submission that the Appellants at paragraph 5 of the plaint dated 2nd June 2021 pleaded that the deceased was working as a mason, miraa farmer and trader earning a net monthly income of kshs 50,000. That on cross examination the 1st plaintiff and wife to the deceased was unable to prove that the deceased was working as a mason, miraa farmer and trader. That she only confirmed that the deceased farmed miraa and maize but did not have any proof to that effect.
42. The respondent submitted further that at paragraph 4 of the plain the Appellants pleaded that the deceased was survived by his wife the 1st Appellant and a son by the name Prince Muchui. That they invite the court to note that the chiefs letter produced as PEX-9 mentions only one dependent being Doris Nkirote. That the Appellants never produced any proof of the existence of Prince Muchui or even proof that he was a dependent of the deceased. That no birth certificate was produced and therefore the deceased had only one dependent being Doris Nkirote.
43. The respondent further submitted that there being no proof whatsoever of the deceased earnings the trial court took the multiplicand approach whereby it adopted the minimum wage provided for under the regulation of wages (General)(Amendment) order 2019 being Kshs.7,240.95/- for a period of 16 years and further applied the ratio of 2/3 thereby awarding Kshs.926,841.60/=.
44. It is the respondent submission that the trial court was more than gracious in applying the above multiplicand and therefore the Appellants are just after enriching themselves despite having been adequately compensated. The respondent invites the court to find the trial court award was just and dismiss the appeal with costs.
45. The respondent submitted on the third issue on whether the claim on loss of consortium was proved. The respondent submitted that the Appellants are not entitled to any award whatsoever under that heading since the same is not available under the *Fatal Accidents Act* or the *Law Reform Act*. That there is no law for award of damages to the spouse of a deceased person for loss of consortium. The respondent relied in the case of Acceler Global Logistics v Gladys Nasambu Waswa & another (2020)eKLR.



46. It is the respondent's submission that the Appellants are not entitled to any damages under thus heading and proceed to dismiss the same with costs.
47. The respondent submitted that they urge the court to be persuaded by the respondents' submission and authorities since the same is up to date with their economic context and circumstances of the case herein.

Analysis & Determination

48. I have considered this appeal, submissions and the decisions relied on. I have also considered the trial court's record and the impugned judgment. This being a first appeal, it the duty of this court as the first appellate court to reconsider, reevaluate and reassess the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.
49. In *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, the Court of Appeal held that;

“An appeal to this Court from a trial 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”
50. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”
51. Similarly, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the court stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”
52. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:
 - i. Whether the trial magistrate erred in law and fact in finding that the deceased died on the same day contrary to the evidence that is so inordinately low.
 - ii. Whether the Appellants had not proved the deceased's income when there was overwhelming evidence to prove it.
 - iii. Whether the trial magistrate erred in law in using the minimum wage of a general labourer as the multiplicand when there was evidence before court that the deceased was a mason, miraa farmer and trader.



- iv. Whether the trial court erred in applying a multiplier of 16 years which was too low given the age and occupation of the deceased.
 - v. Whether the trial court erred in denying the Appellants damages for loss of consortium.
53. The Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR 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...”
54. In the case of *Southern Engineering Co. Ltd vs. 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...”
55. In *Power Lighting Comp. Ltd & Another vs. Zakayo Saitoti Naingola & Another* [2008] eKLR, the court said:
- “On quantum court the in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages (1) Damages should not be inordinately too high or too low; (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and a such they should be commensurate to the injuries suffered; (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts; (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment ...”

Whether the trial magistrate erred in law and fact in finding that the deceased died on the same day contrary to the evidence that is so inordinately low.

56. The first award under challenge is on pain and suffering. The trial court awarded Kshs. 30,000 which the appellants argued was on the lower side.
57. I have perused the copy of the death certificate which was produced by PW2 as P Exhibit 8 it shows that the deceased died on 24th February, 2021 yet he was involved in the accident on 21st February 2021 as per the police abstract produced as P Exhibit 1 as per the evidence of PW1 and PW3.
58. Subsequently the trial court erred when it stated that the deceased died on the same date of the accident as per PW1’s testimony which is contrary to the Appellant’s documents on record.
59. Indeed, the Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete – Kisumu Civil Appeal No. 284 of 2001* reiterated what it had earlier held in the case of *Kemfro vs. Lubia* (1982-88) that:-
- “It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the



court below simply because it would have awarded a different figure if it had tried the case at first instance...”

60. The general rule is that the award for pain and suffering depends on whether after the accident, the deceased suffered any such pain. In *Joseph Kivati Wambua versus SMM & Another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR, Hon. Odunga J observed as follows: “In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.”
61. In *Theuri Kihira versus Gerhard Matthiessen* [2019] eKLR the Court awarded Kshs 100,000/- under this head and held as follows;
- “The deceased died five days after the accident. He was initially admitted at the Nyeri Provincial General Hospital and later transferred for more specialized treatment at Kenyatta National Hospital in Nairobi. The scanty information in the death certificate shows that he died of massive internal bleeding; he also sustained a torn lung and liver. There is no doubt that he must have experienced a lot of pain before he finally succumbed. Taking all these factors into consideration, I will make an award of Kshs. 100,000/= under this head.”
62. The award made by the trial court on this head in view of the above authorities can be termed low and, on that basis, I find that an award of the Appellant Kshs. 100,000 in line with the principle that comparable damage should attract comparable award. The deceased died 3 days after the accident and in those days in light of injuries suffered, he suffered pain and suffering. Flowing from the cited authorities the awards of Kshs. 100,000 is fair.

Whether the Appellant proved the deceased’s income during the trial.

63. The Appellant pleaded that his husband was a mason, miraa farmer and a trader earning a net monthly income of over kshs.50,000 and would spend a big chunk of income in maintaining his young family. It was also the Appellant’s evidence that his late husband was a businessman in Muthara and he was also a farmer.
64. I note that the Appellant never availed any evidence to support her assertions that his husband was a miraa dealer and a maize seller. To that end I agree with the trial court observation.

Whether the trial magistrate erred in law in using the minimum wage of a general labourer as the multiplicand when there was evidence before court that the deceased was a mason, miraa farmer and trader.

65. The Appellant pleaded that his husband was a mason, a miraa farmer and a trader. There was no evidence led to prove that assertion as correctly held by the trial court. The Appellant did not call other people whom the deceased worked with to give evidence that he was a mason, a miraa farmer and a trader. The Appellant stated that the deceased earned a sum of kshs 50,000/ per month but nothing was adduced to prove the same. In the result the court was proper to adopt the minimum wage provided in the regulation of wages General Amendment order 2019 being kshs.7,240.95.



66. I am guided by the decision of John Simon Ashers & another Vs Nelson Okello Onjao [2020] eKLR the court held:“

In the absence of evidence of the deceased’s earning, I find that in calculating loss of dependency, the trial court rightly applied the multiplicand of Kshs. 7,000/-which was the minimum wage for an unskilled worker and a multiplier of 10 years since the deceased died at the age of 45 years. The dependency ratio of 2/3 is normally applied in a case where the deceased has dependents such as the deceased in this case and I find that the same was correctly applied.”

Whether the trial court erred in applying a multiplier of 16 years which was too low given the age and occupation of the deceased.

67. The deceased death certificate produced as P Exhibit 8 shows that the deceased died at the age of 39 years. The trial court rightly held that if the deceased was working in the Public Sector he would have worked to retirement age of 60 years.
68. I find that the multiplier of 16 years was proper for reasons that the trial court explained that considering the nature of work of the deceased which required him to be moving regularly and putting into consideration the vicissitudes, vagaries and uncertainties of life he was expected to work until he was 55 years old and thus the court adopted a multiplier of 16 years.
69. I find the trial court reasoning proper and there is no reason to disturb in regard.

Whether the trial court erred in denying the Appellants damages for loss of consortium.

70. The Appellants submitted that during the hearing the 1st Appellant testified that she had not remarried and that by the death of her husband she had lost the companionship, love, affection, comfort, mutual services and sexual intercourse from her late husband. The Appellants relied in the case of *Salvatore De Luca vs Abdullahi Hemedi Khalil & Another* (1994)eKLR. The Appellants submitted that going by the above facts and case law an award under the head of loss of consortium is justified.
71. In an attempt to address the issue of loss of consortium, our courts have struggled to find a clear stand on the same. I say so for the reason that in the case of *Innocent Keti Makaya Denge Vs Peter Kipkore Cheserek & another* [2015] eKLR, Githua, J. was of the view that: “With respect to the award of KShs. 150,000/- for loss of consortium, I entirely agree with the appellant that this award should be set aside in its entirety as it was not anchored on any law. There is no law that provides for an award of damages to the widow of a deceased person for loss of consortium. The *Law Reform Act* and the *Fatal Accidents Act* which are the two statutes which govern the award of damages in fatal accident claims recognize only three heads of general damages and loss of consortium is not one of them. These are damages for pain and suffering, damages for loss of expectation of life and damages for loss of dependency. In my view, loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his or her quality of life had as a result been diminished. Loss of consortium cannot thus be maintained as a claim on its own. In light of the foregoing, the award of damages for loss of consortium to the respondents portrays a serious misapprehension of the law by the trial magistrate. The award was obviously made contrary to the law and cannot be allowed to stand. It is consequently set aside...”



72. However, in the Ruth Chepngeno Mutai Case (supra), Hon. Visram, J. was of the view that:
- “As a result of the death of the Deceased, the Plaintiff lost a husband. She told this court that she had no intention to remarry. Considering the cited authorities and the circumstances of the Plaintiff in particular, I award her Kshs. 100,000/= for loss of consortium.”
73. Similarly, in Paul Kioko Vs Samuel G. Karinga & 2 Others [2012] eKLR, Kshs. 100,000/= was awarded to a widower for loss of consortium and servitium; while in Rose Adisa Odari Vs Wilberforce Egesa Magoba [2009] eKLR, an award of Kshs. 50,000/= was made to the widow for loss of consortium in a case where the deceased was aged 35 years at the time of his death.
74. In the case of Micah Nyolei & Stanley Kiplagat Milgo Vs Bonventure Anthony Okumu & Another, an award of Kshs. 200,000/= was awarded on 22 July 2016 for loss of consortium by the High Court at Eldoret (Hon. Ngenye-Macharia, J.) while P B S & Another Vs Archdiocese of Nairobi Kenya Registered Trustees & 2 Others [2016] eKLR, the Plaintiff was awarded Kshs. 800,000/= for loss of consortium by Hon. Aburili, J.
75. Clearly, therefore, there is sound basis for the claim and award of damages for loss of consortium in fatal accident matters. Indeed, in the Court of Appeal case of Salvadore De Luca Vs Abdullahi Hemedi Khalil & Another [1994] eKLR, held that:
- “So far as consortium is concerned, there is evidence that the appellant loved his wife and so did their children. The appellant has not re-married. No doubt, he had lost his wife’s companionship. There is, moreover, an impairment in the social life of the appellant and his young children who, too, have lost love, care and devotion of their mother. The learned judge clearly erred, in our view, in failing to award any damages for loss of consortium and servitium. Bearing in mind the fact that each case should be judged on its own facts, we would think that an award of Shs. 40,000/= is a fair measure for this head of damages and we award the appellant this sum with interest from the date of judgment in the superior court until payment in full.”
76. In the case herein, the appellant did not plead for damages for loss of consortium and therefore the same cannot be granted in a vacuum. This ground must fail.
77. The Appeal partially succeeds. For avoidance of doubt the findings of the trial court are hereby upheld save for the award of pain and suffering which is hereby set aside and substituted with an award of Kshs 100,000.
78. The appellant to get half of the costs of the appeal.

DATED, SIGNED AND DELIVERED AT CHUKA AT MERU THIS 26TH DAY OF SEPTEMBER, 2024.

L.W. GITARI

JUDGE

