



**Mano v Kenyatta National Hospital (Civil Appeal E164 of 2023)
[2024] KEHC 13061 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13061 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E164 OF 2023
TW OUYA, J
OCTOBER 29, 2024**

BETWEEN

JAMES MUTHEE MANO APPELLANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

*(Being an appeal from Judgement and decree of Hon. Wendy K. Micheni,
Chief Magistrate's delivered on 24th day of February, 2023 in CMCC
No. Civil Suit of 5924 of 2019 at Chief Magistrate's court at Nairobi)*

JUDGMENT

Background

1. This appeal emanates from Judgement of the Chief Magistrate Court delivered on 24th February 2023. The Appellant commenced a suit vide a plaint dated 7th August 2019 against the defendant for special damages and general damages for death arising out of negligence after a road traffic accident on 19th February 2018 at 12.00 pm. The plaintiff's case was that on the material date, the deceased, one Angelos Miano Muthee was involved in an accident where he sustained severe head injury which left him unconscious. The deceased was rushed to the defendant hospital and was advised to undertake a CT scan from the doctors. The defendant however failed to carry out the CT scan till a later time and result of which showed the deceased suffered from right temporal contusion, hemorrhage, left temporoparietal and non – depressed skull and required him to be admitted to the ICU. This was also followed by the delay by the defendant in admitting the deceased till 1.00 am on 20th February 2018. As a result of the deceased health not improving, the doctors recommended that a second CT scan be done and the servants and/or employees delayed releasing the result of the second CT scan until 23rd February 2018.
2. The defendant hospital advised that the deceased needed critical surgery and asked the Appellant to sign the consent form only to be informed that the deceased had suffered brain stem death. The



- defendant's doctors' put the deceased on life support machine despite them being privy to the fact that the deceased had suffered brain stem death that was irreversible until his demise on the 28th February 2018.
3. The plaintiff in his plaint particularized negligence as follows:
 - i. Failing to offer the deceased the best possible care as demanded and required in the observance of its duty of care to members of the public especially as expected of it being an institution specializing in rendering medical services to the public.
 - ii. Failing to exercise sufficient care and skills in attending to and/or handling the deceased.
 - iii. Laxity in administering treatment to the deceased despite him being a critical patient.
 - iv. Failing and/or avoiding to administer emergency surgical treatment on the deceased in a timely manner causing his death.
 - v. Having the panel incompetent and/or negligent doctors that subject patients to unnecessary pain and suffering.
 4. In their statement of defence, the defendant stated that its officers, servants, agent or employees managed the deceased with expected care, attention and medical skill in the circumstances. They denied any breach of duty of care to the deceased. The defendants' position is that the suit is statutorily time barred by virtue of section 3(1) of the *Public Authorities Limitation Act* Cap 239 as read with section 4, 27, 28, 29 and 30 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 5. The matter proceeded to full trial and the court dismissed the plaintiff's claim giving rise to the present Appeal. The appellant being dissatisfied with the judgment hereby appeals under the following grounds:
 - a. The learned magistrate erred in facts and law in finding in favour of the respondent to the extent of dismissing the Appellant's claim.
 - b. The learned magistrate erred in facts and law by failing to consider the evidence on record and appreciate the fact that the respondent had not filed any pleadings.
 - c. The learned magistrate applied the wrong principles in diminishing the Appellant's claim.
 - d. The learned magistrate erred in facts and law in failing to appreciate the totality of the weight of the evidence adduced by the Appellant.
 - e. The learned magistrate erred in fact and law in failing to find that the respondent owed the claimant a duty of care.
 - f. The learned magistrate erred in law and in faulting the claimant by not filling a witness statement while the rules of procedure do not require so.
 - g. The learned magistrate erred in fact and law in attributing 100% liability on the claimant.
 6. The Appellant prays for:
 - a. The Appeal be allowed and the judgment and consequential orders of the small claims court made on 16th February 2023 be set aside.
 - b. Costs of the Appeal be awarded to the Appellant.
 7. The appeal was canvassed by way of submissions by both parties.



The Appellant reiterated his case that:

- i. The deceased was never accorded ICU treatment because the defendant had none but that the Appellant was never given an opportunity to transfer the deceased to a facility with ICU facilities.
 - ii. The deceased was misdiagnosed, the injuries outlined at post mortem were missed by the Respondent, hence he was not accorded the right the right management at the required time.
 - iii. The Respondents delayed taking the deceased to the theatre and as such his condition deteriorated while under their watch upon which he prematurely died
 - iv. The deceased was placed under unnecessary mechanical ventilation for three days while the respondent knew that he was long dead.
8. The Appellant makes reference to the Trial Court finding which stated in part that:
- “The Court in understanding the situation at the hospital on that day, also takes note that the delay was not reasonable. This Court believes that if better management of the patient was to be out into consideration noting the critical state of the patient, then in the slightest opportunity the deceased life may have been salvaged”
9. It is his argument that the trial court having made the aforementioned finding, erred in finally dismissing the suit. He also contends that the Respondent’s reasoning that this court should change the words in the above ruling from “not reasonable” to “not Unreasonable” is not tenable because the entire paragraph should be taken into context considering that the words that follow immediately also point to the trial court intention that the patient was not properly managed.
10. The ordinary interpretation of the Trial court finding above is that it pointed to the fact that the patient was not properly managed noting his critical state and that there was a slight opportunity the deceased life may have been salvaged.
11. The appellant argues that he had called an expert witness by virtue of the Post mortem report prepared and signed by Dr. Dorothy Njeru having been admitted.
12. In response to the Respondent’s (Cross-Appellant’s) submissions, the Appellant in further submissions argues that the issue of limitation of time was addressed by the trial court and the Respondent’s arguments were disallowed.
13. The Appellant raises the issue that the deceased was misdiagnosed, That the injuries outlined at post mortem were missed by the Respondent, hence he was not accorded the right the right management at the required time. He relies on the post-mortem report conducted by Dr. Dorothy Njeru which had the following findings:
1. Subglial haematoma
 2. Fracture base of skull
 3. Left sided epidural haematoma
 4. Marked global subdural and subarachnoid haemorrhage



14. The Respondent agrees with the trial court judgement and holding that the Appellant had not proved his case on a balance of probabilities. The Appellant is in agreement with the finding of the trial court in part:

“The court in understanding the situation at the hospital on that day, also takes note that the delay was not reasonable. This court believes that if better management of the patient was to be put into consideration noting the critical state of the patient, then in the slightest opportunity the deceased life may have been salvaged.”

14. The Respondent on the other hand agrees with the trial court Judgement and holding that the Appellant had not proved his case on a balance of probabilities. The Respondent however has issue with failure by the trial court to set aside leave granted to the Appellant to file suit out of time and to hold that delay in filing suit was not satisfactorily explained.
15. The Respondent’s position is that the suit was time barred. The Respondent avers that it is a public body under Section 3(1) of the *Public Authorities Limitation Act*, a suit against it should be filed within a year from the accrual of the cause of action. That the suit herein was filed on 8th August 2019 while the cause of action arose on 28th February 2018 when the deceased passed on. The Respondent avers that there was no order of court giving leave to file suit out of time. He also argues that leave granted ex-parte can still be challenged during hearing. He cited the cases of 1. Jones M Musau & Another Versus Nairobi Hospital & Another 2014; 2. John Paul Odero Vs Bartilol Kigen & Two Others advancing the argument that leave to file suit out of time is normally sought in ex-parte proceedings and the defendant is allowed to challenge the facts in due course of the hearing of the main suit.
16. The Respondent’s second argument is that the Appellant failed to prove negligence against the Respondent. The Respondent concurs with the trial court finding and maintains that the Appellant failed to prove negligence on the part of the Respondent. He cites the following authorities on the issue of negligence: 1. GNG vs. The AG (2017) eKLR 2. Antony Lungaya Murumbutsa Versus Moi Referral And Teaching And Referral Hospital (2014) eKLR 3. John Motura Njuguna T/a Topkins Maternity And Clinic Versus ZWG (2017) eKLR

Analysis And Determination

17. This court has considered pleadings by the parties, record of appeal and the submissions on record plus the authorities cited. The duty of this court as a first appellate court is to re-evaluate the evidence and draw its own conclusions, but always bearing in mind that it did not have the opportunity to see or hear the witnesses testify. See *Peters v Sunday Post Limited* (1958) EA 424; *Selle and Another v Associated Motor Boat Co. Limited and Others* (1968) EA 123 and *Williams Diamonds Limited v Brown* (1970) EA 1. The Court of Appeal in *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278 stated that:

“A court of appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did.”

18. Having set out the foregoing, I find that the seven (7) grounds of appeal can be condensed into three (3) key issues for consideration and determination, namely:
- a. Whether the Appellant’s case was time barred and whether leave was granted by court
 - b. Whether the Appellant proved the elements of negligence against the Respondent



- c. Whether the Appellant was entitled to damages
19. I will consider each of the issues separately.

a. Whether the Appellant's case was time-barred

The record indicates that the suit herein was filed on 8th August 2019 while the cause of action arose on 28th February 2018 when the deceased passed on. The Appellants sought leave of the trial court to file suit out of time based on the following grounds:

- i. "That preliminary enquiry committee mention pretrial case No. 42/18 before the medical practitioners and Dentist Board took long to conclude."
 - ii. "The deceased died on 28th February 2018 after being denied medical attention."
 - iii. "That the delay in filing this matter is not inordinately long and issue to the time taken to determine the inquiry and Covid Pandemic."
20. The Application was considered and prayer granted vide Ruling dated 15th February 2021 hence the Appellant's plaint dated 8th August 2019 was also deemed to be properly filed. This court is thus satisfied that the plaintiff's suit was properly adopted by court and that the Respondent has not provided any factual or legal basis to challenge it.

b. Whether the Appellant proved the elements of negligence against the Respondent

21. Suffice it to say that the law is clear as to who has the burden of proof in civil claims, as seen under Sections 107, 108 and 109 of the Evidence Act. The Court of Appeal in *Mumbi M'Nabea v David M. Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:

"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." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

"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."

The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the Evidence Act, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes



that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

22. The Appellant particularized the elements of negligence in his plaint dated 7th August 2019 as indicated in paragraph 3 above. He testified in the trial as the sole witness PW1 in part:

“I blame the hospital for negligence. They failed to take my son to the theatre, for two days. He died while awaiting the procedure. I had already signed the consent forms. I even requested for a transfer to another hospital but the request was rejected.

I wish to produce the documents as Exhibit 1 to 16.

I pray for the prayers in the plaint. The deceased had a promising future.

Cross Examination

“The deceased was involved in a road accident and had a head injury. I was not present. He was taken to hospital shortly after the accident. I don’t have any medical training. I don’t know how long a..... should be done after an accident but it was an urgent issue. I am aware that the hospital is public and has many patients.

I don’t know how many ICU beds it has. The patient could have been taken to another hospital.....

Re-examination

“I asked for a transfer when I saw my son’s condition was getting worse.

Wangai: We close plaintiff’s case.

23. The Appellant also adduced documentary evidence to wit; Exhibit 1-16 in support of his case. From the documents, it is discernable that the deceased was admitted at the Respondent hospital emergency unit on 19th February 2018 at 12 pm with severe head injury. There is no doubt from the evidence that the deceased required emergency treatment. That the deceased was referred to the ICU for admission and that he died on 28th February 2018 after being diagnosed with features of brain stem death. The Appellant demonstrated that deceased required urgent treatment but the Respondent was sluggish in response to the extent that he requested for a transfer of the patient to another hospital facility which was denied. He cites the delay to admit the patient in the ICU, the delay to take the CT scan, the delay to release and to act upon the CT scan results which recommended emergency surgery and, that the decision that it was too late to undertake surgery was arrived at after the above lapses and inordinate delay.

24. From the statement of Dr. John Boore who was the Defendant’s sole witness, one is able to discern the following key dates and activities:

19th February @ 12p.m. Admission to the emergency unit, CT scan, Review by maxillofacial and ENT specialists @9 pm, Review by ICU Team @9.15pm

20th February morning, Review by neurosurgeon and critical care team, admission into ICU @1pm

23rd Repeat CT scan, Consent for surgery signed

24th pre-operative checklist and theatre preparations, Decision not to operate the patient

25th, 26th and 27th daily family conferencing



28th death of the deceased.

From the above, the dates 21st and 22nd are not accounted for while 25th, 26th and 27th are the dates that followed after a decision was made not to operate on the patient. It was at this point that the reality was communicated to the family through daily family conferencing.

25. The Respondent does not deny that the deceased required emergency treatment. The Respondents evidence as adduced by DW1 was that the Respondent medical staff did all that was possible within their circumstances. They admit that there was delay in admitting the patient in the ICU because of non-availability of a bed at that time and that the patient was instead placed on conservative management. DW1 in his evidence stated in part:

“The number of patients had overwhelmed our facilities. We have filled one bed capacity at the time. The deceased was in the list to be taken to RRA for high dependency care. He was to be placed there awaiting placement at ICU(RRA). We only have 21 ICU beds and 12 theatres. From the medical notes it is clear that on 24th February 2018, the deceased had been allocated a bed in the theatre. The patient was found unstable to go for theatre.

We have the standard theatre list which shows the action date.

There was no delay in the management of the patient. There were many patients pending.”

Cross Examination

“The CT scan serves many patients for the full hospital. The queue depends on each case and the numbers. I don't have the records here.

RRA is the equivalent of ICU. It is at the point of entry for patients. Once admission is done, we have an ICU in the wards. The RRA is at the accident and casualty.

The deceased was to be transferred from RRA to ICU but there was no vacancy.

Transfer to another hospital can be done when all supportive facilities are not available. The relatives are advised of this. I am not aware when Miano's relatives came. He was under the available facilities. The relatives must have been informed to look for another ICU bed but it is not documented.

I don't recall any such requesting for a transfer. I saw the patient with a team of neurosurgeons.”

26. From foregoing I have no doubt in my mind that the Appellant has demonstrated that there was inordinate delay in taking action to save the deceased's life. The Respondent does not deny that there was delay but raises the defence of lack of facilities at the public institution.

27. The question to be answered therefore is whether the Respondent facility can be held liable for the circumstances demonstrated in their evidence. The court in the case of Bolam v Friern Hospital Management Committee (1957) 2 All E.R. explained the law on liability in medical negligence as follows:

“--- The test whether there has been negligence or not is not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have those special skill...”



18. Furthermore, the following are the elements encompassing the tort of negligence as laid out by the Supreme Court in the case of Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR:

- a. a duty of care,
- b. a breach of that duty,
- c. causation, and
- d. damage.

28. As concerns the first element on statutory duty of care, it is not in dispute that the deceased was at all material times a patient under the medical care of the Respondents herein, thereby giving rise to a statutory duty of care. The Plaintiff/ Appellant tendered sufficient evidence to support his testimony that the deceased was admitted at the defendant hospital under the care and instruction of the Respondents servants and /or agents, in addition to being attended to by other staff members and doctors under the umbrella of the Respondent. Consequently, the statutory duty of care owed by the Defendants required that they not only ensure that they/their agents possess the proper skills and expertise, but that they also exercise the same in a proper and reasonable manner. Having established that there subsisted a statutory duty of care owed by the Respondent to the Appellant, the court will now contemporaneously discuss the second, third and fourth elements on whether the same was breached, thereby causing the death of the deceased.

29. The courts have previously held that any professional person ought to demonstrate the skills possessed and to thereafter use such skills with adequacy and efficiency. This is precisely what the East African Court of Appeal alluded to when it held the following in the case of Pope John Paul's Hospital & Another v Baby Kasozi [1974] EA 221 cited in the authority of John Gachanja Mundia v Francis Muriira & Another [2017] eKLR:

“If a professional man professes an art, he must reasonably be skilled in it. He must also be careful, but the standard of care, which the law requires, is not insurance against accidental slips. It is such a degree of care as normally skillful member of the profession may reasonably be expected to exercise in the actual circumstances of the case, and, in applying the duty of care to the care of a surgeon, it is peculiarly necessary to have regard to the different kinds of circumstances that may present themselves for urgent attention...A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motorcar. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater...The practitioner must bring to his task a reasonable degree of skill and knowledge, and must exercise a reasonable degree of care...”

30. From the court's consideration of the above, the Defendant/Respondent on his part and through its agents acted in a negligent manner in a number of ways. Foremost, it is apparent from the record that the Defendant/Respondent handled the Plaintiff in a casual manner and did not act efficiently to save the deceased's life. Taking into account the Respondent's defence that the facilities were overstretched and that the respondents and their agents did all that they could to save the deceased's life, one cannot fail to see the laxity and delay in taking emergency action from the moment the deceased was admitted at the facility on 19th February to 28th February 2018 when the deceased succumbed.



31. The key questions to ask questions are: 1. When the doctors noted that the patient required immediate emergency treatment at the ICU and that the same was not available, was the client duly informed? Was the Appellant advised and/or given the opportunity to rush the patient to another facility when life could be saved? 2. Why did it take several days to act on the CT scan results (which recommended emergency surgery) 3. Why was the Appellant's request to transfer the patient to another facility ignored until when it was too late? Indeed, ten (10) days is a long wait for an emergency patient only for the Appellant to be informed that it was already too late even for surgery.
32. In addition, there is nothing to show that the Defendant/ Respondent acted to save the deceased's life by mitigating on time considering the delicate situation of the patient. What is apparent from the Respondent's evidence is that the Respondent authorities resorted to managing the patient at the RRA with all the life support systems while waiting for a bed at the ICU. It was their position that the patient's condition was not stable owing to the nature of the injuries and required stabilization before engaging in surgery which was invasive and risky.
33. In view of the court, the critical dates are between are between 20th after review by neurosurgeon and critical care team followed by admission into ICU, to 24th at 4pm when the patient was found to have deteriorated. There is an indication that a repeat CT scan was undertaken on 22nd and its review done on 23rd upon which in the witness' words:

“...the neurosurgeons team made a decision for emergency evacuation (drainage) of the contusional hemorrhage in theatre.”
34. Again, the record indicates that 'consent to operate' was signed by next of kin and it was until 24th at 4pm when preparations were being made for theatre that a decision for surgery was cancelled on the basis that the patient's condition had deteriorated and that he had suffered brainstem death. The circumstances demonstrated above are glaring with delay and laxity for lack of a better word. The sole purpose for seeking emergency treatment is to save life and when that treatment is sought in a medical facility of the respondent stature, an ordinary right-thinking person expects prompt action and/or professional advice on which both hospital and the client can act upon to save life.
35. It is notable that the Appellant did not call for or adduce evidence of a doctor which would have aided in this case as observed by the trial court. This court does not place itself either in the place of a medical professional but has elected to evaluate the facts and circumstances adduced in evidence by looking into the sequence of events which are glaring with delay and laxity contrary to the expectations of an ordinary right-thinking person.
36. It is also notable that the only mention of the medical board was during the application for leave for extension of time. There is a letter attached in the record of appeal by the Medical Practitioners and Dentists Board the Respondent facility dated 12th September 2018 inquiring into the matter but there is no indication as to whether or not it was concluded.
37. In the court's view therefore, the laxity with which the Respondent facility handled the Appellant's patient amounted to a breach of the duty of care. Secondly failure advise on the realities of the Respondent institution at the time and the available options including transferring the patient to another facility amounted to negligence. Thirdly, standing in the way of and/or ignoring the Appellant's request to transfer the patient to another facility when life could still be saved and knowing very well that the Respondent facility had no capacity at the material time amounted to negligence.
38. The lingering question herein is whether the patient would have survived had immediate action been taken upon the CT scan done on the 22nd. Indeed, there is a big chance of survival when



intervening measures are taken on patients on time. Unfortunately, the surgeons reviewed it on 23rd and recommended emergency surgery which was not acted upon until 24th at 4pm. In view of all the foregoing circumstances, the appellant owed the Respondent owed the Appellant duty of care which was breached, leading to the death of the deceased. This court is in agreement with the trial court observation that:

“...if better management of the patient was to be put into consideration noting the critical state of the patient, then in the slightest opportunity the deceased life may have been salvaged...”

39. The court is thus satisfied that the Plaintiff successfully made a case for negligence against the Defendant/Respondent Hospital/Facility and therefore holds it liable.

Quantum Of Damages

40. Upon finding in favour of the Plaintiff, the court is persuaded that the Appellant would be entitled to damages. The Court of Appeal in *SJ v FrancESCO D. Nello & Another (2015) eKLR* stated on the issue of assessment of damages thus:

“The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the *Ossuman Mohammed & Another vs. Saluro Bundi Mohamud, CA 30/1997* (unreported) wherein the following passage, in the case of *Kigaragari vs. Aya (1982 – 1988), KAR 768* is employed;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage”

41. On general damages for pain suffering and loss of amenities, it is apparent that the Plaintiff experienced immense and prolonged pain particularly as a result of the delayed interventions. In the case of *P K M (suing on own behalf and as next friend of A J B) & G S M V Nairobi Women Hospital & Mutinda (2018) eKLR* the court held in part that:

“I bear in mind that any award ,.....should not send shock waves in the body politic with far reaching implications, It is also prudent to note that the plaintiff would not have been in this position had prudent and professional attendance been extended to them. The court also is cognizant of the fact that by the time the deceased was getting to hospital he had been involved in an accident and that full liability then cannot befall on the defendant. However, while I agree with this, I also state that the plaintiff should be compensated for the injuries sustained as a result of the action, commissions and/or commissions of the defendants.

42. For an award of lost years, the court will rely on the case of *Zachary Abusa Magoma V Julius Asiago Ogetonto & Jane Kerubo Asiago (2020) CIVIL APPEAL NO 74 of 2019 eKLR* which is an appeal of the decision cited by the defendant in this case, the court will take a lump sum approach the court cited *Marko Mwenda Vs Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993* where he held that:

“In adopting a multiplier, the court has regard to such personal circumstances of both the deceased and the dependents 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 lump sum 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 result of the death of the deceasedthe 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, to insist on the multiplier approach would be to sacrifice justice on the altar 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.”

43. Irrespective of the age of the deceased the mere presence of the deceased in the family was a valuable asset in which I believe the parents are proud of.
44. 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.1,000,000/= where it was proved that the deceased at the time of death was an 18 year-old who was about to be admitted to the university. The appellants on the other hand proposed an award of kshs. 256,740 before the lower court after applying the multiplier approach. The trial court in awarding kshs. 2,000,000/= held as follows:

“In this present case the plaintiff has proposed a global sum of kshs. 3,000,000/= relying on NRB HCC NO 814 OF 2007. PETER KIBOGORO WANJOHI (Suing as the Administrator of LILIAN WANGUI WANJOHI (DECEASED) VS CHRISTINE WAKUTHI MURIUKI & ANOTHER

I note that in the said authority the deceased was a university student studying Education course and a global sum was awarded. In the present case the deceased was a college student at UNIVERSITY OF NAIROBI studying Bachelor of Commerce at the Business School.

45. Having considered the cases cited above, I believe that an award of ksh. 1,500,000/= was going to be enough but taking into account the economic times and also lapse and passage of time, this court believes that an award of ksh. 2,000,000/= would suffice under the head loss of dependency.
46. For the award of pain and suffering this court believes an award of ksh. 100,000/= would suffice. This I supported by the case of Sukari Industries V Clyde Machimbo Jume HB HCCA No. 68 of 2015 (2016) eKLR the court held as follows:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from ksh. 10,000/= to kshs. 100,000/= over the last 20 years hence I cannot say that the sum of kshs. 50,000/= awarded under this head is unreasonable.”



47. On loss of expectation of life, I find that the sum of ksh. 100,000 would be reasonable taking into account that deceased was 25 years old at the time of his death. In Paul Ouma V Sarah Akinyi and Monica Achieng were (Suing as the legal representative in the Estate of Paul Otieno Were (Deceased) (2018) eKLR the court held as follows:

“ 13. On loss of expectation of life, the trial court awarded kshs. 140,000/= which the Appellant urged is excessive and should be reduced to kshs. 70,000/=. The respondent did not agree. The Appellant has not urged why an award of ksh. 140,000/= is excessive for loss of expectation of life for the deceased who died at the age of 26 years. The death certificate exhibit 5 produced as exhibit reveals the deceased died at the age of 29 years. I have considered the authorities relied upon and evidence on record and find an award of kshs. 100,000/= for loss of expectation of life would be proper”

48. This court notes that the trial court had assessed damages but declined to award based on its finding. This court finds the assessment reasonable and in line with the authorities cited above. The court equally finds that the Appellant claimed for special damages amounting ksh. 36,000 but did not plead it in the plaint neither proved it hence the claim shall fail.

49. In light of this the court asserts that the plaint has succeeded and the court enters an award as tabulated below:

1. General damages
 - i. Pain and Suffering kshs. 100,000/=
 - ii. Loss of expectation of life kshs. 100,000/=
 - iii. Loss of dependency Ksh. 2,000,000/=Total ksh. 2,200,000/=
2. Costs of the suit and of the appeal are awarded to the plaintiff

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29th DAY OF OCTOBER, 2024

ROA 14 days.

HON. T. W. OUYA

JUDGE

For Appellant Burugu

For Respondent N/A

Court Assistant Martin

