**Njoroge & another v Wanjugu & another (Suing as the Legal Representatives of the Estate of Charles Nganga Gitome) (Civil Appeal 55 of 2024) [2024] KEHC 14957 (KLR) (Civ) (28 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14957 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYANDARUA**

**CIVIL**

**CIVIL APPEAL 55 OF 2024**

**CM KARIUKI, J**

**NOVEMBER 28, 2024**

**BETWEEN**

**MICHAEL KAMAU NJOROGE ..... 1ST APPELLANT**

**PAUL MAINA NJATHI ..... 2ND APPELLANT**

**AND**

**ESTHER WANJUGU & JACOB GITOME NGANGA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF CHARLES NGANGA GITOME) ..... RESPONDENT**

## JUDGMENT

1. The Appellants herein bring this appeal against the judgment delivered at Nyahururu on 4th August 2022 in Nyahururu CMCC No. 258 of 2019, in which judgment was entered in favor of the Respondent against the Appellants as followsLiability 100% in favor of the plaintiffPain and suffering – Kshs. 150,000/-Loss of expectation of life – Kshs. 100,000/-Loss of dependency -Kshs. 1,920,000/-Special damages – Kshs. 86,730/- plus interest and costs.

2. The instant appeal is on liability and quantum, and the Appellants advanced the following grounds:-

    i. That the learned trial magistrate erred in law and fact in clearly failing to properly evaluate the evidence adduced by the parties in relation to the pleadings on the nature of the case, thereby making a determination on liability that is incongruent with the pleadings and evidence and is therefore untenable.

    ii. That the learned magistrate erred in law and, in fact, in finding that the defendants+ liable on the basis not of established negligence as ought to be but on the ostensible if not flimsy

basis that there were mild innocuous inconsistencies of the defendants' evidence but which has nothing to do with the causation of the accident.

iii. That the learned magistrate erred in law and fact in finding the Appellants liable in negligence, yet the circumstances of the accident were precipitated by the relevant motorcycle ramming into the Appellants' motor vehicle from the rear and that there was not much the Appellant would have done to avert the accident.

iv. That the learned trial magistrate erred in law and totality misapprehending or not apprehending at all the principles of or the doctrine of negligence as a basis of imposing liability and therefore held the Appellants liable on the unsound mind.

v. That the learned magistrate erred in law and fact in shifting the burden of proof in evidence for the plaintiff to the Appellants herein.

vi. That the learned magistrate erred in law in applying speculative and unproven sums in computing damages for loss of dependency and thereby imposing against the Appellants liability to pay an excessive compensation in respect of loss of dependency to the Respondents.

vii. That the learned magistrate erred in law and fact in using an excessive multiplier of 12 years to compute the damages for loss of dependency against the principles applicable.

viii. That the learned magistrate erred in law and fact in making duplicate awards under the *Law Reform Act* and Fatal Accident Act in a case where the recipients thereof would be the same Respondent herein.

**Appellants' Submissions**

**Submissions on grounds 1,2,3,4 and 5 of the Memorandum of Appeal;**

3. The Appellants submitted that there is no justification in holding the testimony of PW1 to be more credible than that of DW1 and that there is no evidence corroborating the eyewitness version of events that the driver of the said motor vehicle joined the feeder road abruptly or without indicating.

4. It was stated that the 2nd Appellant's testimony was consistent in that he slowed down and showed his intention to turn and join the feeder road. Moreover, PW2, during cross-examination, indicated to the court that the fact that the driver of the said motor vehicle did not indicate was not made known to him as the investigating officer by the said witness.

5. In fact, it was PW2's testimony that the said eye witness during investigations did align himself with the version of events presented by the driver of the said motor vehicle. It was, therefore, the Appellant's submission that there was no justification for the learned magistrate to admit this fact as credible.

6. Further reliance was placed on Accidents, Compensation and the Law, 2nd Edition at pg. 38, Anns vs. Merton London Borough Council [1978] AC 728, Muthuku vs. Kenya Cargo Services Ltd [1991] KLR 464 as cited in the case of Tombe Tea Factory Ltd vs. Samuel O. Araka [2010] eKLR, Eliud Papoi Papa vs. Jigneshkumar Rameshbai Patel & Anor [2017] eKLR, Embu Public Road Services Limited vs. Riimi [1968] EA 26

7. The Appellants asserted that it was the testimony of the 2nd Appellant that he slowed down and indicated before joining the feeder road. This testimony was not challenged in any way, and the 2nd Appellant was consistent with this version of events. Further, it was stated that this was sufficient evidence that the 2nd Appellant did care for other road users, and there was no justification for him to exert more due care by examining the rear-view mirror. Moreover, while the Learned Magistrate

examined the expected actions of the 2nd Appellant herein, he failed to investigate the expected actions of the rider of the motorcycle, which was following the 2nd Appellant's motor vehicle.

8. It was contended that the rider of the said motorcycle failed to give due regard to the 2nd Appellant's motor vehicle as the facts infer that he failed to keep a safe distance and, if he did, he was over speeding; hence, failed to note that the 2nd Appellant's motor vehicle had indicated to turn right and had further slowed down.

9. Moreover, if the rider of the motorcycle were indeed diligent and not overspeeding, the nature of injuries leading to death would not have occurred. It is, therefore, their submission that the learned magistrate erred in law and fact in holding the 2nd Appellant herein to a higher degree of duty of care than the Deceased rider as the same shifted the burden of proof from the Respondent herein to the Appellant.

10. Furthermore, at the very least, the court would have admitted there exists evidence of contributory negligence. Reliance was placed on Peter Okello Omedi vs. Clement Ochieng, [2006] eKLR, Jane Muthoni Nyaga vs Nicholas Wanjohi Thuo & Another, [2010] eKLR and Peter Mwenja Kariithi & Another vs Isaiah Owili Kiburo

**Submissions on Grounds 6 and 7 of the Memorandum of Appeal;**

11. It was stated that with respect to the loss of expectation of life, the learned trial magistrate made a conventional award of Kshs. 100,000/=. With respect to loss of dependency, the trial court took into consideration that the Deceased was 60 years old at the time of his death and, notwithstanding the allegations that the Deceased was a farmer earning between Kshs. 30, 000/=, the court did not have evidence to support the same. It was argued that the learned trial magistrate consequently adopted a sum of Kshs. 20,000/- without any justification for the application of the same and ignoring the defendant's submission in either applying the minimum wage for an unskilled employee in 2018, which was Kshs. 7,240,95/= or apply a global figure having been judiciously guided by legal precedence. Moreover, they stated that the said figure was excessive and unsubstantiated.

12. It was averred that the learned trial Magistrate further applied a multiplier of 12 years. It is the Appellants' submission that in adopting a multiplier of 12 years, the learned trial Magistrate ignored the vicissitudes of life and principles applicable to the circumstances, taking further note that the Deceased was 60 years of age. Reliance was placed on the cases of Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another (unreported) as cited with approval in Leonardo Ekisa & Another vs. Major K. Birgen, Mary Kerubo Mabuka & Newton Mucheke Mburu & 3 Ors,

13. It was the Appellants' submission that, in the instant case, a multiplier of 1 year is sufficient.

14. Additionally, it was stated that the learned trial Magistrate further applied a dependency ratio of 2/3, although no justification was issued in the judgment for applying the ratio of 2/3. It is noteworthy from the proceedings in the trial court that despite PW3 alleging that the Deceased was the breadwinner and that he used to pay for the house, maintenance, and food, no documentary evidence was adduced by the witness to support the claim of maintenance. Moreover, it was admitted that the minors of the Deceased were all adults living by themselves, and if there was any dependency, the same was by the wife. It was the Appellant's submission that dependency is a matter of fact to be determined in each case, and there is no law that 2/3rds of a person's income is to be taken as available for his expenses.

15. It is the Appellants' further submissions that the Respondents, having failed to add the evidence to show that the Deceased used to provide for the domestic expenses of the family, the learned trial

Magistrate should have, in the circumstances, applied a dependency ratio of ½. Reliance was placed in the case of Apollo Nyangayo Hongo vs. Kenya Bus Service Ltd & Another

16. As such, it was their submission that what was due under the heading of Loss of dependency is as follows: Kshs. 7,240.95/= x 1-year x 12 months x 1/3 = 28,963.80/= less contribution.

17. Further and in the alternative, the court has also held that where earnings have not been proved and cannot be ascertained, a global award ought to be awarded in the place of speculation.

**Submissions on Ground 8 of the Memorandum of Appeal**

18. The appellants' submission was that the learned trial court erred in making duplicate awards of damages under both the Fatal Accident Act and the *Law Reform Act* contrary to law and principle, ignoring helpful submissions in that respect by the Appellants' counsel.

19. In conclusion, it was stated that the upshot of the Appellants' submissions is that the appeal filed herein is worthy, and the same should be allowed. The lower court decision set aside and substituted with a decree allowing the Appellant's claim and dismissing the Respondents' claim or reviewing the decree upon terms that are just and in consonance with the evidence adduced before the trial court.

20. Respondents' Submissions were not available at the time of drafting this judgment.

**Analysis and Determination**

21. This appeal concerns liability and quantum. As this is the first Appeal, and as stated in Selle & Another v. Associated Motor Boat Co. Ltd & Others (1968) EA 123, this court is duty-bound to reevaluate the facts afresh and reach its own independent findings and conclusions. However, unlike the trial court, this Court neither saw nor heard the witnesses when they testified.

22. Having considered the grounds of appeal, the record of appeal, the submissions herein, and the authorities relied on, I opine that the issues for determination in the instant appeal are liability and the quantum of damages awarded by the trial court.

23. Firstly, it is essential that I reiterate that the legal burden of proof in a civil case lies upon the party who invokes the aid of the law, as was discussed by the court in the case of Evans Nyakwana vs. Cleophas Bwana Ongaro [2015] eKLR where it was stated that:-

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden ... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 of law that proof of that fact shall lie on any particular person...The Appellant did not discharge that burden, and as Section 108 of the *Evidence Act* provides, the burden lies in that person who would fail if no evidence at all were given as either side."

24. Moreover, the case should be proven on a balance of probabilities. Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] eKLR stated that:-

> " In ordinary civil cases, a case may be determined in favor of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance

of probabilities. He has established that it is probable than not that the allegations that he made occurred."

25. In determining the issue of liability, I am guided by the Court of Appeal in Michael Hubert Kloss & Another vs. David Seroney & 5 Others [2009] eKLR, where it stated:-

> " The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in Stapley v Gypsum Mines Ltd (2) (1953) A.C. 663 at p. 681 as follows:
>
> "To determine what caused an accident from the point of view of legal liability is a most challenging task. If there is any valid logical or scientific theory of causation, it is pretty irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it.....
>
> "The question must be determined by applying common sense to the facts of each particular case. One may find that, as a matter of history, several people have been at fault and that if any one of them had acted properly, the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

26. Considering the evidence adduced in the trial court, it was not in dispute that the Deceased's motorcycle hit the Appellant's motor vehicle from behind. PW1, who was an eyewitness to the accident, testified that in his statement, he had stated that the motor vehicle hit the motorcycle. Still, he confirmed that it was the other way round. He said that there was a distance of 10 meters between them and that the bike was at a distance. It was his testimony that the motor vehicle was not indicating that the driver had a helmet and that he had no passengers.

27. In cross-examination, he stated that the motor vehicle was partly on the road and that the motorcycle was not at a high speed.

28. PW2 testified that the accident happened at 3 pm at Mundia Estate along Olkalou Dundori tarmac road between motor vehicle KBC 145N and motorcycle KMCX 228L heading in the same direction when the rider hit the motor vehicle, fell on the road and was severely injured. He stated that an inquest was recommended, but the same was not complete and that the motor vehicle driver and an eyewitness made the report. He asserted that it is not true that he blamed the rider for the accident as per the insurance investigation report.

29. Upon cross-examination, PW2 confirmed that he did not know who was to blame for the accident, that PW1 did not state that the motor vehicle did not indicate and that he seemed to agree with the motor vehicle driver. On re-examination, the witness asserted that the point of impact was on the road.

30. On the other hand, DW1 stated that he was driving behind a slow motor vehicle. He overtook it and was to join a feeder road when a motorcycle hit him from behind. The certificate of inspection showed damage on the rear bumper and the left, and he blamed the rider for the accident. He said that he escorted him to the hospital and then went to the hospital.

31. On cross-examination, DW1 stated that he was overtaking and was to branch to the right feeder road when he heard a bang on the road. He did not expect the rider to follow him as he was overtaking and was at a speed of 15kph. On reexamination, he confirmed that he had indicated that he was turning right.

32. DW2, the insurance investigator, asserted that he placed blame on the rider who was riding the motorcyclist and hit the motor vehicle at the right rear.

33. It is clear that the Appellants' and Respondent's narration of who was to blame for the accident was in variance. The trial court, in its judgment, stated that the 2nd Appellant's testimony in court and his witness statement were at variance because he failed to mention that he was overtaking another vehicle.

34. The trial magistrate also stated that the report done by the investigator on behalf of the insurance was done 6 months after the accident and only had the 2nd Appellant's statement. The trial magistrate held that, as submitted by counsel for the plaintiff, the report is lopsided and cannot be conclusive, an assertion that I agree with.

35. Additionally, the trial magistrate found the eye witness' evidence to be credible and asserted that he was riding in the oncoming direction and could see clearly what was ahead of him. He held that it was apparent that the 2nd Appellant did not use his rear mirror to check before branching off the main road. If he was intent on joining the feeder road ahead, why would he at the same time be overtaking another vehicle near the junction only to suddenly branch to join the feeder road? Eventually, he held the 2nd defendant 100% liable for the accident.

36. Looking at the evidence on record, the 2nd Appellant was driving along Olkalou Dundori road with the Deceased riding his motorcycle behind him. It appears that there was a car ahead of them that the 2nd Appellant overtook, followed by the Deceased. The 2nd Appellant also had intentions of joining a feeder road on the right after overtaking, and according to him, as he was about to enter the feeder road, the Deceased hit him from behind. Whether he indicated or not was not conclusively established by the investigations done by PW2, but I am convinced that he must have stopped suddenly in order to join the feeder road, and that is when the Deceased's motorcycle bumped into his car. Contrary to the trial magistrate, it is my considered opinion that if there was a distance of about 10 meters between the 2nd Appellant and the Deceased as per PW1's account, then the Deceased must have been speeding, thus causing him to bridge that distance and hit the 2nd Appellant's car.

37. Accordingly, all road users owe a duty of care to other road users, and they ought to move with due care and observe the Highway Code. In the circumstances of this case, I find that the 2nd Appellant was more to blame, and I, at this moment, apportion liability at 90%:10% in favor of the Respondents.

38. On the quantum of damages, the circumstances under which this court can upset the award of damages have been previously laid down in the case of Mbogo & Another Vs Shah (1968) EA, where it was held: -

> " .... this court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have taken into consideration and in doing so, arrived at a wrong conclusion."

39. Further, the Court of Appeal in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The court expressed itself clearly thus: -

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or

that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

**Pain and Suffering**

40. For pain and suffering, the trial court awarded the Deceased Kshs. 150,000/-. The Deceased died a day after the accident while receiving treatment in Nakuru.

41. I will be guided by the case of Hyder Nthenya Musili & Another vs-China Wu Yi Limited & Another [2017] eKLR, where the Court stated as follows: -

> "…. As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the Deceased suffered pain and suffering as a result of his injuries in the period before his death…. The generally accepted principle, therefore, is that very nominal damages will be awarded on these two heads of damages if the death follows immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering, the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death…."

42. Accordingly, the Deceased, having died a day after the accident, I find that the trial court's award of Kshs. 150,000/- was inordinately high and replaced the same with Kshs. 50,000/- taking into account the Deceased's pain and suffering for a day.

**Loss of Expectation of Life**

43. The trial court awarded Kshs. 100,000/- and guided by the Hyder Nthenya Musili case [Supra], I uphold the same.

**Loss of Dependency**

44. The Appellants heavily challenged the award made by the trial court under this head. They stated that the trial court took into consideration that the Deceased was 60 years old at the time of his death and, notwithstanding the allegations that the Deceased was a farmer earning between Kshs. 30, 000/=, the court did not have evidence to support the same. It was argued that the learned trial magistrate consequently adopted a sum of Kshs. 20,000/- without any justification for the application of the same and ignoring the defendant's submission in either applying the minimum wage for an unskilled employee in 2018, which was Kshs. 7,240,95/= or use a global figure having been judiciously guided by legal precedence. Moreover, they stated that the said figure was excessive and unsubstantiated. It was the Appellants' submission that, in the instant case, a multiplier of 1 year is sufficient.

45. Additionally, it was stated that the learned trial magistrate further applied a dependency ratio of 2/3, although no justification was issued in the judgment for applying the ratio of 2/3. It is noteworthy from the proceedings in the trial court that despite PW3 alleging that the Deceased was the breadwinner and that he used to pay for the house, maintenance, and food, no documentary evidence was adduced by the witness to support the claim of maintenance. Moreover, it was admitted that the minors of the Deceased were all adults living by themselves, and if there was any dependency, the same was by the wife. As such, it was their submission that what was due under the heading of Loss of dependency is as follows: Kshs. 7,240.95/= x 1-year x 12 months x 1/3 = 28,963.80/= less contribution

46. The Appellants also argued that in the alternative, the court has also held that where earnings have not been proved and cannot be ascertained, a global award ought to be awarded in the place of speculation.

47. From the trial magistrate's judgment, he adopted an income of Kshs. 20,000/- and a ratio of 2/3rd, noting that even if the children are adults, the Deceased's wife is unemployed and relies on him. Further, the trial magistrate stated that if the Deceased was in salaried employment, he would have worked up to the age of 60 years. That is not the case; the plaintiff said he would have worked up to 70 years and proposed a multiplier of 12, whereas the defendant gave a figure of one year. The court found the proposal by the plaintiff reasonable and took the figure of 12; hence, 20,000 x 12 x 12 x 2/3 = 1,920,000/-

48. Accordingly, from the material on the trial record, there was no evidence whatsoever availed by the Respondents that the Deceased earned an income of Kshs. 30,000/-. Moreover, the Deceased was 58 years old at the time of his death. He was said to have retired from the police service and that he was working as a farmer. The Respondents asserted that the Deceased was taking care of his wife and adult children. The trial magistrate did not offer any explanation as to why he adopted a sum of Kshs. 20,000 even though, in my opinion, the Deceased's earnings could not be proved.

49. It is my considered opinion that in awarding damages for loss of dependency, the trial court had the option of applying the multiplier-multiplicand method or taking the global sum approach. The trial magistrate adopted multiple approaches and, in turn, gave an extraordinarily high award and relied on a figure of Kshs—20,000, which was unjustifiable. In the circumstances of this case, I believe that the global sum approach would have been more appropriate, considering that the deceased's earnings were not proven, as well as his age and the rate of inflation. This was the position in the case of Rishi Hauliears Limited vs. Josiah Boundi Onyancha [2015] eKLR, where the court held:-

    a. "This was a proper case for the court to have awarded a global sum in view of the age of the Deceased and the scanty evidence provided by the Respondent. In this regard, I adopt Ringera J.'s reasoning in Mwanzia Vs. Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J., in Albert Odawa Vs. Gichimu Gichenji NKU HCCA No. 15 of 2003 (2007) eKLR, in which he expressed the following view: "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."

50. Additionally, the global sum is not a figure given arbitrarily; instead, it is an award based on the circumstances of the case and similar decisions made by courts in the past. In the case of Franklin Kimathi Maariu & another Vs. 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 of 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."

51. Furthermore, in the case of John Wamae & 2 Others Vs. Jane Kituku Nziva & Another (2017) eKLR, the court awarded a global sum of Kshs. 400,000/- to a Deceased farmer and guard aged 61 years. In the case of Moses Wetangula & another Vs. Eunice Titika Rengetiang (2018) eKLR, the court awarded a global sum of Kshs. 500,000/= to a 42-year-old retired KDF officer. As observed by the trial court, in the case of Hashi Hauliers & Another Vs. Joel Songbook & Another (2021) eKLR, the court awarded a global sum of Kshs. 1,000,000/= being damages for loss of dependency.

52. Consequently, considering the aforementioned comparative awards and the circumstances of this case, I find that an award of Kshs. 700,000/- would be more appropriate. Therefore, I disturb the trial court's award of Kshs. 1,920,000/- and replace it with Kshs. 700,000/-. The trial magistrate also went ahead and deducted the award for loss of expectation for life from the total sum of the prize in his judgment.

**Special Damages**

53. The court awarded special damages of Kshs. 86,730/—, which was pleaded and proved. I will, therefore, not disturb the award under this head.

54. Furthermore, the Appellants submitted that the learned magistrate erred in law and fact in making duplicate awards under the *Law Reform Act* and Fatal Accident Act in a case where the recipients thereof would be the same Respondent herein. In the case of Hellen Waruguru Waweru (suing as the legal representative of Pete Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR, where the Court of Appeal held that:

> "This court has explained the concept of double compensation in several decisions, and surprisingly, some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the Deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently, the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life, as these are only awarded under the *Law Reform Act*. Hence, duplication issues do not arise. The words 'to be taken account' and 'to deducted' are two different things."
>
> .....
>
> The confusion appears to have arisen because of the different reports on the Kemfro case (supra), which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727, which concentrates on Kneller JA's decision to extract the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2), and the ratio decided is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
>
> "6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
>
> 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit of the estates of Deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the Deceased persons by the *Fatal Accidents Act*. This, therefore, means that a party

entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* with respect to the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

55. Accordingly, guided by the case above law, I reject the Appellants' assertion, and the trial magistrate's deduction of the amount under the loss of expectation of life in this case was erroneous. I will, therefore, have to interfere with the final award of damages.

56. In the upshot, the appeal herein partly succeeds, and the following final awards are hereby issued:

a. Liability: - 90%: 10%

b. Pain and suffering - Kshs. 50,000/-

c. Loss of expectation of life - Kshs. 100,000/-

d. Loss of dependency - Kshs.700,000/-

e. Special Damages - Kshs. 86,730/-

f. Subtotal - Kshs. 936,730/

g. Less 10% contribution - Kshs. 93,673/-

=Grand Total.....Kshs 843,057/-

ii. The Appellants will bear the cost of the suit at the trial court, and each party will bear their own costs of this appeal.

**JUDGMENT, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 28TH DAY OF NOVEMBER 2024.**

**.....**

**C. KARIUKI**

**JUDGE**