



REPUBLIC OF KENYA



**United Millers Limited v Ayako & another (Suing as legal representatives  
of the Estate of Laurent Kabila Ouma) (Civil Appeal E012 of 2024)  
[2024] KEHC 15028 (KLR) (25 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 15028 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E012 OF 2024  
RE ABURILI, J  
NOVEMBER 25, 2024**

**BETWEEN**

**UNITED MILLERS LIMITED ..... APPELLANT**

**AND**

**KEZIA ADHIAMBO AYAKO & VICTOR OTIENO OUMA (SUING AS  
LEGAL REPRESENTATIVES OF THE ESTATE OF LAURENT KABILA  
OUMA) ..... RESPONDENT**

*(An appeal arising from the judgment and decree in Kisumu CMCC No.  
223 of 2019 delivered on 26th May, 2023 by Hon. K. Cheruiyot, SPM)*

**JUDGMENT**

1. The appellant United millers Limited was sued by the respondents herein Keziah Adhiambo Ayako & Victor Otieno Ouma (suing as leagal representatives of the estate of Laurent Kabila Ouma, deceased, vide a plaint dated 8<sup>th</sup> May 2019 seeking for general damages under the *Fatal Accidents Act* and the *Law Reform Act* as well as special damages of Kshs. 1,682,210 following a road traffic accident that occurred on the 6<sup>th</sup> August 2016 involving the appellant’s motor vehicle registration number KBV 192Q.
2. It was the respondent’s case that on the particular date the deceased was walking along Ring Road on the extreme right-side verge of the road facing Kilo area when the appellant and/or its authorised driver, servant and/or agent negligently drove, managed the aforementioned motor vehicle causing it to leave its rightful lane on the left side and ended up knocking and running over the deceased leading to him sustaining fatal injuries.
3. The appellant filed a statement of defence in which he denied the claim and put the respondents to strict proof of their case.



4. In his judgement, the trial magistrate held that as the appellant had failed to call any evidence in support of its defence, the respondents' case in as far as liability was concerned remained uncontroverted. He went on to hold the appellant 100% liable for the accident. The learned trial magistrate quantified the damages as follows:
  - Loss of expectation of life; Kshs. 150,000
  - Pain and Suffering; Kshs. 300,000
  - Loss of dependency; Kshs. 5,822,600
  - Special Damages; Kshs. 1,521,040
5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 31<sup>st</sup> January 2024 raising 14 grounds of appeal that are summarised below:
  - a. The learned trial magistrate erred in law and finding the appellant 100% liable, while there was ample evidence to find the deceased contributed to the accident.
  - b. The learned trial magistrate erred in law in awarding damages for loss of dependency that was excessive and inordinately high.
  - c. The learned trial magistrate erred in law and in fact in choosing to use the multiplier approach rather than the global award approach when the income of the deceased was not known or capable of being ascertained.
  - d. The learned trial magistrate erred in law and in fact in holding that the deceased would have been employed at job group K when such matter was not pleaded.
  - e. The learned magistrate erred in law and in fact in ignoring the submissions made by the appellant in their entirety then reaching an unbalanced decision unfair to the appellant.
  - f. The learned magistrate erred in law and in act in failing to analyze the evidence before him and consider it carefully before making his decision.
  - g. The learned trial magistrate erred in law and in fact in rendering a judgement that did not contain the point for determination, the determination and reasons for determination contrary to Order 21 Rule 4 Civil Procedure Rules.
6. The appeal was canvassed by way of written submissions and both parties complied with the court's directions.

### **The Appellant's submissions**

7. The appellant submitted that the judgement failed to meet the threshold for judgement as stipulated in Order 21 Rule 4 of the Civil Procedure Rules warranting an interference by this court as was held in the case of *Timsales Limited v Samuel Kamore Kihara 2016*] eKLR, *Awili Nelson v Purity Achieng Ochieng 2021*] eKLR, *Jameson Siika v Andrew Maranga Ongera 2016*] eKLR and that of *Joseph Karisa Baya v Ceis Giorgio & Another 2020* eKLR.
8. It was submitted that in concluding that negligence was obvious without saying what that negligence was, the trial court misdirected itself and as stated in ground 1 of the appeal, erred in law in finding the appellant 100% liable, while there was ample evidence to find the deceased contributed to the accident.
9. The appellant further submitted that whether or not the defendant has called evidence, there is no automatic, or obvious success in the plaintiff's case especially where witnesses called have been



subjected to bruising cross-examination. Reliance was placed on the case of *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau [2016] eKLR CACA NO. 87 OF 2014, Margaret Wanjiru Ndirangu & 4 Others v Attorney General [2020] eKLR Civil Appeal No. 305 of 2016.*

10. The appellant submitted that as it was not clear as to who caused the accident between the lorry driver and the deceased then in accordance with established law, liability ought to be shared equally as was held in the case of Hussein Omar Farah v Lento Agencies, CACA 34 OF 2005 (2006) eKLR.
11. It was submitted that without any pleading of what income the deceased would have earned had he joined university and completed his degree course, the court could not have found as it did that the deceased would enter service at Job Group K and would earn Kshs. 45,190 and thus the court erred in using the multiplier approach.
12. It was submitted that in failing to consider the submissions and authorities cited before him and without once referring to them, the trial magistrate made a major error of misdirection entitling this court to interfere.
13. Reliance was placed on the case of Godwin Mbaka Njagi (Suing as personal representatives of HARRISON Mbaka – Deceased) v Caren Mati & Another [2020] eKLR where the deceased was an engineering university student and the plaintiff did not show by evidence how much such persons would earn upon completion of their courses and the trial court gave an award of Kshs. 1,500,000 using a minimum wage of Kshs. 15,000.
14. It was thus submitted that the court could only properly follow the global approach and give a lump sum as there was no pleading nor evidence as to what the deceased would have become or earned had he completed his degree course.
15. The appellant submitted that a global award of Kshs. 1,600,000 would be sufficient for the deceased as was held in the case of Teresia Wanjiru Githinji v Lucy Kanana M’rukaria & Another (Suing as Legal Representative of Ernest Gutuura Nabea (Deceased) [2021] eKLR.

### **The Respondents’ submissions**

16. On liability, it was submitted on behalf of the respondents that the appellant did not call any witness and subsequently, no plausible reason was given to justify why the appellant driver veered off his lawful path on the left to the right where the deceased was. The respondents relied on the case of Isabella Wanjiru Karanja v Washington Malele [1983] eKLR where the court exclaimed that vehicles well driven and well maintained do not just run over bridges and plunge into rivers.
17. The respondents relied on the cases of Margaret Wangari Kiambuthi v Jane Njeri Ngugi & Another (Suing for and on behalf of the Dependents and the Estate of Arios Kinyanjui Mukirai ( Deceased [2018]eKLR where the court at paragraph 14 of the judgment observed that the appellant motor vehicle was more lethal than the bicycle that the deceased was cycling and held the appellant 10% liable for the accident. Further reliance was placed on Francis K. Righa v Mary Njeri (Suing as the legal Representative of the Estate of James Kariuki Nganga [2014] eKLR where the court adversely mentioned the duty of a motorist to other road users bearing in mind that a motorist wields a much lethal weapon than any other motorist and hence the higher duty of care expected from the driver.
18. It was submitted that there was no evidence on record proving the claim that the deceased dashed across the road and that had that occurred, the accident would have occurred on the left hand side hence it cannot be inferred as the appellants suggest without evidence. The respondents submitted that the appellant who intends this appellate court to draw this conclusion did not proffer such evidence.



19. The respondents further submitted that there was no collusion and thus the authorities cited in support of such allegation are misplaced and at complete parallel with the facts of this matter. It was submitted that the accident herein occurred on the right lane and that in absence of exculpatory evidence, this constitutes *res ipsa loquitur* as was held in the case of *Susan Kanini Mwangangi & another v Patrick Mbithi Kavita* [2019] eKLR.
20. It was submitted that based on the foregoing, the respondents established the appellant's negligence on a balance of probability and the onus properly shifted to the appellant to dispel the same.
21. The respondents submitted that their duty is not to prove their case beyond reasonable doubt but on a balance of probabilities and thus the deceased having died prematurely before he could be given the opportunity to gain employment, there was no evidence negating his chances on gaining employment along his area of specialization and further, that there was no law evidenced by the appellant requiring that such likelihood be separately pleaded.
22. It was submitted that the Court of Appeal has reaffirmed the various variables to be taken into account on proof of income and employment when it comes to the question whether one has to produce bank statements, book of accounts, receipts, and testimonials as the safest way to determine the parameters that one was in active employment or his income earnings as was held in the case of *Jacob Ayigo v Simon Obayo* [2005] eKLR.
23. The respondents relied on the case of *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku court of appeal sitting at Nyeri in civil appeal no. 35 of 2014* eKLR where the court pronounced itself stating that "The choice of a multiplier is a matter of the court's discretion which discretion has to be exercised judiciously with a reason."
24. It was thus submitted that the parameters of age, likely income premised on qualifications and dependency were evidenced sufficiently to support the trial court's decision on the multiplier approach to determine loss of dependency award.
25. As to whether the judgment of the trial court went against Order 21 Rule 4 Civil Procedure Rules, it was submitted that the appellant has not submitted on this and as such, it was abandoned.

#### **Analysis and Determinations submissions**

26. I have considered this appeal, submissions by parties and the decisions relied on. I have also perused the trial court record and the impugned judgment. This being a first appeal, it is by way of a retrial and parties are entitled to this court's decision on the evidence on record. The court should however bear in mind that the trial court had the advantage of seeing the witnesses testify and give due allowance for that.
27. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal held that:

"This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and 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."



28. Similarly, in *Nkube v Nyamiro* [1983] KLR 403, it was held that:
- “A court on appeal will not normally interfere with the finding of fact by a 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 his conclusion.”
29. I have considered the arguments by parties and perused the evidence on record. Two issues arise for determination in this appeal.
- i. Whether the trial court’s judgement violated the provisions of Order 21 of the Civil Procedure Rules;
  - ii. Whether the trial court erred on liability; and
  - iii. Whether the awards were inordinately high.
30. On the first issue which this Court considers to be the core issue and which, should the court find in the affirmative, might determine this appeal in limine, the Appellant’s Counsel submitted in contention that the trial court did not lay a basis or give reasons for awarding the Respondents the general damages for pain, suffering and loss of amenities. In his view, the judgment failed to meet the threshold for judgment as stipulated in Order 21 Rule 4 of the Civil Procedure Rules on what judgment should comprise of i.e. concise statement of the case, points for determination, the decision thereon and the reasons for the decision.
31. The respondents on their part erroneously submitted that the appellant had not addressed itself to the submissions on this issue and thus deemed it abandoned.
32. I have perused the brief judgment of Hon. K. Cheruiyot on both liability and quantum. The question is whether that judgment meets the requirements of Order 21 Rule 4 of the Civil Procedure Rules.
33. It is true that judgment must comply with Order 21 Rule 4 of the Civil Procedure Rules which provides that:
- “Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons thereof.”
34. Examining the judgment as impugned, the same was on both liability and quantum. The trial magistrate commenced the judgement by setting out the respondents’ claim against the appellant’s and the appellant’s response after which he proceeded to set down the issues for determination being whether negligence was proved, the quantum of damages and who should pay costs.
35. On liability, the trial magistrate set out the evidence presented before the court before finally holding that as the respondents’ evidence remained uncontroverted as far as liability was concerned, the appellant was 100% liable.
36. On quantum, the trial magistrate awarded Loss of expectation of life - Kshs. 150,000, Pain and Suffering - Kshs. 300,000, Loss of dependency; Kshs. 5,822,600 and Special Damages - Kshs. 1,521,040
37. For the award under all the aforementioned headings, the trial magistrate gave out reasons for making the award.



38. In *R W K v A M A* [2016] eKLR, it was held as follows where the appellant challenged the judgment of the Kadhi on the style used to write the judgment:

“20. There are different styles to judgment writing. One, as in this case, is to analyze all issues and give all findings in the end. The other style is to analyze and make finding on each issue framed for determination. Going through the judgment, the trial Kadhi may have not listed the issues for determination but they are clearly captured in his judgment.

21. It is preferable, although not mandatory, to list issues for determination. Judgment writing is however a matter of style and clarity. In this case the style chosen by the trial Kadhi does not impugn the decision as the reasons are given and authorities are cited. The court is also not persuaded that the Respondent's further affidavit was the only evidence relied upon by the trial Kadhi to reach the decision. The Kadhi appears to have used it as corroborative evidence for the Respondent's case. Such evidence is admissible in civil litigation.”

39. For an elaborate comparison on issues of what a defective judgment is, see *Awili Nelson v Purity Achieng Ochieng* [2021] eKLR.

40. In this case, it is my finding that the trial court's judgment set out above meets the threshold of the essentials expected of it under Order 21 Rule 4 of the Civil Procedure Rules.

41. On liability, the appellant was held 100% liable for causing the accident. In *Stapley v Gypsum Mines Limited* (2) (1953) A.C 663 at P. 681 reiterated in the case of *Ndatho v Chebet (Civil Appeal 8 of 2020)* [2022] KEHC 346 (KLR) (16 March 2022) (Judgment) Lord Reid reasoned that:

“To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite 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 fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally.”

42. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that: -

“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.”

43. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that: -

As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the



affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

44. It was the respondents' duty to adduce evidence that the appellant was liable for causing the accident that led to the deceased sustaining the fatal injuries.
45. Neither of the respondents witnessed the accident. However, PW3, Ian Collins Odongo testified that he witnessed the accident. He adopted his written statement dated 28<sup>th</sup> March 2019. It was his testimony that the deceased was walking by the road side towards Kilo when he was hit by the appellant's lorry that was being driven at a high speed. PW3 testified that the lorry had initially swerved to the left almost hitting another pedestrian whom he called Esther before swerving to the right and hitting the deceased who had nowhere to run to as he had reached a fence from whence he could not escape and as such, he was hit and dragged under the appellant's vehicle until the vehicle came to a standstill after hitting a pole.
46. In cross-examination, PW3 was firm that he was on the right side of the road at a barber shop and further that the deceased did not attempt to cross the road.
47. Juxtaposed against this testimony, it is worth noting that the appellant did not call any evidence in support of their defence.
48. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:
- “In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”
49. In the case of *Motex Knitwear limited v Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002*, Lessit, J (as she was then) citing the case of *Autar Singh Bahra and another v Raju Govindji*, HCCC No. 548 of 1998 appreciated that:
- “Although the defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”
50. In *Trust Bank Limited v Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No 1243 of 2001*, the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.
51. In the case of *Karuru Munyororo v Joseph Ndumia Murage & another Nyeri HCCC No 95 of 1988*, Makhandia, J (as he then was) held that:
- “The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her



on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon."

52. Similarly, in the case of *Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani)* HCCC No 165 B of 2000, Mbaluto, J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the Plaintiff stands uncontroverted.
53. If one is still in doubt as to the legal position, reference could be made to the case *Drappery Empire v The Attorney General Nairobi* HCCC No 2666 of 1996 where Rawal, J (as she then was) held that where the circumstances leading to the deliveries of goods are not challenged and stand uncontroverted due to the failure by the defendant to adduce evidence, the standard of proof in civil cases (on the balance of probabilities) has been attained by the Plaintiff.
54. In the instant case, there was uncontroverted evidence of an eye witness PW3 who testified on oath on how the material accident occurred in his presence, how the appellant's motor vehicle was being driven, how it almost knocked one other pedestrian by swerving to the left and to the right before and found the deceased who was walking and knocked him and how it was not true that the deceased was crossing the road as alleged by the appellant in the pleadings and submissions.
55. The appellant laments that the trial magistrate did not consider the submissions by the appellant. I have perused the judgment and indeed, the trial court did not refer to the submissions filed by both parties, both on liability and quantum of damages.
56. However, this is not a case that was determined by way of submissions but on the basis of evidence on oath. I am aware that the appellant's counsel filed 24 pages of submissions and therefore it was expected that the trial court refers to those submissions. I am however, well aware that submissions are not a substitute for evidence.
57. As was stated by the Court of Appeal in *Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another* [2014] eKLR:

"Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."
58. The above decision was echoing what Mwera J (as he then was in the High Court) had earlier stated in *Erastus Wade Opande vs. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007, that:

"Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided." In so coming to the closing point regarding the meaning and import of submissions in matters, I find that submissions are like decorations in a wedding fete where parties therein decorate the props and environment generally to direct the guests' attention to the fact that there is a wedding cake placed somewhere in readiness for enjoyment by way of eating. They are to attract guests to focus on the real issue partaking of the cake. Where there is no wedding cake, the decorations are meaningless for guests do not eat decorations. And, a wedding cake can be eaten without decorations necessarily being there. In like manner, courts will decide on issues before them even where submissions have not been made thereon."



59. I am persuaded that in this case, the trial court considered the evidence tendered within the appropriate legal framework in arriving at a finding that the Respondents had proved their case on a balance of probabilities as the appellants Statement of Defence remained mere averments with no evidential value. Guided by the above decisions I find no basis upon which this court can interfere with the learned trial magistrate's finding on liability.
60. Regarding quantum of damages under the *Fatal Accidents Act* and *Law Reform Act*, the appellant submitted that the trial magistrate erred by using the multiplier approach whereas the variables of age, likely income premised on qualifications, dependency were not sufficiently evidenced and as such the trial court arrived at an award that was inordinately high.
61. The question is whether the Magistrate erred in using the multiplicand?
62. Njagi J, in *Kakamega H.C.C.A. 10/2017 Chitabhadhiya Enterprises & Another Vs. Gladys Butali* stated as follows after analyzing the two methods-multiplicand and the global approach:
- “...A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in *Kenya Power & Lighting Company Limited Vs E.K.O & Another, Kiambu HCCA No. 169 of 2016 (2018) eKLR* where he said that:“...It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand...”
63. Clearly, there is no one fixed and definitive method that must be applied. The trial magistrate made a choice of one of the formulae and cannot be faulted as he could choose to go either way.
64. In the making of the choice of the multiplicand, this Court observes that there was no evidence before the trial court of the deceased's earnings. The deceased was only 18 years old and was scheduled to join Jomo Kenyatta University to pursue Bachelor of Science degree .
65. The Appellant argued that this was a perfect case where the global award was the most reasonable method.
66. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the locus classicus case of *Bashir Butt v Khan Civil Appeal No. 40 of 1977 [1978] eKLR* thus:
- “An appellate Court will not disturb an award of 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.”
67. It is without doubt that damages are clearly payable to a parent of a deceased child irrespective of the age of the child and their pecuniary contribution because the mere presence of a child in a family is itself



a valuable asset which the parents are proud of and are entitled to keep intact. (see *Kenya Breweries Limited vs. Saro* [1991] eKLR).

68. In the instant case, the respondents adduced evidence that the deceased was 18 years old and was waiting to join the Jomo Kenyatta University to study a Bachelor of Science course.

69. It is indeed correct that the deceased had no known income. Further, there was no evidence that he was destined for a well-defined career path. In *Roger Dainty v Mwinyi Omar Haji & another* MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR, the Court to Appeal observed that:

“...To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life...”

70. In the case of *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of *Mercy Nzula Maina* (deceased) [2016] eKLR, the Court held as follows-

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

71. In this case, I am in agreement with the appellant that it was difficult to ascertain the multiplicand with any precision and as such, this was a perfect case to make a global award.

72. The appellant submitted that a global award of Kshs. 1,600,000 would be sufficient for the deceased as was held in the case of *Teresia Wanjiru Githinji v Lucy Kanana M’rukaria & Another* (Suing as Legal Representative of *Ernest Gutuura Nabea* (Deceased) [2021] eKLR.

73. *Ndungú J in Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR reviewed downwards the award on loss of dependency where the deceased was awaiting admission to university. The court reasoned as below;

“...They cited the decision of *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 appellant 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 & ANO.

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 Gusii Institute studying a course on food and beverage.”



Having considered the cases cited before the trial court and taking into account that the deceased was about to sit for her final examination before graduating, I find the Kshs 2,000,000 awarded by the trial court was excessive and the same is substituted for an award of Kshs 1,500,000/- under the head loss of dependency.”

74. In *Samwel Kimutai Koriri (Suing as Personal And Legal Representative Of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School) & Another* [2016] eKLR, Okwany J awarded a sum of Kshs 1.8 million where the deceased was a student at a teachers training college.
75. In *Steve Tito Mwasya & Another (Both Suing As Legal Representatives of The Estate of Sherinna Koki Toti (Deceased) v Rosemary Mwasya* [2015] eKLR, Serгон J awarded a staggering 14 million shillings where the deceased was a bachelor of Commerce student at Strathmore University.
76. These decisions are persuasive and I am in agreement with the awards made therein as they show a near agreement on what amounts to a reasonable global award.
77. In my view a global award of Kshs. 3,000,000 (three million Kenya shillings) would be reasonable considering the circumstances of this case.
78. Special damages were not challenged. I uphold the trial magistrate’s award of the same. Furthermore, the grounds of appeal do not challenge the awards made under the various heads of pain and suffering, special damages, and loss of expectation of life. The awards made under those heads are accordingly upheld.
79. The upshot of the above is that I hereby allow this appeal partially. The award for loss of dependency is hereby set aside and substituted with an award of Kshs 3,000,000. All other awards remain untouched.
80. As the appeal is only partially successful on the one head of award under loss of dependency, I find that the appropriate order to make on costs is that each party shall bear their own costs of this appeal. The general damages earn interest from date of judgment until payment in full while the special damages shall earn interest at court rates from date of filing suit until payment in full.
81. This file is closed. The lower court file be returned forthwith with copy of judgment on email.
82. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

