Starway International Freight & Fowarders Ltd & another v Kembu & another (Sued as Legal Representatives of the Estate of Boniface Mburu Nzomo - Deceased) (Civil Appeal E17 of 2020) [2023] KEHC 3656 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3656 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E17 OF 2020

FR OLEL, J

APRIL 27, 2023

BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON B KASAVULI (P.M.) DELIVERED ON 8TH OCTOBER 2020 IN MOVOKO CMCC NO 837 OF 2019

BETWEEN

STARWAY INTERNATIONAL FREIGHT & FOWARDERS LTD .... 1ST APPELLANT

SAID ABDALLAH ..... 2ND APPELLANT

AND

JOYCE KAMENE KEMBU ..... 1ST RESPONDENT

JULIUS KYALO MUTAVI ..... 2ND RESPONDENT

SUED AS LEGAL REPRESENTATIVES OF THE ESTATE OF BONIFACE MBURU NZOMO - DECEASED

(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON B KASAVULI (P.M.) DELIVERED ON 8th OCTOBER 2020 IN MOVOKO CMCC NO 837 OF 2019)

JUDGMENT

1. The Appellant's were the defendants was in the primary suit, where they were sued as the driver and registered owner of Motor vehicle KCP 690Y. It was alleged that on 13th April 2019, the deceased was lawfully standing at a bus stop at Mulolongo stage along Mombasa road waiting to board a bus home, when by reason of negligence the appellants aforestated motor vehicle was carelessly, recklessly and/or was negligently driven by the 2nd defendant who was employed by the 1st defendant, that he caused

the said motor vehicle to veer off the road and knocked down the deceased, whereby the deceased sustained fatal injuries.

2. Both the defendants filed their joint written statement of defense 26th November 2019, where they denied any liability and blamed the deceased for crossing the road when it was not safe to do, so and thus was the author of his own misfortune.

3. After hearing the suit, the learned magistrate in his judgment delivered on 8trh December 2020 apportioned Liability at 100% as against the appellant's and proceeded to award damages for pain and suffering , loss of expectation of life and loss of dependency all totaling to Kenya shillings Two million, eight hundred and ninety thousand only (Ksh.2,890,000/=), special damages were also proved to the tune of Kenya shillings forty thousand, seven hundred and five thousand only (Ksh.40,705/=) only. The total quantum awarded to the respondent's was Kenya shillings two million, nine hundred and thirty-one thousand, one hundred and five only. (Ksh 2,931,105/=) Plus costs and interest.

4. The Appellant's, being dissatisfied by both quantum awarded and liability as apportioned did file their memorandum of Appeal on 27th October 2020 and raised several grounds of appeal namely: -

    a. That the learned trial Principal magistrate erred in law and in fact by failing to hold that the deceased was fully to blame or by failing to show the deceased was substantially to blame to at least 50%

    b. That the learned Principal magistrate erred in law and in fact by making award for Ksh.2,740,400/= which was manifestly excessive taking into account the circumstances of the case

    c. That the learned Principal magistrate erred in law and in fact by deciding the suit against the weight of evidence on both the issue of liability and quantum

Facts of the Case

5. PW1 Cpl Wilfred Mburungu testified that he was based at Athi River patrol base. He testified that a fatal road accident occurred on Mombasa road involving motor vehicle KCP 690Y driven by the 2nd defendant. The 2nd defendant was driving from Mombasa to Nairobi and on reaching bridge 39 one pedestrian Boniface Mburu Nzomo, age 30 years crossed the road. He was knocked down and died on the spot. According to the witness the deceased appeared drunk and was warned by one Duncan Mwangundu not to cross the road. He confirmed that he was not the investigating office and the information he gave court was recorded by one P.C Mohammed, who was also informed by an eye witness. The 2nd defendant was not prosecuted and the case was pending under investigations.

6. PWII Julius Kyalo Mutavi, testified and relied/adopted his witness statement filed in court and dated 18th October 2019. He also produced all the plaintiff exhibits apart from exhibit 11, which were employment letters from Landmark holding ltd. In cross examination, the witness testified that he was an uncle to the deceased and he did not witness the accident. The deceased mother was 59 years old and the deceased earned Ksh 527/= daily, he had no wife or child. The chief's letter proved that he 1st respondent was the mother of the deceased.

7. PWIII Zablon Mazigo Amdany testified that he worked at Landmark holding co ltd as operations manager. He had worked at the said company for 36 years and was the one who recruited the deceased to work for the said company. He produced the employment letter as an exhibit. He was employed as a turn boy and earned Ksh 527/= daily. On 13th April 2019 they received information that the deceased had been involved in an accident. Earlier in the day he had been at work and was not intoxicated. They

had planned to promote him to be a driver and the company's policy was that they retire at 60 years. In cross examination the witness stated that the deceased worked for them for two years and eight months and they would pay them weekly and they did not make statutory deductions on the salaries of casual laborers. Further he was not aware if deceased intoxicated himself after work. The deceased also had no disciplinary issues at work to warrant his dismissal.

8. DWI Said Abdallah also testified and adopted his witness statement filed in court. It is undated but is on page 87 of the record of appeal. Therein he stated that on 13th April 2019 at about 16.00hrs he was driving motor vehicle KCP 690Y & trailer ZF 312Q along Mombasa –Nairobi Highway. The weather was clear and he was moving slowly due to Athi river traffic Jam. He heard people shouting at him and boda boda persons telling him to stop. After he stopped, he was told that he had hit a pedestrian who was trying to cross the road between my truck and trailer. He alighted and was not lynched as he was not at fault. The deceased had been warned not to cross in between his lorry and the trailer but ignored. The traffic police from Athi River came and took measurements and he later recorded his statement at Athi River police station. He confirmed that the deceased was knocked with the rear part of the trailer, on the right side.

9. In cross examination he confirmed that the accident occurred at stage 39 in Athi River. He had started his journey on 12th April 2019 at 7.00pm and was tired when the accident occurred. He did not witness the accident before it occurred and was only stopped by boda boda riders and was informed of what had transpired. He could not take the deceased to hospital as he had been crashed under the third Axle. In reexamination he confirmed that the deceased was not knocked from the front of the motor vehicle.

Appellant's Submissions

10. The appellants filed their submissions on 17/01/2023. The did submit that learned Magistrate failed to properly evaluate the evidence present before court. The respondents failed to call an eye witness during trial and relied on the evidence of the police officer, who was not the investigating officer and thus presented hearsay evidence. The O.B and police abstract could not be termed as conclusive evidence to show how the accident occurred. The said documents only proved that indeed an accident did occur but failed to place liability on the door step of the appellants.

11. The respondents thus failed to discharge the burden of proof as to how the accident occurred and also as to who was to blame for the said accident. The trial magistrate therefore erred in using the pleading to find fault when no such evidence was adduced. The appellants relied on Machakos HCC Appeal No 70 of 2018 *Techno Steam Lrd v John Muto* & Nakuru HCC case No 186 of 2002 *Margaret Wanjiru v S. Karanja & another*

12. The appellants further blamed the deceased for being negligent by crossing the road between the lorry cabin and the trailer and thus should also have been found 100% negligent for causing the said accident. In the alternative the trial magistrate should have at least held the deceased to be 50% liable since there was no sufficient evidence to show who was to blame for the said accident.

13. The third issue raised by the appellants was that the trial magistrate erred in using a dependency ratio of 2/3 instead of 1/3 since the deceased was not married , had no child and his only dependent was his mother. It was there contention that the dependency ratio used should have been 1/3 as it was not shown by evidence what the deceased used to spend to sustain his mother. Dependency was a question of fact to be proved by the person who asserted the same before the court could determine the level of dependency. The appellants relied on the citation of *Techard Stema Power Ltd v Mutio Muli & Mutua Ngao* HCC Appeal No 70 of 2018 & *Grace Kanini v Kneya Bus Service* Nairobi HCCC No

4708 of 1998, *Marko Mwenda v Bernard Mugambi & Another* Nairobi HCCC No 2343 of 1993, *Jane Chelangat Bor v Andrew Otieno Onduu* (1988 -1992) KAR 288 amongst others.

14. The final point raised in their submissions was that the trial magistrate erred in calculating quantum using the gross salary instead of net salary. The other error identified was that the multiplier of 25 years used was on a higher scale. The appellants prayed that the mutliper of 15 years be used and the award be reduced. They prayed that this appeal be allowed and the primary suit be dismissed. In the alternative they prayed that contributory negligence of 50% should be attributed to the deceased and the damages awarded be apportioned taking into consideration contributory negligence.

Respondents Submissions

15. The respondents file their submissions on 25/01/2023. They did contend that they adequately proved their case before the trial magistrate, who after considering and appraising the pleadings and evidence arrived at a proper decision, that the appellants were 100% liable for the accident. The appellant's driver could not explain how the incident occurred and did not see the appellant attempting to cross the road to enable him take evasive action. Further it was farfetched and impossible for the appellant to cross the road in between the lorry cabin and the trailer of a moving motor vehicle. More importantly it should be noted that the appellants did not plead particulars of negligence as against the deceased in their statement of defence. They relied on the citation of *Jackson Mutuku Ndetai v Bayusuf & sons* Nairobi HCCA 231 of 2002 , where the court held that a driver ought to do all that he can in the circumstances to prevent the accident from occurring.

16. The 2nd appellant was not aware that he had knocked down the deceased until stopped by "boda boda riders", and the trial court having critically reviewed the evidence presented, rightly found that the appellants were 100% liable for the accident. It was their submissions that this finding was proper and should not be disturbed.

17. As regards the quantum awarded the respondents submitted that the deceased mother was a dependent under provisions of section (4), (1) of the *fatal accidents Act*. The deceased was 32 years, while the mother was 59 years. The accused was not married and did not have children, his death definitely robbed his mother of a son she was entirely dependent on. There was proof that the deceased was employed and earned Ksh.527/= per day, which he used to sustain himself and his mother. He was heathy and had good prospect's working up to 60 years. The dependency ration of 2/3 was thus justified and the award of Ksh.2.740,000/= too was justified.

18. It was further submitted that the proper way to determine multiplier was to consider age of the deceased, the balance of earning life, the age of the dependent, the life expected, the length of dependency, the vicissitudes of life and factor accelerated by payment of lump sum. See *Leonard Ekisa & Another v Major Birgen* (2005) eKLR .For dependency it had been determined in many citations that parents in most Kenyan families do expect their children when adults to help them and thus they were dependent's as envisaged under the law. See *Kenya Breweries Ltd v Saru* (1991) KLR 408 & *Sheikh Mushtaq Hasan v Nathan Mwangi Kamau Transporters & 5 others* (1986) KLR 457

19. On quantum, the respondents stated that the quantum awarded was appropriate and the appellant did not demonstrate the prejudice they would suffer by settling the same. The respondents submitted that the appeal was devoid of merit and prayed that it be dismissed with costs.

Analysis Determination

20. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

21. As held in *selle & Another v Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals 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 conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 EACA 270

22. In *Peters v Sunday Post Limited*(1968) EA 123 the court of Appeal for East Africa stated as follows;

> " It is a strong thing for the appellate court to differ from the finding, on a question of fact, of a judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has indeed jurisdiction to review the evidence in order to determine, whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a difference conclusion

23. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari v Purushottam Tiwari (Deceased) by L.Rs* (2001) 3 SCC 179.

24. A first appellate court is also the final court of fact and litigants are entitled to full fair independent consideration of the evidence. The parties shave a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of section 78 of the *civil procedure Act* a court of first appeal can appreciate the entire evidence and come to a different conclusion. See *Kurian Chacko v Varkey Ouseph* AIR 1969 Keral 316

A. The respondent did not prove Negligence as against the Appellants and in the alternative the Deceased should shouldered 50% Liability for the Accident

25. The appellant's submitted that the respondents did not adequately prove that indeed it was the appellants who were negligent and therefore liable for the accident. They submitted at length on the

question as to whether the appellant proved his case on a balance of probability and stated that the respondents failed to prove any negligence on their side.

26. Section 107(1) of the *Evidence Act* 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."

Section 108 of the *Evidence Act* further provides that ;

> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

27. In the case of *Evans Nyakwana v Cleophas Rwana ongaro* (2015) eKLR it was held 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 desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged 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."

28. The Question then is what amounts to proof on a balance of probabilities. Kimaru J in *William Kabogo Gitau v George Thuo & 2 others* (2010) 1 KLR 526 stated that;

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleased 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 opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred.

29. Reference is also made to *Palace Investments Ltd v Geofrey Kariuki Mwnedwa & Another* (2015) eKLR , Where the judges of Appeal referred to

> "Denning J in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof he had this to say;
>
> > "That degree is well settled, it must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it is more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where the parties.....are equally (un)convincing, the party bearing the burden of proof will loose because the requisite standard will not have been obtained."

30. It is clear in this appeal that the main issue in contention is liability and in particular the trial court finding that the appellants were 100% liable. From the evidence presented, PW1 was not the investigating officer. He stated that the deceased appeared drunk and was knocked down by the suit motor vehicle while crossing Mombasa – Nairobi road. This information was provided by one

Dancan Mwangundu, who had warned him not to cross the road. The said Dancan Mwangundu never recorded a statement with the police. PW2 was the deceased uncle and he too did not witness the said accident and were called and informed of the tragic accident. DW1 did not fare any better in terms of giving better particulars as to how the accident occurred. He stated that he was driving from Mombasa to Nairobi. There was traffic Jam. The deceased was knocked with the rear part of the trailer. It was on the right side.

31. PW1 evidence was hearsay as it was information received from a third party (one Dancan Mwangundu), who did not record a statement with the police nor was he called to testify as to how the accident occurred. The evidence of the other two witnesses also did not shade any light as to how the accident occurred. The trial court in its judgment did evaluate the evidence tendered and found as a fact that the evidence of PW1 could not be relied upon as he also admitted in cross examination that the entry in the OB could be true or false, secondly there was no evidence presented to show that the deceased was drunk on the said evening, when the accident occurred. He subjected the pleadings to the evidence on record and the fact that DW1 never saw the deceased crossing or tempting to cross the road as alleged to find that the appellants were liable for the said accident.

32. In *Masembe v Sugar Corporation and another* (2002) 2 EA 434 it was held that;

> " Negligence is not actionable per see but is only actionable where it has caused damages and in that regard the primary task of the court in a trial of negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or amongst them accordingly.....There is no act or omission that has static blameworthiness and therefor each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of the conduct."

33. In *Vyas Industries v Diocese of Meru* (1976-1985) EA 596; (1982) KLR 114; It was held that an appellate court will not interfere with apportionment of liability unless the judge has come to a manifestly wrong decision or based his apportionment on wrong principles and this was the case since the greater blame attaches to t a driver who runs into unlighted stationary lorry on a straight road.

34. The issue of apportionment of liability was also discussed in *Khambi and another v Mahithi and another* (1968) EA 70 where it was held that;

> " It is well settled that where a trial judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial judge." Similar decisions have been reached in *Mahendra M Malde v George M Angira* Civil Appeal No 12 of 1981

35. The line of evidence presented by the appellants that the deceased was crossing the road between the lorry truck and the trailer holds no water and was improbable. If that were true the deceased would in all probability have been crushed by the front axle of the trailer. DW1 also confirmed that he did not see the deceased cross the road in front of the suit motor vehicle. His testimony was that, "The deceased was knocked with the rear part of the trailer. It was on the right side. That is all." Further in cross examination he stated that " I did not take the deceased to hospital because the third Axle was on

top of the deceased." Indeed even though the PW1 and PW2 testimony never proved negligence on the part of the appellants, the appellants witness evidence tied loose ends as to what transpired, which is " The deceased was knocked with the rear part of the trailer and crushed by the third axle". This rear part of the trailer definitely cannot be between the lorry cabin and the trailer as the third axle is way behind at the rear of the trailer.

36. In the case of *Masembe v Sugar Corporation and Another* (2002) 2 EA 434 (*supra*) referred to above, it was further held that;

> " when a man drives a motor car along the road, he is bound to anticipate that there maybe things and people or animals in the way at any moment, and he is bound not to go faster that will permit his course at any time to avoid anything he sees after he has seen it...A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that the other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albetly negligently.

37. Given the particular set of facts herein DW1 ought to have been careful and ought to have had a keen lookout for other road users to enable him take reasonable steps to avoid the said accident. The fact that he admits that the deceased was knocked by the rear of the trailer partially absolves him from the entire blame as it was also expected that the deceased too would have taken reasonable care of a prudent man while using the road to avoid being knocked by the rear of the trailer. Accordingly, some negligence must be attributed to the deceased.

38. I find and do hold that the trial magistrate erred in failing to take into consideration this glaring fact and thus failed to properly apply his mind to these particular circumstances. It is however not easy to determine who between the two was more negligent. At this point, it is important to point out that the appellants filed their investigation report as part of the record of appeal and the same was referred to in cross examination of DW1. This court is allowed by law to reexamine the entire record. From the said report which was the only document filed by the appellants in their list of documents at page 4 thereof (or page54 of the record of appeal) the report states that ;

> " when he reached the accident section under construction they were stopped by the construction workers in order to give way to other motorists heading towards the opposite direction. As they were released to proceed and was accelerating a male adult pedestrian emerged from between other stationary vehicles on the right side as he dashed into the road crossing from the left side. Due to the impact he hit the motor vehicle then fell under the vehicle before he was run over by the rear wheels dying on the spot."

39. The above explanation is probably the true account of how the accident occurred, but none of the parties pursued the said line of evidence. Be that as it may having considered the evidence on record in totality, I do find that this is a proper case where this court must interfere with the award of liability. I do set aside the trial magistrate award of 100% liability as against the appellant and enter liability at 30:70 in favour of the deceased.

B. The quantum awarded for Ksh 2,740,400/= which was Manifestly Excessive Taking into Account the Circumstances of the Case

40. In the case of Jane Chelagat Bor v Andrew Otieno Oduor [1988] – 92] eKLR 288[1990-1994] EA 47 the Court of Appeal held that:-

> " In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency."

41. Further in the case of *West(H) and Sons Limited v Shepherd* [1964] AC 326 at 345 it was appreciated that ;-

> " The purposes of compensation is not to remedy or re-compensate every injury but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously".

42. The appellants did submit that the Quantum Awarded was manifestly excessive as the deceased was not married and his only dependent was his mother. The age of the mother was not given nor was there any evidence as to what amount the mother used to receive from the deceased. Further as regards dependency the appellants submitted that the dependency ratio ought to have been 1/3 ratio and not 2/3 ratio as used by the trial court. The trial court also erred in using the Gross salary and not net salary thereby resulting to excessive damages being awarded. The final issues raised by the appellants was that the multiplier too ought to have been reduced. The 25 years applied was on a higher scale and it should have been reduced to 15 years

43. The respondents on the other hand submitted that the deceased mother was a dependent recognized by virtue of Section (4), (1) of the *Fatal Accidents Act* and his premature death deprived him of normal expectation of life. There was evidence that the 2nd respondent, (deceased mother) was 59 years and it was a matter of common notoriety that children in African setup take care of their parents. The age of the appellant was proved, his salary too was proved and thus the award as calculated could not be faulted and did not prejudice the appellants in any manner.

44. In the case of *Leonard Ekisa & Another v Major Birgen* (2005) eKLR Ringera J stated that;

> " In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of the earning life, the age of the dependents, the life expectancy, the length of dependency, the vicissitudes of life and factor accelerated by payment in lumpsum."

45. With respect to the multiplier used I do find that the age of the appellant was proved at 32 years old, his mother was 59 years old, considering the vicissitudes of life, age of the dependent, life expectancy and length of dependency I do find that a multiplier of 20 years would have been more appropriate as opposed to a multiplier of 25 years which was on the higher scale.

46. On the issue ratio as stated in the citation of *Beatrice Wangui Thairu v Hon Eziekiel Barngetuny & Ano* Nairobi HCC No 1638 of 1998(unreported) Ringera J as he was then stated that;

> " .... Constrained to observe that there is no rule of law that two thirds of the income of a person is to be taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. When a trial court adopts two thirds income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, these findings of fact have long masqueraded as holding on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not, it takes a discerning court to put the law back on track."

47. The appellant died at 32 years of age and had only one dependent who is the 2nd respondent (his mother). There was no evidence lead to show the level of dependency though it is accepted that in our African setup it is the children who maintain their parents. Since she was a single parent, it was unlikely that the deceased would use 2/3 of his income to maintain her. The reverse is more probable. Given the particular facts of this case, I do find that the trial magistrate further erred in using a ratio of 2/3. The same is set aside and ratio of 1/3 is applied.

48. The final issued raised by the appellant is that the magistrate erred in law in using gross pay instead of net pay in tabulating quantum. They relied on the citation of *Grace Kanini v Kenya Bus Servces* Nairobi HCCC No 4708 of 1989 where it was stated that " The court must find out as a fact what was the annual loss of dependency is and in so doing, it must bear in mind that the relevant income of the deceased is not gross earning but the net earnings.

49. While this proposition holds true, the evidence presented by PW3 Zaolon Mazigo who was the operations manager at landmark Holding Ltd was that, they would pay the deceased Ksh 527/= as his daily wage and the same was paid on weekly basis. The company never used to make any statutory deductions as casuals do not pay the same. The deceased was not a permanent employee. This was proof enough that no deductions were made on the deceased salary with respect to statutory deduction's and thus the court cannot interfere with the same amount.

50. Having found a such, I do find it appropriate to recalculated the quantum due to the respondents. The dependency used will be 1/3 of the gross pay being Kshs517/= {13,702 x12x20 x1/3=1,096,160.00/=} less 30% liability {1,096,160.00 – 365,386.70 = 730,773.30/=}.

Disposition

51. Having exhaustively analyzed all the issues raised in this appeal I find that it partially succeeds on the issue of liability and multiplier used to determine the question of quantum. I do thus make the following orders;

    a. The finding on liability in the judgment dated 8th October 2020 by Hon B Kasavuli (p.m) In Mavoko Cmcc No 837 of 2019 is hereby set aside and substituted with a finding that both the appellants and the deceased are to share liability at a ratio of 30:70 in favour of the Respondents. Further the multiplier is reduced from 25 years to 20 years.

    b. The quantum awarded for loss of Dependency is thus reduced to Ksh 730,773.30/=.

    c. The award on Pain and suffering, loss of expectation of life and special damages will remain as awarded in the primary suit.{ Ksh 190,705/=}

    d. The total damages awarded is Ksh 921,478.30/=

e. Each party to bear their costs of this appeal, while costs of the primary suit shall be borne by the Appellant.

52. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 27TH DAY OF APRIL 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 27TH DAY OF APRIL, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant