



REPUBLIC OF KENYA



KENYA LAW
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Cherangani Hills Limited & another v Rashid & another (Civil Appeal E003 of 2022) [2023] KEHC 18684 (KLR) (31 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18684 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPENGURIA
CIVIL APPEAL E003 OF 2022**

AC MRIMA, J

MAY 31, 2023

BETWEEN

CHERANGANI HILLS LIMITED 1ST APPELLANT

JOHN KIMTAI KIBOI 2ND APPELLANT

AND

MIRIAM CHETECH RASHID 1ST RESPONDENT

**PATRICK GITHONGO THI NG'ANG'A (SUIING AS THE PERSONAL
REPRESENTATIVES OF THE ESTATE OF NJINRIUS MWANGI NG'ANG'A
(DECEASED) 2ND RESPONDENT**

*(Being an Appeal arising out of the judgment and decree of Hon. L.G.G.
Okwengu (Resident Magistrate) in Kapenguria Chief Magistrate's
Court Civil Case No. E033 of 2021 delivered on 12 th May, 2022)*

JUDGMENT

Introduction:

1. The appeal in this case is against the judgment and decree of a Magistrates Court in finding the Appellants liable for a fatal accident and the award of damages.
2. The subject case was Kapenguria SPMCC NO. E033 of 2021; Miriam Chetech Rashid & Patrick Githongothi Ng'ang'a (Suing as the Personal Representatives of the Estate of Njinrius Mwangi Ng'ang'a (Deceased) vs. Cherangani Hills Limited & John Kimtai Kiboi (hereinafter referred to as 'the civil case').
3. The appeal is opposed.



The Appeal:

4. The Appellants, being dissatisfied with that trial Court's decision rendered on 12th May, 2022 filed a Memorandum of Appeal dated 24th May, 2022. The Appellant has raised 8 grounds of appeal in disputing the findings and orders of the trial Court.
5. In precis, the Appellants faulted the trial Court for finding them 90% liable in negligence against the weight of the evidence adduced. They accused the trial Court of failing to consider their submissions and applied wrong principles that ultimately led the Court to arrive at an erroneous conclusion. In particular, they lamented that the trial Court used wrong principles in assessing damages under the various heads. They opined that the suit had not been proved to the required standard and was for dismissal.
6. In view of the foregoing, the Appellants prayed that the appeal be allowed by setting aside the decision of the trial Court and dismissing the same with costs.
7. In the alternative, they prayed that the damages under loss of dependency be set aside in totality while those under loss of expectation of life be reviewed downwards. The Appellants further prayed for costs of the appeal and those at the trial Court.
8. On the directions of this Court, the appeal was heard by way of written submissions.
9. In their submissions dated 19th January, 2023 and filed on 1st February, 2023, the Appellants argued that the burden of proving negligence rested with the Respondents. In their view, however, that burden was not discharged to the required standard of proof being on a balance of probabilities. They observed that PW1 and PW2's testimonies were contradictory regarding the circumstances leading up to the accident. They maintained that the 2nd Appellant took reasonable steps to avoid the accident. For these reasons, the Appellants wholly blamed the deceased for causing the accident.
10. On general damages for loss of expectation of life, the Appellants submitted that the award of Kshs. 200,000/= was not comparable to recent awards. Relying on several decisions, they propositioned that the same be set aside and substituted with an award in the sum of Kshs. 100,000/=. On loss of dependency, the Appellants submitted that the trial Court was wrong in adopting a multiplicand sum of Kshs. 30,000/= in the absence of evidence. They opined that based on the facts of the case, the global award approach rather than the multiplier approach using the Regulation of wages was sufficient since there was no proof of wages/earnings of the deceased. They faulted the trial Court for holding that the deceased would have retired at 70 years as a jua kali artisan based on the biblical expectancy of life. In their view, that finding was not founded in law.
11. On dependency ratio, the Appellants submitted that the same was not proved since the Respondents failed to furnish birth certificates, school fees receipts and/or report cards.
12. For these reasons, the Appellants urged this Court to award a global sum of between Kshs. 400,000/= and Kshs. 500,000/=.
13. The Respondents opposed the appeal in its entirety. They filed written submissions dated 25th January, 2023. They submitted that the Appellants failed to demonstrate that the trial Court exercised their discretion to apportion liability injudiciously. They lauded the decision of the trial Court as acting on correct principles in arriving at its findings.
14. On liability, the Respondents submitted that the Court was correct to apportion the same in the ratio of 90%:10% in their favor on account of the corroborative evidence of PW2 and PW3. They blamed the



2nd Appellant since the death was wholly dependent on his driving. Since the Respondents' evidence was uncontroverted, this Court ought to uphold the trial Court's findings.

15. On general damages for loss of dependency, the Respondents relied on paragraph 12 of their Plea as well as the testimonies of PW1 and PW2 to hold that the dependency ratio had been established to the required standard of proof. On account of PW1 and PW2's evidence, the Respondents maintained that the deceased was a jua kali artisan earning Kshs. 30,000/= monthly. Since it was not disputed, it ought to be upheld.
16. In summary, the Respondents urged this Court to uphold the findings of the trial Court on general damages under the Fatal Accidents Act and the Law Reform Act as correct.
17. For the above reasons, the Respondents prayed that the appeal be dismissed with costs.

Analysis:

18. This Court has duly considered the entire record and the parties' submissions as well as the decisions referred to.
19. The High Court, as the first appellate Court, is enjoined to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano. vs. Associated Motor Boat Co. Ltd* (1968) EA 123).
20. This Court, nevertheless, appreciates the settled principle that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni – versus- Kenya Bus Service Ltd.* (1982-88) 1 KAR 278 and *Kiruga –versus- Kiruga & Another* (1988) KLR 348).
21. Bearing the above in mind, this Court finds that there are mainly two issues for determination. They are on the aspect of liability and quantum of damages.
22. In discharging that burden, this Court will, in the first instance, relook at the evidence at the trial. For clarity, the Appellants herein were the Defendants in the civil case whereas the Respondents in the appeal were the Plaintiffs in the civil case.

The Plaintiffs' case:

23. Until his death, Njiri Mwangi Ng'ang'a, the deceased in this matter, was a family man and a jua kali artisan. He used to make and repair jikos, sufurias and boxes. Together with his farming business, the deceased earned around Kshs. 30,000/= monthly that supported the following of his family members: -
 - i. Alice Muniye Wangari – Wife Aged 41 Years;
 - ii. Miriam Chetech Rashid – Daughter Aged 27 Years, Pw1 And Co-administratrix Of The Deceased's Estate;
 - iii. Damaris Chepkopus – Daughter Aged 17 Years;
 - iv. Celestine Chelagat – Daughter Aged 12 Years;
 - v. Fabian Poriot – Son Aged 9 Years;
 - vi. Shantel Chepchumba – Daughter aged 5½ years.



24. Those facts were averred in the Plaint and supported by the Kapenguria Chief's letter dated 26th May, 2021 which was produced in evidence.
25. The Plaintiffs averred that on 20th April, 2021, the deceased was at around 6:00 p.m. walking on a footpath at Baptist area near Makutano town along the Kitale-Lodwar corridor. He was walking together with one Patrick Githombohi Ng'ang'a who testified as PW2. PW2 was a brother to the deceased and a co-Administrator of the deceased's estate.
26. It was posited that PW2 was also in the company of PW1 at the time of the accident. PW1 was a daughter of the deceased and was known as Miriam Chetech Rashid.
27. PW1 and PW2 denied that the deceased was drunk. They further stated that as they walked, on reaching the Baptist junction in Makutano area, PW2 and the deceased decided to cross the road to the other side. They crossed from the left side facing Makutano direction.
28. PW2 crossed the road and was surprised that the deceased was knocked down by an oncoming vehicle which he did not even see. According to PW2, the vehicle hit the deceased from behind on the right side of the road facing Kapenguria. PW2 continued that the suit vehicle left the left side and hit the deceased on the right side of the road. That, he was knocked down in between the yellow and white lines. The deceased fell unconscious after being thrown ahead.
29. Explaining the circumstances leading up to the accident, PW1 testified that she saw the deceased hit on the right-hand side outside of the white lane on the tarmac road. He was walking on the right side of the white lane on the road as one faced Kapenguria. She added that suit vehicle was being driven at a high speed.
30. The deceased was rushed to Kapenguria County Hospital in the company of good samaritans. Accordingly, the deceased utilized the sum of Kshs. 12,760/= whose receipts were produced in evidence.
31. The deceased succumbed to the injuries 10 days later, that was on 29th April, 2021. A Post Mortem Report dated 4th May, 2021 and a Certificate of Death dated 10th May, 2021 were also produced. A Burial Permit dated 4th May, 2021 was issued and the deceased was buried at Chewoyet village in West Pokot County.
32. The accident was reported at Kapenguria Police Station. A Police Abstract dated 12th May, 2021 was produced in evidence.
33. The deceased was 64 years old at the time of his death. He lived a normal happy life and was in good health. PW2 testified that the estate spent a sum of Kshs. 50,000/= towards coffin, hearse and dressing fees. They produced a receipt dated 4th May, 2021 in proof.
34. PW3 was No. 81322 Cpl. James Simbiri, the investigating officer attached to Kapenguria Police Station. He visited the scene of accident shortly after the accident occurred.
35. He testified that the point of impact was on the right side of the road slightly past the yellow line. As a result of the accident, the suit vehicle suffered damage on the windscreen.
36. According to PW3's findings, the deceased was crossing from Tartar feeder road while the suit vehicle was coming from Kitale. While the deceased was crossing the road, the driver of the suit vehicle tried to avoid hitting him but wasn't successful. According to the skid marks, the driver swerved from the left to the right side of the road. Ultimately, he blamed the deceased for causing the accident.



37. The Respondents instructed the firm of Gacathi & Company Advocates to pursue the claim. Charging them a sum of Kshs. 20,000/= towards legal fees, the Respondents obtained a Grant of Letters of Administration Ad Litem dated 8th July, 2021 Kapenguria SPMC SUCC. MISC No. 18 of 2021. They paid Kshs. 1,060/= into Court as filing fees. The Administrators also produced their identification cards in evidence.
38. The Respondents accused the 2nd Appellant for causing the accident as a result of driving the suit vehicle so negligently and carelessly that it lost control, veered off the road and knocked down the deceased to his death. They accused the Appellants of negligence in the manner set out in paragraph 7 of the Plaint. They added that he was guilty of failing to keep any proper lookout in a busy and built up area of the road and drove at an excessive speed. Had the 2nd Appellant observed the provisions of the Highway Code and the Traffic Act, that accident would not have occurred.
39. The Respondents blamed the 1st Appellant vicariously. They served a demand notice by way of post as well as a statutory notice prior to filing the civil case.
40. The Plaintiffs prayed for damages in the civil case.

The Defendants' case:

41. The Appellants jointly filed their Statement of Defence dated 26th August, 2021. They denied the averments contained the Plaint. They blamed the deceased for causing the said accident. They particularized negligence on his part at paragraph 7 of their Defence.
42. The 2nd Appellant testified as DW1. That was on behalf of the Appellants. He recalled that on that fateful day at 6:00 p.m., he was driving the suit vehicle from Kitale heading towards Makutano on the left lane of the Kitale-Lodwar road. Upon reaching Tartar junction near Makutano, the 2nd Appellant was in sight of the deceased and others. He had just emerged out of a diversion where the road was undergoing construction of a weighbridge. He had slowed down.
43. Suddenly, the deceased emerged from the left side facing the Lodwar direction onto his lawful lane. He tried to apply emergency breaks. He swerved to avoid hitting the deceased but it was too late. The impact caused a collision with the deceased on the middle of the left lane. The suit vehicle was halted in the middle of the road due to the impact of the accident.
44. Following the accident, the 2nd Appellant alighted from the suit vehicle. The deceased was lying down unconsciously. He observed that he was smelling of alcohol. The 2nd Appellant assisted the deceased by rushing him to hospital with the aid of some well-wishers. He later returned to the scene and found police officers at sight. He was later interrogated by police officers.
45. DW1 blamed the deceased for causing the accident as he was drunk, abruptly jointed the road without checking that it was safe, encroached onto his lawful lane and crossed the road when it was unsafe.
46. He produced his operational driving licence.
47. This Court will now consider the appeal on the main twin grounds of liability and quantum.

Liability:

48. The following facts are not disputed: -An accident occurred on 20/04/2021 at around 6:00 p.m. at Baptist area near Makutano along the Kitale – Lodwar road;The accident involved the deceased and motor vehicle registration number KAS 316Q Isuzu NKR lorry;The said motor vehicle was at the material time driven by the 2nd Appellant under the 1st Appellant's behest, the owner of the



vehicle;The suit vehicle was on the left lane of the Kitale-Lodwar highway heading towards the Makutano direction;The deceased was a pedestrian;The deceased suffered fatal injuries as a result of the accident.

49. The aspect of liability on the part of the claimants was addressed by PW1, PW2 and PW3.
50. The evidence of PW1 and PW2 on the point of impact is somewhat contradicting. According to PW1, the deceased was hit on the right-hand side outside the white lane of the tarmac road. He was walking on that right side when he was hit. She blamed the 2nd Appellant for over speeding.
51. PW2 was in the direct company of the deceased. His evidence was that they stopped to cross the road to the right-hand side. They were on the left side of the road. PW2 was first to cross to the right-hand side. While stating that he did not see any oncoming vehicle, PW2 also testified that the suit vehicle knocked the deceased from behind on the right side of the road facing Makutano. It was his testimony that the suit vehicle emerged from the left side to hit the deceased on the right side. That the accident occurred in between the yellow and white lines, but on the right lane as one faces Makutano.
52. Did PW3, the investigating officer harmonize the testimonies above? According to PW3, the presence of skid marks established where the point of impact was. To him, it was on the right side of the road slightly past the yellow line.
53. He stated that the deceased was crossing from the left to the right-hand side of the road. He also stated that in order to avoid the accident, the driver swerved from the left to the right side of the road, but still hit the deceased. PW3 blamed the deceased for causing the accident.
54. DW1 was the driver of the offending vehicle. He stated that due to a road diversion, he had slowed down. He was in sight of the deceased who suddenly emerged from the left side. In a bid to avoid a collision, the 2nd Appellant swerved and tried to apply emergency brakes. However, that was too late. Following the accident, the suit vehicle stopped in the middle of the road. The 2nd Appellant blamed the deceased for causing the accident as he was drunk and crossed the road so suddenly without being careful to let the vehicle first pass.
55. Gathered from the above, there is no doubt that the deceased was hit as he was crossing from the left-hand side of the road to the right-hand side of the road. PW2 was ahead of the deceased. He may have not really seen how the accident occurred, but certainly saw where the vehicle stopped and where the deceased lay.
56. The evidence of PW3 and DW1 tends to settle the point of impact. Whereas DW1 contended that the impact was on the yellow line diving the two lanes, PW3 stated that it was slightly passed the yellow line on the right lane as one faced Makutano. Since PW3 visited the scene shortly after the accident and saw the screech marks on the road, his version of the point of impact seems to be more appealing than that of DW1.
57. This Court, therefore, finds and hold that the point of impact was slightly passed the yellow line on the right lane as one faced Makutano on the Kitale-Lodwar highway.
58. It is in evidence that the deceased was following PW2 while crossing the road. If the deceased was knocked slightly passed the yellow line then two possibilities arise. The first one is that the deceased may have hopped into the road when the vehicle was near and the other possibility is that the deceased crossed when the vehicle was within a safe distance, but the vehicle was driven at a high speed that it met the deceased on the road.



59. Further, as the vehicle's last position was on the right lane facing Makutano and the given presence of the screech marks, then it is evident that DW1 took steps towards avoiding the accident, but it was too late.
60. Gathered from this analysis, this Court finds that both parties were to blame for the accident. Had both been more careful, the accident would have surely been avoided. The deceased and DW1 were both careless and not mindful of each other.
61. For that reasoning, this Court finds that the trial Magistrate erred in apportioning liability in the ratio of 90%:10% in favour of the deceased. Respectfully, this Court has to interfere with that finding.
62. The said finding is hereby set aside and is substituted with finding that the deceased and DW1 were both and equally to blame. The liability is, hence, apportioned at 50%:50% between the deceased and DW1.

Quantum:

63. An appeal on quantum of damages is one relating to the manner in which a trial Court assessed damages. An assessment of damages is generally a difficult task as it hinges on a Court's exercise of discretion.
64. A Court in assessing damages is supposed to give a reasonable award which is neither extravagant nor oppressive while being guided by factors including previous awards for similar injuries and the principles as developed by the Courts. However, what constitutes a reasonable award is an exercise of discretion and will depend on the peculiar facts of each case and an appellate Court must be slow to interfere with such an exercise of discretion. (See *Butler vs. Butler* (1982) KLR 277.)
65. 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.
66. This position was restated by the Court of Appeal in *Arrow Car Limited -vs- Bimomo & 2 others* (2004) 2 KLR 101 and also in *Denshire Muteti Wambua -vs- Kenya Power & Lighting Co. Ltd* (2013) eKLR.
67. This Court will now reconsider the various heads of damages.
68. On the damages under the *Law Reform Act*, the trial Court allowed Kshs. 100,000/= for pain and suffering before death. According to the Certificate of Death, the deceased died on 29th April, 2021 at Kapenguria County Referral Hospital. He, therefore, died 10 days after the accident.
69. Throughout that period, the deceased was in hospital. However, the evidence did not reveal whether the deceased regained consciousness or remained unconscious until death.



70. The Court in Civil Appeal No. 42 of 2018; Joseph Kivati Wambua vs. SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased, rightly so, held as follows on damages under this head: -
- ... The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.
71. Given the uncertainty on the state the deceased was in hospital for the period of 10 days, this Court finds that the award of Kshs. 100,000/= was fair and reasonable in the circumstances of this case.
72. On damages for loss of expectation of life, the Court awarded the Respondents Kshs. 200,000/=. The trial Court found that the deceased was 64 years old at the time of his death. It also considered the economic times experienced in 2022.
73. In assessing damages under this head, the test is not subjective as to ascertain whether the deceased was capacitated to further life on earth to bring happiness. The test is based on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he/she had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects [See *Benham vs. Gambling* [1941] AC 157].
74. In this case, the deceased had no history of any chronic illness. The autopsy revealed that save for the injuries that the deceased had sustained, he was generally in good condition. His life was only cut short by the accident. This Court agrees with the trial Court's observations and upholds the award under that head.
75. Next is the award for damages for lost years or loss of dependency under the *Fatal Accidents Act*.
76. The trial Court determined the deceased's dependents from the Chief's letter and the evidence of PW1 and PW2. It found that 3 of the dependents were minors. On the number of years the deceased would have worked, the trial Court considered the intricacies of life that the biblical expectancy of a jua kali artisan would have reached 70 years, applied a multiplier of 6 years and a multiplicand of Kshs. 30,000/= as pleaded by the Respondents thereby awarding the sum of Kshs. 1,440,000/=.
77. The fact that the deceased was an artisan in active service and a farmer were vouched by PW1 and PW2. Apart from the averments, there was no further evidence to that.
78. The Court, however, in addressing the issue held as follows: -
- ... the current minimum wage for an upgraded artisan is Kshs. 20,500/=. The plaintiff pleaded that the deceased was a jua kali artisan and a farmer and therefore an amount of Kshs. 30,000/= would be sufficient for both the farming and jua kali work the deceased undertook.
79. The trial Court did not expound on who an upgraded artisan is and how the deceased qualified as one. It also did not disclose which guidelines it relied upon in arriving at such a finding. Therefore, the



- amount of Kshs. 20,500/= as wages for an upgraded artisan seemed to have been plucked from the air since no justification was tendered.
80. Further, the amount of Kshs. 9,500/= from farming, as to make a total sum of Kshs. 30,000/=, seemed to have been unsubstantiated as well.
81. It appears that the trial Court was determined to use the mathematical formula in determining the damages for lost years. It is unknown to this Court whether the Court was aware of the instances where a global sum would instead be adopted.
82. Indeed, in light of the vicissitudes of our society, it is not always pragmatic that every household in Kenya will have documentary evidence in support of a person's earnings. The informal sector remains the heart of dependency for a lot of citizens of the country. However, it is not lost that documentary evidence is the best-case evidence whose probative value will always remain weighty. What then are the guiding principles which a Court should consider when faced with circumstances where there is no documentary evidence on earnings?
83. This Court recently dealt with this issue in Civil Appeals No. E045 and E046 of 2021 John Rotich Limo (suing as the legal Administrator of the estate of Martin Kiplagat Limo (deceased) -versus- Rose Ngoyai and Job Mabonga (unreported) in the High Court at Kitale in stating as follows: -
68. The manner in which damages for lost years ought to be arrived at has, by now, been a well-trodden path. Briefly put, where there is evidence of income on the part of the deceased or such income can be appropriately ascertained say for instance through the duly gazetted minimum wages or any other manner as to enable the Court appropriately determine the multiplicand, then a Court is enjoined to undertake the mathematical process of calculating the lost years by inter alia using the multiplicand, the earnings among other parameters.
69. In instances where it is not possible to ascertain the deceased's income, say for instance where the deceased was not in any formal employment, business or such-like engagements, a Court is called upon to adopt a global sum.
84. The aforesaid was reiterated in 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 held as follows: -
- 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 into 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 as the appropriate mode of assessing the loss of dependency...
85. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji Nakuru* High Court HCCA No. 15 of 2003 [2007] eKLR, the Court made the following observation: -
- 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.”



86. Similarly, in *Moses Mairua Muchiri vs. 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....
87. Returning to the case at hand, there was no evidence on the earnings by the deceased. Further, the basis of Kshs. 20,500/= was not substantiated by way of a relevant Regulation of Wages (General) (Amendment) Order.
88. It is, therefore, the finding of this Court that since there was no evidence of earnings and none could be reasonably ascertained, then the best way for assessment of damages under this head was by way of adopting a global sum.
89. Be that as it may, this Court will only review the award of Kshs. 1,440,000/= on the lost years if it happens to be an exaggerated award. In ascertaining so, this Court must also consider the award of damages awarded under the limb of loss of expectation of life under the *Law Reform Act* as well as previous awards in similar cases.
90. The deceased died at the age of 64 years. He was survived by the 3 minor children two of which were of tender years. The deceased, therefore, had a long way in raising the said children.
91. With such a background, this Court will now look at comparative awards. The Court, however, remain grateful to the various decisions referred to by the parties in their submissions in respect to the appropriate awards.
92. In *China Civil Engineering & another vs. Mwanyoha Kazungu Mweni & another* [2019] eKLR, the High Court on appeal upheld a global sum award of Kshs. 700,000/= for loss of dependency where the deceased was aged 70 years old.
93. In *Moses Maina Waweru vs. Esther Wanjiru Githae* (Suing as the personal representative of the Estate of the late David Githae Kiririo Taiti [2022] eKLR where the deceased died aged 68 years, the Court made an award of Kshs. 800,000/= for loss of dependency.
94. In *Kimaiyo vs. Nyakweba* (Suing as the legal representative of the Estate of the deceased Seline Kerubo Nyakweba) (Civil Appeal 18 of 2018) [2022] KEHC 15488 (KLR) (16 November 2022) (Judgment), the High Court on appeal awarded the deceased's estate Kshs. 700,000/= where the deceased died aged 80 years old.
95. By taking the foregoing into account, this Court is persuaded that the award of Kshs. 1,000,000/= coupled with the award on loss of expectation of life and in the unique circumstances of this case, is reasonable. With utmost respect to the trial Court, this Court will review the award downwards.
96. The Court now turns to the award on special damages. The trial Court, awarded special damages in the sum of Kshs. 84,310/= for the reason that the sum was uncontroverted.
97. With great respect, the trial Court misdirected itself in arriving at that conclusion. The fact that special damages were not controverted is not synonymous with proof of the same to the required standard. It is trite law that special damages must not only be pleaded but must also be proved since he who alleges must prove. Did the Respondents prove special damages on a preponderance of the evidence adduced?



98. In this case the award of Kshs. 84,310/= was justified. There was appropriate evidence against each expense to prove that the expenses were properly incurred.

Disposition:

99. Deriving from the foregoing, this Court hereby determines the appeal as follows: -

1. The appeal hereby partially succeeds.
2. The findings of the trial Court are hereby reviewed as follows: -
 - i. Liability is equally apportioned between the deceased and the Appellants herein.
 - ii. The following awards are allowed: -
Pain and suffering - Kshs. 100,000/= .Loss of expectation of life - Kshs. 200,000/= .Lost years - Kshs. 1,000,000/= .Special damages - Kshs. 84,310/=.
3. The awards shall be subject to the 50% contribution.
4. As the appeal partially succeeds, each party shall bear its own costs on appeal.
5. The Respondents herein (formerly the Plaintiffs in the civil case) shall be entitled to costs in the civil case.

100 It is so ordered.

DELIVERED, DATED AND SIGNED AT KAPENGURIA THIS 31ST DAY OF MAY, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Mr. Annihanda, Counsel for the Appellants.

Mr. Marinda, Counsel for the Respondents.

Juma – Court Assistant.

