



**Majani & another (Suing as the legal representatives/administrators of the Late Antony Liphede)
v Godfrey (Civil Appeal E030 of 2022) [2023] KEHC 18048 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E030 OF 2022
JRA WANANDA, J
MAY 26, 2023**

BETWEEN

MORTON MAJANI 1ST APPELLANT

VUGUZA JANE LIPHENDE 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES/ADMINISTRATORS OF THE
LATE ANTONY LIPHEDE**

AND

MANGESA GODFREY RESPONDENT

JUDGMENT

1. This Appeal arises from a suit seeking compensation for the death of a 31 years old male which arose as a result of a road accident. In the suit, the Appellants were the Plaintiffs whereas the Respondent was the Defendant. The suit was dismissed but the Court, as is required of it, also made an assessment of the damages that it would have awarded under the different heads had the suit succeeded.
2. The Appeal is not only against the trial Court's determination of liability but also against the trial Court's assessment of the quantum as aforesaid.
3. The background of the matter is that by the Plaint filed on 03/09/2018 in Kakamega Chief Magistrates Court Civil Case No. 257 of 2018, the Appellants sued the Respondent seeking general damages, special damages, costs of the suit and interest. The Appellants were the brother and mother, respectively, of the deceased. The Plaint was filed through Messrs Abok Odhiambo & Co. Advocates.
4. It was alleged that the accident occurred on 27/09/2017 along the Kisumu-Kakamega Road at Lunyerere Bridge area and involved a motorcycle registration number KMDD 960M TV Star which the deceased was riding and the motor vehicle registration number KBY 077D Toyota S. Wagon alleged



- to have been owned by the Respondent, that the Respondent's said vehicle was carelessly or negligently driven thus causing it to violently knock down the deceased and occasioning him fatal injuries.
5. The Appellant filed his Statement of Defence on 16/07/2019 wherein he denied liability and, in the alternative, blamed the deceased for causing or contributing to the accident. The same was filed through Messrs Kibichiy & Co Advocates.
 6. The suit proceeded to full trial wherein the Appellants called 2 witnesses. These were the mother to the deceased (2nd Appellant) and a traffic police officer. On the Respondent's part, he testified on his own behalf. The witnesses adopted their Statements and also gave oral testimonies.
 7. PW1 was the 2nd Appellant, Jane Vuguza Liphede. She testified that the deceased was her son, he died out of injuries sustained in the road accident, she was called at 6.00 am and informed of the accident, she went to the scene but found that the deceased had already died, the body and the accident motor vehicle were still at the scene, post mortem was conducted, the deceased was a businessman and a farmer, he owned a posho mill and also rode a motorcycle as a boda boda rider, the deceased used to support PW1 with Kshs 10,000/- monthly, the funeral expenses was Kshs 450,000/-, she obtained a police abstract and also a letter from her local Chief which she used to obtain a limited grant and for which she spent Kshs 70,000/-, through her Advocate they issued a demand letter for which she paid Kshs 5,000/-, she conducted a search in respect of the accident motor vehicle for which she paid Kshs 550/- and that she has lost the support which she used to get from the deceased.
 8. In cross-examination, she stated that the co-Appellant was also his son and he was not employed. She conceded that she did not produce any document to show ownership of the motorbike by the deceased, she claimed that the deceased's documents were lost at the scene of the accident, she used to stay with the deceased therefore he used to give her money in cash, she had no receipts to support the Kshs 450,000/- funeral expenses alleged and she did not witness the accident.
 9. PW2 was Police Constable John Koech attached at Vihiga Police Division performing traffic duties. He produced a Police Abstract in respect of the road accident and stated that he was not the investigating officer, the accident occurred on 10/3/2017 at around 6.00 am at Lunyerere bridge along Kakamega-Kisumu Road involving the motor vehicle and motorcycle earlier mentioned, he was sent to Court to produce the abstract, the case was still pending under investigations, he did not have a police file and that the initial investigating officer was transferred to Naivasha. In cross-examination, he stated that he could not trace the police file, he also did not carry the Occurrence Book (OB), he did not visit the scene, he did not interrogate any of the witnesses and he could not tell who was to blame for the accident.
 10. On his part, the Respondent testified as DW1. He stated that he was driving at a speed of about 40 km/h, he was approaching a T-junction, he reported the accident, he was issued with a police abstract and that the motorcyclist had no protective gear. In cross-examination, he stated that the motorcyclist was in front of him, DW1 was on the left lane of the road, his vehicle was damaged on the left side and that when making a turn one does so in a low gear.
 11. After the hearing, the trial Court delivered its Judgment on 17/05/2022 dismissing the suit in its entirety for failure to prove liability against the Respondent.
 12. On the possible damages that the Court would have awarded had the suit succeeded, the Court assessed the same as follows:



Loss of expectation of life	Kshs 200,000.00	
Pain & suffering	Kshs 30,000.00	
Loss of dependency	Kshs 970,281.60	
Special damages	i. Succession Cause	Kshs 70,000.00
	ii. Motor vehicle search fees	Kshs 550.00
	iii. Funeral expenses	Kshs 60,000.00

13. On (c) above (loss of dependency), the figure of Kshs 970,281.60 was arrived at by adopting the minimum wage in Kenya of Kshs 10,107.10 stated to have been prevailing as at that date, multiplier of 24 years and a dependency ratio of 1/3. The same can therefore be summarized as follows:
 $Kshs\ 10,107.10 \times 24 \times 1/3 = Kshs\ 970,281.60/=$
14. Aggrieved by the trial Court's said decision, the Appellants filed this Appeal on 24/05/2022. In the Memorandum of Appeal, the following 4 grounds were cited:
- i. That the learned trial Magistrate erred in law and in fact by failing to find the Respondent wholly liable for the accident.
 - ii. That the learned trial Magistrate erred in law and in fact by dismissing the Appellants' suit against the weight of evidence.
 - iii. That the learned trial Magistrate erred in law and in fact by adopting a multiplier of 24 years and a dependency ratio of 1/3.
 - iv. That the learned trial Magistrate erred in law and in fact by holding the Appellant to a higher standard of proof than is expected in civil cases.
15. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellants filed their Submissions on 18/11/2022 and the Respondents filed on 19/01/2023.

Appellant's Submissions

16. The Appellants' Counsel readily agreed that the burden of proving the Respondent's negligence and liability lay with the Appellants. He however argued that it is not contested that the accident occurred and that the accident motor vehicle was owned by the Respondent, that since the Respondent was the sole registered owner of the motor vehicle, he should be held wholly liable for the accident, that the Respondent owed a duty of care to the deceased and which duty was breached occasioning the fatal injuries, that PW2's testimony also supported the Appellants, that the Respondent ought to be held 100% liable for the accident because the Respondent was unable to bring his motor vehicle to an abrupt stop showing that he was driving at a higher speed than he alleged and that the deceased was in front of the Respondent and it was the Respondent who then knocked down the deceased as he failed to maintain a safe distance.
17. Counsel disagreed with the trial Magistrate's inference that the Appellant did not avail an eye-witness to the accident and that this was fatal to their case, he relied on the doctrine of *res ipsa loquitur* as pleaded in the Complaint and submitted that lack of eye-witnesses was by no means fatal to the Appellants'



- case. On this point, he cited the cases of Emmanuel Wawole Machawa -vs- Harun Kariuki Kamande [2020] eKLR and also North End Trading Company Limited (carrying on business in the name of Kenya Refuse Handlers Limited) -vs- City Council of Nairobi [2019] eKLR.
18. On quantum, Counsel submitted that PW1 (2nd Appellant) testified that the deceased was a businessman, a farmer, owned a posho mill and also rode a motor cycle as a boda boda rider. He recounted PW1's evidence on the deceased's earnings, the financial support that he used to give to PW1 and also recited the documents produced in support of special damages. He then cited PW1's testimony that the deceased's documents regarding ownership of the motor cycle were lost at the scene of the accident. He added that the deceased was working in the informal sector and people in such sector such as the deceased rarely keep sufficient records for the Court to make an inference regarding their income. He conceded that PW1 had no receipts in support of the funeral expenses but submitted that Courts have recently been adopting a subtle approach in awarding damages and are alive to the fact that being in an African setting, whenever a family is bereaved, the family usually incurs expenses in interring the deceased member of the family, the present case is no different, the failure to produce receipts is not a bar in awarding funeral expenses. On this point, he relied on the case of Jacob Ayiga Maruja & Another vs Simeon Obayo CA 167/200 [2005] eKLR.
 19. Counsel further submitted that the at the time of death, the deceased was 31 years of age, he left behind 2 dependents being his mother and brother. On pain and suffering, the deceased died on the same day of the accident, as such the Court ought to award Kshs 100,000/- under this item. On loss of expectation of life, Counsel submitted that the deceased passed away at the age of 31 years, he had his whole life ahead of him and thus, an award of Kshs 200,000/- would suffice.
 20. On loss of dependency, he submitted that the deceased was earning roughly Kshs 25,000/- and used to support his mother with a monthly stipend of Kshs 10,000/-, where the Court is unable to draw inference as to what a deceased person used to earn, then the go to method is to usually adopt a global sum approach in awarding damages under this head, the same should be adopted herein. He cited the case of Moses Mairua Muchiri -vs- Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR and urged the Court to award a global sum of 3,000,000/- under this head.
 21. On Special damages, Counsel urged that the Appellants be awarded the entire sum of Kshs 225,550/- pleaded in the Plaintiff. On funeral expenses, he prayed for a sum of Kshs 150,000/-. On the lack of receipts for funeral expenses, he cited the case of Alice Ombachi & Another -vs- Jerusha Kemunto Mokaya & Joshua Ageta Mokaya (suing as the legal representatives and administrators of the estate of Risper Nyaboke Mokaya (deceased) [2019] eKLR.

Respondents' Submissions

22. The Respondents' Counsel opposed the appeal and submitted that vide the defence filed in Court, the Respondent denied the allegations on the Appellants' suit and invited strict proof, the Respondent averred that if an accident ever occurred as alleged then the same was wholly, totally and/or substantially occasioned by the negligence on the part of the deceased, PW1 (2nd Appellant) testified that she was informed via phone call that her son had been hit by a motor vehicle, she visited the scene and found him dead, PW1 did not testify as to how much the deceased was earning from the alleged business neither did she produce any business permit or payslips. PW2 (traffic police officer) testified that he was not the investigating officer and that he had not visited the scene of the accident, he did not interview any witnesses, he did not know whether anyone was charged for the accident, the matter was still pending under investigations and he did not know whether anyone was to blame for the accident. Counsel added that when asked about the original police abstract, the officer could not state where it



was nor why he did not bring it to Court, the officer acknowledged that he did not know the material facts relating to the accident and he neither had the police file nor the sketch map.

23. Counsel added that the Respondent testified that he was trailing a motorcycle whose rider indicated that he was turning left, the Respondent then slowed and swerved to the right to allow the motorcycle to turn left as indicated, suddenly the motorcycle rider turned right thus hitting the Respondent's motor vehicle, the rider had no license, helmet or reflector jacket, he blamed the rider for the accident, the police abstract produced by the Respondent also blamed the rider of the motorcycle, he was driving at a moderate speed of approximately 70 km/h.
24. Counsel submitted further that the Appellants' case was not supported by evidence and that the burden of proof is always on whoever alleges. He cited the case of Statpack Industries vs James Mbithi Munyao, Nairobi HCCA No. 152 of 2003. He added that neither of the witnesses called by the Appellants were present at the scene of the accident and that the Appellants did not call any eye-witness. He relied on the case of Nairobi CACA No. 195 of 1995, Mary Wamboi vs Kenya Bus Services. On the issue of the traffic officer who testified, not being the investigating officer, he cited the case of Postal Corporation of Kenya & Another vs Dickens Munayo [2014] eKLR.
25. On quantum, he submitted that had the Appellant's case succeeded, then on pain and suffering, the deceased died on the spot and does not qualify to be awarded under this item. He however proposed a figure of Kshs 10,000/-. On loss of expectation of life, he submitted that the deceased was 31 years old and proposed a figure of Kshs 100,000/-.
26. On loss of dependency, Counsel submitted that the Chief's letter does not list any dependent, there is no indication as to the deceased's marital status, PW1 did not adduce any evidence of how she was dependent on the deceased and there is therefore no evidence upon which the Court can attempt to assess the deceased's income. He therefore proposed that the Court adopts the sum of Kshs 8,500/- as monthly income as per the Regulation of Wages (General Administration) Order, 2005. On multiplier, Counsel submitted that the Court adopts 10 years. A summary of Counsel's proposal on loss of dependency was therefore as follows:
$$\text{Kshs } 8,500/- \times 10 \times 12 \times 1/3 = \text{Kshs } 340,000/-$$
27. On Special damages, he submitted that the Court should not award the Appellants for a claim which they did not specifically claim for nor proved.
28. He cited various further cases in support of his arguments above on quantum and prayed that this Appeal be dismissed.

Analysis & determination

29. The duty of an appellate Court was set out in Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
30. In determining this Appeal therefore, this Court will be guided by the above principles.
31. Before I proceed further, I may reiterate, as already stated, that although the suit was dismissed, the trial Court correctly and as required of it, went ahead to assess the probable quantum that it would



have awarded to the Appellant had the suit succeeded. Apart from simply challenging the trial Court's findings on liability, the Appellant has also challenged this assessment of the probable quantum terming the amounts assessed as being too low. Considering that the suit was dismissed, one may rightly term it a mere futile academic exercise for this appellate Court to again engage in interrogating the probable quantum assessment. However, for the benefit of developing jurisprudence and also considering the time and effort put in by the parties in researching and preparing Submissions, my view is that this appellate Court should still proceed to analyse, interrogate and make determinations on the probable quantum assessed by the trial Court. In the circumstances, this Court will include such matters as part of the issues for determination in this appeal.

32. I also notice that regarding damages under the head of "loss of expectation of life", the trial Court assessed the probable amount as Kshs 200,000/-. This is the same amount that the Appellant's Counsel has also proposed in his Submissions. In view thereof, I shall presume that there is no challenge by the Appellant on this item. On his part, the Respondent's Counsel has proposed a sum of Kshs 100,000/- for this item. However, since there is no cross-Appeal by the Respondent, the Respondent too has no basis to ask for review of the assessment. I will not therefore include this item of "loss of expectation of life" in the issues for determination.
33. In my view therefore, the issues that arise for determination in this appeal are the following;
- i. Whether the trial Court erred in dismissing the Appellant's suit for failure to prove liability against the Respondent.
 - ii. Whether the doctrine of Res ipsa loquitur was applicable in this matter
 - iii. Whether the trial Court's assessment of the probable damages for "pain and suffering" was inordinately too low.
 - iv. Whether the trial Court's assessment of the probable damages for "loss of dependency" was inordinately too low.
 - v. Whether the trial Court erred in not awarding the rest of the Special damages pleaded.
34. I now proceed to analyse and determine the said issues.

i. Whether the trial Court erred in dismissing the Appellant's suit for failure to prove liability against the Respondent.

35. It is trite law that an appellate Court will only interfere with the Judgment of the lower Court if the decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] KLR, where Kneller JA & Hancox Ag JJA, held as follows:

"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.

36. As correctly pointed out by the Respondents' Counsel, the moment the Respondent filed a defence denying the allegations made in the Plaint, the Appellants were placed to their strict proof, a joinder of issues ensued and the Appellants assumed the burden of proving that the accident was caused by the negligence of the Respondent.
37. The Appellants fault the Magistrate for dismissing the suit but sample this: the Appellants called two witnesses, the first witness, PW1 (2nd Appellant), stated that she was informed via a phone call that her son had been hit by a motor vehicle, she therefore did not witness the accident and went to the scene



long after the accident had occurred. On his part, PW2 (traffic police officer) testified that he was not the investigating officer, he did not visit the scene, he did not interview any witnesses, he did not know whether anyone was charged for the accident, the matter was still pending under investigations, he did not know whether anyone was to blame for the accident, he did not know how the accident occurred and neither did he produce the police file nor the sketch map.

38. The only eye-witness account of how the accident occurred was from the Respondent. From his oral evidence and witness statement, he testified that he was driving behind the deceased's motorcycle, the deceased indicated that he was turning left, the Respondent then slowed and swerved to the right to allow the deceased to turn left as indicated, that however the deceased turned right thus hitting the Respondent's motor vehicle, the rider had no helmet or reflector jacket and that the deceased was to blame for the accident.
39. The above was the state of evidence before the trial Court. Having not called any eye-witness, the Appellant had no way of rebutting the Respondent's testimony. In the circumstances, I have no hesitation in agreeing with the trial Court that the Appellants failed to produce evidence to prove their case on a balance of probabilities. It is clear that apart from mere allegations, the Appellant did not present any evidence to justify holding the Respondent liable.
40. The Appellant's Counsel has submitted that it is not contested that the accident occurred and that the motor vehicle was owned by the Respondent. According to him, since the Respondent was the registered owner of the motor vehicle, he should be held wholly liable for the accident. I cannot accept this submission. Blame for an accident is not a strict liability matter, negligence must be proved. Mere ownership of a vehicle cannot therefore by itself be a basis for attributing liability to the owner.

ii. Whether the doctrine of Res ipsa loquitur was applicable in this matter

41. The Appellant's Counsel has invoked the principle of Res ipsa loquitur. On the applicability of this principle or lack thereof, I cite the Court of Appeal decision in PGM (Suing as a legal representative of the estate of KMG - Deceased) v Kimathi (Civil Appeal 98 of 2017) [2022] KECA 76 (KLR) (4 February 2022) (Judgment) where it was stated as follows:

“ 33. See also the discussion of the application of the above doctrine in the persuasive High Court case of Susan Kanini Mwangangi & another vs. Patrick Mbithi Kavita [2019] eKLR in which the predecessor of this Court's decision in Embu Public Road Services Ltd. v Riimi [1968] EA 22 was cited with approval with regard to the following exposition: “The doctrine of res ipsa loquitur is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant ... The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control.”



34. Lastly, in *Ali Salim Karama vs. African Line Transport Co. Ltd Mombasa Civil Case No. 187 of 2006*, the court expressed itself thereon as follows: “On the applicability of the doctrine of *res ipsa loquitur* in the case of *Mary Ayo Wanyama & 2 Others* (suing as personal representative of the estate of *Pontianus Ngondwa Mukoya vs. Nairobi City Council Nairobi CA No. 252 of 1998*, this Court made observation that “there was doubt as to whether *res ipsa loquitur* could be described as a doctrine,” but the court was clear in its mind that the phrase or maxim simply means that: “It is a rule of evidence whose essence is that an event which in the ordinary course of things is more likely than not to negligence. In other words, whether the expression *res ipsa loquitur* is applicable or not depends upon whether in the circumstances of the particular case, the mere fact of the occurrence which caused hurt or damage is a piece of evidence relevant to infer negligence.”
35. Our take on the totality of the above assessment which we have deliberately set out in extenso on the application or otherwise of the above doctrine is that there must be facts from which an inference can be drawn that in the absence of any explanation, the causation of the accident subject of the inquiry in the litigation was due to the negligence of the defendant. Herein there is no evidence demonstrating how the deceased came into contact with the respondent’s motor vehicle. If at all there was such contact. There is, therefore, no facts on the basis of which an inference could then and can now be drawn to pin responsibility on the respondent for the causation of the deceased’s death.” (emphasis mine).
42. It is therefore clear from the foregoing that the *Res ipsa loquitur* doctrine only applies in limited circumstances, where a Defendant has not offered any explanation at all of how an accident occurred. In this case, the Respondent gave his account of how the accident occurred which account is quite plausible and which, more importantly, was not controverted at all by the Appellants since they did not call any eye-witnesses. In the circumstances, the principle of *Res ipsa loquitur* is of no assistance to the Appellant. The doctrine is therefore not applicable in this instant matter

iii. Whether the trial Court’s assessment of the probable damages for “pain and suffering” was inordinately too low.

43. On the issue interference with a trial Court’s award of quantum, I cite the decision in *Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR*, where the Court of Appeal stated as follows:
- “...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie [1941] 1 All ER 297*. It was echoed with approval by this Court in *Butt v. Khan [1981] KLR 349* when it held as per Law, J.A that:
44. An appellate Court will not therefore 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.



45. Regarding the award of damages under the head of “pain and suffering”, the trial Court held that had the Appellant proved its case, then it would have awarded a sum of Kshs 30,000/-. On his part, the Appellant’s Counsel submitted that the deceased died on the same day of the accident, as such the Court ought to award Kshs 100,000/-. On his part, the Respondent’s Counsel submitted that the deceased died on the spot and does not therefore qualify to be awarded under this item. He however proposed a figure of Kshs 10,000/-.
46. In *West Kenya Sugar Co. Limited v Philip Sumba Julaya* (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR, Njagi J, made a commendable comparison and analysis of the principles applicable in the assessment of damages under the heading of “pain and suffering” and “loss of expectation of life” and stated as follows:
- “ 10. The deceased in the instant case died on the spot. The trial court made an award of Ksh. 30,000/= for pain and suffering. The advocate for the appellant contends that the award was inordinately high when considered that the deceased died on the spot. That an award of Ksh. 10,000/= could have been sufficient compensation.
11. As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.
12. In *Josephine Kiragu –vs- Vyas Hauliers Ltd* (2017) eKLR where the deceased had died instantly, Njoki Mwangi, J. held that an award of Ksh. 10,000/= for pain and suffering was on the lower side and increased it to Ksh. 30,000/=.
13. In the case of *Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015* [2016] eKLR, where the deceased had died immediately after the accident and the trial court had awarded Ksh. 50,000/= for pain and suffering, Majanja J. held that:
- (5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”
14. In the case of *Simon Bogonko v Alfred Mongare Mecha & Another* (Suing as the Legal Representatives of the Estate of Akama Mong’are (Deceased)) [2019] eKLR and *Omanga Fish*



Limited V CKB & JM (Suing as the Legal Representatives of The Estate of JMM (Deceased) [2019] eKLR, Maina J, reduced awards of Ksh. 100,000/= to Ksh 20,000/= for pain and suffering where the deceased in the cases had died on the spot.

15. In my view the award of Ksh. 30,000/= for pain and suffering is not manifestly excessive as there are High Court authorities to support it. The award will therefore stand.”
47. Further, in the case of Sukari Industries Limited vs Clyde Machimbo Juma, Homa Bay HCCA No. 68 of 2015 [2016] eKLR where the deceased died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. stated as follows:

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

48. In this instant case, the deceased died on the spot and the trial magistrate awarded Kshs. 30,000/= for pain and suffering. Considering the above authorities, I find that the award is within the normal range, thus it cannot be termed to be unreasonable or manifestly too low to justify interference by this appellate Court. The ground of appeal faulting the trial Magistrate on her assessment of damages for “pain and suffering” therefore also fails.

iv. Whether the trial Court’s assessment of the probable damages for “loss of dependency” was inordinately too low

49. On “loss of dependency”, the rival proposals made by the parties as compared with what the trial Court assessed can be tabulated as follows:

Multiplier	Multiplicand	Dependency ratio	Total	
Assessed by trial Court	12 years	Kshs 10,107.10 (minimum wage)	1/3	Kshs 970,281.60
Appellant’s proposal	–	–	Kshs 3,000,000.00 (global sum)	
Respondent’s proposal	10 years	Kshs 8,500 (minimum wage)	1/3	Kshs 340,000.00

50. Before the trial Court, it was alleged that the deceased was a businessman, a farmer, owned a posho mill and also rode a motor cycle as a boda boda rider. It is however clear from the Record that no



documentary evidence was produced to prove this allegation. The Appellant alleged that the deceased's supporting documents including those proving ownership of the motor cycle were lost at the scene of the accident. It was further alleged that the deceased was working in the informal sector and that people in such sector rarely keep sufficient records for the Court to make an inference regarding their income. It is under these circumstances that the trial Court opted to adopt the multiplier method and apply the minimum wage as the multiplier.

51. The Plaintiff's Counsel has submitted that the deceased's monthly earnings was approximately Kshs 25,000/- and that he used to support his mother with a monthly stipend of Kshs 10,000/-. He however appears to concede that no sufficient material was placed before the trial Court to prove this allegation. This is so because he submits that where the Court is unable to draw inference as to what a deceased person used to earn, then the go to method is to usually adopt a global sum approach in awarding damages under this head. He then proceeds to suggest that such global award method be adopted herein.
52. On the method to be adopted in assessing damages under the head of "loss of dependency", where the earnings of the deceased cannot be accurately ascertained, I have perused several decisions and established that there is no settled unanimity by our Courts on whether to apply the "multiplier-minimum wage" method or to apply the "global sum approach".
53. For instance, in the case of *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) vs Hellena Wanjiru Rukanga* [2020] eKLR the Court of Appeal agreed that a minimum wage may be adopted as a multiplicand where monthly income could not be ascertained.
54. On his part, Ngaah J 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, Ngaah J, 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."
55. Further, in *Gilbert Kimatare Nairi & another (Suing as personal representative of the Estate of Jackline Sein Lemayian (Deceased) v Civiscope Limited* [2021] eKLR, Chacha Mwita J held as follows:
 39. Regarding loss of dependency, the trial court awarded a global figure of Kshs. 600,000 which the appellants complained was low while the respondent contended was high. The trial court cited binding decisions on it (*Mary Khayesi Awalo & Another v Mwilu Mulungi & Another supra*) and *Albert Odawa v Gichimu Gichenji (supra)* on applying global award.
 40. As the court stated, the multiplier approach is just a method of assessing damages and not a principle of law. It can and should be abandoned where the facts of the case do not favour its application. In that regard, I do not find fault on the part of the trial court in adopting the global approach. Similarly, I am not persuaded that the trial court was in any error in awarding Kshs 600,000



for loss of dependency. It was neither low nor high to call for this court's interference."

56. Regarding the multiplier approach, I have further perused comparable Court decisions where the deceased persons were within the range of the age of the deceased herein, whose income could not be sufficiently ascertained and the Court therefore applied the 'minimum wage-multiplier' method as opposed to the "global sum approach".
57. I found that for instance in *Siyaram Enterprises & another v Samuel Nyachani Nyachani Suing on behalf of the estate of Vincent Ngwacho Nyachani* [2015] eKLR, where the deceased was 31 years old, Chitembwe J applied a minimum wage of Kshs 9,000/- as the multiplicand and a multiplier of 16 years. Applying a dependency ratio of 1/3, the total amount translated to an award of Kshs 576,000/-
58. In *Muriuki Ruth v Mueni Mbaluku & another* [2020] eKLR, where the deceased was 32 years old, On'gudi J applied a minimum wage of Kshs 5,844/- as the multiplicand and a multiplier of 25 years. Applying a dependency ratio of 2/3, the total amount translated to an award of Kshs 1,168,840/-
59. In this instant case, the deceased was 31 years old, the trial Court applied a minimum wage of Kshs 10,107.10 and a multiplier of Kshs 24 years. Applying a dependency ratio of 1/3, the total amount translated to an award of Kshs 970,281.60. Evidently, the said assessment and award are not markedly different from what was adopted and assessed in the sample cases cited above.
60. Personally, I would have preferred the global award approach in this matter considering the absence of sufficient evidence to support the monthly income. However, I associate myself fully with the view adopted by P.J. Otieno J in *Stephen Murathi v Brenda Makena (Suing as the legal representative of the estate of Andrew Muthuri (deceased))* [2021] eKLR, where he stated as follows:
 19. In coming with the sum awarded, the court below appreciated that there was insufficient evidence on income and chose to award a global sum rather than adopt the multiplier formula. For that the court cannot be faulted because it was within its right to do so because the multiplier formula is just one of the tools in assessing damages. It isn't a dogma and only applicable when appropriate.
 20. I find no error of application of principles nor misapprehension of the evidence. Am thus left with the duty to find out if the sum was excessive. The law remains that the duty of assessment of damages in personal injury claims is a difficult one and falls within the discretion of the trier of fact which discretion ought not be interfered with slightly unless the appellate court sets out to substitute its discretion for that of the trier of facts.".
61. I have carefully looked at case law and authorities in respect to the arguments for and against the use of multiplier approach as opposed to the global sum method and find that the Courts have been split on the appropriateness of the approach to adopt. Since no documentary evidence was produced as proof of the deceased's monthly income, the trial Court could have adopted either the multiplier-minimum wage approach or global sum approach. The trial Court adopted the former. Since that was a matter that fell in the discretion of the magistrate, I hold that he did not misdirect himself in that regard. In light of the foregoing, I decline to interfere with or disturb the trial Court's assessment of damages for "loss of dependency". This ground of Appeal therefore also fails.



v. Whether the trial Court erred in not awarding the rest of the Special damages pleaded

62. It has been held in a plethora of authorities and it is settled law that for special damages to be awarded, they must be specifically pleaded and also strictly proved. One instance of such authorities is *Maritim & Another –v- Anjere* (1990-1994) EA 312 where it was stated as follows:

“It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.”

63. In the Plaint, the claim for Special damages was pleaded as follows:

Obtaining Letters of Administration	Kshs 70,000/-
Funeral and mortuary expenses	Kshs 150,000/-
Demand notice	Kshs 5,000/-
Motor vehicle search	Kshs 550/-
Kshs 225,550/-	

64. The Appellant produced Receipts in support of all the said items save for the funeral and mortuary expenses. The trial Court quoted case law and recognized, correctly, that even in the absence of receipts, the Courts have nevertheless always still given awards for reasonable and legitimate funeral expenses. Accordingly, even in the absence of receipts, the trial Court went ahead and assessed an amount of Kshs 60,000/- as the amount it would have awarded had the suit succeeded.

65. On my part, considering the effects of inflation and the prevailing economic state of the country, I would have awarded the entire sum of Kshs 150,000/- in funeral expenses had the Appeal succeeded on liability. However, this is neither here nor there since the suit remains dismissed

Final Order

66. In the end, this Court rules as follows:

- i. The trial Court did not err in determining that no liability had been demonstrated against the Respondent and did not therefore err in dismissing the suit.
- ii. This Appeal is accordingly dismissed.
- iii. Considering that the Appellant lost a loved one, each party shall bear its own costs of this Appeal.

DELIVERED VIRTUALLY, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2023

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JOHN R. ANURO WANANDA
JUDGE

