



**Midland Construction Company Ltd v Otaba & another (Suing as the Administrators
& Personal Representatives of the Estate of Fabiano Otaba Asoka -Deceased)
(Civil Appeal 24 of 2019) [2023] KEHC 17706 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17706 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 24 OF 2019
JRA WANANDA, J
MAY 26, 2023**

BETWEEN

MIDLAND CONSTRUCTION COMPANY LTD APPELLANT

AND

MOSES BARASA OTABA 1ST RESPONDENT

FAUSTIA NEKESA OTABA 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS & PERSONAL REPRESENTATIVES OF
THE ESTATE OF FABIANO OTABA ASOKA -DECEASED**

JUDGMENT

1. This Appeal arises from a suit seeking compensation for the death of a 70 years old man which arose as a result of a road accident. In the suit, the Appellant was the Defendant whereas the Respondents were the Plaintiffs.
2. By the Plaint filed on 22/06/2016 in Mumias Principal Magistrate Court Civil Case No. 175 of 2016, the Respondents sued the Appellant seeking general damages, special damages, costs of the suit and interest. The Respondents were the son and widow, respectively, of the deceased. The Plaint was filed through Messrs C.M. Mwebi & Co. Advocates.
3. It was alleged that the accident occurred on 13/01/2015 along the Mumias-Busia Road at Lunganyiro area and involved the motor vehicle registration number KAW 975B Toyota Pick-Up alleged to be owned by the Appellant. It was alleged that the said vehicle was negligently driven such that it lost control and knocked the deceased who was a pedestrian and that as a result, the deceased suffered fatal injuries.



4. The Appellant filed its Statement of defence on 10/08/2016 wherein it admitted that the accident occurred but denied liability. In the alternative, it blamed the deceased for causing or contributing to the accident. The Plaintiff was filed through Messrs Staussi & Asunah Advocates.
5. The suit proceeded to full trial wherein the Respondents called 3 witnesses. These were the 1st Respondent (son to the deceased), an eye-witness and a traffic police officer. On the Appellant's part, the driver testified.

Respondent's case before the trial Court

6. PW1, Moses Barasa Otaba, the 1st Respondent and son to the deceased, testified that on 13/01/2015 at around 6.45 pm he received a report that his father had been involved in an accident at Loganyiro market along the Busia-Mumias Road, his father was already dead by the time that he reached the scene, he called the police who came over, interviewed people, collected the body and took it to the mortuary, on 17/01/2015 a post mortem was conducted, he paid Kshs 14,000/- for it, he also purchased a cloth for the body at Kshs 2,500/-, a coffin at Kshs 18,000/-, incurred Kshs 45,000/- for transport and purchased cows at Kshs 55,000/- to feed mourners and other items for Kshs 45,000/-. He produced receipts for some of the items.
7. He further testified that he obtained a Police Abstract indicating the registration number of the motor vehicle that was involved in the accident, he got a letter from the chief to confirm that he was a son to the deceased, he also obtained a certificate of death and Letters of Administration (Limited Grant) to commence this case and paid Kshs 15,000/- for it. Further, he stated that the driver of the vehicle was charged in a traffic case, his father died at the age of 70 years, he was a farmer and used to earn Kshs 8,000/- per month.
8. PW2, Ernest Mukanda testified that on the fateful day he was on the road near Lunganyiro market, he was on the left side towards Busia, an accident occurred, he knew the deceased who was knocked down, the deceased was on the same road as him, the deceased was walking heading also towards Busia side, PW2 saw a vehicle from Mumias side also heading towards Busia, both PW2 and the deceased were walking towards the same direction, PW2 was about 50 metres in front, the deceased was walking beside the road, the vehicle pushed the deceased in front, he fell on the road on the right side on the murrum and died on the spot. PW2 blamed the driver for speeding, he alleged that the vehicle moved out of the road and knocked the deceased. In cross-examination, he stated that the deceased was near a matatu, he reiterated that the vehicle was speeding, it was about 100 km/h, and that at Lunganyiro there is a market on both sides although it was not a market day.
9. PW3, the traffic officer confirmed that the accident was reported to the police, investigations were completed, the driver was charged but was acquitted. In cross-examination, he stated that he did not know how the accident occurred and was only relying on the record that he found.
10. The Appellant's driver then testified as DW1. He stated that he was on the Mumias-Busia Road, when he reached Lunganyiro market he was facing a matatu (public service vehicle), he was driving behind it, DW1 was driving at a speed of about 50 km/h, when they reached Lunganyiro market the matatu stopped, he put on the indicator and reduced his speed, a person (the deceased) appeared in front of the matatu that had stopped and wanted to cross the road, he applied brakes, he noticed the person when the person was in the middle of the road, the person appeared drunk and was disorderly, he hooted and tried to avoid the person, later the police came, he went to the station and reported the incident. He blamed the deceased for causing the accident, he denied that he was speeding or overtaking, he alleged that the vehicle was in good condition, he blamed the deceased because the deceased "never passed very fast", he admitted that he was charged with a traffic case but averred that he was acquitted.



11. In cross-examination, he stated that his speed was moderate, the vehicle hit the deceased on the right side, the deceased was crossing from the left to the right side, he saw the deceased when the deceased was in the middle of the road and reiterated that he was not overtaking. In Re-examination, he stated that he did not see the deceased earlier because the deceased was blocked by the stationery matatu.

Trial Court's Judgment

12. After the hearing, the trial Court delivered its Judgment on 04/02/2019. Liability was apportioned at 90:10 in favour of the Respondents and damages awarded to the Respondents in the following terms:
- i Pain & suffering Kshs 20,000/-
 - ii Loss of expectation of life Kshs 100,000/-
 - iii Loss of dependency Kshs 350,000/-
 - iv Special damages Kshs 176,000/-
Total Kshs 646,000/-
Less 10% contribution Kshs 64,000/-
Net Award Kshs 581,400/-
 - v Costs and interest

Appeal

13. Aggrieved by the trial Court's said decision, the Appellant filed this Appeal on 27/02/2019. In the Memorandum of Appeal, the following 3 grounds were cited:
- i. That the learned trial Magistrate erred in law and fact in awarding sums in damages which was/is manifestly and/or inordinately high, thus connoting an error in principle, taking into account past decisions of the Courts and the current trend of awards.
 - ii. That the learned trial Magistrate erred in law and fact in awarding damages that were not proved.
 - iii. That the Judgment of the Learned trial Magistrate was/is against the weight of evidence.
14. It was then directed that this Appeal be canvassed by way of written Submissions. The Appellant filed his Submissions on 25/08/2021 and the Respondents filed on 28/01/2022.

Appellant's Submissions

15. The Appellant's Counsel stated that PW2 (the eye-witness) testified that the deceased fell down on the road "on the right on the murrum" and that "the vehicle that knocked him, it went on the road and stopped in front and the driver proceeded". Counsel described the said narration as very "confused, confusing and absolutely illogical". He submitted that if the vehicle left the road and knocked the deceased who was walking beside the road as PW2 alleged then the deceased would have fallen down off the road on the murrum, the deceased could not have fallen on the road and fallen on the murrum at the same time, if the vehicle indeed veered off the road to the left and hit the deceased on the murrum, the deceased could not have landed on the right, on the road.
16. Counsel further submitted that the evidence of the Appellant's driver (DW1) was in stark contradiction to that of the eye-witness (PW2), the trial Magistrate muddled the waters further by



introducing a theory which indicated that the Magistrate was not clear in his mind as to whether the deceased was crossing the road at the moment of impact or whether he was standing in a bus market. He faulted the Magistrate for failing to consider these glaring inconsistencies in the evidence of the Plaintiff's witnesses, he erred in apportioning 90% liability against the Appellant and only attributing 10% against the deceased, the allegation that the driver was speeding was not proved, although the driver was charged with the offence of causing death by dangerous driving he was acquitted, the traffic officer could not establish the point of impact and had no idea how the accident occurred, the onus of proving negligence is on he who alleges, the Respondents failed to prove their case on a balance of probabilities, the Magistrate failed to appreciate that PW2 alleged that the deceased was walking beside the main road but was allegedly hit by the vehicle while on its lane and came to fall down on the road in front of the vehicle. According to Counsel, this was not plausible, if the deceased was hit while walking beside the road, he would have fallen further off the road and not on the road in the path of the vehicle which was on its lane, at the worst the trial Magistrate should have apportioned liability at 50:50.

17. On quantum, Counsel submitted that on loss of expectation, the award of Kshs 100,000/- was on the higher side considering that at the age of 70 the deceased was already in his sunset years, a sum of Kshs 50,000/- should have been awarded.
18. On loss of dependency, he submitted that the deceased was past retirement age, no proof was tendered of work or earning, however having pleaded Kshs 8,000/- in earnings, the Respondents abandoned the pleadings and prayed for a global figure of Kshs 500,000/-, it can only be surmised that their reason for so doing was that they belatedly realized that they had insufficient or no evidence to support their claim for lost income, the Respondents having pleaded a specific sum in lost earnings it behoved the trial Court to consider and apply the well laid down principles, the global award of Kshs 350,000/- was without basis, it was in the nature of a gratuitous award and was inordinately high, the trial Court failed to indicate why it considered that a global sum was more appropriate and not the multiplier and multiplicand approach, his application of the lump sum option was therefore arbitrary, the Respondents listed 7 adult children as dependents, they cannot be considered as dependents, dependency was therefore not proved, the alleged wife to the deceased who may have been the only legitimate dependent was not called as a witness. He cited the decision in *Livingstone Mwambugu Mwakhungo & Another v Sarah Anyango Jaoko* [2016] eKLR.
19. Counsel further submitted that should this Court be inclined to agree with the trial Court that damages for lost years was warranted then the Respondents are entitled to no more than an award of Kshs 40,000/- on the basis of a multiplier of 1 year and a multiplicand of the minimum wage of Kshs 5,000/- as at 2015 against a ratio of 2/3.
20. Regarding Special damages, Counsel submitted that the trial Court awarded the entire sum of Kshs 176,000/- that was claimed although the receipts tendered in evidence were for a sum of Kshs 55,000/- only, the Magistrate failed to appreciate that in African communities burials are a communal affair and funeral expenses cannot therefore have been borne by the two Respondents only, the trial Magistrate erred when he agreed that no receipts were produced but went on the assumption that "burial ceremonies in Kenya and more particularly in Western Kenya is an expensive affair.
21. Counsel further submitted that the trial Court jumped into the arena of conflict and decided the matter on sympathy rather than on law and fact and opined that the award should not have been more than Kshs 165,000/- before contribution as follows:
 - a Pain & suffering Kshs 20,000/-
 - b Loss of expectation of life Kshs 50,000/-



- c Lost income at Kshs 5,000 x 1 x 12 x 2/3 Kshs 40,000/-
 - d Special damages
 - i. Mortuary fees Kshs 14,000/-
 - ii. Dressing Kshs 2,500/-
 - iii. Coffin Kshs 18,000/-
 - iv. Transport Kshs 6,000/-
 - v. Cost of ad idem Kshs 15,000/-
- Total Kshs 165,000/-

Respondents' Submissions

22. The Respondents' Counsel submitted that the Memorandum of Appeal listed 3 grounds none of which expressly referred to a challenge against the trial Court's findings on liability, the Appeal is only against quantum, an Appeal ought to be precise and grounds of Appeal ought to be specifically stated and enumerated, the alleged appeal against liability should be dismissed, it is only in the Submissions that the Appellant has raised an issue of liability which is not contained in the Memorandum of Appeal and is not one of the grounds of appeal, the Court should therefore only consider the Submissions on quantum.
23. Counsel submitted that in any event, this Court can only interfere with the trial Court's findings if there was an error which amounted to miscarriage of justice, the eye-witness (PW2) testified that he was a pedestrian along Mumias-Busia Road same as the deceased who was ahead of him, the vehicle came from behind and knocked the deceased pushing the deceased in front, the deceased fell on the murrum and died on the spot, the vehicle was at high speed, it moved off the road and knocked the deceased, the deceased was near a matatu and the vehicle knocked the deceased from behind, the police officer (PW3) confirmed that the Appellant's driver (DW1) was charged with the offence of causing death even though he was acquitted, the acquittal did not absolve the driver of blame since that was a criminal case where the standard of proof was different from that in this civil case, apportionment of liability at 90%:10% was reasonable and no miscarriage of justice was done.
24. On quantum, Counsel submitted that the respective awards were reasonable and on special damages, he submitted that the entire sum of Kshs 176,000/- was proved by receipts produced in evidence.

Analysis & determination

25. 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.”
26. In my view, the issues that arise for determination in this appeal are the following:
 - i. Whether this Court should entertain the Submissions relating to liability
 - ii. Whether the trial court erred in its apportionment of liability.



- iii. Whether the trial Court’s award for loss of expectation of life was proper.
 - iv. Whether the trial Court’s award for loss of dependency was proper.
 - v. Whether the trial Court’s award for Special damages was justified.
27. I now proceed to analyse and determine the said issues.

i. Whether this Court should entertain the Submissions relating to liability

28. The Respondents have raised the objection that the Appellant has in its Submissions made arguments challenging the trial Court’s apportionment of liability yet the Grounds of Appeal contained in the Memorandum of Appeal do not raise any challenge against the issue of liability. The Respondents has therefore urged this Court to disallow such arguments and confine itself to the challenge on quantum.
29. The Memorandum of Appeal contains 3 Grounds, the first two expressly fault the trial Magistrate’s findings on quantum while the third is general in that it simply states that “the Judgment and/or decision of the trial Magistrate was/is against weight of evidence”.
30. I therefore agree with the Respondent that indeed the Grounds of Appeal do not contain any express challenge against the trial Court’s findings and/or apportionment of liability. However, in the interest of justice, I will deem the description “the Judgment and/or decision of the trial Magistrate was/is against weight of evidence” as being wide enough to give room for the arguments on liability as well.
31. I also take into account the fact that under Sections 1A and 1B of the Civil Procedure Act, the Courts are enjoined to give effect to the Overriding Objective (also known as O² principle) in the exercise of its powers “to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes”.
32. Indeed, the Court of Appeal held in Equity Bank Limited v West Link MBO Ltd Civil Application (Appeal) No. 78 of 2011 as follows:
- “Courts of law exist to administer justice and in doing so, they must of necessity balance between the competing rights and interests of different parties but within the confines of the law, to ensure the ends of justice are met. Inherent power is the authority possessed by a court implicitly without it being derived from the constitution or statute.”
33. I also take cognizance of Article 159(2)(d) of the Constitution which requires Courts, when exercising judicial authority, to do justice without undue regard to procedural technicality. The Article provides as follows:
- “Justice shall be administered without undue regard to procedural technicalities.”
34. As was stated in the Court of Appeal in Abdirahman Abdi also known as Abdirahman Muhumed Abdi v. Safi Petroleum Products Ltd. & 6 others, Civil Application No. Nai. 173 of 2010, “the overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantive justice.....”
35. I however caution that this holding is only limited to the facts of this case and should not be blindly interpreted as a general principle to be applied as a general precedent. Each case ought to be determined on its own facts. The law therefore remains that for an Appellant to be allowed to argue a point, the same must have been raised in its Grounds of Appeal.



36. For the said reason, I will analyze both the challenges against liability as well as quantum.

ii. Whether the trial Court erred in its apportionment of liability

37. An appellate Court will only interfere with the conclusions and findings of a trial Court if the findings and conclusions were not supported by evidence or were premised on wrong principles of the law. This was the import of the holding in *Onyango & Another Vs. Luwayi* [1986] KLR 513, where the Court of Appeal held inter alia as follows:

“the Court of Appeal would not interfere with the findings of fact of the two lower courts unless it was clear that the magistrate and the Judge had so misapprehended the evidence that their conclusions were based on incorrect bases.”

38. In this instant case, the eye-witness, PW2, Ernest Mukanda, although with some slight incoherence, testified that on the fateful day he was walking as a pedestrian on the left side of the road near Lunganyiro market towards the side of Busia, the deceased was on the same road as him and was also walking heading towards Busia, PW2 saw a vehicle from Mumias side also heading towards Busia, both PW2 and the deceased were on the same direction, PW2 was about 50 metres in front, the deceased was walking beside the road, the vehicle pushed the deceased in front and the deceased fell on the right side of the road and died on the spot. PW2 blamed the driver for speeding and stated that the vehicle had moved out of the road and knocked the deceased. It was however not very clear from his evidence whether at the time of the impact, the deceased was standing beside the road or was already crossing. However, the relevant portions of the evidence are clear. In cross-examination, he stated that the deceased was near a matatu, he reiterated that the vehicle was being driven at a speed of about 100 km/h, and that at Lunganyiro there is a market on both sides.
39. On his part, the Appellant’s driver started that when he reached Lunganyiro market he was driving behind it a matatu, he was driving at a speed of about 50 km/h, when they reached Lunganyiro market the matatu stopped, he put on the indicator and reduced his speed, the deceased appeared in front of the matatu that had stopped and wanted to cross the road, he applied brakes, he noticed the deceased when the deceased was already in the middle of the road, the deceased appeared drunk and was disorderly, he hooted and tried to avoid the deceased but it was too late to avoid the impact. He blamed the deceased for causing the accident, denied that he was speeding or overtaking, he blamed the deceased because the deceased “never passed very fast” and he admitted that he was charged with a traffic case but that he was acquitted. In cross-examination, he stated that his speed was moderate, the vehicle hit the deceased on the right side, the deceased was crossing from the left to the right side, he saw the deceased when the deceased was in the middle of the road and reiterated that he was not overtaking. In Re-examination, he stated that he did not see the deceased earlier because the deceased was blocked by the stationery matatu that had stopped ahead.
40. From the two conflicting versions, I take the driver’s testimony with a pinch of salt. First, the fact that the impact was so huge that the deceased died on the spot is indicative of a very high speed. With such impact, he definitely could not have been driving at a speed of 50 km/h as he alleged.
41. Considering the evidence that the accident occurred in an area with a market on both sides of the road, I am persuaded that by driving at a high speed in such an area, the driver was negligent. The fact that the vehicle was on the left side of the road but knocked the deceased on its right side also means that the deceased had almost finished crossing and was almost out of the lane of vehicle. If indeed he was driving at a moderate speed, he would have easily slowed down to allow the deceased complete crossing



the road. The fact that he was unable to slow down in time or swerve is evidence that he was driving at a high speed.

42. Further, the driver contradicts himself by alleging that he was not overtaking but then at the same stating that the matatu had stopped right ahead of him and that he put on his indicator signalling a move to the right. If the matatu had stopped ahead, where did he get the room to continue moving and moreso at such a high speed that he violently knocked the deceased to the point of causing him death on the spot? What was the relevance of putting on the indicator to signal intention to move to the right if not to overtake?
43. Again, he states that he only noticed the deceased when the deceased was already in the middle of the road, that the matatu blocked his view of the deceased and that the deceased appeared from in front of the matatu. If he was driving behind the matatu and the matatu had stopped and if he did not overtake, how then did he come into direct contact with the deceased? How come he did not see the deceased in good time?
44. Although the Appellant's Counsel alleges that the eye-witness' testimony was contradictory, which may be true to some extent, I find that the Appellant's driver's testimony was even worse as it contained much more contradictions and inconsistencies.
45. The Appellant's Counsel also submitted that he was acquitted in the criminal traffic case and that such acquittal ought to have been taken as an absence of proof in the civil trial. My comment is that, first, the Judgment or proceedings in the traffic case were never produced in evidence. Secondly, it was stated in the case of *Joseph C. Mumo v Attorney General & Another* [2008] eKLR as follows:

“It agrees entirely with the prosecution that an acquittal on a criminal charge is not per se basis for a civil liability. This is so because the standard of proof in both jurisdictions is different in the first instance. In the second instance, the court seized of the Civil Jurisdiction may it be subordinate or superior is never bound by the decision of the court that had been seized of the criminal proceedings. As noted earlier on the standard of proof is different and the court seized of the civil proceedings is entitled to re-evaluate the evidence on its own and arrive at its own decision as to civil liability on a balance of probability....”

46. Further in the case of *Philip Keipto Chemwolo & Mumias Sugar Co. Ltd v Augustine Kubende* [1982-88] 1 KAR 1036 at 1039-1040, it was stated that;

“... it is further submitted that the standard of proof in a traffic case is beyond reasonable doubt despite conviction and that conviction is not conclusive proof that the defendant is fully to blame”

47. For the said reasons, I do not find any justification to interfere with the trial Magistrate's findings and apportionment of liability.

iii. Whether the trial Court's award for loss of expectation of life was proper

48. In *Kemfro Africa Limited t/a "Meru Express Services [1976]" & Another V. Lubia & Another (No. 2)* [1987] KLR page 30 the Court of Appeal held that:

".... The principles to be observed by the appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it must be satisfied that either that 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."

49. This principle was reiterated in *Dilip Asal v Herma Muge & another* [2001] eKLR [2001] KLR as follows:

"..... Assessment of damages is essentially an exercise of discretion and the grounds upon which an appellate Court will interfere with the manner in which a trial Court assessed damages relate to issues of an error of principle."

50. 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 trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

51. In this instant case, the Appellant's Counsel submitted that on "loss of expectation", the award of Kshs 100,000/- was on the higher side considering that at the age of 70 years the deceased was already in his sunset years. He suggested that a sum of Kshs 50,000/- should have been awarded. To establish comparable awards, I have perused various authorities in which the deceased persons were of ages close to that of the deceased in this instant case.

52. In *Joseph Mugweru Njenga & another v Joseph Kamau Ng'ang'a* [2018] eKLR, like in this case, the deceased was 70 years old. H. Omondi J (as she then was) awarded loss of expectation of life at Kshs 100,000/-.

53. In *John Muchiri Njoroge & another v Monicah Asami* [2021] eKLR, H. On'gudi J also awarded a sum of Kshs 100,000/- for loss of expectation of life and stated as follows:

"The trial court awarded Ksh. 100,000/= for loss of expectation of life. In the case of *Mercy Muriuki & Another -Vs- Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR the Court observed that: -

"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

The appellants have not shown any thing so outrageous about the award of ksh. 100,000/= for loss of expectation of life and I will therefore not interfere with the said award."

54. Similarly, in *Allan Owiti Awuor & another v Tabitha Micere Mathu (Suing as Personal Representative of The Estate of Peter Math Ng'ang'a)* [2021] eKLR where the deceased was 57 years old, Mwita J awarded the same figure of Kshs 100,000/-.

55. I too therefore find that "the appellant has not shown any thing so outrageous about the award of Ksh. 100,000/= for loss of expectation of life". I will therefore not interfere with the award.

iv. Whether the trial Court's award for loss of dependency was excessive

56. On loss of dependency, as aforesaid, the Appellant's Counsel submitted that the deceased was past retirement age, that no proof of work or earning was tendered, that having pleaded Kshs 8,000/- in earnings, the Respondents abandoned the pleadings and prayed for a global figure of Kshs 500,000/-,



that it can only be surmised that their reason for so doing was that they belatedly realized that they had no evidence to support the claim for lost income. He added that the global award of Kshs 350,000/- was without basis, it was in the nature of a gratuitous award, it was inordinately high, the trial Court failed to indicate why it considered that a global sum was more appropriate and not the multiplier/multiplicand approach, therefore his application of the lump sum option was arbitrary, that the Respondents listed 7 adult children as dependents who cannot be considered as dependents, that dependency was therefore not proved and the alleged wife to the deceased who may have been the only legitimate dependent was not called as a witness.

57. Counsel relied on the decision of E. Maina J in *Livingstone Mwambu Mwakhungo & Another v Sarah Anyango Jaoko* [2016] eKLR which was an appeal against an award of loss of dependency by a Magistrate's Court. In that case, the deceased died at the age of 65 years, all her children were by then adults, they were all working save for one who was alleged to be in college, but even for this one there was no proof that he was in college, it was stated that his college fees were raised through fund raisers, the deceased's income was not proved and that the trial Magistrate was alleged to have plucked the multiplicand from the air. Maina J agreed and found that dependency was not proved and damages for loss of dependency ought not to have been awarded. Accordingly, she set aside the award.
58. However, Maina J subsequently distinguished her said decision in *Livingstone Mwambu Mwakhungo* (supra) when a similar argument was placed before her in the latter case of *Samuel Nyoro & another v Joyce Wanjiku Kamau & another (Suing as Legal Representatives of Estate of Kamau Muturi (Deceased))* [2020] eKLR. She distinguished her earlier decision in the following terms:
- “On the merits of the appeal, while the principle is that for one to benefit from an award where the deceased was advanced in age, as in this case, one needed to prove dependency, the circumstances of this case are distinguishable. In the case of *Livingstone Mwambu Mwakhungo & another v Sarah Anyango Jaoko* [2016] eKLR, *Gerald Mbale Mwea v Kariko Kihara & another* [1997] eKLR and *John Wamae & 2 others v Jane Kitutu Nziva & another* [2017] eKLR where the courts set aside the awards of the lower courts on the ground that loss of dependency was not proved the beneficiaries were all adult children with their own sources of income. In the case giving rise to this appeal the award was made to among others the wife of the deceased (the respondent). It is not unreasonable to expect that even at 78 years the deceased would still have been fending for his wife more so given that he was a driver. The award made under the *Fatal Accidents Act* goes to the benefit of a parent, spouse or children but does not extend to the grandchildren and as the children of the deceased did not prove dependency, they cannot benefit from the award either directly or through their children. The award is therefore for the benefit of the wife (widow) of the deceased solely.....”
59. Where therefore there is a widow, the Court is not restricted from awarding loss of dependency since the widow will qualify as a dependent. In this instant case, the Appellant's Counsel conceded that the widow may have been a legitimate dependent. His only contention was that the widow was not called as a witness. While this may be a persuasive and valid argument, I have looked at the Plaintiff and established that the widow was expressly named and described as the widow and a dependent. Further, she was the 2nd Plaintiff in the suit (and 2nd Respondent herein) and was also expressly named in the Chief's letter produced in evidence as the widow and a survivor of the deceased. Again, in his testimony, the son (PW1) also expressly named the widow.
60. In the circumstances, I do not believe that not calling the widow as a witness diminished the trial Magistrate's findings.



61. On the method adopted by the trial Court in awarding damages under the head of loss of dependency, the Court used a global sum approach. In her same decision in the said Samuel Nyoro & another v Joyce Wanjiku Kamau & another (supra), E. Maina J also dealt with the separate ground of appeal challenging the trial Magistrate's adoption of a global award rather than a multiplier/multiplicand approach. In dismissing the challenge, she stated as follows:

“.... As for the quantum itself I find that the trial Magistrate was guided by a correct principle which was that of a global award as opposed to the multiplier/multiplicand method, and as the quantum itself is reasonable and not inordinately excessive I would have no justification to interfere with it. In the upshot I find the appeal has no merit and dismiss it with costs to the respondent. It is so ordered.”

62. I also cite the decision 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, where 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.”

63. In this case, the deceased was 70 years old and already in his sunset years as correctly submitted by the Appellant's Counsel. For this reason, an appropriate multiplier could not be reasonably ascertained. Similarly, his income could not be ascertained with precision. In the circumstances and considering the above authorities, the trial Magistrate cannot be faulted for adopting the global award or lump sum method.

64. I therefore find that “the appellant has not shown anything so outrageous” about the global award of Ksh. 350,000/- for loss of dependency. I will therefore also not interfere with the award.

v. Whether the trial Court's award for special damages was justified

65. Regarding Special damages, Counsel submitted that the trial Court awarded the entire sum of Kshs 176,000/- that was claimed although the receipts tendered in evidence were only for a sum of Kshs 55,000/-, that the Magistrate failed to appreciate that in African communities burials are a communal affair and funeral expenses cannot therefore have been borne by the two Respondents only, that the Magistrate erred when he agreed that no receipts were produced but went on the assumption that “burial ceremonies in Kenya and more particularly in Western Kenya is an expensive affair.

66. I have perused the Record and established that, while in the Plaintiff the Respondents pleaded a sum of Kshs 176,000/- the Receipts produced amounted to Kshs 153,500/- made up as follows:

- i Purchase of cattle Kshs 60,000
 - ii Transport & purchase of foodstuffs Kshs 60,500
 - iii Cost of Succession Cause Kshs 15,000
 - iv Coffin Kshs 18,000
- Total Kshs 153,500



67. It is trite law that a claim for special damages must not only be pleaded, but must also be strictly proved. This is because a claim for special damages represents what the party may have actually lost in the form of the expenses incurred and he would want to be put back to the position he was had he not been forced to incur the expense, hence the need to strictly prove these claims.
68. However, on the matter of absence of Receipts for funeral expenses, the Court of Appeal in *Premier Diary Limited v Amarjit Singh Sagoo & another* [2013] eKLR stated as follows:
- “We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased - testified that they spent much more than this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”
69. Similarly, the Court of Appeal in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR held as follows:
- “We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.”
70. Further, in *JNK (suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School* [2018] eKLR, Gikonyo J having made reference to the above case held as follows:
- “In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”
71. In view of the foregoing, while I agree that special damages must be pleaded and proved, a perusal of the above authorities reveals that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses.
72. In the circumstances, despite the failure to produce receipts totalling the pleaded figure of Kshs 176,000/-, there really is no dispute that indeed there was a funeral following the deceased's death. This is evidenced by the copy of the burial permit on record. The Appellants are therefore entitled to a reasonable award in funeral expenses. I find the sum awarded to be such reasonable figure.
73. I shall therefore not disturb nor interfere with the award.



Final Order

74. In the premises, this Appeal is without merits. The same is dismissed with costs to the Respondent.

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

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JOHN R. ANURO WANANDA

JUDGE

