Wakhanu v Sada (Suing as the personal representative of the Estate of Francis Juma Tembu) (Civil Appeal 19 of 2022) [2023] KEHC 26138 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26138 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 19 OF 2022

DK KEMEI, J

NOVEMBER 30, 2023

BETWEEN

KASSIM OCHANJI WAKHANU ..... APPELLANT

AND

REV PIUS TEMBU BEATRICE SADA ..... RESPONDENT

SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF FRANCIS JUMA TEMBU

(Being an appeal arising from the Judgement of Hon. D. Mutai Senior Principal Magistrate delivered in Bungoma CMCC 678 of 2009 on 13th November 2018)

JUDGMENT

1. This appeal challenges the trial magistrate's judgment on the twin issues of liability and quantum. The Appellant was the Defendant in a suit wherein the Respondents claimed damages under the *Law Reform Act* and *Fatal Accidents Act*, Special damages, costs and interests in regard to fatal injuries sustained by the deceased as a result of an accident that occurred along Bungoma-Nambacha Murram Road on 18th March 2008. The accident involved the appellant's motor vehicle Registration No. KAA 703A which he managed and/or controlled in a manner that it hit the deceased's bicycle from behind. At the trial, the Respondents testified and called one witness. On the other hand, the Appellant only filed its defence denying liability but failed to attend the hearing. After considering the evidence before him and the Respondents submissions, the trial magistrate found the appellant wholly liable for the accident and proceeded to assess and award the Respondents damages in the sum of Kshs. 1, 723, 930/ =.

2. Being aggrieved, the Appellant preferred this appeal which is premised on grounds that: -

    i. That the learned trial magistrate erred in fact and in law by apportioning 100% liability to the Appellant (Defendant) despite the Respondent been entirely responsible for the accident.

ii. That the learned trial magistrate erred in law and fact by adopting a multiplicand of 19 years which was excessive and without taking into consideration vicissitudes and vagaries of life.

iii. That the learned trial magistrate erred in law and in fact in awarding loss of dependency of Kshs. 1, 520,000/=, an award which was excessive, considering that there was no proof of dependency.

iv. The learned trial magistrate erred in law and in fact in using the minimum wage of Kshs. 10,000/= an award which was excessive, as it was more.

v. That the learned trial magistrate erred in law and in fact by awarding pain and suffering to a tune of Kshs. 100,000/=, an award which was excessive since the deceased died on the spot.

vi. That the learned trial magistrate erred in law and fact by failing to find that special damages pleaded had not been specifically proved as provided for by law.

vii. That the learned trial magistrate erred in law and fact by failing to pay regard to the authorities that were guiding in the amount of quantum that is appropriate and applicable in similar cases as the one she was deciding.

viii. That the learned trial magistrate's exercise of discretion in assessment of quantum was injudicious.

ix. That the learned trial magistrate erred in fact and in law by failing to consider the Appellant's submissions on both liability and quantum by completely disregarding the submissions and authorities of the Appellant and as a result arrived in unjustified decision on quantum.

3. By this appeal, it is urged that this Court do set aside the trial magistrate's findings on liability and quantum and replace it with its own assessment and that the costs of this appeal and the lower Court suit be provided for.

4. The appeal proceeded by way of written submissions. The Appellant submitted on three major issues. On the issue of ownership of the motor vehicle, Counsel for the Appellant submitted that he denied the allegations that he was the bona fide owner of the suit motor vehicle. He asserted that no evidence was adduced to prove that the Appellant is indeed the owner of the aforesaid motor vehicle by way of a certificate of search from the Registrar of motor vehicles as it is conclusive proof of ownership of motor vehicle. The Appellant relied on the case of Thuranira Karauri vs Agnes Ncheche Civil Appeal No. 192 of 1996 and the case of John Kiria & 6 Others vs Charles Kaunda Musyoka & Another (2010) eKLR High Court Nairobi (Nairobi Law Courts) Civil Appeal 232 of 2008. The Counsel for the Appellant submitted that the failure by the Respondents to produce the copy of record to prove the Appellant is the owner of the suit motor vehicle is fatal to this appeal and cannot tie the Appellant to the subject accident.

5. On the issue of liability, Counsel for the Appellant submitted that subject to the provisions of the section 107 (1) of the *Evidence Act*, CAP 80 Laws of Kenya, it was therefore the Respondents duty to prove their allegations of negligence on a balance of probabilities. According to the evidence of PW2, she warned the deceased about the motor vehicle behind them but that the deceased told her that the driver had eyes. It was submitted that the deceased was informed of the impending danger but chose to ignore it and did not do anything to avoid the occurrence of the accident. According to Counsel for the Appellant, it was elaborate from PW2's testimony that the deceased was carrying a woman who had a child contrary to the provisions of section 89 of the *Traffic Act*. The deceased was therefore negligent in carrying excess passengers as it could have caused the bicycle to lose balance at the bridge where he was hit. Counsel further submitted that the Respondents failed to call the police officer to produce

the police file in Court which held substantive information that is integral in establishing liability on the part of the Appellant. He relied on the case of Osman Ahmed Kahia vs Joseph G. Njoroge (2012) eKLR. Counsel submitted that PW1 failed to assist the lower Court in establishing who was to blame for the accident. Further, Counsel submitted that though the driver of the motor vehicle registration number KAA 703A was charged and convicted of causing death by dangerous driving, it is trite that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit. Counsel for the Appellant relied on the case of Mwinzi Muli vs James Kenneth Kiarie & Another (2020) eKLR. Counsel submitted that the Respondents failed to discharge the burden of proof as called upon. He urged this Court to hold that the Appellant was partly to blame for the accident and apportion liability at 50:50. He relied on the case of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another (2004) eKLR.

6. On the issue of quantum, Counsel submitted that under the heading of pain and suffering, the deceased died immediately after the accident thus did not experience any pain and/or suffering. According to him, subject to the rule of precedents the appropriate award under this head ought to have been Kshs. 10,000/=

7. Under the heading of loss of expectation of life, Counsel for the Appellant submitted that as per the deceased's death certificate, he died at the age of 41 years. Counsel acknowledged that the deceased's life span was indeed shortened by the accident but not to a massive extent given the mortality rate in the Country. He argued that the uncertainties and vicissitudes of life ought to be considered, and that in reference to this appeal a moderate award not beyond Kshs. 60,000/= would have been appropriate. Counsel relied on the case of Jemimmah Wambui Njoroge vs Philip Mwangi (2001) eKLR. Counsel urged this Court to make an award of Kshs. 80,000/= bearing in mind the rate of inflation

8. Under the heading of loss of dependency, Counsel for the Appellant submitted that, PW1 testified that the deceased was a farmer but did not state the exact and/or approximate amount he earned. Counsel submitted that in exclusion of material evidence before the Court to prove income, the Court ought to use Kshs. 2, 536/= as the minimum wage for an unskilled labourer as provided for under the Regulation of Wages (General) (Amendment) Order, 2006 which was operational at the time of the deceased's demise. He relied on the case of Gachoki Gthuri (suing as the legal representative of the estate of James Kinyua Gachoki (deceased) vs John Ndiga Njagi Timothy & 2 Others (2015) eKLR. On the multiplier, Counsel for the Appellant submitted that dependency is a matter of fact and the same ought to be proved by evidence. He submitted that the Court ought to rely on a multiplier of 7 years after taking into account the uncertainties and vicissitudes of life. He relied on the case of Vincent Kipkorir Tanui (Suing as the administrator and/or Personal representative of the Estate of Samwel Kiprotich Tanui (Deceased) vs Mogogosiek Tea Factory Co. Ltd & Another (2018) eKLR where the deceased was 40 years and the High Court used a multiplicand of 10 years. He urged this Court use a multiplicand of 2/3 for loss of Dependency

9. On special damages, it was submitted that only specifically pleaded sums will be awarded after strict proof by way of receipts. According to Counsel, the Respondents only pleaded Kshs. 48, 270/= as special damages but proved Kshs. 7, 429/= and that ought to be the only amount the Respondents are entitled to.

10. Counsel submitted that the dependents only benefit from the *Fatal Accidents Act* since awarding under the *Law Reform Act* will amount to double compensation. Counsel relied on the cases of Simeon Kiplimo Murey & 3 Others vs Kenya Bus Management Services Limited & 4 Others civil Appeal No. 2 of 2013; David Kajogi M'Mugaa vs Francis Muthomi, Civil Appeal No. 118 of 2010 and Francis Wainaina Kirungu (Suing as the Personal representative of the Estate of John Karanja

Wainaina (Deceased) vs Elijah Oketch Adellah (2015) eKLR and Kemfro vs A.M. Lubia and Olice Lubia (1982-1988) KAR 727.

11. Miss Ogato, learned counsel for the Respondents, submitted under three issues. On the issue of whether the Respondent proved their case on a balance of probabilities, she submitted that the Respondents established that the Appellant was liable for the accident and fatal injuries that caused the death of the deceased. Counsel submitted that the Respondents gave uncontroverted evidence and- that the decision was made after their case was proved on a balance of probabilities. According to Counsel, the Respondents proved negligence against the Appellant for the occurrence of the accident and that the same was not challenged in anyway. She urged this Court to uphold the decision of the trial Court on liability. Counsel relied on the case of Evans Nyakwana vs Cleophas Bwana Ongaro (2015) eKLR.

12. On the aspect of who is to blame for the accident, Counsel for the Respondents submitted that as per PEXH7(a) the Police Abstract demonstrated the fact that the police had found the Appellant liable for the accident that led to the death of the deceased. Further, she concurred that indeed no evidence was adduced to dispute the documentary evidence by the Respondents and no objection was tendered to inhibit the production of the same which was dully filed in Court. Counsel relied on the case of Joel Muga Opija vs East African Sea Food Limited (2013) eKLR. She submitted that the Appellant was found liable in the Traffic Case No. 314 of 2008 for causing death by dangerous driving and was jailed for two years.

13. On the issue of quantum, Counsel for the Respondents submitted that the suit was brought pursuant to both the *Fatal Accidents Act* and the *Law Reform Act*. She submitted that this Court is only allowed to interfere with the award of the lower Court if the Court acted upon some wrong principles of law or the same was extremely high or very low. Counsel relied on the case of Mbogo & Another vs Shah (1968) E.A93. Counsel urged this Court to dismiss this Appeal as it is simply an afterthought.

14. On special damages, Counsel submitted that the Respondents proved what they specifically pleaded and that this Court ought to uphold the same.

15. I have considered this appeal, submissions made on behalf of the parties and the authorities relied on. This being a first appeal, it is by way of a retrial and this Court has a duty to reanalyse, reconsider and re-evaluate the evidence afresh and come to its own conclusion on that evidence. The Court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

16. In Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123, the East African Court of Appeal held that:

> " An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial judge's findings of fact if it appear either that he failed to take into account particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."

17. Further in Williamson Diamonds Ltd and another v Brown [1970] EA 1, the same court held that:

> " The appellate Court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion."

18. And in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR the Court of Appeal stated;

> " 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."

19. PW1 was Beatrice Sada, the 2nd Plaintiff in the lower Court, adopted her statement filed together with the Plaint as PEXH2. She told the Court that the deceased was her husband and proceeded to produce in Court a dowry agreement as PEXH1. She told the Court that she had 5 issues with the deceased and proceeded to adduce their respective baptismal cards as PEXH2(a-e). According to her, the deceased died at the age of 41 years as a result of injuries sustained from a road accident at Dorofu area along Bungoma-Nambacha road. She adduced a death certificate as PEXH3 and told the Court that she spent Kshs. 44, 350/= in funeral expenses. She availed a bundle of receipts as PEXH4. She testified that the deceased was a sugarcane farmer and adduced statements from Mumias Company as PEXH5 to prove the same. She further adduced a Grant as PEXH6, a receipt of Kshs. 820/= for the Grant as PEXH6(a), a Police Abstract as PEXH7(a), a receipt of Kshs. 200/= for the Police Abstract as PEX7(b), and a copy of a demand letter as PEX8. Also, she testified that the deceased was the sole breadwinner of the family.

20. PW2 was Celestine Nakhumicha who testified that she was a pillion passenger on the deceased's bicycle on the material day of the accident. According to her, the Appellant's motor vehicle registration number KAA 703A hit the bicycle at the bridge from behind in which she sustained injuries. She blamed the Appellant for the accident as he approached the bridge at a high speed and that the Appellant was charged, convicted and sentenced to two years imprisonment.

21. PW3 was Rev. Pius Tembu who was the 1st Plaintiff in the lower Court, adopted his statement filed together with the Plaint. He testified that on 18th March 2018 he was in Bungoma Town when the deceased, his brother, called him informing him that he was involved in an accident and was taken to Bungoma Hospital for treatment. The deceased told him that the matatu driver was charged with the offence of dangerous driving and adduced the proceedings and judgement of the Court in the Traffic case as PEX9.

22. At the close of the Respondents case, the Appellant was not present in Court to defend his case and that the lower Court proceeded to set the matter down for Judgement.

23. Judgment was finally delivered on 13th November 2018. In the judgment, the trial Court held that the Respondents had successfully proved their case on a balance of probability that the Appellant was 100% liable for the accident and proceeded to make an award of Kshs. 1, 723, 930/=, costs plus interest.

24. On the quantum of damages, as correctly submitted by Counsel for the respondent and as was held in the cases of Paul Kipsang Koech & another V Titus Osule Osore [2013] eKLR and Kiwanjani Hardware Ltd & Another V Nicholas Mule Mutinda [2008] eKLR an appellate Court will only interfere with the award of the trial Court if it is inordinately so high or low as to represent an entirely erroneous estimate or it is based on some wrong legal principle or on a misapprehension of the evidence.

25. On the issue of ownership of the suit motor vehicle, the Appellant submitted that the trial magistrate erred by holding the Respondents had proved the ownership of the motor vehicle registration No. KAA 703A yet they only produced a police abstract to show that the Appellant was the owner of the

said motor vehicle at the time of the accident. The Respondents in the lower Court and in this appeal relied on the contents of the police abstract to prove ownership of the vehicle.

26. In respect to evidentiary value of a police abstract as regards proof of ownership of a motor vehicle, in the case of Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another, (2010) eKLR the Court of Appeal held as follows:-

> " Where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross-examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it was challenged by evidence or in cross-examination, the plaintiff would need to produce certificate from the Registrar or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary"

27. Further in the case of Ibrahim Wandera vs. P N Mashru Civil Appeal No. 333 of 2003 the Court of Appeal expressed itself as follows:

> " The learned Judge did not at all make reference to the police abstract report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968W, with Mashru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it and that means that the respondent was satisfied with the evidence... The police abstract form established ownership of the accident bus and the appellant was properly given judgement by the trial court against the respondent."

28. And Warsame J. (as he then was) in the case of Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 held as follows:

> " Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the *Evidence Act*. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence."

29. On perusal of the lower Court record, I do confirm that Respondents produced police abstract in Court as exhibit 7(a). Counsel for the defendant/respondent never raised any objection to the production of the police abstract neither did he cross examine the witness on it. The document therefore became part of exhibits produced and its contents unchallenged evidence in prove of the Plaintiffs/Respondents case. I do not therefore see the reason as to why the trial magistrate would doubt ownership yet the contents of the police document which is a government public document was not

challenged by the Appellant who failed to fully participate in the trial in the lower Court beyond filing his defence.

30. From the foregoing, I find that the police abstract can be taken as proof of ownership of the vehicle.

31. On the issue of liability, this being a first appellant Court, I must consider the evidence in the trial Court so as to arrive at my own independent conclusion while bearing in mind that I did not hear or see the witnesses. The Respondents evidence as contained in statements which was adopted as their evidence, was inter alia that the Appellant's motor vehicle was being driven at an excessive speed; that the driver failed to keep a proper lookout for other road users and more especially the deceased's bicycle and that the driver did not take any measures to avoid the accident. The Appellant did not adduce any evidence to rebut or controvert the Respondents evidence (PW2) who was an eye witness and my finding is that the evidence which clearly proved negligence against the Appellant stands. My view is anchored on the decision of the Court of Appeal in the case of John Wainaina Kagwe V Hussein Dairy Limited [2013] eKLR where the court stated:-

> " .... the Respondent never called any witness(es) with regard to the occurrence of the accident. Even its own driver did not testify, meaning that the allegations in its defence with regard to the blame- worthiness of the accident on the Appellant either wholly or substantially remained just that, mere allegations. The Respondent thus never tendered any evidence to prop up its defence, whatever the respondent gathered in cross examination of the Appellant and his witnesses could not be said to have built up its defence as it were, therefore, the Respondent's defence was a mere bone with no flesh in support thereof. It did not therefore prove any of the averments in the defence that tended to exonerate it fully from culpability. It was thus substantially to blame for the accident....."

32. Similarly, in this case the Appellant did not adduce any evidence to controvert that of the Respondents and therefore his averments in the statement of defence are just but allegations. I am obviously not persuaded by the argument that because the police abstract did not apportion liability then both parties must be found equally liable. This is because causation is an issue of fact which must be proved through evidence. It cannot be presumed. It is my finding that the Respondent proved negligence against the appellant on a balance of probabilities and in the absence of evidence to attribute contributory negligence to the Respondents, I must agree with the trial magistrate's finding that the Appellant was wholly to blame.

33. As regards quantum, in Woodruff vs. Dupont [1964] EA 404 it was held by the East African court of appeal that:

> " The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not

entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant."

34. The Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate Court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

35. It was therefore held by the same Court in Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457 that:

> " The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect...A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own..."

36. Similarly, in Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

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

37. In this case, the deceased sustained injuries which led to his ultimate demise. From the proceedings of the lower Court, the Respondents testified that prior to his death, the deceased was a sugarcane farmer. That he was married to PW2, Beatrice Sada, and they had five children. PW1 indicated that he was the deceased's brother. The Respondents testified that requested the deceased made Kshs. 32,200/= per month and produced a statement from Mumias Sugar Company. I take cognisance of the fact that this did not clear the Court's doubt on the earnings prompting the trial magistrate to work with an average figure of Kshs. 10,000/= when calculating loss of dependency.

38. The death certificate shows that the deceased was 41 years old and that he died on 18th March 2008 at Bungoma Hospital as a result of cardiorespiratory failure due to frail chest due to a road traffic accident.

39. In regard to the issue of damages awarded under the *Law Reform Act*, the court 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 observed that-

> " 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."

40. In the present case, PW1 indicated that on 18th March 2008 he was in Bungoma Town when the deceased, his brother, called him informing him that he was involved in an accident and was taken to Bungoma Hospital for treatment. I am therefore guided by the death certificate which indicates that the deceased died at Bungoma District Hospital. From the foregoing, it is evident that the deceased did not die immediately after the accident happened but endured pain and suffering before breathing his last. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows-

> " 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.... 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." (emphasis added).

41. In view of the above decisions and bearing in mind that this Court has been invited to exercise its discretion when considering the award made by the trial court, I find that the award made in the sum of Kshs. 100,000/= for pain and suffering was not excessive. I therefore uphold the said award.

42. Looking at awards made under loss of expectation of life, the Court in the case of Rose v Ford [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate.

43. In Benham v Gambling [1941] AC 157 it was held that-

> " In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he 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." (emphasis added).

44. In the present case, the deceased was aged 41 years, he was married and had five children. It was stated that he was a sugarcane farmer and that he was able to take care of his family from the earnings he made. The trial magistrate in the judgment made an award of Kshs. 100,000/= for loss of expectation of life.

The Appellant's Counsel submitted that no award under this head should have been made in line with the case of Kemfro Africa Ltd v Aziri Kamu Lubia & another [1882-1988] 1 KAR 727.

45. Due to different interpretations of the above decision as to whether an award of loss of expectation of life under the *Law Reform Act* and an award of loss of dependency under the *Fatal Accidents Act* amounts to double compensation, the Court of Appeal in Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited [2015] eKLR, held as follows-

> " This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependents under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that: -
>
> An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

46. In light of the foregoing decisions, I am not persuaded that the Respondents should not be awarded damages under loss of expectation of life. I also see no rationale as to why damages for loss of expectation of life should be deducted from the award under loss of dependency. I therefore uphold the trial court's judgment under loss of expectation of life in the sum of Kshs. 100,000/=.

47. As regards the award for loss of dependency, the Appellant faults the learned trial magistrate for considering extraneous matters. It is submitted by the Appellant that the learned trial magistrate disregarded the fact that the deceased was a farmer as alleged. According to the Appellant, there was no evidence that the deceased earned Kshs.10,000 per month. The Appellant submitted that in the absence of monthly earnings of the deceased the Court ought to have resorted to the minimum wage for unskilled persons as observed in HCCA No.108 of 2008 Philip Musyoka Mutua vs. Veronicah Mbura Mutiso [2018] eKLR. The Appellant has referred the Court to the minimum wage of Kshs. 2, 536/- stipulated in the Legal Notice No.116 Regulations of Wage (General)(Amendment) Order,2006) as the deceased died when the same was operative. According to the Respondents, Kshs.10,000/- was reasonable as the deceased used to earn Kshs. 32,200/=. As the deceased died on 18th March 2008, the trial court ought to have been guided by the minimum wage of Kshs. 2,536/= stipulated in the Legal Notice No.116 Regulations of Wage (Agricultural Industry) (Amendment) Order,2006). I shall adopt the Wage of Kshs. 2,536/= and set aside Kshs. 10,000/-.

48. The Appellant did not challenge the trial court's finding that the deceased was married with five children. According to the Appellant, the dependency ratio of 2/3 was proper.

49. According to the Appellant, a multiplier of 19 years adopted by the learned trial magistrate was erroneous as the lower Court failed to factor in the uncertainties and vicissitudes of life. The Court should have adopted 7 years. In the converse, the Respondents submitted that the deceased was 41 years old and in good health hence able to live up to 60 years. The Appellant relied on the case of VZL & Another vs Chrispine Agunja Omoga [2014] eKLR where for a deceased aged 37 years, the court adopted 20 years as multiplier.

50. The deceased was aged 41 years at the time of his death. He was a farmer. While the retirement age for public servants is 60 years, as a farmer, the deceased could have worked longer as long as his health permitted. Taking into account the uncertainties of life, I conclude that a multiplier of 19 years adopted by the Magistrate is unreasonable. At 41 years, the 17 years would be appropriate. As for the monthly income, the parties are in agreement on the minimum wage adopted by the court. It follows that under the head under consideration, I find no basis to fault the learned Magistrates findings.

51. I am guided by Ringera J. in Leonard Ekisa & Another vs. Major Birgen [2005] eKLR where the learned Judge stated that in determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.

52. Ringera J. in the case Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR) stated as follows:-

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."

In the result the damages for lost of dependency are now calculated as follows: Kshs. 2,536/= x 2/3 x 12 x 17 = Kshs. 344,896/=.

53. On special damages, from the records, it is elaborate that the Respondents pleaded Kshs. 48, 270/- but only proved special damages to a tune of Kshs. 8, 780/=.

54. For the above reasons, I am satisfied that there is a basis for interfering with the trial Court's discretion. Consequently, this appeal partially succeeds. The trial Court's finding on liability against the Appellant is upheld.

55. From the foregoing, I find the appeal partially succeeds. I hereby set aside the lower Court's judgement in CMCC No.678 of 2009 on quantum. I proceed to award as follows: -

    a. Pain and Suffering Kshs 100,000/=

    b. Loss of Expectation of Life Kshs 100,000/=

    c. Loss of Dependency Kshs 344,896/=

    d. Special Damages Kshs 8, 780/=

    Total award Kshs. 553,676/=

58. Each party shall bear their own costs in the appeal while the Respondents will have full costs and interest in the lower Court.

    It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2023.

D. KEMEI

JUDGE

In the presence of:

Wekesa for Ogato for Appellant

No appearance Nyairo for Respondents

Kizito Court Assistant