REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL APPEAL NO.172 OF 2019

JOSEPH GATONE KARANJA.....APPELLANT

VERSUS

JOHN OKUMU SOITA & ESTHER CHEPKORIR

(Suing as admin of The estate of BENARD SOITA NYONGESA (DCD).....RESPONDENTS

(Being an appeal against Judgment of Hon. Naomi Wairimu in Eldoret

CMCC No.477 of 2018 delivered on 1/11/2019)

JUDGMENT

Introduction & Background

1. In the CMCC No.477 of 2018, the respondents herein had sued the appellant seeking both general and special damages as well as costs and interest of the suit. In the plaint dated the 2nd of May 2018, the respondents alleged that on or about the 12th of February 2018, the deceased, Bernard Soita, was lawfully walking as a pedestrian along the Eldoret-Uganda Road, when the appellant and or his driver/agent, negligently drove motor vehicle Registration KBZ 321S, causing the said motor vehicle to veer off the road and knock down the deceased. As a result, the deceased sustained fatal injuries to which he succumbed.

2. The matter proceeded to full trial whereupon the learned magistrate delivered judgement on the 1st of November 2019 finding the appellant herein 100% liable and awarded quantum totaling to Kshs 3,132,320/= as follows:

a. Pain and Suffering – 50,000/-

b. Loss of expectation of life – 150,000/-

c. Loss of dependency – 2,822,976/-

d. Funeral expenses and Ad litem – 109,344/-

3. Being aggrieved with this decision on liability and quantum, the appellant via a memorandum of appeal dated the 29th of November 2019 preferred the instant appeal citing 14 grounds of appeal.

4. On the 22nd of June 2021, court directed that the appeal be canvassed by way of written submissions and both parties duly filed their submissions

Appellant's Submissions

5. The appellant in his submissions dated the 16th of July 2021 identified four issues for determination namely whether the learned trial magistrate erred in law and fact in holding the appellant 100% liable, whether the learned trial magistrate erred in law and fact in making awards under the Law Reform Act, whether the learned trial magistrate erred in law and fact in making awards of Kshs 2,822,976/- under the Fatal Accidents Act to the estate of the deceased and finally; whether the learned trial magistrate erred in law and fact making awards under special damages without any proof thereof.

6. On the first issue, the appellant submitted that the respondents did not prove particulars of negligence on the part of the appellant as required under Section 107 & 108 of the Evidence Act. It was his submission that the deceased being a pedestrian also owed a duty of care to themselves while using the road and relied on the case of ***Peter Okello Omedi vs Clement Ochieng [2006] eKLR***. The appellant specifically argued that the lack of a sketch plan made it impossible to know whether the accident occurred on the road or off the road so as to apportion liability correctly. It was further submitted that the reliance by the trial magistrate of the police abstract without any other documentary evidence amounted to insufficient evidence to hold the appellant 100% liable. Furthermore, the appellant submitted that the mere fact that the appellant's driver was charged with causing death by dangerous driving was not conclusive evidence that he was liable for the accident wholly. The appellant called into question the evidence of PW1 who was not the investigating officer and that of PW3 who he submitted was not sure where the point of impact was. In this regard, reliance was placed on ***Elizabeth Bosibori & another vs Pamaria Moraa Nyamache [2017] eKLR and David Kinyanjui & 2 Others vs Meshack Omar Munyoro, Civil Appeal No. 125 of 1993***. It was the appellant's submission that the deceased had contributed to his own misfortunes since he breached the duty of care he owed himself. Consequently, the appellant proposed that liability be apportioned equally as between the deceased and the appellant rather than solely on the appellant.

7. On the second issue, the appellant submitted that the trial magistrate award under the Law reforms Act was excessive. It was submitted that the award of Kshs 50,000 for pain and suffering was excessive considering that the deceased died on the spot. The appellant submitted that the court should have taken into account the case of ***E.A Growers Ltd vs Charles Nganga Ngugi Nyeri Civil Appeal No. 129 of 2009***, where the court awarded the deceased estate Kshs 10,000 in similar circumstances and or decline to award the estate of the deceased anything since he died instantly, in which case, he did not suffer any pain before succumbing. Reliance was placed on the case of ***Henry Omweri Ooro & another vs Samuel Mungia Kahiga & another [2016] eKLR***. As regards loss of expectation of life, it was submitted that the award of Kshs 150,000 was not justified and that Kshs 60,000 was sufficient. The authority in ***Joseph Kahiga & Paul Mathioya vs World Vision Kenya [2014] eKLR*** was relied upon.

8. On the third issue, the appellant's contention is that the trial magistrate use of 26 years as the multiplier is without justification since the deceased was not a civil servant where it could be presumed that he would have remained actively at work up to 60 years. Secondly, the use of Kshs 13,572/-, being the minimum wage, as the multiplicand is contested by the appellant who submitted that the same is without any sufficient reason and or justification. It was therefore the appellant's submission that without any proof being adduced as to whether the deceased was a skilled laborer or whether he was indeed working, the court shouldn't have adopted the minimum wage as the multiplicand. Third, the appellant challenges the adoption of 2/3 as the dependency ratio on the basis that the deceased was married and his dependents were the widow and the children. In his submissions, the appellant submitted that there no proof of relationship between the deceased and the alleged dependents since there was no proof either via birth certificate or marriage certificate. It was therefore his submission that since income and dependency ratio is uncertain, the court should adopt the global/lump sum approach and grant Kshs 300,000 as compensation. The appellant relied on a number of cases including the case of ***Mwanzia vs Ngalali Mutua Kenya Bus Ltd as cited in Albert Odawa vs Gichumu Githenji [2007] eKLR***.

9. On the fourth and last issue, the appellant challenged the award of Kshs 109,344/= as funeral and special damages. It was his contention that the receipts produced, do not bear KRA stamp; they do not bear the name of the deceased and finally, that the receipts do not portray clearly what the payments were made for.

10. In conclusion, the appellant submitted that the court sets aside the lower court judgement, allow the appeal herein and grant the respondents a total of Kshs 185,000.

Respondents' Submission

11. The respondent on their part submitted that the subordinate court's decision on both liability and quantum was proper and should therefore not be disturbed. Through their submissions dated the 28th of June 2021, the respondents submitted that the evidence of PW3 an eyewitness and that of PW1, a police officer points to the negligence of the appellant and or his driver and which formed the basis of the court's decision to find the appellant 100% liable. In particular, the respondents submitted that PW3 testified that the motor vehicle was being driven from the Eldoret direction towards the Webuye direction and that the deceased and another pedestrian were walking on the right side of the road facing Webuye when the motor vehicle KBZ 321 S left its lane and ventured onto the side on which the deceased was lawfully walking as a pedestrian and hit him. In this regard, it was submitted that the evidence of PW3 and PW1 was unchallenged and uncontroverted as the appellant did not call any evidence to challenge their testimonies and in the absence of such, the trial court was correct in finding the appellant wholly liable.

12. On the issue of quantum, it was the respondent's submission that the award of Kshs.3,132,320 was proper. They observed that the deceased was a farmer and businessman and as such, the income of Kshs 13,572 per month adopted by court was reasonable in the circumstances. They relied on the case of ***Auto Hauliers Company Ltd vs Margaret Muthoni Kinyeni & another, Eldoret HCCA No.62 of 2018***.

13. The respondents further submitted that the dependency ratio of 2/3 adopted by court was reasonable as the deceased was the sole bread winner of his family and relatives and relied on the case of ***John Mwangi vs Patrick Kariuki & another, Nakuru HCCC No. 99 of 1994***. The respondents also submitted that multiplier of 26 years was reasonable considering that the deceased was a farmer and a businessman aged 34 and would have worked up to the age of 60 years and relied on the case of ***Miriam Sei & 2 others vs John Njega Khuyu & another, Kakamega HCCC No. 12 of 1985***.

14. As regards damages for loss of expectation of life, the respondents submitted that the award of Kshs 150,000/- was reasonable as the deceased died at 34 years and had prospects of living longer. The respondent relied on ***Kiptampan Lockorir vs Kadenga Kenga & Another, Mombasa HCCC No. 478 of 1994***.

15. Finally, as regards pain and suffering, the respondents were of the view that the award of Kshs 50,000 was reasonable since the deceased suffered a lot of pain and before his death. He died relied on the case of **Mwalla Katana Mwangongo vs Kenya Post and Telecommunications, Mombasa 16 RD of 1997**.

16. In conclusion, the respondents submitted that the appeal lacks merit on both issues of liability and quantum, and urged court to dismiss the same with costs.

Analysis & Determination

17. This being a first appeal, it is the duty of court, as the first appellate court, to reconsider, reevaluate and reanalyze the evidence afresh and come to its own conclusion. The court must however bear in mind that unlike the trial court, it did not see the witnesses testify and should give due allowance for that.

18. This principle is anchored under ***Section 78 of the Civil Procedure Act*** and was pronounced in ***Francis Ndahebwa Twala v Ben Nganyi, Siaya Civil Appeal No. 5 Of 2017*** as follows;

> **"This being a first appeal, this Court is mandated by Section 78 of the Civil Procedure Act and as was espoused in the case of Kenya Ports Authority Vs Kushton (K) Ltd (2009) 2 EA, 212 wherein the Court of Appeal stated; inter alia: -**
>
> **"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

19. The principle was reiterated in ***Selle –vs- Associated Motor Boat Co. Ltd [1968] EA 123*** where the court stated: -

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

20. Consequently, as a first appellate court, this court's role is to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions about it, bearing in mind that the court did not have the opportunity of seeing and hearing the witnesses first hand.

21. Considering that the appellant has appealed on the issue of liability and quantum, this court will re-evaluate the evidence in that regard as this is the only issue for determination.

a. Liability

22. The appellant submitted that the trial court erred in finding him 100% liable for the accident and death of the deceased. It was his contention that the finding was not supported by any proof, since the respondents did not prove the particulars of negligence on the part of the appellant. It was his submission that the deceased as a pedestrian also owed a duty of care to himself while using the road and urged court to apportion liability equally.

23. Having perused the records, the evidence and the judgment of the trial court, I note that the trial magistrate duly considered relevant evidence of all the witnesses in coming to her conclusion. In particular, the trial magistrate in her judgement considered all the evidence and testimony given by the witnesses. She noted that PW3 stated that the point of impact was off the road where the pedestrians were walking and that the vehicle was being driven at high speeds when it veered off the road and knocked the pedestrians. She further considered the testimony of PW1 who stated that one of the pedestrians died on the spot. Furthermore, the trial magistrate took into consideration the fact that the appellant herein did not call any witness to rebut the testimony of the plaintiff's (respondents) witnesses. Accordingly, the trial magistrate entered judgement on liability at 100% in favour of the respondents and against the defendant.

24. I find the trial court assessment of fact and evidence on liability to be correct as highlighted below.

25. PW 3, Christopher Odhiambo Nyamrembo, testified on the 25th of June 2019 adopting his testament dated the 20th of June 2019. It was his testimony that the accident was caused by motor vehicle Reg KBZ 321S. PW 3 blamed the driver for the accident and testified that the driver was going to Uganda from Eldoret. Further, PW 3 testified that the pedestrians who were hit were on the right side of the road as one faces Uganda. He in fact testified that the motor vehicle was being driven at a high speed as a result of which the driver lost control, veered off the road and went on to the pavement where the pedestrians were walking, knocking down the deceased. PW 3 was not cross-examined.

26. The testimony of PW3 was corroborated by that of PW1, PC Cheserek, who testified on the 2nd of April 2019. In particular, PW 1 testified that the accident occurred on the 12th of February 2018 and involved the motor vehicle reg.no KBZ 321S. This is the same vehicle that PW3 testified caused the accident. In addition, PW1 testified that the pedestrians were on the right side of the road facing Webuye from Eldoret, further corroborating the evidence of PW3, that the pedestrians were on the right side of the road facing Uganda. PW 1 also testified that the motor vehicle lost control and hit a motor cycle and crashed the pedestrians who were off the road wherein the deceased died on the spot while the other pedestrian, Peter Mukara, died later at the hospital. PW1 also produced the abstract as exhibit 1. On cross-examination, PW1 noted that he didn't visit the scene and didn't have the police file as he was not the investigating officer.

27. The abstract, PEX1, further confirms that the said motor vehicle was involved in a fatal accident. The abstract does indicate the motor

vehicle as a lorry Isuzu KBZ 321S, further corroborating the evidence of PW3, the eye witness.

28. From the testimony of PW1 and PW3, it is clear that the deceased was walking off the road on the material day and that the accident involved the motor vehicle reg. no KBZ 321S. It is also clear that the said motor vehicle lost control and veered off the road and knocked down the deceased who died on the spot. The death certificate of the deceased clearly indicates that he died due to severe hemorrhage as a result of crushed pelvis due to road traffic accident. Furthermore, from the record, it does seem that the evidence of PW3, an eye witness, was unchallenged and uncontroverted.

29. Taking all these evidence into account, it is clear that the deceased was lawfully walking on the correct side of the road when the motor vehicle KBZ 321S lost control due to high speed, left its lane on the road, veering off and venturing onto the lane that the deceased was walking, knocking him down and killing him instantly.

30. I do not see any justification in the appellant's argument that the deceased owed himself a duty of care. If any, it is clear that the deceased was walking on the correct side of the road and thus exercised his duty of care properly. The same cannot be said of the appellant.

31. Furthermore, I reject in toto, the argument by the appellant that the police abstract should not be considered since it was not supported by any other documentary evidence. It seems to me, that the appellant is not challenging the contents of the abstract but rather seeks to have documentary evidence to support the same. I find this argument weak and take I take guidance in the Court of Appeal decision **in *Joel Muga Opija v East African Sea Food Limited [2013] eKLR*** where the court allowed an abstract as evidence and stated:

> **"It is clear to us that there has been a move from the rigid position that was pronounced, albeit as obiter, in the Thuranira case. In any case in our view an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."[emphasis added].**

32. In the foregoing, I do not see any reason to depart from the trial court's finding of 100% liability on the part of the appellant and the same is hereby upheld.

b. Quantum

i. Pain and Suffering

33. As regards pain and suffering, the appellant argued that the award of Kshs.50,000 was high considering that the deceased died on the spot. It was his argument that the court should not make any award to the deceased estate under this limb.

34. On the other hand, the respondents submitted that the award of Kshs 50,000 was proper since the deceased suffered a lot of pain and suffering before his death.

35. In **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR** it was 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 award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."**

36. Furthermore, in ***Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased)*** paragraph 21 the Hon. Odunga J observed: -

> **"The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness… a distinction ought to be made between a case where the deceased passes away instantly and where the death takes placed some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).**

37. Similar emphasis was placed in ***Civil Case No. 56 of 2014 Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another [2016]*** eKLR where Hon. P. Nyamweya observed: -

> **"As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award**

a sum of Kshs 200,000/= for pain and suffering for this reason." (emphasis mine).

38. The above case law points to the fact that the ward of pain and suffering depends on whether the deceased died on the spot or after some time. That is, 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. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this latter case, the presumption is that the deceased experienced pain and suffering prior to his or her death unlike in the former.

39. The question before this court therefore is whether the award of Kshs 50,000 was high considering that the deceased died on the spot. I have looked at the case law submitted by both parties. I have also had a look at other cases as highlighted below.

40. 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/=.

41. In the case of ***Sukari Industries Limited vs 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:

> **"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."**

42. In the case of ***Simon Bogonko vs 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 persons in the cases had died on the spot.

43. In my view therefore, the award of Ksh. 50,000/= for pain and suffering is not manifestly excessive as there are High Court authorities to support it. In the circumstances, I see no reason to depart from the trial court's award and the same is hereby upheld.

ii. Loss of expectation of Life

44. As regards loss of expectation of life, the appellant submitted that the award of Kshs 150,000 was not justified and urged court to substitute the same with an award of Kshs 60,000.

45. This was opposed by the respondents who submitted that the same was reasonable as the deceased died aged 34 years and had prospects of staying longer in the world.

46. I have looked at the case law submitted by the parties and also looked at other cases highlighted below.

47. In **Anthony Konde Fondo & another v RMC (The Representative of FC (Deceased) [2020] eKLR,** Justice R. Nyakundi upheld an award of Kshs 150,000 where the deceased was a minor**.**

48. In **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 Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."**

49. In the case of ***Moses Akumba & Another vs Hellen Karisa Thoya [2017] eKLR***, Chitembwe J. held that an award of Ksh. 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high.

50. In the cases of ***Patrick Kariuki Muiruri & 3 Others vs Attorney General [2018] eKLR Sergon J***. made an award of Ksh. 200,000/= under this heading. In ***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*** an award of Ksh. 200,000/= was made.

51. Furthermore, in **Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR**, the court found an award of Kshs 100,000 as reasonable and not excessive and upheld the same.

52. Finally, 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,** the court held that an award of Kshs 200,000 was not excessive.

53. The above case law indicates that there exist authorities that support the award made by the learned trial magistrate. In any case, it has not

been shown that the trial court used the wrong principles in making the award for loss of expectation of life and in the absence of the same, there is no reason to interfere with the award of the lower court. It is therefore my considered view that the award of Ksh. 150,000/= for loss of expectation of life was not excessive and the same is hereby upheld.

iii. Loss of dependency

54. The appellant challenged the use of 26 years as the multiplier, Kshs 13,572/= as the multiplicand and dependency ratio of 2/3.

a. Multiplier

55. As regards the use of 26 years as the multiplier, the appellant's contention is that the trial court was wrong in applying 26 years as multiplier without any justifiable reasons and authority in support of the same. It was the appellant's argument that the deceased was not a civil servant wherein it could have been presumed that he was to remain in active work up to 60 years.

56. I have looked at a number of cases with similar and or almost similar cases which I highlight hereunder.

57. In **Mombasa Maize Millers Ltd vs W.I.M [2016] eKLR,** the deceased was stated to be aged 34 years at the time of death not married but blessed with a child, a multiplicand of Ksh.15,000/= and a multiplier of 20 years with loss of dependency of 2/3 was applied to calculate the award on lost years.

58. Similarly, in **Naomi Nyambura Karanja** suing as the administrators of the estate of **Simon Karanja Mirungu (Deceased) vs Zacharia Muteru Kadunga & Another [2017] eKLR** the court upheld a multiplier of 24 years for a deceased aged 34 years at the time of his death; to calculate loss of dependency.

59. Furthermore, in **P.N.M. & Another vs Telcom Kenya Ltd & Others [2015] eKLR**, the court applied a multiplier of 30 years for 26 years old deceased while in **Patrick Kanai Waweru** suing as legal representative of the estate of **Grace Njoki Kanai vs George Ogwilla & 2 Others HCCC No. 5 of 2012** on loss of dependency the court applied a multiplier of 24 years for 34 years old deceased, whose evidence showed she was involved in business during her life time.

60. In ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR*** the Court of Appeal stated that, **"The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason." In this case the learned magistrate reasoned that the deceased, who was 34 years old, "[C]ould have lived to the retirement age if it were not for the accident. There are also the vagaries of life."** In that case, the court awarded a multiplier of 26 years implying that the deceased could have worked until he was 60 years old.

61. In the circumstances, I find that the trial magistrate use of 26 years as reasonable and see no reason to disturb the same.

b. Multiplicand

62. The appellant submitted that the trial magistrate court was wrong in adopting a multiplicand of Kshs 13,572 without any sufficient reasons. It was his contention that since there was no proof in support of the plaintiff's claim on the earnings of the deceased, the court should not have used the multiplicand of Kshs 13,572.

63. The trial court indeed agreed that there was no proof adduced as to the amount the deceased used to earn. In the absence of the same, the court turned to the Regulation of wages (general) Amendment Order 2014 where the wages for unskilled labour were set at Kshs 13,572/-.

64. A number of cases that I have looked at point to the fact that the choice of multiplier and multiplicand are at the discretion of court. The same must however be exercised judiciously and with reason. In ***Cornelia Elaine Wamba vs Shreeji Enterprises Ltd. & Others [2012] eKLR***, the court stated,

> **"the choice of a multiplier or multiplicand is a matter of the Court's discretion which discretion has to be exercised judiciously and with a reason. Some of the factors to be taken into consideration by a court in the exercise of its mandate on the choice of the two are the age of the deceased, nature of the profession he was aged in, possibility of retirement from employment where the profession engaged in provides for a retirement age and, lastly, possibility of death through natural causes and departure for greener pastures elsewhere."**

65. In the case of ***Francis Righa vs Mary Njeri (Suing as the Legal Representative of the estate of James Kariuki Nganga [2021] eKLR***, the court of Appeal had this to say on the choice of multiplier and multiplicand to be adopted in assessing damages under Fatal Accident Act;

> **"…on the choice of a multiplier and multiplicand, we take it from the decision of the court in the case of Roger Dainty versus Mwinyi Omar Haji & Another 2004 that to ascertain a reasonable multiplier in each case, the court should consider relevant factors like the income of the deceased, the kind of work he was engaged in before his death, the prospects of promotion and his expectations of working life."**

66. Going by above decisions, the formula for assessment of dependency is the multiplicand that the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased as a result of premature death. The dependency ratio, is the fraction of the income that a person is expected to give to his dependents in his lifetime. If a person is married, it is expected that the person would spend 2/3 of his income to support his dependants but where the person unmarried it is accepted that 1/3 of his income utilized in support of his

dependants.

67. On the question of the multiplicand adopted by the trial court using a minimum wage guideline, it is apparent that the deceased was engaged in informal employment where it is difficult to tell the actual regular income. In such circumstances, the legal position is to adopt the minimum wage guideline as a guiding principle in assessing loss of income. This was the position adopted by court in ***Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu [2021] eKLR*.**

68. However, it seems that the trial court fell into error by applying non-existent provisions of the law. That is, there is no regulation of wages 2014. The only existing regulation on wages is that of 2015 namely, The Regulations of Wages (General) Amendment) Order 2015, Legal Notice No. 117 of 26th June 2015. Accordingly, I find that the trial court applied wrong provisions of the law and as a result, the same must be disturbed.

69. A look at the regulations 2015, which provides the minimum wage for different categories of workers shows that there is no categorization of boda boda riders, something that the court in ***Petronila Muli vs Richard Savi & another (Supra)*** acknowledged. In fact, the court noted that 'from the schedule, boda bodas are not classified which is an anomaly that should be rectified by the Ministry of Labour in their next review, because motorcyclist commonly referred to as boda bodas in Kenya are now a major employer of many youths if the number of motorcycles in Kenyan roads is anything to go by.'

70. Consequently, the court categorized boda boda riders in the comparable category of mechanist (motor vehicle repairers) laundry operators, light tractor drivers etc and determined their minimum wage as per the schedule, as Kshs. 10,840.50 for workers living in *''Other Areas''*.

71. In the instant case, it is notable that the deceased was a boda boda rider which was confirmed by the deceased wife PW2 Esther Wekesa in her testimony. The same was never challenged by the appellant herein. There is also every indication that the deceased was residing in Eldoret and in particular, Jua Kali. This was once again confirmed by PW2 during trial. The same remains unchallenged. The Residence of the deceased at time of his death is important in the application of the 2015 regulations since the same sets minimum wages depending on the location of the individual. That is, there are different wages for different localities. Eldoret town is considered other areas since it has not been listed in column 2 or column 3 and is thus excluded from the same.

72. As a result, the minimum wage is Kshs 10,840.50. This is the amount that this court adopts as the multiplicand. The amount of Kshs 13,572 is hereby set aside.

c. Dependency Ratio

73. The appellant challenged the 2/3 dependency ratio and argued that there was no proof of relationship between the deceased and the alleged dependants since no documents were adduced to show the relationship.

74. The respondents on their part argued that the dependency ratio was reasonable as the deceased was the sole bread winner of his family and relatives.

75. The court while applying 2/3 as the dependency ratio held that the deceased was married and that his dependants were his wife and children.

76. I have looked at the evidence of the parties, the submissions and the pleadings. PW 2 testified to the effect that she and the deceased had four children aged 14, 11, 9 and 6 years. On cross-examination, PW2 testified that she didn't have birth certificates of the children. She also testified that the deceased was the sole bread winner of the family. However, there is a letter from the chief confirming that the deceased had 4 children aged 14, 12, 9 and 5 years. Despite the slight difference in the ages as captured by the chief's letter, there is every indication that the deceased indeed had 4 children- a son and 3 daughters.

77. Courts have held that the dependency ratio, is the fraction of the income that a person is expected to give to his dependents in his lifetime. As such, if a person is married, it is expected that the person would spend 2/3 of his income to support his dependants but where the person unmarried it is accepted that 1/3 of his income is utilized in support of his dependants. This position finds support in a litany of cases. See ***Petronila Muli v Richard Muindi Savi & Catherine Mwende Mwindu [supra]*** and **Sidi Kazungu Gohu & Another (Legal Representatives of the Estate of George Yongo Katana (Deceased) vs Fatuma Abdi Mohamed & Another [2021] eKLR.**

78. In the circumstances, I see no reason to disturb the trial court's finding of 2/3 dependency ratio.

79. In terms of the total award under the loss of dependency therefore, this court takes into consideration the following cases;

80. In ***Nakuru HCCA No. 182 of 2003; Joseph Njuguna Mwaura VS Builders Den Ltd & Anor***, the deceased was 35 years old and was married with three children aged 18,16 & 6 years at the time of her death. The Court awarded Kshs 3,400,000/= for loss of dependency using the multiplier approach i.e. a multiplicand of Kshs 25,000/=, multiplier of 17 years and dependency ratio of 2/3.

81.In ***Kisii HCCA No. 39 of 2014; Marwanga Jeffern vs Jeckton Ochieng' & Anor*** an award of Kshs 1,600,000/= for loss of dependency was awarded for a deceased who died at the age of 30 and was survived by a widower and a 10-year-old son.

82. In ***Mombasa Maize Millers Ltd VS WIM (supra)***; the deceased was aged 34 years at the time of death, not married but had a 4-year-old son. The Court used the multiplier approach to award Kshs 1,600,000/= for loss of dependency i.e. multiplicand of Kshs 15,000/=, multiplier of 20 years and dependency ratio of 2/3.

83. In ***Machakos HCCC No. 51 of 2014 Florence Mueni Mbuva & Anor vs China Wu Yi Ltd***; the deceased died at the age of 30 and was survived by a wife and two sons aged 3 & 6 years. Using the multiplier approach, the Court awarded Kshs 11,944,800/= for loss of dependency i.e. multiplicand of Kshs 55,300/=, multiplier of 27 years and dependency ratio of 2/3.

84. In the instant case, the deceased was survived with a wife and 4 children aged 14, 12, 9 and 6 years. Furthermore, it is evident from the plaint that the deceased mother was also dependent on her as she is listed as a dependent.

85. The total loss of dependency is thus 10,840.50 x 26 x 12 x 2/3 =2,254,824.

iv. Special Damages

86. As regards special damages, the appellant disputed the amount of Kshs 109,344/- awarded and submitted that the same had not been proved via receipts since they do not bear the name of the deceased. His second argument was that the court ought not to have awarded the same for failure to comply with the provisions of Section 19 and 20 of the Stamp Duty Act.

87. This was opposed by the respondents.

88. It is indeed trite law that special damages must be specifically pleaded and strictly proved. I have looked at the receipts and is clear that that they are in relation to the deceased death. Whereas some may not bear the name of the deceased, they are all dated around the time of the deceased burial and also period of death. I therefore see no reason to disregard the same.

89. As regards the issue of Stamp Duty and the argument that the receipt does not comply with Section 19 and 20 of the Stamp Duty Act, I have looked at the case relied on by the appellant and indeed share the holding that Section 19 makes it clear that no document which is chargeable to stamp duty shall be received in evidence except in the case of the prescribed exception that is pursuant to Criminal Proceedings or if produced by the collector to recover duty unless stamp duty has been charged on it.

89. However, Section 19 is not absolute and is subject to Section 19(3) and Sections 20 and 21 that indicate that an instrument for which the law requires stamp duty to be paid is not necessarily inadmissible in Court and that the same may be admitted provided the stamp duty is assessed and paid together with any penalty arising therefrom. See ***Leonard Nyongesa v Derrick Ngula Righa [2013] eKLR*.**

90. In the foregoing, I find that the receipts are admissible as the appellant has not shown that the same has not been paid or that there is any penalty arising therefrom.

91. In the circumstances, I see no reason to disturb the same and it therefore stands.

92. The upshot is that the appellant's appeal partially succeeds and the court grants the award as follows: -

a. Pain and Suffering - Kshs 50,000/-

b. Loss of expectation of Life - Kshs 150,000/-

c. Loss of dependency - Kshs 2,254,824/-

d. Special Damages - Kshs. 109,344/-

TOTAL AWARD - Kshs.2,564,168/-

93. Costs shall be for the respondent.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY, 2022

E. O. OGOLA

JUDGE