**Bwire v Wayo & Sailoki (Civil Appeal 032 of 2021)**
**[2022] KEHC 7 (KLR) (24 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 7 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CIVIL APPEAL 032 OF 2021**

**JM MATIVO, J**

**JANUARY 24, 2022**

**BETWEEN**

**JOHN BWIRE ..... APPELLANT**

**AND**

**JORAM SAIDI WAYO & EULIANA NABALAYO SAILOKI (BOTH SUING ON BEHALF OF THE ESTATE OF BENJAMEN WAYO SAILOKI) ..... RESPONDENT**

***(An appeal against the Judgment decree of Hon. Khapoya S. Benson, Principal Magistrate delivered on 3rd June 2021, in Taveta Principal Magistrates Civil Case No. E1 of 2020)***

## JUDGMENT

Introduction

1. The appellant seeks to overturn the decision in PMCC No. E 1 of 2020, Taveta rendered on 3rd June 2021 by Khapoya S. Benson, Principal Magistrate on both liability and quantum of damages. In the said case, the Respondents had sued the appellant seeking recovery of general and special damages, loss of future income; lost years and or dependency; loss of expectation of life; pain and suffering before death arising from a road accident on 20th May 2020 in which a one Benjamin Wayo Saloki-deceased sustained injuries from which he died.

The Duty of a first appellate court

2. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the

witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd.& others*[1]). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited*: -[2]

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

3. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.[3]

4. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.[4] In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of *Civil Procedure Act*,[5] a court of first appeal can appreciate the entire evidence and come to a different conclusion.

The pleadings

5. In the Plaint dated 30th September 2020, the Respondents averred that on or about the 20th May 2020, the deceased was lawfully walking along Cess Road, (off the road), when the motor vehicle registration KCT 315 allegedly driven at a high speed by an authorized driver or agent of the appellant overtook a tricycle and, in the process, it lost control, veered off the road and knocked the deceased as a consequence of which he sustained injuries from which he died.

6. The appellant in its statement of defence dated 18th November 2020 denied liability and alternatively attributed the accident to the deceased's negligence wholly or substantially.

The evidence

7. The Respondents' case in the lower court rested on the evidence of two witness, namely, PW1, a Police Officer and PW2, Joram Sidi Wayo, the 1st Plaintiff. The appellant did not call any witnesses nor did he file Witness Statements. The only evidence on record is what was tendered by the Respondents.

1 {1968} EA 123.

2 {1958} E.A. page 424.

3 See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179.*

4 See *Kurian Chacko vs. Varkey Ouseph AIR 1969 Kerala 316.*

5 Cap 21, Laws of Kenya.

8. PW1, a Police Officer testified that a report was made at the Police Station about the accident. He testified that the vehicle overtook a tuktuk at high speed and in the process, it knocked down a pedestrian, namely, Benjamin Wayo Sailoki-deceased who was walking along the road and he died on the spot. He testified that the driver took off and abandoned the vehicle at Chachewa area and disappeared. His testimony was there is a continuous yellow line. He blamed the driver for the accident. He produced the police abstract report and Post Mortem report.

9. PW2, Joram Saidi Wayo, the 1st Plaintiff adopted his Witness Statement dated 30th September 2020. The substance of his evidence was that the deceased who was his father was born in 1965 and he was earning Kshs. 32,000/= per month from his farming business which he used to provide for his family. He testified that on the material day he learnt that his father had been involved in a fatal road traffic accident and he went to the hospital only to find he had died. He said he spent Kshs. 75,000/= for burial expenses and Kshs. 30,000/= to obtain letters of administration. He also obtained a Police Abstract report. It was his evidence that the accident was blamed on the driver of the motor vehicle KCT 315R.

10. In his judgment, the trial Magistrate observed that the defendant did not call evidence to rebut the Plaintiff's evidence. He held that the Plaintiff established liability at 100% basis against the appellant. He allowed special damages of Kshs. 30,000/= and funeral expenses of Kshs. 75,000/=. He awarded Kshs. 50,000/= for pain and suffering and Kshs. 200,000/= for loss of expectation of life. As for loss of dependency, he adopted a multiplier of 10 years, an income of Kshs. 13,572/= and a dependency ration of 2/3 and arrived at Kshs. 1,080,760/= making a total sum of Kshs, 2,330,760/=.

The appeal

11. The appellant seeks to overturn the judgment citing the following grounds: -

    a. That the learned trial Magistrate erred in law and in fact in making a finding of negligence against the appellant without evidence and in holding that the Respondents had proved their case on liability on a balance of probability.

    b. That the learned trial Magistrate erred in law in making findings on liability based on extraneous issues and or hearsay evidence and in failing to analyze and weigh the evidence against the rules of evidence before making any findings based on it.

    c. That the assessment of damages for loss of dependency, loss of expectation of life and pain and suffering were inordinately high as to represent an entirely erroneous estimate.

    d. That the learned trial Magistrate in assessing damages under the *Law Reform Act* and under the *Fatal Accidents Act* by failing to apply the correct principles in determining the same hence arrived at an erroneous assessment or estimate of damages.

12. The appellant prays that: -

    a. That the learned trial Magistrate's order on liability against the appellant be set aside and the suit against the appellant herein be dismissed with costs.

    b. That the award for pain and suffering, loss of expectation and loss of dependency be set aside and assessed downwards if the court finds liability was proved.

    c. That the costs in this appeal be given to the appellant.

Analysis of submissions and determination**

13. First, I will address the question of liability. As Sir Percy Winfield, quoted in *Clerk & Lindsell* on Torts[6] states:-

> " Tortuous liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redress-able by an action for un-liquidated damages."[7]

14. Negligence is defined in Charleswoth & Percy on Negligence[8] as: -

> " ...In current forensic speech, negligence had three meanings, they are: (a state of mind, in which it is opposed to intention; (2) careless conduct; and (3) the breach of a duty to take care that is imposed by either common law or statute. All three meanings are applicable in different circumstances but any one of them does not necessarily exclude the other meanings."

15. In *Blyth v The Company of Proprietors of the Birmingham Waterworks*[9] it was held inter alia:-

> " Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do..."

16. In *Halsbury's Laws of England*[10] it is stated: -

> " The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a causal connection must be established."

17. The appellant's counsel faulted the learned Magistrate's finding on negligence/liability for not properly addressing himself to the legal issues that had been raised by the appellant in binding case law supplied to him. He submitted that the appellants raised issues touching on the value of the evidence of PW1 and whether it alone would prove negligence and whether the Plaintiff proved negligence. He summarized the evidence of PW1, the Police Officer and argued that the trial court did not consider the probative value and weight of his evidence which was essentially hearsay evidence. He argued that the trial court conveniently did not rule on the issue. Also, he argued that he provided case law in support of the proposition that police evidence alone cannot prove negligence. He argued that the evidence of a police

6 15th Edition, London: Sweet & Maxwell, 1982, at page 1

7 *Winfield, Province of the Law of Tort, Page 32.*

8 *R.A. Percy, Charlesworth & Percy on Negligence, 8th Edition, London: Sweet & Maxwell, (1990), page 3*

9 {1856} 11 Ex 78, (E.R. Vol. CLV1 1047), A PAGE 1049

10 4th Ed at Para 662 ( page 476).

officer who was not at the scene of the accident at the time of the accident cannot be used to prove how an accident happened and cited *David Kajogi M'mugaa v Francis Muthoni*[11] which held: -

> " The trial court failed to observe and note that the investigating officer's report could not be said to be conclusive as to the occurrence of the accident and who was to blame as the officer was not at the scene at the time of the occurrence of the accident. That the report had no statements of eye witnesses. That the report was not thorough as both P.W.2. and D.W.1. admitted in their evidence there were witnesses to the accident. That no sketch plan was produced giving details as to the point of impact, where the deceased lied and where the vehicle stopped after the accident.
>
> I therefore do not agree that the evidence of an investigating officer alone can be conclusive as to who is to blame for the accident nor can it be said to be binding on the court and I hold such evidence is mere opinion to the court, which court can accept or reject for various reasons."

18. Additionally, counsel relied on *Kennedy Nyangoya v Bash Hauliers*[12] which held: -

> " In this matter, a police abstract was produced by PW1 to show that DW1 was to blame for the accident. DW1 was however not charged with a traffic offence. PW1 in his evidence informed the court that he was not the Investigating Officer. In my considered view, his evidence did not assist in any way to build the plaintiff's case. PW1 did not visit the scene of the accident or take any sketch plan or map of the area where the accident happened for production in court. Even if the police abstract indicated that DW1 was to blame for the accident, the said abstract was not conclusive proof of liability in the absence of evidence being called to support it. Another shortcoming in the appellant's case was the unexplained failure to call the Driver who was driving the matatu at the time of the accident."

19. Also, relied on *Fredrick Wichenje Ikutwa v Florence Mwikali*[13] in support of the proposition that in civil cases, the degree of burden of prove is on a balance of probabilities and refused to be persuaded by hearsay evidence since the witness was not at the scene of the accident. Additionally, he relied on *Florence Mutheu Musembi & Geofrey Mutunga Kimiti v Francis Karenge*[14] in which the court said: -

> " A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents."

11 {2012} e KLR.

12 {2016} e KLR.

13 {2020} e KLR.

14 {2021} e KLR.

20. He submitted that the Police Officer's evidence that the vehicle was over speeding and that he veered off the road and knocked down the deceased is hearsay and of zero probative value nor could the court make a finding on the point of impact. (Citing *Francis Mburu Njoroge v Republic*[15]). He argued that the trial court misdirected itself by relying on hearsay evidence. He submitted that the Respondent never discharged the burden of prove and cited Florence Mutheu Musembi & Geofrey Mutunga Kimiti v Francis Karenge[16] in support of the proposition that he who alleges must prove. He submitted that the burden vested on the claimant does not diminish even where a defendant fails to call any evidence in rebuttal, so, the trial magistrate was clearly misdirected. (Citing *Charterhouse Bank Limited (Under Statutory Management) v Frank N. Kamau*[17] and *Daniel Toitich Arap Moi v Mwangi Stephen Muriithi*[18]) He submitted that the case was prosecuted casually and cited *Halsbury Laws of England*:[19]

> " If the plaintiff only established facts which are equally consistent with the accident being the result of his own or the defendant negligence he cannot succeed. He cannot recover when the cause of the damage is left in doubt or is attributable with equal reason to some cause other than the defendant's negligence."

21. On his part, the Respondent's counsel cited *Bundi Makube v Joseph Onkoba Nyamuro*[20] which held that a Court of Appeal will not normally interfere with a finding by the trial court unless it is based on no evidence, or on a misapprehension of evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did. He also relied on the proposition that the court should consider that it did not see the witnesses testify. He argued that the appellant did not file a witness statement and or list of documents, but only filed a defense and submissions. This, he argued left the Respondent's evidence uncontroverted. He cited *North End Trading Company Limited v The City Council of Nairobi*[21]in support of the proposition that where a party fails to call evidence in support of its case, the party's pleadings are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated and have not been subjected to the required test of cross-examination. Also, that a defense in which no evidence is adduced to support it cannot be used to challenge the Plaintiff's case. He also relied on *Njeri Murigi v Peter Macharia & Another*[22] which held that pleadings, answers in cross examination and or submissions do not amount to evidence or defence. He argued that the learned trial magistrate correctly evaluated the evidence and took into account the submissions by both parties and made his findings that the accident was caused by the negligence of the appellant's driver. He argued that unlike the cases cited by the appellant, the appellant did not call witnesses. He argued that the Respondent's evidence was reliable, credible and admissible. Additionally, he submitted that the appellant did not show how the trial magistrate misapprehended the evidence on record or acted on wrong principles.

15 {1987} e KLR.

16 {2021} e KLR

17 {2016} e KLR

18 {2014} e KLR

19 4th Edition volume 34, Page 46 paragraph 54: at Page 47 Paragraph 55.

20 Civil Appeal No 8 of 1983.

21 {2019} e KLR.

22 {2016} e KLR.

22. The Plaintiff's counsel placed heavy reliance on several decisions which held that where a party fails to adduce evidence, its pleadings remain mere allegations which have not been proved. However, the applicability and relevancy of the said decisions to the facts and circumstances of this case is in doubt. It is settled law that a case is only an authority for what it decides. This is correctly captured in the following passage: -

> "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides...."

23. The ratio of any decision must be understood in the background of the facts of the particular case. It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it. It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.

24. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.

25. Whereas it is true that where a party fails to adduce evidence, its pleadings remain mere allegations is correct, this proposition is not a statement of general application to be applied blindly and without due regard to the facts and circumstances of the facts at hand. The peculiar facts of each case must be considered. As we all know, in both criminal and civil cases, the phrase 'burden of proof' is commonly said to be used in two quite distinct senses. In one sense it means 'The peculiar duty of him who has the risk of any given proposition on which the parties are at issue — who will lose the case if he does not make this proposition out, when all has been said and done.'[23] A basic test for determining which party has the burden of proof is contained in the judgment of Walsh JA in *Currie v Dempsey*.[24] His Honour stated "in my opinion [the legal burden of proof] lies on a plaintiff, if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action, eg if its existence is a condition precedent to his right to maintain the action. The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an "avoidance" of the claim which, prima facie, the plaintiff has."

26. "Burden of Proof" is a legal term used to assign evidentiary responsibilities to parties in litigation. The party that carries the burden of proof must produce evidence to meet a threshold or "standard" in order to prove their claim. If a party fails to meet their burden of proof, their claim will fail. The general rule in civil cases is that the party who has the legal burden also has the evidential burden. If the Plaintiff does not discharge this legal burden, then the Plaintiff's claim will fail. In civil suits, the plaintiff bears the burden of proof that the defendant's action or inaction caused injury to the Plaintiff, and the defendant

23 *James B Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) at 355.*

24 (1967) 69 SR (NSW) 116.

bears the burden of proving an affirmative defense. If the claimant fails to discharge the burden of proof to prove its case, the claim will be dismissed. If, however the claimant does adduce some evidence and discharges the burden of proof so as to prove its own case, it is for the defendant to adduce evidence to counter that evidence of proof of the alleged facts. If after weighing the evidence in respect of any particular allegation of fact, the court decides whether the (1) the claimant has proved the fact, (2) the defendant has proved the fact, or (3) neither party has proved the fact.

27. Talking about the legal burden and evidential burden of prove placed upon the Plaintiff by the law, I find it useful to recall *Mbuthia Macharia v Annah Mutua Ndwiga & another*[25] in which the Court of Appeal when dealing with the issue of burden of proof observed: -

> 'The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift" to the patty who would fail without further evidence?"

28. In every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. In my view, in the instant case, to meet this standard, the Respondent was required to do much more in the lower court as I will show shortly. As stated earlier, the Respondent's case in the lower court rested on two witnesses who were not at the scene. The Police Officer testified that a report was received at the Police Station. He was not at the scene. His testimony on how the accident occurred is not direct evidence but secondary evidence. Similarly, PW2, only learnt about the accident and went to the hospital only to find that the deceased had died. He was not at the scene. None of the two witnesses could give an account on how the accident occurred. None of them could give an eye witness account. Eyewitness testimony is critical in both criminal and civil trials, and is frequently accorded high status in the courtroom.

29. Direct evidence is evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof.[26] Direct evidence is a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts. Examples of direct evidence are when a person testifies that he/she:- saw an accused commit a crime, heard another person say a certain word or words, or observed a certain act take place.[27] If, for example, a witness testifies that it was raining outside, this personal knowledge is direct proof to show that it was raining.

30. "Direct Evidence" is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact. So Direct Evidence is real, tangible, or clear evidence of a fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion.

25 Civil Appeal No. 297 of 2015 {2017} e KLR.

26 *Black's Law Dictionary, Sixth Edition*.

27 Black's Law Dictionary, Sixth Edition.

31. The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the Plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the appellant to rebut since the Respondent had not discharged the legal burden of prove. However, he was blinded by the mere fact that the appellant never called evidence and overlooked binding decisions cited by the appellant before him. At that point it was irrelevant that the appellant never adduced evidence at all because there was nothing to rebut. On this ground alone, I allow this appeal in its entirety

32. Notwithstanding my above finding, I will address the question quantum of damages. The appellant's counsel submitted that assessment of damages is an exercise of discretion and the court cannot interfere with it unless the conditions set out in *Hidaya Ilanga v Mangema Manyoka*[28]are established. He described the award as arbitrary and urged the court to set it aside. He pointed out that the Magistrate did not list assessment of damages as one of the issues for determination. Also, he argued that the learned Magistrate just gave figures plucked from the air. He pointed that the learned Magistrate did not consider any case law nor did he explain how he arrived at different heads of damages. He argued that the Magistrate overlooked all the relevant principles in assessing the damages. He also argued that the awards are inordinately high and urged this court to interfere.

33. Counsel urged the court to re-assess the damages in the event it finds that liability was proved. He submitted that the evidence tendered was that the deceased was a farmer aged 55 years earning Kshs. 32,000/= per month but no evidence was tendered to support this position. He pointed out that the deceased had 5 children aged between 26 to 36 years who are not children within the meaning in the *Children Act* because they were all above 18 years. He relied on *Philip Kiplimo Tuwa v Elkana Kipserem Ngetich (suing as legal administrative of the estate of Esther Jeptooo Deceased*[29] and *Gerald Mbale Mwea v Kariko Kihara & Another*[30]in support of the proposition that dependency is a question of fact, and, that, the listed dependants are aged 26 to 36 years and no evidence was tendered to show that they were being supported by the deceased.

34. Counsel argued that in absence of cogent evidence on income, the Insurance (Motor Vehicle Third Party Risks (Amendment) Act 2013 Section 2 provides that the court should be guided by the Minimum Wage prevailing at the given time. He submitted that the deceased was a farmer based at Taveta, so the applicable order would be Legal Notice No. 3 dated 19th December 2018 published on 8th January 2019 Regulation of Wages (Agricultural Industry) (Amendment) Order 2018 the deceased having died on 20th May 2020. The wage for an unskilled farmer like would be Kshs. 6,736.30. He submitted that the trial court misdirected itself in adopting The Regulation of Wages General (Amendment) Order 2018 which does not apply to farmers, and also wrongly branded the deceased as a gardener while the evidence was that he was a farmer. He submitted that the adoption of a Minimum Wage of Kshs. 13,592.90 was misplaced.

28 {1961} EA 705.

29 {2009} e KLR.

30 {1997} e KLR.

35. Regarding the multiplier, he suggested 3 years and cited *Julius Maina Muthoni v Alfred Kinyanjui Wainaina & Another*[31] in which the court adopted 1 year for a 54-year-old deceased person; *Jacob Ayinga Marya & another v Simon Obayo*[32] in which the court applied 7 years for a deceased aged 53 years. He submitted that the multiplier of 10 years was arbitrary.

36. Regarding the dependency ratio, counsel submitted that under this head the court gave a ratio $\frac{2}{3}$ without any explanation or evidence of dependency. He argued that the dependents were adults between 26 years to 36 years, so they should have been the ones supporting the deceased. He however suggested that for adult dependents, 3 years would suffice. He proposed Kshs. 107,780.80/= arrived at using an income of Kshs. 6,736.30, a multiplier of 3 years and a ratio of 1/3.

37. As for loss of expectation of life, he argued that the award of Kshs. 200,000/= was inordinately high and citing *M K & Another v E O O*;[33] *Morris Gitonga (Suing as the legal representative of the estate of B M) v Morris Mutunga Kyaula & Another*[34]and *Francis K. Righa v Mary Njeri (Suing as the legal representative of the estate of James Kariuki Nganga*[35] he urged the court to award Kshs. 100,000/ =under this head. As for damages for pain and suffering, he argued that they are usually minimal and urged the court to award Kshs. 20,000/= arguing that the Kshs. 50,000/= is excessive for a person who died on the spot.

38. The Respondent's advocates on quantum of damages submitted that assessment of damages is a discretion of the trial court and this court exercising its appellate jurisdiction cannot interfere with the award(s) just because it would have arrived at a different assessment. (Citing *Catholic Diocese of Kisumu v Tete*.[36]). On pain and suffering and loss of life expectation, he submitted that the amounts awarded are not excessive. On special damages, he argued that the appellant never submitted on the same. On loss of dependency, he submitted that the deceased children qualify as dependents under the *Fatal Accidents Act* their age notwithstanding. He argued that the court cannot be faulted for adopting a ratio of $\frac{2}{3}$. As for proof of income, he argued that they cannot be proved by way of documents alone. (Citing *Jacob Ayiga Maruja & Anor v Simeon Obayo*[37]).

39. He argued that the applicable minimum was The Regulation of Wages (General) (Amendment) Order, 2018 as contained in Legal Notice No. 2 of 2018. He submitted the comparable occupation of a farmer in the minimum statutory wage is that of a gardener who pursuant to The Regulation of Wages (General) (Amendment) Order, 2018 as contained in Legal Notice No. 2 of 2018, being Kshs.13,572.90/= per month.

31 {2008} e KLR.

32 {2005} e KLR

33 {2018} e KLR.

34 {2017} e KLR.

35 {2020} e KLR.

36 {2004} e KLR.

37 {2005} e KLR.

40. He argued that the choice of a multiplier is a discretion of the court so the trial Magistrate cannot be faulted for failing to adopt the multiplier suggested by the appellant. He argued that the trial court cannot be faulted for adopting a multiplier of 10 years. He cited *Jacob Ayiga Maruja & Anor v Simeon Obayo*,[38] *Channia Shuttle v Mary Mumbi*[39] where the court adopted a multiplier of 9 years for a 56-year-old deceased and *Joseph Mwangi Wanyeki v Alex Muriithi Mucoki & Anor*[40] where the court adopted a multiplier of 10 years for a deceased farmer who died aged 57 years old therein. He argued that the multiplier of 10 years applied in this case cannot be faulted.

41. It is settled law that an appellate court will not interfere with an award of general damages by a trial Court unless:- (a) the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of principles; or (c) where the trial court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial court acted under a misapprehension of facts; or (e) where injustice would result if the appellate court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.[41] In *Kivati v Coastal Bottlers Ltd*[42] the Court of Appeal stated:-

> " The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

42. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. In the Ghanian case of *Mensah v Amakom Sawmill*[43] Apaloo, J. (as he then was)[44] articulated how difficult the subject of assessment of damages is and turned to the judgment of Lord Wright in *Davies v Powell Duffryn Associated Collieries Limited*[45] for support. This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. Lord Wright said: -

> " There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will

38 {2005} e KLR

39 {2017} e KLR

40 {2019} e KLR.

41 See *Dumez (Nig) Ltd v Ogboli* {1972} 3 S.C. Page 196." Per BADA, J.C.A (P. 28, paras. C-G) -

42 Civil Appeal No. 69 of 1984.

43 [1962] 1 GLR, 373,

44 Apaloo J later became a High Court Judge of Kenya, Court of Appeal Judge in Kenya, and Chief Justice of Kenya

45 [1942] 1 All ER, 657

generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties,..."

43. Some of the uncertainties or questions asked are: -

a) How long would the deceased have continued to live if he had not met this particular accident?

b) How much working life did he have? This second question brings into focus the deceased's state of health and age.

c) Some of the uncertainties taken into account in rolling down the amount are: - the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time.[46]

44. Lord Wrights rule, which was applied by other decided cases, was admirably summarized in *Charlesworth on Negligence*[47] as follows: -

> " Method of calculating damages: When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.' The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependents and the probable duration of the continuance of the deceased's assistance to the dependents during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependents in consequence of the death."

45. As Holroyd Pearce, L.J. said- "since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury." He was however, of the view that arithmetical calculations do not provide a substitute for common sense.[48] As was held in *Beatrice Wangui Thairu v Hon. Ezekiel Barng'etuny & Another*[49] cited *Rev. Fr. Leonard O. Ekisa & Another v Major Birgen*,[50] there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case.

46 *de Graft Johnson v Ghana Commercial Bank (Royal Exchange Assurance Ltd 3rdParty) [1977] 1 GLR 179*, Edusel, J.

47 (3rd Edition), pp 560 & 561, para. 909.

48 See the case of *Daniels v. Jones [1961] 1 WLR 1103 @ 1110 – C.A.*

49 Nairobi HCCC No. 1438 of 1998 unreported

50 [2005] e KLR

Lastly, as was stated in *Hannah Wangaturi Moche & Another v Nelson Muya*[51] in determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.

46. Having accentuated the applicable principles in cases of this nature, I now turn to this case. In the impugned judgment, the learned Magistrate replicated the pleadings, the evidence, the parties' submissions and proceeded to analyze the evidence, albeit briefly. At page 26 of the judgment the learned Magistrate stated:-

> " From the foregoing and in finality I find and hold that the Plaintiffs successfully on a balance of probabilities, established their case against the defendant. I this enter judgment in favour of the Plaintiffs against the defendant.
>
> Final orders
>
> Liability assessed at 100% against the defendant.
>
> Quantum
>
> a. Special damages.....Kshs. 30,000/=
>
> b. Funeral expenses.....Kshs. 75,000/=
>
> Total.....Kshs. 105,000/=
>
> General damages
>
> c. Pain and suffering.....Kshs. 50,000/=
>
> d. Loss of expectation of life.....Kshs. 200,000/=
>
> e. Loss of dependency.....Kshs. 13,572x12x10x2/3= Kshs.1,080,760/=
>
> Total.....Kshs. 1,330,760/=

47. The learned Magistrate listed the finding on liability and the above figures as his final orders. There is no discussion on how he arrived at the liability or the said figures, or what considerations or principles he considered in arriving at what he termed as final orders. A lot of paper and ink was deployed rehashing the Plaint, the defence, the evidence and the submissions which are duplicated almost word for word. But more important is the failure to provide reasons to support the final orders, particularly, how he arrived at the said orders.

48. The form and contents of a judgment is provided for under Order 21 Rule 4 of the *Civil Procedure Rules, 2010* which provides in clear terms that "Judgment in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reason for such decision." Order 21 Rule 5 provides that a court shall state its decision on each issue. In fact, failure to determine all the issues raised in the pleadings is so serious that in *Chandaria v Nyeri*[52] the court observed that failure to deal with many of the issues makes the judgment unsatisfactory and amounts to a mistrial.

51 Nairobi HCCC No. 4533/1993.

52 {1982} KLR 84 at 85.

49. The giving of reasons is a normal incident of the judicial process.[53] The obligation to explain how, and why, a particular decision has been reached stems from the common law. This duty has a constitutional dimension as well.[54] This is consistent with the dictates of the Constitution.

50. The benefits of giving reasons cannot be understated. First, it enables the recipient to see whether any appealable or reviewable error had been committed, thereby informing the decision whether to appeal, or let the matter lie. Second, it answers the frequently voiced complaints that good and effective judicial process could not win support or legitimacy unless it is accountable to those whose rights are affected. Third, the prospect of public scrutiny provides a disincentive not to act arbitrarily. Fourth, the discipline of giving reasons could make decision-makers more careful, and rational. Fifth, the provision of reasons provides guidance for future cases. The merits of giving reasons can never been doubted.

51. The giving of reasons for a judicial decision serves at least three purposes. First, it enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the court decision.[55] Thus, the articulation of reasons provides the foundation for the acceptability of the decision by the parties and by the public. Second, the giving of reasons furthers judicial accountability. As Professor Shapiro said: -

> " ... A requirement that judges give reasons for their decisions — grounds of decision that can be debated, attacked, and defended — serves a vital function in constraining the judiciary's exercise of power."[56]

52. Third, under the common law system of adjudication, courts not only resolve disputes — they formulate rules for application in future cases.[57] Hence, the giving of reasons enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will probably be decided in the future. The next question is what are adequate or sufficient reasons? Regrettably, this question does not admit of a simple answer. It is always a matter of degree. Judges, acting reasonably, may have quite different views on this subject. What seems to be clear is that there must be some process of reasoning set out which enables the path by which the conclusion was reached. This path of reasoning is missing from the judgment showing how the damages were arrived at.

53. A court, though obliged to give reasons, is not required to address every submission that was advanced during the course of the hearing. As long as the reasons deal with the principal issues upon which the decision turns, they will normally pass muster. Plainly, judges are not expected to deal specifically with every consideration that passes through their minds as they proceed to their conclusion. However, any submission that is worthy of serious consideration should, ordinarily, receive some attention in the reasons provided. In that regard, courts should endeavour to recognize and give effect to the importance of providing adequate reasons. The extent to which a court must go in giving reasons is incapable of

53 *Public Service Board of New South Wales v Osmond (1986) 159 CLR 656 ('Osmond').*

54 *Wainohu v New South Wales (2011) 243 CLR 181*. In Wainohu, legislation which empowered Supreme Court judges to make specific declarations and decisions, but included a provision stating that any judge making such an order was not required to provide reasons, was held to be invalid. The exemption from the duty to give reasons was repugnant to institutional integrity and incompatible with the exercise of judicial power. At the same time it was recognised that not every judicial order need be accompanied by reasons.

55 See McHugh JA in Soulemezis v Dudley Holdings

56 In Defence of Judicial Candor (1987) 100 Harv L Rev 731 at 737

57 Taggart "Should Canadian Judges Be Legally Required to Give Reasoned Decisions In Civil Cases" (1983) 33 University of Toronto Law Journal 1 at 3-4.

precise definition.[58] Reasons given should not be read pedantically, but sensibly,[59] provided the reasons expose 'the logic' of the decision, and contain findings on those matters of fact essential to that logic, they would normally be adequate.[60]

54. If it is not possible to understand from the judgment how the final orders were arrived at, then plainly those reasons will be inadequate. The reasons should trace the major steps in the reasoning process so that anyone reading them can understand exactly how the decision-maker reached his or her conclusion. The legal principles applied should be evident from the judgment.

55. If the reasons are poorly expressed, and anyone reading them is left to speculate as to the possible route by which the result was achieved, the reasons will fail. The reasons must demonstrate that a finding of fact was based upon logically probative evidence. If they do not do so, an appellate court will not strain to find a basis upon which the decision can be upheld. The duty to give reasons is, of course, an integral part of any courts task in deciding a case. I would add that it is also an important part of any courts task in ruling upon a procedural question, an interlocutory issue, or determining an evidentiary point.[21]The absence of reasons is a serious omission which renders the award on damages arbitrary and undefendable in law.

    The dependants are said to be aged between 26 and 36 years. There was no attempt to show that at their age they were depending on their father. As authorities suggest, dependency is a question is fact. It must be proved by way of evidence. To me, dependency was not proved and there was no basis for awarding damages under this head. In view of my conclusions herein above on quantum, it is my finding that the appeal on quantum of damages succeeds. On this ground alone, I allow the appeal and set aside the entire award on damages.

56. Notwithstanding my above finding, I will address the question of quantum of damages in the event my findings on liability and quantum are found to be wrong. The deceased was said to have been a farmer. Of course, no details were provided to explain the kind of farming, the products and the market or even the size of the firm. There was no evidence that the farm collapsed upon his death. The amount applied as income was in my view on the higher side.

57. However, in my view, the multiplier of 10 years is not unreasonable and if I were to award damages, I would still apply it and allow the amount of Kshs. 6,736.30 suggested by the appellant's counsel as reasonable income. As for the ration, a dependency ratio of $\frac{1}{3}$ is reasonable. On loss of life expectation, I would not disturb the amount of Kshs. 200,000/= awarded. I also find no reason to disturb the Kshs. 50,000/= for pain and suffering. I would also leave the award on funeral expenses undisturbed which are special damages. The legal fees of Kshs. 30,000/= cannot be special damages because the Plaintiffs had first to attain locus standi to sue. The foregoing constitutes my view of reasonable award of damages If I were to make such an award.

Conclusion

58. In view of my findings on liability and quantum, the inevitable conclusion is that this appeal is merited and therefore it succeeds. I allow it and substitute the judgment of the learned Magistrate dated 3rd

[58] See *Telstra Corporation Ltd v Arden {1994} 20 AAR 285. Burchett J.*

[59] *Dodds v Comcare Australia (1993) 31 ALD 690, 691.*

[60] Ibid.

June 2021 with an order dismissing the Plaintiffs suit with no orders as to costs. Each party shall bear his costs for this appeal.

Orders accordingly

**SIGNED, DATED AND DELIVERED VIRTUALLY VOI THIS 24TH DAY OF JANUARY 2022**

**JOHN M. MATIVO**

**JUDGE**