REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 136 OF 2019

BETWEEN

KIOKO PETER.....APPELLANT

-AND-

BEATRICE KELI MBUVI

***(suing as Legal Representative of the Estate of* AMOS MUTUNGA (Deceased).....RESPONDENT**

(Being an appeal from the Judgment of the Honourable Magistrate

at Machakos Law courts by Hon. Ms. Kenei dated 3rd October, 2019

in CMCC No. 300 of 2016)

BEATRICE KELI MBUVI

***(suing as Legal Representative of the Estate of* AMOS MUTUNGA (Deceased).....PLAINTIFF**

-VERSUS-

KIOKO PETER.....DEFENDANT

JUDGEMENT

1. The Respondent herein sued the Appellant in her capacity as legal representatives of the Estate of **Amos Mutunga** (Deceased) who died on the 3rd day of November, 2014 following injuries received in a road traffic accident involving the appellant's motor vehicle registration no. KBX 382V and KAH 034F. The suit was in respect of a claim for compensation under both the ***Fatal Accidents Act*** and the ***Law Reform Act*** in which the Respondents claimed General Damages, Special Damages, Costs and Interests.

2. In her judgement dated 3rd October, 2019, held the Appellant 100% liable and then proceeded to assess the quantum of damages. In the absence of proof of what the deceased was earning, the learned trial magistrate relied on ***Regulation of Wages (General Amendment) Order*** of 2018 which came into force on 1st May, 2018 and which placed the wages of a driver of medium sized vehicle at Kshs 23,039.40. As regards the multiplier she found that the deceased who was aged 38 years would have worked up to 50 years bearing the nature of his work and bearing in mind the vagaries and uncertainties of life and opined that 12 years was reasonable. On dependency, she found that since the Plaintiffs were a cousin and an aunt and stated that the deceased had fathered a child and produced a birth certificate the ratio of 2/3rds was reasonable in calculating the loss of dependency. In her judgement, loss of dependency was Kshs 6,635,344.20; pain and suffering was Kshs 20,000/=; pain and suffering was Kshs 100,000/- and special damages came to 124,300/- based on the receipts produced. She however found that since her pecuniary jurisdiction was limited to Kshs 5,000,000/- she could only award the same which she did with costs and interests.

3. This appeal, which only challenges the quantum of damages, is based on the following grounds:

1) The Honourable Magistrate erred in law and in fact in awarding loss of dependency at Kshs. 6, 635, 344.20/= which amount was excessive, exorbitant and unwarranted in light of the evidence adduced.

2) The Honourable Magistrate erred in law and in fact in awarding loss of dependency at Kshs. 6, 635, 344.20/= without factoring the loss of dependency ratio of 2/3 and even after factoring the amount will be Kshs. 2, 211, 782.40 which amount is still excessive, exorbitant and unwarranted in light of the evidence adduced.

3) That the Learned Magistrate erred in law and in fact in failing to deduct the award of Loss of Expectation of life of Kshs. 100,000/= under the rule of Thumb

4) The Honourable Magistrate erred in law and in fact in awarding pain and suffering at Kshs. 20, 000/= which amount was excessive, exorbitant and unwarranted in light of the evidence adduced.

5) The Honourable Magistrate erred in law and in fact in awarding Special Damages at Kshs. 124, 300/= which amount was not strictly proved

6) The Honourable Magistrate erred in law and in fact by failing to take into consideration the Appellant's written submissions on record.

7) The Honourable Magistrate's finding and decision were against the weight of the evidence adduced.

4. On behalf of the appellant, it was submitted that the award for Loss of dependency in the sum of Kshs. 6, 635, 344.20/= was erroneously calculated having regard to the salary, years, multiplicand and the ratio applied in the said judgment. According to the Appellant, the total award as per the Magistrate would aggregate to Kshs. 2, 211, 782.40 /=. According to the Appellant, in making the said award the learned trial magistrate did not factor the loss of dependency ratio of 2/3 and that had that been done the award would have been Kshs. 2, 211, 782.40.

5. It was however the Appellant's submission that even the said award of Kshs. 2, 211, 782.40/= was excessive and unwarranted in light of the evidence adduced.

6. The Appellant faulted the learned trial magistrate for arriving at the said award when it was clear that there was no proof on the amount of salary the deceased used to earn. While the Respondents alleged that the deceased used to be a *matatu* driver before his demise, she failed to produce a valid License to drive a public Service Vehicle and the one which was produced by the plaintiff was issued on 21/04/2009 and expired on 20/04/2011. From, the record, it was submitted, the alleged accident occurred on 3/11/2014 long after the License to drive a public Service Vehicle produced by the plaintiff had expired. Accordingly, there was no evidence that at the time of his death, the deceased was gainfully employed. It was therefore submitted that in the absence of any evidence as to the deceased's earnings, the Court ought to have adopted the multiplicand of Kshs. 8, 579/= which was the minimum wage at the time of the deceased's demise as per legal Notice No. 71 of 2012. In support of this submission the Appellant relied on **Kimilili Hauliers Limited vs. Maurice Msindano Musungu (Suing as dependant of Jackson Odhiambo Okoth Deceased) [2012] eKLR** and urged the Court to set aside the multiplicand of Kshs. 23, 039.40/= and substitute therefor Kshs. 8, 579/=.

7. The Appellant also cited **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini –vs- A.M. Lubia & Olive Lubia [1982 – 88] 1 KAR 727** at page 730, on the principles for interference with an award by the appellate court and it was urged that the trial court did not consider the submissions and the authorities cited by the Appellant when arriving at its judgment.

8. It was further submitted that the Learned Magistrate erred in law and in fact in failing to deduct the award of Loss of Expectation of life of Kshs 100, 000/= under the rule of the thumb. According to the Appellant, since this was a fatal injury claim brought under the ***Fatal Accident Act*** and the ***Law Reform Act,*** the Court has to take account the possibility of double compensation and deduct the award from the final figure as the beneficiaries entitled to the deceased's estate are the same persons to benefit under ***Fatal Accidents Act***. The authority for this position was the same case of **Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini –vs- A.M. Lubia & Olive Lubia [1982 – 88] 1 KAR 727** (supra). As well as **Joseph Wachira Maina & Another vs. Mohammed Hassa (2006) eKLR**.

9. The learned Magistrate was also faulted for making an award of Kshs 20, 000/= despite the fact that the Deceased died on the same day. In support of this position the Appellant relied on **New Kenya Co-Operative Creameries Ltd (Formerly Kenya Co-Operative Creameries) & Another vs. Chebusit Arap Langat [2013] eKLR** wherein **Sergon, J** awarded Kshs. 10,000/= for pain and suffering where the deceased died on the same day. The Court was urged to set aside the said award of Kshs. 20, 000/= being the Award for pain and suffering and be substitute therefor Kshs. 10, 000/=.

10. As regards special damages, it was submitted that the same must not only be specifically pleaded but also strictly proved by way of production of receipts which adhere to the provisions of the ***Stamp Duty Act*** which the Respondents failed to comply with and as such the claim for special damages ought to have failed. Accordingly, it was submitted that the trial court erred in making an award of Kshs. 124, 300/= in that regard, reliance being placed on the holding in the case of **Zachariah Waweru Thumbi vs. Samuel Njoroge Thuku [2006] eKLR** and it was submitted that the said award was not strictly proved by production of original receipts.

11. It was therefore urged that this Appeal ought to be upheld and the award of the lower court be adjusted accordingly.

Respondents' Case

12. In opposing the appeal, it was submitted on behalf of the Respondents that the Appellate court will only interfere with the trial's court

findings on quantum if the same is too high or excessively low and the Respondents cited, as authority for this proposition, **Rook vs. Rairrie** [1941] 1 ALL E.R. 297 as echoed with approval in **Butt vs. Khan** [1981] KLR 349, **Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini vs. A.M. Lubia and Olive Lubia** (1982 –88) 1 KAR 727 at p. 730 and **Gicheru vs. Morton and Another (2005) 2 KLR 333** . In addition, reliance was placed on **Daniel Kosgei Ngelechi vs. Catholic Trustee Registered Diocese of Eldoret & Another [2013] eKLR** where the court cited with approval the case of **Kigaragari vs. Aya (1982-88) 1 KAR 768.**

13. Regarding the award of loss of dependency, it was submitted that the Trial Court rightly held that the deceased was earning salary per month as a driver of public service vehicle driver based on examination in chief averred that (the deceased) was a public service vehicle driver and used to earn Kshs. 45,000/= from the same which was repeated during cross-examination and that this evidence was neither challenged, controverted or disproven by the Appellant. According to the Respondent, the duty of a Plaintiff is to prove the case on the balance of probabilities and that it is not requirement that the parties produce strict and fast documentation to prove income and earnings. Accordingly, reliance was placed on **Jacob Ayiga Maruja & Another vs. Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR**, and **Siyaram Enterprises & Another –vs. Samuel Nyachani Nyachani (2015) eKLR**. To the Respondents, PW1's evidence on earnings of the deceased having neither being disputed nor disproven by the Appellant, the Court was correct in awarding monthly salary that the deceased was earning at Kshs. 23,039.40/**-.**

14. According to the Respondents, the learned trial magistrate rightly adopted the minimum wage as contained in the ***Regulations of Wages (General Amendment) Order*** of 2018 which came into force on 1st May, 2018 as opposed to the one contained in legal Notice No. 71 of 2012.

15. According to the Respondents, the trial court did not err in applying a dependency ratio of two-thirds and they relied on the decision of the Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another vs. Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** where the said court stated that the choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason.

16. The Respondents cited the meaning of "dependant" under Section (4) (1) of the ***Fatal Accidents Act***, it is clear who a dependant for whose benefit a claim under the said Act can be brought and submitted that in this case the evidence was that the deceased was blessed with 1 issue and a birth certificate was produced. From the said birth certificate, it's clear that the child was aged 14 years at the time of the demise of the deceased. It is obvious that child depended on the deceased financially and emotionally. It was submitted that there was evidence from PW1 that the deceased used to help with providing for the children and paying schools fees and this evidence was neither challenged nor disproven by the Appellant either. The Respondents relied on **Theta Tea Company Ltd & Another vs. Florence Njau Njambi NRB CA Civil Appeal No. 64 of 2000[2002] eKLR**, and submitted that the Court was correct in awarding a dependency ratio of two-thirds.

17. As regards the multiplier, it was submitted that based on **FMM and Another vs. Joseph Njuguna Kuria (2016) eKLR**, **Benedeta Wanjiku Kimani vs. Changwon Cheboi & another [2013] eKLR**, **Innocent Ketie Makaya Denge vs. Peter Kipkore Cheserek & another [2015] eKLR** that in the instant case evidence on record as adduced by the Plaintiff's/Respondents very well indicate that the deceased was of good health prior to the accident. Indeed, the Plaintiff submitted that the deceased may as well as lived for a further 35 years if life had not been cut short by the accident. A multiplier of 12 years under the current modern expectation of life, it was submitted was quite low. According to the Respondents, it is not disputed that the deceased was aged 38 years at the time of his death. The retirement age in Kenya is 65 years and not 60 years as pointed out by the Court. It was also not proven by the Appellant that the deceased suffered from any physical aliment that would have led to the deceased not working for 60 years. As such it was prayed that the multiplier of 16 years as adopted by the lower court be upheld.

18. As regards the submission that the award under the ***Fatal Accident Act*** ought to have been deducted from the award under the ***Law Reform Act*** the Respondents relied on the decision of the Court of Appeal in **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015] eKLR** where the learned Judges expressed themselves 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 Dependants 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:-**
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> **"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.**
>
> **7. 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 Dependants 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."

19. Based on the said judgement, it was submitted that the trial court was correct in its judgment.

20. Regarding the award for special damages, it was submitted that though the Appellant's advocate had invoked Section 10 of the ***Insurance (Motor Vehicle Third Party Risk) Act*** as amended vide the ***Insurance (Motor Vehicle Third Party Risk) (Amended) Act no. 50 of 2013*** Section 3(b) which was to the effect that the award given for general damages shall include medical and any other expenses which may have been incurred as a result of the accident being claimed by the plaintiff, the Appellant's advocate did not annex any recent decisions to support the said claim. Accordingly, it was submitted that Sections 107 to 109 of the ***Evidence Act*** the court was correct in awarding special damages as proven by the Respondents of Kshs. 124,300/=.

21. It was therefore urged that this appeal ought to be dismissed with costs to the Respondent.

Determinations

22. In this appeal, the appellant is only challenging the quantum of damages. 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."

23. 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…"

24. 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."

25. The first issue was whether the learned trial magistrate's calculation of the award for loss of dependency was correct. In her judgement, the learned trial magistrate applied the multiplicand of Kshs 23,039.40 with a multiplier of 12 and dependency ratio of 2/3rds. That ought to have been 23,039.40 x 12 x 12 x 2/3rds which comes to 2,211,782.40. It is therefore true that the award of Kshs 6,635,344.20 was arithmetic error which could as well have been corrected by the invocation of the slip rule pursuant to section 99 of the ***Civil Procedure Act***.

26. The Appellant however still has a problem with the said award on principle. According to him, there was no evidence of the deceased's earnings since the driving licence relied upon had expired by the time of the deceased's death and there was no evidence that he was earning Kshs 23,039.40. According to the Appellant, the Court ought to have adopted a multiplicand of Kshs. 8, 579/= which was the minimum wage at the time of the deceased's demise as per legal Notice No. 71 of 2012.

27. It is therefore clear that the Appellant does not dispute that the deceased was entitled to some amount in terms of earning. His issue is as regards the amount to be adopted. In her judgement, the learned trial magistrate found that in the absence of proof of what the deceased was earning, ***Regulation of Wages (General Amendment) Order*** of 2018 which came into force on 1st May, 2018 would apply and under it, the wages of a driver of medium sized vehicle at Kshs 23,039.40.

28. In her evidence, PW1 testified that the deceased was earning Kshs 1,000/- per day and exhibited the driving licence and PSV Permit. On the other hand, PW2 testified that the deceased was earning Kshs 1,500/- per day in cash. After considering the evidence on record, the learned trial magistrate found that the deceased was a driver but in the absence of evidence of the actual earnings and based on the prevailing wage guidelines, the reasonable amount in the circumstances was Kshs 23,039.00. **Mshila, J** in **Kimilili Hauliers Limited vs. Maurice Msindano Musungu (Suing as dependant of Jackson Odhiambo Okoth Deceased) [2012] eKLR** while adopting the multiplicand as Kshs. 5,000/= held that:

"in the absence of evidence as proof of income the Government minimum wage guideline for unskilled labourers set by the Ministry of Labour be applied."

29. Section 2 of the ***Insurance Motor Vehicle Third Party Risks Amendment Act, 2013*** states that:-

> **"'earnings' means revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007 or the determination of the reasonable income, whichever is higher."**

30. In **Priscilla Mwathimba-vs-Simon Kaibunga & Another Meru CA 132 of 2008**, the Court opined as follows:-

> **"While the Appellant did not produce evidence of earnings of Kshs. 30,000.00 per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of Kshs. 5,000.00 as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that the deceased had a wife and six children…can both a shop and farming be producing only Kshs. 5,000.00 per month? This court finds it's unreasonably low to sustain such a family. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural folks compensation for reason that there are no proper records of income."**

31. I therefore associate myself with the opinion of the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** that:

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."**

32. In this case there was evidence on the basis of which the trial court could arrive at the decision it did and I find no reason to interfere therewith.

33. It was further submitted that the Learned Magistrate erred in law and in fact in failing to deduct the award of Loss of Expectation of life of Kshs 100, 000/= under the rule of the thumb. According to the Appellant, since this was a fatal injury claim brought under the ***Fatal Accident Act*** and the ***Law Reform Act,*** the Court has to take account the possibility of double compensation and deduct the award from the final figure as the beneficiaries entitled to the deceased's estate are the same persons to benefit under ***Fatal Accidents Act***.

34. The Court of Appeal in **Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004** expressed itself on the matter as follows:

> **"As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards…Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-."**

35. The Court of Appeal (**Waki, Nambuye** and **Kiage JJA**) in the case of **Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR** similarly stated that:

> **"…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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise… 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". This 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."**

36. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. I have read the judgement of the learned trial magistrate and I agree that there was no indication that the court took into account the possibility of the double compensation. Taking cue from **Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri** (supra) I find that the sum of awarded ought to have been discounted by Kshs 100,000/- t take into account the fact of the congruence of compensation and the fact of lumpsum payment as was held in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** where it was held that:

"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

37. The learned Magistrate was also faulted for making an award of Kshs 20, 000/= despite the fact that the Deceased died on the same day. In this case, it is clear that the deceased died on the same day of the accident. There was no evidence as to how long after the accident he died. Without evidence as to how long after the accident he died the assumption is that he passed away immediately after the accident. I therefore agree that an award of Kshs 10,000.00 being general damages for pain and suffering is reasonable based on the decision in **New Kenya Co-Operative Creameries Ltd (Formerly Kenya Co-Operative Creameries) & Another vs. Chebusit Arap Langat [2013] eKLR**.

38. As regards the special damages, the Court relied on the receipts produced and based its award thereon. The Appellant contends that the documents relied upon were invalid due to lack of stamp duty payments. The Court of Appeal in the case of **Paul N. Njoroge vs. Abdul Sabuni Sabonyo [2015] eKLR** held in respect of the matter that;

"21. The finding is often made by lower courts that documents which do not comply with the* Stamp Duty Act, Cap 480, *Laws of Kenya were invalid and inadmissible in evidence. But this Court has held that to be erroneous and accepts the view it took in the case of* Stallion Insurance Company Limited v. Ignazzio Messina & Co S.P.A [2007] eKLR *where it stated thus:

"Mr. Mbigi submitted that the guarantee document relied on by the Respondents to enforce their claim was inadmissible in evidence as it was not stamped contrary to the Stamp Duty Act. It is a submission which has been raised in other cases before but this Court has approved the procedure that ought to be followed in such matters. A case in point is Diamond Trust Bank Kenya Ltd vs. Jaswinder Singh Enterprises CA No. 285/98 (ur) where Owuor JA, with whom Gicheru JA (as he then was) and Tunoi JA, agreed, stated: -

"The learned Judge also found that the agreements could not be enforced because they contravened section 31 of the Stamp Duty Act (cap 480). In view of my above finding, it suffices to state that sections 19(3) 20, 21, and 22 of the same Act provided relief in a situation where a document or instrument had not been stamped when it ought to have been stamped. The course open to the learned Judge was as in the case of Suderji Nanji Ltd. -vs- Bhaloo (1958) EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram -vs- Raven Chond (2) 1930) A.I.R Lah 854 that:

"before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty ……

The Appellant has never been given the opportunity to pay the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the 2nd defendant/Respondent and he must be given the opportunity".

We would adopt similar reasoning in finding that the trial court was in error in peremptorily rejecting evidential material on account of purported non-compliance with the* Stamp Duty Act. *At all events, the Act itself provides a penal sanction for failure to comply with the provisions thereunder, but this is subject to proof.

22. We have examined the record and it is evident that Njoroge testified on the medical expenses he incurred over a period of eight months and periodically thereafter for out-patient treatment from the time he was discharged from Forces Memorial Hospital. The clinical officer,* Thetu Theuri Gitonga *(PW7-sic), and the consultant physiotherapist,* Paul John Mwangi *(PW7), both of whom attended to him and issued receipts for payments he made testified to that. There was also evidence that Njoroge bought the plates which were fixed on the leg for Kshs. 38,735/= and there was a receipt to show for it. Other documents on medical expenses were also tendered in evidence by consent of the parties without calling the makers thereof."

39. Therefore, the the mere failure to pay the stamp duty does not nullify the instrument in question. My position is supported by the decision in **Azad Kara vs. Mwangi Mutero Mombasa HCCC No. 222 of 1997** where it was held that whereas it is mandatory under section 19 of the ***Stamp Duty Act***, Cap 480 Laws of Kenya for an agreement to be stamped in order for it to be admissible in evidence however that does not make the document useless in evidence as the omission is curable under section 20 of the ***Stamp Duty Act***. Further as was held by **Law, J** (as he then was) in **Sunderji Nanji Limited vs. Mohamedali Kassam Bhaloo [1958] EA 762,** "before holding a document inadmissible in evidence on the sole ground of its not being properly stamped, the court ought to give an opportunity to the party producing it to pay the stamp duty and penalty. The appellant has never been given the opportunity of paying the requisite stamp duty and the prescribed penalty on the unstamped letter of guarantee on which he sought to rely in support of his claim against the second defendant/respondent, and he must be given that opportunity." It is therefore my view that the mere fact that the transfer document may not have been stamped even if true would not necessarily render the same inadmissible. However, this issue was raised only in submissions hence has little if any evidential weight.

40. Having considered the issues raised in this appeal I find that the award ought to have been as hereunder:

a) Pain and Suffering……..……Kshs 10,000.00

b) Loss of expectation of life…….Kshs 120,000.00

c) Loss of dependency……..Kshs 2,211,782.40.

d) Special Damages……..…….Kshs 124,300.00

Total……..Kshs 2,466,082.40

Less Discount……..……Kshs 100,000.00

Net Total…….Kshs 2,366,082.40

41. Accordingly, Judgement is entered in the foregoing terms.

42. The special damages will accrue interest at court rates from the date of filing suit till payment in full while the general damages will accrue interest at the same rate from the date of judgement in the trial court till payment in full.

43. The costs of the suit in the lower court are granted to the Respondent while each party will bear own costs of this appeal.

44. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 25th day of April, 2022.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munguti for Mr Musyoka Kimeu for the Respondent

CA Susan