



Rai Plywoods (K) Ltd v Winnie Wambui Gitau (Suing as personal & legal representative of the estate of John Karanja Wachuma (Deceased)) (Suing as personal & legal Representative of the Estate of John Karanja Wachuma (Deceased)) (Civil Appeal 6 of 2020) [2022] KEHC 10251 (KLR) (30 June 2022) (Judgment)

Neutral citation: [2022] KEHC 10251 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
CIVIL APPEAL 6 OF 2020**

WK KORIR, J

JUNE 30, 2022

BETWEEN

RAI PLYWOODS (K) LTD APPELLANT

AND

WINNIE WAMBUI GITAU (SUING AS PERSONAL & LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN KARANJA WACHUMA (DECEASED)) RESPONDENT

SUING AS PERSONAL & LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN KARANJA WACHUMA (DECEASED)

(Being an appeal from the Judgement of Hon. J. L. Tamar, PM delivered on 6/2/2020 in Eldama Ravine PMCC No. 72 of 2019; Winnie Wambui Gitau (Suing as the personal and legal representative of the estate of John Karanja Wachuma (Deceased)) v Rai Plywoods (K) Ltd)

JUDGMENT

1. The Appellant, Rai Plywoods (K) Ltd, through the memorandum of appeal dated 18th February, 2020 prays for the following reliefs:
 - a. That the appeal herein be allowed;
 - b. That the judgement of the lower court delivered on 6/2/2020 be set aside and the same be substituted with proper finding/judgment;
 - c. That the Respondent to pay costs in the lower court and in this appeal.



2. The appeal is premised on 15 grounds which in summary challenges the finding on liability, the apportionment of liability, the assessment of the damages and the amount of damages awarded on the various heads.
3. At the conclusion of the trial, the Respondent, Winnie Wambui Gitau (suing as the personal and legal representative of the estate of John Karanja Wachuma (deceased)), was awarded damages against the Appellant as follows:
 - a. Pain and Suffering - Kshs. 10,000/=
 - b. Loss of expectation of life - Kshs. 100,000/=
 - c. Loss of dependency - Kshs. 5,000,000/=
 - d. Special damages - Kshs. 132,875/=

Liability was entered against the Appellant at 100% thus making the total amount awarded to the Respondent Kshs. 5,242,875/=.

4. This appeal was canvassed by way of written submissions. The Appellant filed submissions dated 18th March, 2021. On liability, it was submitted that the Respondent did not prove negligence on the part of the Appellant to the required legal standards hence failing to discharge the burden of proof as required by sections 107, 108, and 112 of the *Evidence Act*, Cap. 80. Reliance was placed on the case of *Kennedy Nyagoya v Bash Hauliers* [2016] eKLR in support of the submission that a police abstract alone was not adequate to prove culpability on the part of the Appellant.
5. The Appellant relied on the case of *Postal Corporation Ltd v Dickens Munyai* [2016] eKLR to submit that the sketch maps were important to show how the accident occurred, and in their absence, the trial court could not ascertain how the accident occurred. This Court was therefore urged to apportion liability equally between the Appellant and the Respondent. The Appellant placed reliance on the case of *Peter Okello Omedi v Clement Ochieng* [2006] eKLR in support of the contention that all road users have a duty of care to other road users.
6. On quantum, the Appellant submitted that the trial court erred in using the multiplier method yet the multiplier, multiplicand and the dependency ratios could not be ascertained on the face of the evidence on record. The Appellant urged this Court to use the global award formula and award the Respondent Kshs. 300,000/= or in the alternative adopt a multiplicand of Kshs. 18,319/= and a dependency ratio of 1/3. In support of its case, the Appellant relied on the cases of *Mwanzia v Ngalali Mutua Kenya Bus Ltd* (as cited in *Albert Odawa v Gichumu Gitbenji Nakuru HCCA No. 15 of 2003*); *Multiple Hauliers (EA) Ltd & another v William Abiero Ogeda (Suing as the representative of Christine Arglera Abiero (deceased) & 2 others* [2016] eKLR; and *Asha Mohamed Swaleh v Kennedy Bindi Muriungi & another* [2012] eKLR.
7. As for the special damages, the Appellant submitted that the total sum awarded under this head by the trial court was not proved to the required legal standard. The case of *Francis Muchee Nthiga v David N. Waweru* [2013] eKLR was cited as espousing the principle that special damages must be pleaded with particularity and strictly proved. The Appellant cited the case of *Agnes Wanjiku Ndegwa v KPLC* [2004] eKLR to submit that the award ought not to have been made since the Respondent did not comply with sections 19 and 20 of the *Stamp Duty Act*. The Appellant also submitted that there was no proof that the Respondent incurred the expenses as depicted in the exhibits for lack of names and specificity. Further, that some of the expenses were met by well-wishers who contributed towards the funeral expenses.



8. The Appellant faulted the trial court for over-reliance on the evidence of the Respondent hence failing to consider the whole aspect of the case. Further, that the trial court erred when it purported to shift the burden of proof to the Appellant, who was the defendant at the trial, against the legal requirement that the burden of proof lies with the plaintiff even in instances where the defendant decides to keep quite. This submission was supported by reference to the case of *Michael Wanjoni Mathenge v Lydia Nyanguthi Agatha* [2007] eKLR.
9. Finally, it was the Appellant's submission that the trial court erred in law in making a double award to the Respondent under the *Fatal Accidents Act* and the *Law Reform Act*. While relying on the case of *Stephen Gitau & another v Muraguri Ndugire* [2010] eKLR, the Appellant urged this Court to set aside the judgment of the trial court and substitute the same with a legally sound judgment.
10. The Respondent commences her submissions dated 25th April, 2022 by stating that the present appeal is not arguable and should be dismissed. The Respondent also submits that the judgment of the trial court was founded on the facts surrounding the case and the evidence tendered by both parties. She also contends that the Appellant has failed to address its mind to the facts and issues raised in this case hence this appeal is misconceived and frivolous.
11. The Respondent relies on Halsbury's Laws of England 3rd Edition, Volume 28 at page 64 to highlight the principles of road usage and liability in road traffic accidents and to submit that the Appellant was indeed culpable.
12. The Respondent also submitted that as per Order 2 Rule 6(1) of the Civil Procedure Rules, 2010, the Appellant should be restricted to its pleadings and should not be allowed to advance a case not emerging from its pleadings.
13. On quantum, the Respondent submitted that all the evidence supported the findings of the trial court. She relied on *Cornelia Elaine Wamba v Shreeji Enterprises Ltd & others* [2012] eKLR to urge this Court to enhance the awards for pain and suffering, and for loss of expectation of life Kshs. 50,000/= and Kshs. 150,000/= respectively.
14. On the award for loss of dependency, the Respondent referred to the decision of *Richard Matheka Musyoka & another v Susan Aoko & another* [2016] eKLR and urged that in determining this award, the court must first find the multiplicand which is determined by the annual earnings of the deceased which is then multiplied by the multiplier which is based on the life expectancy of the deceased and the dependants. According to the Respondent, the trial magistrate complied with the principles for assessing damages in awarding the estate of the deceased the total amount of Kshs. 5,242,875/= and urged this Court to sustain the award.
15. The Respondent finally submits that this Court should not disturb the findings and judgment of the trial court as the grounds to occasion such disturbance have not been established by the Appellant.
16. Having gone through the memorandum of appeal, the record of appeal and the submissions of the parties, I flag out the following issues for determination:
 - i. Whether the trial magistrate erred in attributing 100% liability for the accident to the Appellant;
 - ii. Whether the trial magistrate relied on wrong principles in making the awards to the Respondent;
 - iii. Whether the trial magistrate erred in law hence making double awards to the Respondent; and



- iv. Who should bear the costs of this appeal?
17. The entry point in determining this appeal is the acknowledgment of the fact that in exercising its appellate jurisdiction, this Court as the first appellate court has a duty to analyze and re-examine the evidence adduced before the trial court and reach its own conclusions. However, in doing so, this Court is required to take into consideration the fact that unlike the trial court, it did not see the witnesses testify. See the Court of Appeal decision in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
18. Similarly, as an appellate court, this Court can only interfere with the award of damages by the trial court if the Appellant demonstrates that the trial court acted on the wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the injury suffered. This position has been stressed in several decisions by the Court of Appeal including *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
19. While addressing the question as to whether the trial court erred in attributing 100% liability to the Appellant, it is imperative to restate that in civil cases, proof is on a balance of probabilities and the burden of proof will always lie with he who alleges. In this case, the burden of proof lay with the plaintiff, now the Respondent, to demonstrate acts of negligence attributed to the Appellant. Similarly, where the defendant seeks to have liability apportioned by alleging negligence on the part of the plaintiff, it is required to prove the aspects of negligence that he alleges arose from the acts or omissions of the plaintiff.
20. It is the Appellant's submission that the trial court erred in attributing 100% liability to it without sufficient evidence. The Appellant also contends that key evidentiary materials like a sketch map which could have aided the court in identifying which party was on the wrong was never produced as evidence. The Respondent on the other hand argues that the evidence of PW1, who was the investigating officer, painted to the court a perfect picture of what he saw when he arrived at the accident scene as one of the first responders.
21. It is not disputed that indeed there was an accident. It is a fact that the drivers of the two motor vehicles involved in the accident succumbed to the injuries sustained in the accident. It is important to point out that the deceased John Karanja Wachuma was the driver of motor vehicle KCG 834Q and not a passenger as alleged by the Appellant. This fact was confirmed by the undisputed evidence of PW2 Winnie Wambui Gitau and PW3 John Mwangi. With regard to the ownership of motor vehicle KAU 006A, a document titled "motor vehicle copy of records" was produced confirming that on 8th March, 2019, the lorry/truck was owned by Rai Plywood (K) Ltd, the Appellant herein.
22. The main question therefore is whether in the circumstances of this case, the Appellant's driver acted as is expected of a reasonable driver. Addressing the issue of negligence in *Stapley v Gypsum Mines Ltd* (2) [1953] AC 663 P.681, Lord Reid had this to say:

“One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.”



23. From the record, it is only the evidence of PW1 Police Constable Benson Wambua that depicts the picture of the scene of accident. PW1 testified that when he arrived at the scene of the accident in the company of his colleagues, they found a fatal accident which had occurred between a Toyota matatu KCG 834Q and an Isuzu canter KAU 006A. He also testified that the motor vehicle KCG 834Q was headed to Eldoret while KAU 006A was headed to Nakuru. PW1 also pointed out that the accident occurred on the left side of the road in a section where there was a continuous yellow line. The scene was on a slope with the direction to Eldoret being on the higher side and that to Nakuru being on the lower side. The officer also testified that there was a corner not far from the scene of accident. He produced a police abstract as an exhibit. From his investigations, he concluded that motor vehicle KAU 006A was to blame for the accident.
24. In *Rabab Micere Murage (Suing as a Representative of the Estate of Esther Wakiini Murage) v Attorney General & 2 others* [2012] eKLR, the Court of Appeal stated as follows:
- “... As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents. It must be for that reason that the appellant accused the respondents of negligence. Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent, and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of *res ipsa loquitur*, but from the evidential burden as imposed under s.112 of the *Evidence Act*.
- ...The burden was on the respondents to disprove negligence on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law...”
25. From the evidence of PW1, the section of the road where the accident occurred had a continuous yellow line and therefore any prudent and reasonable driver was expected to keep to his lane. The National Transport and Safety Authority’s Kenya Learner Driver Handbook at page 10 states that “yellow continuous line means you stick to your side or no overtaking.” This is also captured under Rule 57 of the Highway Code for All Road Users issued by the same body.
26. The evidence on record paints a picture of the driver of motor vehicle KAU 006A overtaking where there was a continuous yellow line and near a corner. The Appellant failed to adduce any evidence to disprove these facts as established by the Respondent. The Appellant also failed to prove any negligent act that could be attributed to the deceased husband of the Respondent who was driving the other motor vehicle. Additionally, the PW3 produced the deceased’s PSV driving license as an exhibit. The authenticity of the documents which confirmed that the deceased was an authorized PSV driver was never challenged by the Appellant. It cannot then be said that the driver was not qualified as alleged by the Appellant. It was upon the Appellant to demonstrate that there was some commission or omission on the part of the deceased which could have given the trial court the basis for apportioning blame. Without any evidence to show that the deceased played a role in the occurrence of the accident, I find no reason to fault the trial court’s finding that the Appellant was indeed 100% liable for the accident. The Appellant’s appeal on the issue of negligence therefore fails and is dismissed.
27. Having concluded that the trial magistrate did not err in the apportionment of liability, I now turn to the issue as to whether the Appellant has established grounds to warrant interference with the trial



court's assessment of damages. A perusal of the petition of appeal and the submissions discloses that the point of contention is the awards for loss of dependency and special damages.

28. The Appellant while challenging the quantum of damages argued that the trial court adopted wrong principles in making those awards. On the jurisdiction of an appellate court to disturb the damages made by the trial court, the Court of Appeal in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR stated that:

“Further, it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.”

29. In this case, the trial court made an award of Kshs. 10,000/= for pain and suffering. The Appellant did not appeal against this award. However, the Respondent submitted that the award of Kshs. 10,000/= was inordinately low and urged this Court to enhance the award to Kshs. 50,000/=. On the Respondent's plea for enhancement of the award for pain and suffering, I only need to point out that she did not file a cross-appeal and her submission, however, persuasive cannot attract any useful comment from this Court as no appeal has been raised on the issue. The same position applies to the Respondent's prayer to this Court to enhance the award for the loss of expectation of life from Kshs. 100,000/= to Kshs. 150,000/=. I say no more.
30. The Appellant has also challenged the trial court's award of Kshs. 5,000,000/= for loss of dependency. It is submitted that there was no evidence on record to support the figures relied upon by the trial court to arrive on the multiplicand, multiplier and the dependency ratios so as to arrive at the award of Kshs. 5,000,000/=. The Appellant further submits that in the absence of documentary evidence to back the figures, the court ought to have adopted a global award approach and awarded the sum of Kshs. 300,000/=.
31. The Respondent on her part urged this Court to dismiss the appeal on this ground and sustain the award of the trial court. The position of the law is that there is no prescribed method for assessing awards for loss of dependency. The trial court cannot be faulted for using the multiplier method. The global award approach proposed by the Respondent is not the only formula for assessing damages for loss of dependency. It is suitable in certain circumstances and as shall shortly be demonstrated, the trial magistrate did not make any mistake by adopting the multiplier approach. The method to be used is determined by the facts of each case.
32. On the issue of loss of dependency, PW2 testified that she was married to the deceased and that they were blessed with one child. She produced a birth certificate and a letter from Angels ECD Nakuru as exhibits. I have also seen on record a letter from the Chief of Kiamaina Location indicating that the deceased was survived by the Respondent and a minor.
33. PW2 also testified that her marriage to the deceased was celebrated under Kikuyu customary law hence they did not have a marriage certificate. The evidence adduced by the Respondent at the trial expressly pointed to the fact that she was the wife of the deceased and their marriage was blessed with one child. The deceased therefore had two dependants. Indeed, the letters of administration to the estate of the deceased issued to the Respondent is sufficient evidence of the relationship between the deceased



and the Respondent. The Appellant's claim that no evidence was adduced to prove the relationship between the deceased and the Respondent is therefore without merit.

34. Still on the issue of the dependency, the Appellant faulted the trial magistrate for adopting a dependency ratio of 2/3 arguing that no evidence was adduced to show that the deceased used to help his wife and child. The Appellant submitted that in the absence of evidence to prove dependency, the trial court ought to have adopted a dependency ratio of 1/3. In respect to this argument, I note that the Respondent who testified as PW2 told the trial court that her husband was the sole breadwinner and that she did not work because of health problems. This evidence was not challenged during cross-examination and it therefore remains uncontroverted. The use of a 2/3 ratio in the calculation of the award for loss of dependency cannot therefore be faulted. It is therefore my finding that the deceased was survived by two dependants and the trial court cannot in the circumstances be faulted for adopting a 2/3 dependency ratio.
35. The Appellant further attacked the use of the multiplier approach by the trial magistrate by submitting that there was no documentary evidence adduced to support the fact that the deceased was a skilled driver earning a monthly pay of Kshs. 25,000/=. On this point, it is observed that PW2 testified that the deceased was employed on six months' probation by a transport company called Classic Shuttle and used to earn Kshs. 1,100/= per day. PW3 John Mwangi, who identified himself as one of the directors of Classic Luxury Shuttle, confirmed the testimony of the Respondent. He produced a letter showing that the deceased actually worked for the company in which he was a director. PW3 also stated that the deceased worked for 26 days in a month.
36. The Appellant has challenged the figure adopted by the trial court as the deceased's salary on the ground that the same was not supported by any documentary evidence. The Appellant's position is that the letter produced by PW3 showing that the deceased worked for their company was not sufficient evidence that the deceased was indeed employed. According to the Appellant, the trial court should have adopted Kshs. 18,319.50 which was the minimum wage for a driver as at 2018.
37. It is noted that no payslip was produced by PW2 and PW3 to show that the deceased worked for Classic Luxury Shuttle Limited as a driver. In fact, PW3 testified that he did not have a record of tax remittance for the deceased because he was paid as a casual and casuals do not pay tax. Nevertheless, the totality of the evidence placed before the trial court established that the deceased was employed as a driver by PW3's company. The letter that was produced by PW3 confirmed that the deceased was employed as a driver. The licensing documents for the deceased were clearly connected to his work as a driver for Classic Luxury Shuttle Limited. The evidence of the deceased's earnings was on a balance of probabilities sufficient to support the trial court's conclusion that the deceased was earning Kshs. 1,100/= per day for 26 days a month.
38. On the multiplier, the trial court adopted 25 years and observed that this figure was arrived at based on the uncertainties of life and the high risks associated with the nature of work the deceased was engaged in. The Appellant submitted that the trial court failed to take into consideration the fact that the deceased was not a civil servant and might not have remained active until the age of 55. The Respondent on her part submitted that she was contented with the trial court's estimation in this regard.
39. In *Easy Coach Limited v John Thomas Akalongo & another* [2014] eKLR, the Court of Appeal noted as follows:

“It is not in dispute that at the time of her death, the deceased was 24 years old. So to the retirement age of 60, she had a remaining working life of 36 years and perhaps more as she was in the private sector whose retirement age is, in most cases, more than the Government



one of 60 years. So the multiplier of 30 years that the learned Judge applied is not so inordinately high as to represent an erroneous estimate. Although put in her position we would have applied a lesser multiplier, the law is that we should not substitute our view with that of the trial Judge. We therefore have no legal basis for disturbing the multiplier of 30 that the learned Judge applied. The appeal on that issue must also fail.”

40. In *Cornelia Elaine Wamba* (supra), the Court listed the factors to be taken into account in selecting a multiplier as follows:
- (a) The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.
 - (b) It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.
 - (c) The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.
 - (d) Death through natural causes and departure for greener pastures elsewhere is also a factor.”
41. The fact that the deceased died aged 30 years is not disputed and is confirmed by the death certificate which was produced as an exhibit at the trial. As submitted by the Respondent, the retirement age in Kenya is 60 years for civil servants. However, this is not the usual case for employees in the private sector. The cases of *Mutiple Hauliers (EA) Ltd & another v William Abiero Ogeda & 2 others* [2016] eKLR and *Asha Mohamed Swaleh v Kennedy Bindi Muriungi & another* [2012] eKLR cited by the Appellant in this regard are distinguishable because in those cases there was no evidence to prove that the deceased persons were indeed employed. In the instant case, the documentary and oral evidence confirms that the deceased was employed as a driver. In the circumstances, I do not find any justifiable reason to interfere with the trial court’s discretion and decision to use 25 years as the multiplier. The reasons advanced by the trial court are well within the principles that a court is required to take into account when selecting a multiplier. The award by the trial court for loss of dependency has not come under sufficient firepower by the Appellant to warrant the interference of the figure by this Court. The appeal on the award for loss of dependency therefore fails.
42. As regard the special damages, it was the Appellant’s case that the receipts for payment of the coffin and hearse did not contain particulars and should not be considered as part of the expenses incurred by the Respondent. The Appellant further submitted that some of the expenditures incurred by the Respondent were funded by well-wishers who contributed towards the funeral expenses. The Appellant also submitted that prior to awarding special damages, the trial court ought to have ensured that stamp duty was paid for the claimed expenses. On her part, the Respondent supported the award for special damages stating that the claim was pleaded and proved to the required standard.
43. On the issue of stamp duty, it is my understanding that evidence of payment of stamp duty is only required against payments in respect of which the claimant is required by law to remit such payments. This is the position adopted in *Agnes Wanjiku Ndegwa v Kenya Power & Lighting Company* [2014] eKLR. Further, the Court of Appeal in *Paul N. Njoroge v Abdul Sabuni Sabonyo* [2015] eKLR held as follows:

“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 v 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 v Bhaloo [1958] EA 762 at page 763 where Law J., (as he then was) quoted with approval the holding in Bagahat Ram v Raven Chond (2) [1930] AIR 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.”

44. I have quoted the Court of Appeal at length so that I can only conclude that the same is self-explanatory and I have nothing useful to add. Consequently, I find no error on the part of the trial court in admitting receipts that bore no evidence of payment of stamp duty.
45. The law is that the special damages must not only be pleaded, but must also be proved. The Respondent at paragraph 7 of her plaint dated 27th May, 2019 pleaded special damages as follows:
 - a. Farewell home charges - Kshs. 14,500/=
 - b. Fees for embalmment - Kshs. 1,500/=
 - c. Coffin and Hearse - Kshs. 40,000/=



- d. Transport - Kshs. 78, 400/=
 - e. Fees for grant of letters of administration ad litem
- Kshs. 75,000/=
 - f. Court fees on filing petition - Kshs. 1,025/=
 - g. Fees charged for obtaining KRA copy of records
- Kshs. 550/=
 - h. Fees on service by registered post - Kshs. 300/=
- Total - Kshs. 211,275/=
46. The trial court awarded Kshs. 132, 875/= noting that it had rejected the receipt for transport. I have reviewed the receipts submitted, I do not find any error apparent on the award by the trial court. The Appellant did not adduce any evidence to show that some of the expenses were offset through harambee proceeds. The award of special damages by the trial court therefore remains undisturbed.
47. The Appellant also faulted the trial court for making double awards to the Respondent. On this issue, the Appellant submitted that the trial court erred in law by adding up the award under the Law Reform Act and Fatal Accidents Act. He submits that the trial court ought to have subtracted one of the awards from the other so as to avoid double compensation under the two Acts. The Respondent in rebuttal submitted that Section 2(5) of the Law Reform Act provides that awards under the Law Reform Act were in addition to and not in derogation of rights conferred under the Fatal Accidents Act.
48. Section 2(5) of the Law Reform Act provides that:
- “(5) The rights conferred by this part for the benefit of 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
49. In Kemfro Africa Limited t/a “Meru Express Services (1976)” & another v Lubia & another (No 2) [1985] eKLR, the Court of Appeal stated as follows:
- “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 and so it appears the Legislature intended that it should be considered...
- It has been argued in some English cases that this provision affects the right and not the benefits. Indeed the legislation can be looked at narrowly or in a wide sense. Narrowly it means rights and no more; widely it means the rights and benefits accruing from those rights are in addition and not in derogation to the rights and benefits resulting from them under the Fatal Accidents Act. In my view what section 2(5) of the Law Reform Act means is 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.
- To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are “taken into account”. The section says what should not be taken into account and not necessarily deducted. For me it is enough 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 as suggested by Mr Barasa.”

50. Similarly, and more recently, the Court of Appeal held in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR 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 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.”

51. The cited decisions of the Court of Appeal leads me to the inevitable conclusion that the claim by the Appellant that the estate of the deceased benefitted twice under the two Acts is without merit. The appeal on that ground therefore fails as the trial court did not err in making awards under both the *Law Reform Act* and the *Fatal Accidents Act*.
52. At the end of it all, I arrive at the conclusion that the Appellant’s case is without merit. The appeal is therefore dismissed. The general principle is that costs follow the event. As such, the costs of this appeal are awarded to the Respondent against the Appellant.

DATED, SIGNED AND DELIVERED AT KABARNET THIS 30*TH DAY OF JUNE, 2022.

W. KORIR,

JUDGE OF THE HIGH COURT

