



Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment)

Neutral citation: [2022] KEHC 11823 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 113 OF 2019**

**OA SEWE, J
JULY 29, 2022**

BETWEEN

JUDY CHEPNENO MOSONIK 1ST APPELLANT

NAHASHON KIPTANUI NGARUIYA 2ND APPELLANT

AND

ROSALINE JEBET CHERUIYOT (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF STANLEY KIPCHUMBA KEMBOI, DECEASED) RESPONDENT

(Being an Appeal from the Judgment and Decree of Hon. Caroline R. T. Ateya (Senior Principal Magistrate) in ITEN SPMCC No. 2 of 2018 delivered on 15th July, 2019)

JUDGMENT

1. The appellants were the defendants in Iten SPMCC No 2 of 2018: Rosaline Jebet Cheruiyot (suing as the administrator to the Estate of Stanley Kipchumba Kemboi, deceased). The cause of action was a road traffic accident in which the deceased, Stanley Kipchumba Kemboi suffered fatal injuries. The respondent had filed a plaint dated March 13, 2018 which was later replaced by an amended plaint dated the 29th May, 2018, in which she averred that on or about November 19, 2016 the deceased was lawfully riding a motor cycle along Eldoret–Eldama Ravine Road when the 2nd appellant negligently and/or recklessly drove Motor Vehicle Registration No KBZ 683 G, thereby causing a collision between the motor vehicle and the deceased’s motorcycle, which accident resulted in the death of Stanley Kipchumba Kemboi.
2. The suit was therefore filed under the *Law Reform Act*, Chapter 26 of the Laws of Kenya and the *Fatal Accidents Act*, Chapter 32 of the Laws of Kenya on behalf of the deceased’s estate and for the benefit of the dependants of the deceased. The respondent had pleaded that the deceased died at the age of 23



years and was in good health; and that he was a farmer earning Kshs 80,000/= per month. It was further pleaded that the deceased was the sole provider of his family, all of whom, by reason of his untimely and tragic death, lost support and companionship; and therefore suffered loss and damage.

3. The claim was resisted by the appellants *vide* their statement of defence dated the May 23, 2018. They thereafter filed an amended statement of defence dated the June 7, 2018 in response to the amended plaint and essentially denied that any accident occurred as alleged by the respondent; and that if the same occurred, it was due to the negligence of the respondent. They therefore denied the particulars of negligence set out at paragraph 5 of the amended plaint and proceeded to supply particulars of negligence on the part of the deceased at paragraph 6 of the plaint. Thus, the appellants sought that the respondent's suit be struck out and/or dismissed with costs.
4. Upon hearing the parties, the learned magistrate apportioned liability at 90%:10% in a judgment delivered on the July 15, 2019. She then proceeded to assess the quantum of damages payable and made awards as hereunder:

For pain and suffering - Kshs 150,000/=

For Loss of expectation of life - Kshs 200,000/=

For loss of dependency - Kshs 3, 552, 000/=

Special damages - Kshs 16, 300/=

Less contribution - Kshs 390, 200/=

Total - Kshs 3, 528, 100/=

5. Being dissatisfied with the judgment of the lower court, the appellants filed the instant appeal, raising the following grounds: -
 - (a) The finding on liability was erroneous *vis-à-vis* the issues entailed and evidence tendered by the appellants.
 - (b) The learned magistrate erred both in law and fact in basing her finding on irrelevant matters without taking into consideration the evidence of the appellants.
 - (c) The learned magistrate erred in law and in fact in failing to appreciate or take into account the appellants submissions or at all.
 - (d) The respondent's case was not proved on a balance of probability as is required by law.
 - (e) The learned magistrate's award on damages was inordinately high, improper, unrealistic and inappropriate under all circumstances of the case.
 - (f) The learned magistrate erred on all points of fact and law in as far as award of damages is concerned.
6. Accordingly, the appellants prayed that their appeal be allowed with costs and the decision of the lower court on both quantum and liability in SPMCC No 2 of 2018 be set aside and a proper finding be made by this court. They also prayed for any further orders as the court may deem just and expedient.
7. On the May 25, 2021, the court directed that the appeal be canvassed by way of written submissions. The appellants had complied and filed written submissions dated May 20, 2021 on the May 24, 2021 while the respondent's submissions dated the May 20, 2021 were filed on the May 21, 2021.



8. The appellant submitted, pursuant to grounds 1, 2, 3 and 4, that the trial magistrate erred when it apportioned liability without any proper evidence being adduced by the respondents. They claimed that, since neither of the respondent's witnesses before the lower court was at the scene of the accident, they could not illustrate who was to blame for the accident. Counsel for the appellants relied on [Statpack Industries v James Mbiti Munyao](#) [2005] eKLR for the proposition that, in such cases, a causal link must be established between the alleged negligence and the injury complained of. He also cited [Mary Wambui Kabugu v Kenya Bus Service Limited](#) [1997] eKLR to support the argument that the respondent ought to have called an eye witness to support her allegations of negligence.
9. Counsel for the appellants discounted the investigating officer's evidence on the ground that there was no sketch map, police file or occurrence book availed before the lower court to back up his assertions; and therefore the evidence was insufficient to prove liability in a civil case as the motorcycle rider also contributed towards the occurrence of the accident. The court was referred to the case of [Philip Keipto Chemwolo & another v Augustine Kubende](#) [1986] eKLR in which it was held that if the plaintiff was not wearing a crash helmet and was riding his motor-cycle at a high speed, then a triable issue arose as to contributory negligence.
10. On quantum, the appellants submitted that the trial court erred when it awarded Kshs 150,000/= for pain and suffering. Their counsel postulated that the lower court ought to have awarded Kshs 10,000/= on this head, as Stanley Kipchumba Kemboi was already deceased by the time he was taken to hospital and did not undergo prolonged pain and suffering. Reliance was placed on the cases of [James Gakinya Karienyé & Another \(suing as the legal representative of the Estate of David Kelvin Gakinya \(deceased\)\) v Perminus Kariuki Gitthinji](#) [2015] eKLR and [Harjeet Singh Pandal v Hellen Aketch Okudbo](#) [2018] eKLR in which a sum of Kshs 10,000/= was awarded for pain and suffering where the deceased died on the spot.
11. On loss of expectation of life, counsel for the appellants faulted the lower court for awarding Kshs 200,000/= under this head instead of the conventional award of Kshs 100,000/=. He relied on [Mercy Muriuki & Another v Samuel Mwangi Nduati & Another \(Suing as the legal Administrator of the Estate of the late Robert Mwangi\)](#) [2019] eKLR in support of his submissions in this respect.
12. In respect of the award of Kshs 3,552,000/= for loss of dependency, counsel for the appellants submitted that no evidence was presented before the subordinate court to prove that the deceased was a farmer; or even that he was earning income on a regular basis from farm the sale of farm produce. He therefore argued that, in those circumstances, the lower court ought to have adopted a multiplicand of Kshs 8,500/=; being the minimum monthly income per [Regulation of Wages \(General Amendment\) Order, 2013](#). Counsel therefore urged the court to find that the multiplicand of Kshs 12,000/= adopted by the lower court was erroneous. In this regard, reliance was placed on the case of [Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita \(suing as the personal representative of\) Mary Nyaboke Keraita- Deceased](#) [2011] eKLR in which it was held that when there was no proof of income, the trial court ought to revert to [Regulation of Wages \(General Amendment\) Order](#).
13. The appellant further took issue with the trial court's decision for adopting a multiplier of 37 years considering the vagaries of life and the fact that the deceased was not in permanent employment. It was the appellant's case that the deceased died at the age of 23 years and there was no certainty that he would have lived to the age of 60 years. The appellant urged the court to exercise its discretion and adopt a multiplier of 25 years; thereby reducing the award for loss of dependency to Kshs 850,000/=. Thus the calculation would be $Kshs\ 8,500 \times 12 \times 25 \times 1/3 = Kshs\ 850,000/=$.
14. On his part, counsel for the respondent supported the finding of the trial court on liability at the ratio of 90% to the appellant and 10% to the deceased. He submitted that that apportionment was supported



by the evidence of PW1 and corroborated by PW2; which was to the effect that Motor Vehicle KBZ 683 G veered off its side and went to the opposite side of the road and hit the motorcyclist on his correct lane. He posited that, if anything, the trial court was too lenient in apportioning liability at 90%:10%, and pointed out that, in line with section 47 of the Evidence Act, the driver was charged with the offence of causing death by careless driving.

15. On quantum, counsel for the respondent supported the net award of Kshs 3,528,100/=. He submitted that the deceased, who died at the age of 23 years, was in perfect health and was earning an income of Kshs 12,000/= per month from his engagements as a farmer. Thus, counsel submitted that the multiplicand adopted by the court was reasonable considering that the prevailing minimum wage at the time was Kshs 15,000/=. Counsel relied on the case of Auto Hauliers Company Limited v Margaret Muthoni Kinyeni & 2 Others [2020] eKLR, where the court upheld the sum of Kshs 10,000/= as a reasonable multiplicand where it was impossible to ascertain the income of the deceased.
16. Counsel further defended the dependency ratio of 2/3 that was used by the trial court terming it reasonable, granted the evidence that the deceased was the sole breadwinner for his family. Reliance was placed on HCCC No 99 of 1994: John Mwangi v Patrick Kariuki & Another, in which the court adopted a dependency ratio of 2/3 because the deceased spent 2/3 of his salary on his immediate family and 1/3 of his salary on himself.
17. It was submitted that the multiplier of 37 years adopted by the lower court was reasonable in the circumstances. Counsel argued that it is not unusual for a farmer to ply his trade beyond sixty (60) years of age and therefore there would be no particular reason to fault the conclusion reached by the trial court on the multiplier. The court was referred to Kakamega HCCC No 12 OF 1985: Miriam Sei & 2 others v John Njenga Kiburo & Another, where the court applied a multiplier of 34 years for the deceased who died aged 26 years.
18. On loss of expectation of life, counsel for the respondent submitted that the sum of Kshs 200,000/= awarded by the lower court was not only reasonable but also in line with the current trends. He cited, for instance, Mombasa HCCC No 478 of 1994: Kiptampan Lockorir v Kadenga Kenga & Another in which Kshs 150,000/= was awarded for loss of expectation of life.
19. Lastly, counsel urged the court to take into account that whereas the accident occurred on November 19, 2016, the victim died on November 20, 2016 while undergoing treatment at Moi Teaching & Referral Hospital; and therefore must have suffered a lot of pain. He cited Mombasa HCCC No 16 of 1997: Mwalla Katana Mwangongo v Kenya Post & Telecommunication in which Kshs 100,000/= was awarded for pain and suffering and urged the Court not to disturb the award of the lower court under that head. Thus, it was the submission of counsel for the respondent that the appeal lacks merit on all fronts and should therefore be dismissed with costs.
20. This being a first appeal, it is the duty of the court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions thereon; while giving due consideration to the fact that it did not have the advantage of seeing or hearing the witnesses. The duty of the 1st appellate court was aptly stated by the Court of Appeal in PIL Kenya Ltd v Oppong [2009] KLR 442 as follows: -

It is the duty of the Court of Appeal, as a first appellate court, to analyse and evaluate the evidence on record afresh and to reach its own independent decision, but always bearing in mind that the trial court had the advantage of hearing and seeing the witnesses and their demeanour and giving allowance for that.”



21. Thus, I have perused and considered the record of the lower court and noted that the respondent called three (3) witnesses, including James Kibiwott Kigen, described as the eye witnesses whose evidence in Iten PMCC No 2 of 2017: *James Kibiwott Kigen v Judy C Mosonik & Another*, was adopted before the lower court by consent of the parties. The appellants opted to not call any witness.
22. Rosaline Chebet Cheruiyot (PW1) told the lower court that the deceased, Stanley Kipchumba Kemboi was her son; and that he died in a road traffic accident, and a post mortem was performed on the body at Moi Teaching and Referral Hospital (MTRH). It was PW1's testimony that the deceased was twenty-three (23) years old at the time of his demise; and that he was a farmer, earning about Kshs 30,000/= per month. She added that the deceased was providing for the family financially; which support has been lost as a result of his death. She accordingly prayed for compensation for her son's death and costs. She produced the Grant ad litem (Exhibit 1); Death Certificate (Exhibit 2); Letter from the Chief (Exhibit 3); Police Abstract (Exhibit 4); Post mortem (Exhibit 5) and Invoices and receipts to support the special damages component of her claim in the sum of Kshs 16,300/=.
23. The evidence of James Kibiwott Kigen was summarized at paragraph 4 of the judgment of the lower court to the effect that, on the November 19, 2016, he was a pillion passenger on the subject motor cycle and that they were heading for Ravine with the deceased when Motor Vehicle Registration No KBZ 638G, which was heading to Eldoret direction veered off its correct lane and hit their motor cycle head on. He further told the lower court that the motor vehicle was moving at a high speed; and that he sustained injuries for which he was treated at Moi Teaching and Referral Hospital. He added that he was wearing a reflective jacket as well as a helmet at the time.
24. The last witness was Cpl Henry Ikle whose testimony was that he was on duty along Eldoret-Ravine road on the November 19, 2016 when he received a telephone call from Chief Kipsaos informing him of a fatal accident. He proceeded to the scene and confirmed that indeed a fatal accident had occurred involving Motor Vehicle KBZ 683G Toyota Premio and Motorcycle KMDG 761K. The dead body was identified to be that of Stanley Kipchumba Kemboi. He added that one James Kibet Kigen had survived the accident with a fractured leg.
25. It was PW2's testimony that he took measurements of the scene, drew a sketch plan and thereafter took the deceased and the injured person to Moi Teaching and Referral Hospital. He thereafter opened a case file No 412 of 2016 for purposes of investigations, but that the complaint was later withdrawn after the parties settled opted for out of court settlement. From his observations at the scene, he was of the finding that the driver of Motor Vehicle KBZ 683G was to blame for the accident for veering off its correct lane and knocking down the motorcycle on its proper lane.
26. On behalf of the defence, counsel agreed that the witness statement of Nashon Kiptanui Ngaiwa, the 2nd appellant herein, filed on September 17, 2018 be adopted as their evidence. The 2nd appellant stated that on November 19, 2016 he left Eldama Ravine for Eldoret at around 11.00 am driving a borrowed Motor Vehicle Registration No KBZ 683G make Toyota Premio. He further stated that he had two passengers in the car one of whom was being taken to hospital; and that, on reaching Kipsaos he suddenly noticed an oncoming motor cycle that was being driven on his side of the road where there was a gentle curve. He explained that the weather was misty and it was raining; and so he was driving at a speed of about 45-55 kph; and that to avoid a head on collision, he swerved to his right and slowed down. The 2nd appellant further stated that, the motorcyclist also swerved to the same direction and hit his motor vehicle on the front left wing; and as a result the cyclist and his pillion passenger fell on the tarmac together with the motor cycle. He added that he stopped immediately and on stepping out of the car, they confirmed that the cyclist had died on the spot; while his pillion passenger was critically injured.



27. In the light of the foregoing evidence, there was credible evidence presented before the lower court to prove on a balance of probabilities that an accident occurred on November 19, 2016 at Kipsaos area of the Eldoret-Ravine Road, involving Motor Vehicle Registration No KBZ 683G and Motor Cycle Registration No KMDG 761K. PW3 produced an abstract to that effect confirming the occurrence. The evidence of PW2, the deceased's pillion passenger, was that the deceased, Stanley Kipchumba Kemboi, died on the spot; which evidence was corroborated by PW3 and DW1, though the death certificate at page 39 of the record of appeal gives the date of death as November 20, 2016. There is likewise no dispute that the motor vehicle was then being driven by the 2nd appellant, Nashon Kiptanui Ngaruiya (DW1).
28. In the light of the evidence presented before the lower court and the grounds of appeal filed herein as well as the written submissions filed by learned counsel on behalf of the parties, two main issues arise for determination; namely, whether the decision of the lower court is tenable on the apportionment of liability at 90:10 in favour of the deceased; and whether the various aspects of quantum of damages were properly assessed.
29. Needless to mention that it is not sufficient that an accident occurred involving the 1st appellant's motor vehicle, which was then driven by the 2nd appellant. The respondent was under obligation to prove the link between that accident and the allegations of negligence made by her at paragraph 5 of her plaint. (see *Statpack Industries v James Mbiti Munyao* [2005] eKLR)
30. As to causation, the 2nd appellant's account differed significantly from the version presented by the respondent's witnesses, particularly in connection with the point of impact. While the 2nd appellant blamed the deceased for riding on the wrong lane, PW3 testified that from his observations at the scene, the 2nd appellant was to blame for the accident for swerving from his lane onto the path of the motorcyclist. The evidence of PW3 was in tandem with that of PW2 who witnessed the occurrence.
31. In those circumstances, blameworthiness was a question to be resolved by the trial magistrate on the basis of the evidence presented by the parties, including her observations on the credibility and demeanour of the witnesses. Having given consideration to that evidence, she attributed 10% liability to the deceased and gave her reasons for that decision. At paragraphs 8, 9 and 10 of her judgment, the learned magistrate also took into account the two authorities cited by counsel for the appellants in connection with the issue of liability.
32. I find no reason to fault the conclusion reached by the learned magistrate in that regard. Indeed, as was observed by Sir Kenneth O'Connor in *Peters v Sunday Post Limited* [1958] EA 424:

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..."

33. And, in *Stapley v Gypsum Mines Ltd* (2) [1953] AC 663 at p 681, Lord Reid had the following to say, which has been quoted with approval by the Court of Appeal in *Michael Hubert Kloss & Another v David Seroney & 5 Others* [2009] eKLR

To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed



and reasonable jury would decide it...The question must be determined by applying common sense to the facts of each particular case. 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.”

34. Similarly, in *Khambi and Another v Mabithi and Another* [1968] EA 70, it was held that: -

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

35. There being no demonstration that in apportioning liability at 90:10 the learned magistrate erred in principle, it is my finding that the decision arrived at by the trial magistrate on liability is justified in the circumstances and is hereby upheld.

36. On quantum, it is trite that assessment of damages is a matter of discretion; and that an appellate court ought not to disturb an award simply on the ground that it would have arrived at a different outcome. In *H West & Son Ltd v Shephard* [1964] AC 326, for instance, it was held that:

...In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range of limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.”

37. Similarly, in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited)* [2015] eKLR, the Court of Appeal held that:

As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages.” (Also see *Butt v Khan* [1981] KLR 349)

38. As has been pointed out herein above, the lower court’s total award of Kshs 3,528,100/= was the sum total of the following:

- (b) Pain and suffering Kshs 150,000/=
- (c) Loss of expectation of life Kshs 200,000/=



- (d) Loss of dependency Kshs 3,552,000/=
- (e) Special damages Kshs 16,350/=
- Less 10% contribution (Kshs 390,200/=)
39. In respect of awards for pain and suffering and loss of expectation of life, the guiding principles are well settled. For instance, in *West Kenya Sugar Co Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR it was held that: -
- ...As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident...”
40. Likewise, in *Joseph Kivati Wambua v SMM & another (Suing as the Legal Representatives of the Estate of EMM-Deceased)* [2021] eKLR it was held: -
- ...what determines the award under that head is how long the deceased took before he either passed away or lost consciousness. In the instant case, there was no cross-examination of the witnesses in order to bring out this evidence. A distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some time after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal...”
41. The same position was taken in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR the court observed that:
- ...The conventional award for loss of expectation of life is Ksh 100,000/- while for pain and suffering the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
42. As has been pointed out hereinabove, in this instance, it is not altogether clear whether the deceased died immediately after the accident or the following day while undergoing treatment. This is because, while PW2, PW3 and the 2nd appellant were categorical that the deceased died on the spot, the certificate of death produced before the lower court indicates the date of death as November 20, 2016. The learned magistrate appears to have taken the option of instantaneous death, and again I find no reason to fault that conclusion. Be that as it may, I agree with the position taken by Hon Majanja, J in the case of *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR that: -
- ...it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death.



According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable...”

43. Hence, for instantaneous death, I find the award of Kshs 150,000/= to be on the higher side. In the case of *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, Mativo, J upheld an award of Kshs. 50,000 where the deceased was said to have died on the spot, as did Hon Majanja, J in *Sukari Industries Limited v Clyde Machimbo Juma* (supra). The award of Kshs 150,000/= for pain and suffering is accordingly reduced to Kshs 50,000/=.

44. On loss of expectation of life, the trial court awarded Kshs 200,000/= which the appellants contend is inordinately high. They suggested an award of Kshs 100,000/= being the conventional amount and urged the Court to find that it would suffice in the circumstances. I note that *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR, Hon Emukule J, reasoned that:

...In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death....”

45. That was in 2013. Thereafter, in the case of *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR an award of Kshs 200,000/= was made for loss of expectation of life where the deceased was aged 33 years old. Similarly, in *West Kenya Sugar Co Limited* (Supra) the Court did not find the award of Kshs 200,000/= on that head to be excessive. In the premises, I find no justifiable cause to disturb the award made by the lower court for loss of expectation of life.

46. On loss of dependency for which the lower court awarded Kshs 3,552,000/=, the appellants submitted that the award was erroneous in that the income used as the multiplicand was not proved. According to counsel for the Appellant, instead of applying Kshs 12,000/= as the deceased’s income, the trial court should have applied the minimum wage of Kshs 8,500/= as provided for under the *Regulation of Wages (General Amendment) Order, 2013*. The Respondent on the other hand maintained that the award was reasonable as the minimum wage in Kenya was then Kshs 15,000/=.

47. The approach taken in *Chunibhai J Patel and Another vs PF Hayes and Others* [1957] EA 748, by the Court of Appeal for East Africa, and which I find useful, was that:

The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase.”

48. Hence, the first question to pose is how old was the deceased as at November 19, 2016 when he died? The evidence adduced by his mother, PW1, was that the deceased was 23 years old at the time of his



death; a fact borne out of the certificate of death produced before the lower court. It was on the basis of that uncontroverted evidence that the lower court arrived at a multiplier of 37 years, convinced that the deceased would have worked until about the age of 60 years. I have no reason to differ and would therefore uphold that finding as well.

49. The appellants took issue with the 2/3 dependency ratio adopted by the trial court, contending that the ratio of 2/3 was on the higher side. I however note that the conclusion of the trial court that the deceased was a single man who used 2/3 of his salary to take care of mother, father and siblings and thus only spent 1/3 of his wages on himself was premised on the evidence of the mother of the deceased, PW1. Consequently, I find no reason to come to a different conclusion on that issue.
50. As regards the multiplicand, it is true that no evidence was adduced by the respondent to prove the deceased's monthly. PW1 simply testified that the deceased was a farmer and that he earned Kshs 30,000/= per month which was never proved. It is also noteworthy that the respondent had pleaded Kshs 80,000/= at paragraph 8 of the amended plaint. On its part, the trial court settled for Kshs 12,000/= on the ground that that sum was the then prevailing minimum wage.
51. Where, as in this case, there was no proof of the deceased's monthly income, the best course would have been for the lower court to award a global sum. In this regard, the decision of Hon Ringera, J in *Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another*, (as quoted by Koome J, (as she then was) in *Albert Odawa v Gichimu Gichenji* [2007] eKLR), is instructive. The learned judge took the view, with which I agree entirely, that:

The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency, and the expected length of the dependency are known 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."

52. Indeed, in *Hellen Waruguru Waweru* (supra) the Court of Appeal cautioned that:

This court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of *Jacob Ayiga Maruja & Another v Simeone Obayo* CA Civil Appeal No 167 of 2002 [2005] eKLR the Court observed:-

'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning 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.'

53. It is therefore my finding, in the light to the foregoing, that the figure of Kshs 12,000/= that the lower court worked with is not excessive in the circumstances. Hence, for loss of expectation of life, the lower courts calculation of $12,000 \times 12 \times 37 \times 2/3 =$ Kshs 3,552,000/= is hereby upheld.



54. In the result, as the award on special damages of Kshs 16,300/= was not contested the total amount due to the estate and dependants of the deceased, is as hereunder:

Under the Law Reform Act: Pain and suffering - Kshs 50,000
Loss of expectation of life - Kshs. 200,000

Under the Fatal Accidents Act

Loss of dependency - Kshs 3,552,000
Less 10% contribution - Kshs 380,200
Special damages - Kshs 16,300
Total Award - Kshs 3,438,100/=

55. In the result, save to the extent aforementioned, the appeal fails and is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 29TH DAY OF JULY 2022.

OLGA SEWE

JUDGE

