Kisua & 2 others v Nthanze & another (Suing as the Administrators of the Estate of the late Justina Kasiva Nthanze (Deceased)) (Civil Appeal 69 of 2019) [2022] KEHC 12582 (KLR) (3 August 2022) (Judgment)

Neutral citation: [2022] KEHC 12582 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 69 OF 2019

MW MUIGAI, J

AUGUST 3, 2022

BETWEEN

BERNARD KISUA ..... 1ST APPELLANT

SAMMY MUTISYA MULWA ..... 2ND APPELLANT

DOMINIC MUTISO KIILU ..... 3RD APPELLANT

AND

ANNA WAENI NTHANZE ..... 1ST RESPONDENT

JOSEPH MUTUNE NTHANZE ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE JUSTINA KASIVA NTHANZE (DECEASED)

(Being an appeal from the whole Judgment of the Hon C.A Ocharo (PM) delivered on 8.2.18 in Machakos Civil Suit No.644 of 2016)

JUDGMENT

Plaint Filed On 26/09/2016

1. The Respondents instituted a suit Machakos CMCC No 644 of 2016 against the Appellants seeking general damages under the *Fatal Accidents Act* and *Law Reform Act*, Special Damages of Kshs 41,250/-,cost of the suit and interest from the date of filing the suit.

2. At all material times , the 1st & 2nd Defendants were the registered owners of motor vehicle Reg KBP 882A while the 3rd defendant was the driver and/or either the actual but unregistered owner of the same vehicle or otherwise had a beneficial or insurable interest therein.

3. The Respondents pleaded that on or about 25th October, 2014, the deceased was lawfully and carefully standing at a bus stage along Machakos-Kitui Road when the 1st and 2nd Appellants motor vehicle registration number KBP 882A was negligently and carelessly driven, controlled and/or managed by the 3rd Appellant who permitted and/or caused it to lose control, to veer off the road and he allowed it to knock down the deceased who sustained fatal injuries and as a result succumbed to the injuries.

4. The Plaintiff /Respondent relied on the doctrine of Res Ipsa Loquitor and held the Defendants vicariously liable.

5. The Respondents pleaded that the deceased was aged 38 years working as a clerk and the sole bread winner to his family. The listed deceased's dependants are her mother Anna Waeni Nthanze, his brother Joseph Mutune Nthanze and his son BN.

6. In her witness statement, Anna Waeni Nthanze stated that the deceased was working as an Office Clerk earning a monthly salary of Kshs 28,000/- out of which the deceased used to send her Kshs 20,000/- every month for the upkeep and school fees for the deceased's child.

7. According to her, the burial costs were approximately Kshs 200, 000/-.

8. In his witness statement, Erick Mutiso stated that the deceased was not married but had a child by the name of BN who was aged 11 years at the time of the accident. That the child was going to school.

9. He stated that on 25th October, 2014 he was present and saw exactly what happened. He stated that motor vehicle registration number KBP 882A which was coming from Kitui direction towards Machakos being driven at a high speed hit the deceased badly. According to him, the deceased died on the spot.

Defence Filed On 7/11/2016.

10. The Appellants denied each and every allegations contained in the Plaint save for the description of parties and the jurisdiction of the Trial Court.

11. The Appellants averred that the accident occurred solely due to or substantially contributed to by the deceased. According to the Defendant, the deceased failed to give way to motor vehicle KBP 882A by walking into its path.

Consent Adopted In Court On 2/11/2017

12. The issue of liability was compromised by parties as follows;

    By consent

    a. Liability be entered against the Defendant in favour of the Plaintiff at the ratio of 80:20

    b. Matter to proceed for assessment

Evidence

13. PW1, Anna Waeni stated that she was in court over her child's case who was hit by a motor vehicle and died on the spot. She stated that she was a farmer. According to PW1, her child was aged 38 years old who had a child known as N aged 14 years, a standard 8 student at [Particulars Withheld] School. According to PW1, her child was working in Nairobi. PW1 sought to be compensated for the loss of her child. PW1 produced Bundle of List of Documents to support her claim.

14. In cross-examination, PW1 stated that her daughter worked in an office in Nairobi but she did not know which office. She stated that she hadn't brought any proof that the daughter worked in an office and was engaged in business. According to her, it was the daughter who told her about the salary the daughter was being paid. She stated that she did not have a payslip. According to PW1, her daughter gave her Kshs 20,000/- every month in cash but stated that she didn't have proof and asked the court to believe her word despite the income not being pleaded.

15. According to PW1, her daughter was not married but had a child. She stated that the child's birth certificate is a part of her documents in court. She stated that she spent Kshs 200,000/- for burial expenses and she had the receipts. According to PW1, she is a farmer and the proceeds are sufficient for her need.

16. In re-examination, PW1 stated that her statement confirms her daughter earnings. She stated that her daughter was also a business lady. She informed court that there was a clinic card which was at home.She stated that she spent Kshs 200,000/- to buy food, transport and mortuary expenses. It was her testimony that she doesn't know the name of the mortuary but it was along Nairobi-Machakos Road where she spent about Kshs 40,000/- in total.

Trial Court's Ruling Delivered On 8/02/2018

17. The Trial Court judgment was only on the quantum of damages as liability had been agreed on parties vide Consent of2/11/2017.

18. On quantum of damages for loss of expectation of life, the Trial Magistrate observed that the standard of living was very high and awarded the Appellants Kshs 250,000/-.

19. Regarding the income earned by the deceased, the Trial Magistrate adopted an income of Kshs 28,000/- and concluded that the deceased was working as a Clerk as indicated in the Death Certificate. She placed reliance on the decision of Majanja J. in *Mwita Nyamohanga & another v Mary Rovi Moherai (Suing on behalf of the estate of Joseph Tagare Mwita & another* [2005] eKLR which was on the proposition that proof or earnings by way of testimony was sufficient evidence of earnings.

20. Regarding the multiplier, she observed that the deceased who was aged 38 years would have worked up to the age of 55 years hence a multiplier of 17 years was reasonable.

21. The Trial Magistrate adopted a dependency ratio of 2/3. She observed that the Chief's letter confirmed that the deceased had a son called B aged 11 years at the time of her death.

22. Regarding the special damages, the Trial Magistrate found that the sum of Kshs 41, 250/- had been pleaded and proved.

23. On funeral expenses, the Trial Magistrate found that despite lack of receipts on the expenses it being a burial of an African child, the family must have incurred some expenses. She settled for a global sum of Kshs 50,000/- and stated that Kshs 200,000/- was on the higher side.

24. The Trial Magistrate entered the award on quantum of damages as follows;

    a. Pain and suffering Kshs 20,000/-

    b. Loss of expectation of life Kshs 250,000/-

    c. Loss of dependency Kshs 3,808,000/-

    d. Special damages Kshs 41,250/-

e. Burial expenses Kshs 50,000/-

Total Kshs 4,169,250/-

Less 20% Kshs 833, 850/-

Kshs 3,335,400/-

Plus costs of the suit and interest.

Memorandum Of Appeal Filed On 30/04/2019

25. Aggrieved, the Appellants have appealed to this Court citing the following grounds of appeal:-

(1) That the Learned Trial Magistrate erred in law and in fact in using a multiplicand of Kshs 28,000/- despite no evidence being tendered to support the same.

(2) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in failing to take into account the applicable statutory deductions.

(3) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in adopting a dependency ratio of 2/3 despite no evidence being tendered that the deceased had a son.

(4) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in adopting an excessive multiplier.

(5) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in awarding an excessive amount of damages for loss of expectation of life.

(6) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in failing to deduct the damages awarded under the *Law Reform Act* when computing the total award.

(7) That the Learned Trial Magistrate erred in law and in fact and misdirected herself in failing to consider the Appellant's submissions on the damages sought.

26. The Appellants have urged this Court to grant the following orders;

a. The Trial Court's judgment delivered on 8.2.18 and all subsequent orders and decrees be quashed and/or set aside.

b. This Honourable Court does determine the issue of quantum.

c. That the costs of this Appeal be borne by the Respondent in any event.

d. Any other and or further relief that this Court deems fit to grant.

Appellants Submissions Filed On 18/11/2021

27. The Appellants placed reliance on their written submissions filed before the Trial Court and contained at pages 47-63 of the Record of Appeal.

28. It has been submitted that it is not in dispute that the deceased died on the spot. The Appellants contends that Kshs 20, 000/- awarded for pain and suffering was manifestly high. The Appellants contend that the Trial Magistrate failed to consider their proposal of Kshs 10,000/- and never gave reasons for the finding in favour of the Respondents.

29. Regarding the quantum of damages for lost years, it is submitted that it should have been the standard conventional sum of Kshs 100, 000/- for the deceased who was aged 38 years hence Kshs 250, 000/- awarded was excessive.

30. According to the Appellants, the Trial Magistrate erred by failing to deduct the sum under this head of damages noting that the administrator of the deceased was her mother who was also to benefit under the quantum of damages for loss of dependency. They urged the court to set aside the award and substitute it with the conventional award of Kshs 100,000/-.

31. The Appellants contends that the Trial Magistrate erred by failing to consider their submissions in respect of loss of dependency that the Respondents failed to produce documents to show that the deceased was working and/or employed and the proof of income as the income statement was never produced in court.

32. According to the Appellants, it was an error by the Trial Magistrate to have adopted a ratio of 2/3 when there was no evidence to show that the deceased had a son. It is submitted that the award under loss of dependency of Kshs 3,808,000/- was inordinately and excessively high.

33. According to the Appellants, the Trial Magistrate completely misguided herself when she awarded an additional Kshs 50,000/- towards funeral expenses when it had not been pleaded and proved. Reliance was placed on the case of *Francis Muchee Nthiga v David Waweru* (2013) eKLR.

34. From the foregoing, it is submitted that the Trial Court did not exercise its discretion fairly since it did not take into account relevant factors in making its award. The Appellant urged the court to examine the supporting authorities in the initial submissions and comparable awards therein.

35. The Appellants urged the court to exercise its discretion in their favour by finding that this appeal has merit and admit it in its entirety. It is submitted that an award of costs requires the court's discretion.

Respondents Submissions Filed On 15/12/2021

36. On behalf of the Respondents, it was submitted that the bone of contention is on factors used by the Learned Trial Magistrate to compute award on this head.

37. It was submitted that the Respondent testified in court on oath and tendered documents before the court clearly stating that the deceased was aged 38 years working as an office Clerk and earning a salary of Kshs 28,000/-. Reliance was placed on the case of *Mwita Nyamohanga & another v Mary Robi Moherai Suing on Behalf of the Estate of Jospeh Tagare Mwita (Deceased) & another* [2015] where Majanja J. held that there was proof of income by way of the deceased's wife testimony which was sufficient to prove income hence there was no need to fall back to the Regulation of Wages Order.

38. Regarding the multiplier of 27 years applied by the Trial Magistrate, it was submitted that it was fair and reasonable given that the deceased was working in private sector where the age is not limited to the formal retirement age of 60 years. Reliance was placed in the case of *Violet Jeptum Rahedi v Albert Kubai Mbogori* (2013) Civil Suit No 676 of 2009 and in *Francis Wainaina v Elijah Oketch Adellah* (2015) Civil Suit No 191 of 2013 where the court adopted a multiplier of 35 years for a 28 year old.

39. The Respondent opposed the applicability of the case of *Kinyosi Kitungi v Simon Okoth Obok & another*, HCCC No 1202 of 1992 cited by the Appellants where the deceased was aged 16 years old unlike the deceased herein who was in private business and working as an Office Clerk. The Respondents assert that taking into account the nature of the deceased employment, the Trial Magistrate finding under the head was appropriate, fair and reasonable. They urged this Court to uphold the Trial Magistrate decision on this head.

40. It was submitted that the dependency ratio of 2/3 has not been disputed or challenged before the court hence the Trial Magistrate did not apply wrong principles or considered irrelevant facts to find that 2/3 of the deceased income was used to support her child, elderly mother and siblings.

41. Regarding the damages awarded for loss of expectation of life of Kshs 250,000/-, it was submitted that before the Trial Court, the Respondents had proposed Kshs 400,000/- as the deceased was of good health and energetic as the prime of her life hence she could probably have lived a long and happy life. Reliance was placed on the case of *Violet Jeptum Rahedi v Albert Kubai Mbogori* (2013) Civil Suit No 676 of 2009 where the Plaintiff was 44 years and was awarded 150,000/-in 2013. According to the Respondents, the award was appropriate and reasonable.

42. As to whether the Trial Magistrate erred for failing to deduct the damages made under the *Law Reform Act* when making the award under the Fatal Accident Act, it was submitted that the Trial Magistrate did not error in law or principle in making the award. Reliance was placed on the cases of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR and *Chen Wembo & 2 others v IKK & another (Suing as the Legal Representative and Administrators of the Estate of CRK (Deceased)* [2017] eKLR, Civil Appeal No 32 of 2014.

43. On the ground that the Appellants submissions were ignored by the Trial Magistrate, it is submitted that it is not a must for the Trial Magistrate to rely on the authorities cited by parties since they are generally marketing language and do not constitute evidence at all as held by the court in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, Civil Appeal No 240 of 2011. Based on the foregoing, it was submitted that it was clear that the Trial Magistrate did not err in any law or principle in making the awards and cannot be termed as inordinately high as to present an entirety erroneous estimate of compensation to which the Respondent was entitled to. They urged this Court to dismiss the Appeal for being untenable and uphold the Trial Magistrate decision.

Determination

44. I have considered the evidence on record, submission filed and authorities relied upon by parties.

45. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co.* [1968] EA 123 that:

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

46. The Appellants assert that the Trial Magistrate erred in law and principle in making the awards hence the quantum of damages should be interfered with by this Court.

Quantum Of Damages

47. The Court of Appeal in the case of *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR held:

> " 10. 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 entirely 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 low or so inordinately high that it must be a wholly erroneous estimate of the damages.."

48. In *Jane Chelagat Bor v 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."

49. The Respondents assert that the Trial Court awards cannot be termed as inordinately high as to present an entirety erroneous estimate compensation entitled to the deceased. Their claim for damages is lodged under the *Law Reform Act* and the Fatal Accident Act.

Damages Under The *Law Reform Act*

Pain and suffering

50. The award for pain and suffering has not been challenged by the Appellant but this Court notes that the Trial Magistrate settled for the sum Kshs 200,000 and declined the sum of Kshs 20,000/- proposed by the Plaintiff, in this Appeal the Respondents. Upon perusal of the Respondent's submissions before the Trial Court, the Respondent proposed the sum of Kshs 200,000/- and not Kshs 20,000/- as indicated by the Trial Magistrate. In the end the Trial Magistrate awarded Kshs 20,000/- and not Kshs 200, 000/-. This is a typographical error.

51. This Court has the power under Section 99 of the *Civil Procedure Act* to correct clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, either of its own motion or on the application of any of the parties. Accordingly, the judgment is corrected.

Loss of expectation of life

52. The Trial Magistrate assessed the award at Kshs 250,000/- on the basis that expectation had gone up with the standard of living very high. Before the Trial Court, the Respondent had quantified Kshs 400,000/- by placing reliance on the case of Violet Jeptum Rahedi v Albert Kubai Mbogori (2013)

where the deceased was awarded Kshs 150,000/-. The Appellants had proposed Kshs 100,000/- based on the CA No 148 of 1989 *Maina Kamau & another v Josephat Muriuki Matoke* KSM CA No 91 of 1997.

53. In the case of *Hyder Nthenya Musili & another v China Wu Yi Limited & another* [2017] eKLR, the Court stated as follows-

> " 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.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000/= while for pain and suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death." (emphasis added).

54. The conventional sum for damages to be awarded under this head is Kshs 100, 000/-. According to the *Oxford Dictionary* Conventional is defined as 'what is generally done or believed' and in *Cambridge Dictionary* it is defined as 'relating to accepted or traditional ways of doing something.'

55. It was emphasized by Court in *Lau Chepung v Hoi Kong Ironwares Godown Co. Ltd* {1988} 2 HKLR 650 that:

> " Apart from automatic adjustment for inflation, a general adjustment of the guidelines may be necessary on account of change in social-economic conditions changes inevitably take place in the everyday life of any growing society and the expectations of the average person and family tend to increase each year goes by."

56. The deceased was aged 38 years. He is said to have been survived by 3 dependents as pleaded in the Plaint. According to the Respondents, the deceased had many more productive years ahead of her. The death certificate show that she was a clerk.

57. The High Court decision have considered awarding a higher amount than the conventional sum is not wrong. In the case of *Moses Akumba & another v Hellen Karisa Thoya* (2017) eKLR Chitembwe J. held that an award of Kshs 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In the cases of *Patrick Kariuki Muiruri & 3 others v Attorney General* [2018] eKLR Sergon J. made an award of Kshs 200,000/= under this heading. In *Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & another* [2018] eKLR an award of Kshs 200,000/= was made. Kemei J. in *Ruth Ngoki Peter & another v Top Carriers Limited & another* [2021] eKLR held the award on loss of expectation of life in the sum of Kshs 250,000/- to be reasonable. Odunga J. in *Catholic Diocese of Machakos & another v Janet Munaa Mutua & another* [2021] eKLR where the deceased was 30 years old held the award of Kshs 200,000.00 was reasonable.

58. Taking into account the high inflationary trends, I find no reason to disturb the award made in the sum of Kshs 250,000/= for Loss of expectation of life. It has not been shown that the Trial Court used the wrong principles in making the award for loss of expectation of life. The award is not excessive and is upheld.

Damages Under The Fatal Accident Act

Loss of dependency

59. Under this head of damages, Ringera J. in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & another* – Nairobi HCCC. No 1638 of 1988 (unreported), held at page 248 that:

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature." See *Grace Kanini v Kenya Bus Services* Nairobi HCCC No 4708 of 1989.

60. It therefore follows that the method to find loss of dependency is the multiplicand (annual net income) multiplied by a suitable multiplier (expected working life lost by the deceased by the premature death), and further by a dependency ratio (ratio of the deceased's income utilized on her dependents).

Multiplicand

61. According to the Appellants, the Respondent (PW1) failed to show that the deceased was working or was employed and the deceased income statement was not produced. It was submitted that the use of Kshs 28, 000/- as the deceased income led to an award that was inordinately and excessively high.

62. The Respondent produced the deceased's Death Certificate that show that the deceased was a Clerk. PW1 stated that the deceased earned Kshs 28,000/- despite not having the deceased's payslip. It was PW1 testimony that the deceased worked in Nairobi and was also engaged in business.

63. The Court of Appeal in *Gerald Mbale Mwea v Kariko Kihara & another* Civil Appeal No 112 of 1995 that the issue of dependency is always a question of fact to be proved by he who asserts. In *Jackline Myeni Nzioka v Jetha Ramji Kera*, NRB C.A. 154 & 155 of 1966 (UR), it was held that dependency is a question of fact.

64. The court's view is that the failure to have the documents does not make it fatal to the Respondent's case. This was the position taken by the Court of Appeal in *Jacob Ayiga Maruja & another v Simeone Obayo* CA Civil Appeal No 167 of 2002 [2005] eKLR where the court stated:-

> " 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." See *Priscilla Mwathimba v Simon Kaibunga & another* Meru CA 132 of 2008.

65. The same court in *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR reiterated that:-

> "...it would be unrealistic and unfair to expect strict proof of income through documents in regard to a small business enterprise carried out by a sole proprietor who is deceased. If there is sufficient evidence that the deceased was carrying out the alleged business, the court has to assess the income, doing the best that it can in the circumstances of the case."

66. In *Leonard O. Ekisa & another v Major K. Birgen* [2005] eKLR Dulu J. held that dependency is a matter of fact. It need not be proved by documentary evidence.

67. The court's view is that there is sufficient evidence to prove that the deceased was employed and earned an income despite lack of payslip or income statement in court. The ground of appeal fails.

Multiplier

68. It is not in dispute that the deceased was 38 years old. In her evidence PW1 confirmed the age of the deceased. The death certificate established the age of the deceased to be 38 years as at the time of the death.

69. The court notes that the Trial Magistrate adopted a multiplier of 17 years on the basis that the roles of a clerk in an office are strenuous hence working upto the age of 65 years would be stretching it too far.

70. I agree with Ringera, J in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 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."

71. According to the Chief's letter dated 11th May, 2015, the deceased was survived by a son called Bonventure Nthanze aged 11 years and his mother Anna Waeni Nthanze (PW1) aged 63 years. By the time the deceased is 55 years old, the son would 28 years old probably not dependant of the deceased care as a minor would require. PW1 stated that she was a farmer and the proceeds from the farming were sufficient for her needs. She stated that the deceased gave her Kshs 20,000/- per month. In her statement, she has stated that the amount was used for the upkeep of the deceased son and payment of school fees.

72. The evidence of PW1 establish that she was not dependent on the deceased since she was farming but the deceased son was depended on the deceased.PW1 stated that deceased son was aged 14 years, a standard 8 student at [Particulars Withheld] Primary School.

73. The court may take the position that farming proceed were sufficient for PW1 needs but that doesn't mean that the deceased never assisted PW1. It could even be possible that she also assisted his brother Joseph Mutune Nthanze who listed in the Plaint.

74. I appreciate the views expressed by Ringera, J (as he then was) in *Marko Mwenda v Bernard Mugambi & another* Nairobi HCCC No 2343 of 1993 that:

> " Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future."

75. The Appellant had proposed 12 years before the Trial Court. It would therefore mean that the deceased would have worked upto the age of 50 years since she was 38 years. The court's view is that 12 years would not match the fact that no evidence was adduced whether the deceased had any underlying health problems that would have led to an early demise. The deceased was not married but the only sole bread winner for her family. At 50 years the deceased would probably be still dependent on the deceased since he will be 23 years perhaps in an education institution.

76. Taking into account the vicissitudes of life and the age of the deceased, the court finds no reason to disturb the Trial Magistrate's choice of multiplier. The multiplier of 17 years is reasonable.

Dependency ratio

77. The Appellant has taken issue with the choice of 2/3 dependency ratio upheld by the Trial Magistrate. Before the Trial Court, the Appellants proposed 1/3 while the Respondent proposed 2/3. The ratio of 1/3 was premised on the ground that the deceased was unmarried and childless since there was no copy of the birth certificate tendered in court for the stated deceased son. The Respondent premised his basis for 2/3 on her oral testimony which was uncontroverted.

78. The position taken by the Appellants was rejected by the Court of Appeal in *Jacob Ayiga Maruja & another v Simeone Obayo* CA Civil Appeal No 167 of 2002 [2005] eKLR. Lack of a copy of the birth certificate would occasion an injustice to the Respondent whose evidence remain uncontroverted. In any case there is a copy of the Chief's letter that confirm, the deceased had a son.

79. The Court of Appeal in *Jane Chelagat Bor v Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, opined that:

> " There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss..."Dependancy" or "dependency" is the relation of a person to that by which he is supported...The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation...But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person...In the instant case one fifth was far too low, even though its effect was mitigated by a generous

multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."

80. It is not in dispute that the deceased was unmarried but had a child. It has been demonstrated by PW1 that the amount sent to her by the deceased was used for the upkeep of the deceased son and payment of school fees. It will be noted that the deceased solely took care of the upkeep and school fees for her stated son. She was unmarried and therefore she had the sole responsibility of taking care of her stated son.

81. The court finds no reason to disturb the adopted dependency ratio of 2/3 by the Trial Magistrate. The same is upheld.

82. In the premise, the Trial Magistrate's tabulation for the award for loss of dependency is upheld.

Whether to deduct the damages awarded under the *Law Reform Act*

83. According to the Appellants, the award of Kshs 250, 000/- for loss of expectation of life ought to have been deducted by the Trail Magistrate since the deceased mother, PW1 was the administrator of the deceased and would benefit from additional damages for loss of dependency.

84. The court notes that the Appellants were contend with not deducting the award since they did not submit or plead the issue before the Trial Court. The issue then cannot be a ground to be taken on appeal.

85. In *Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others* [2016] eKLR the Court held;

> " The issue of locus standi of the 2nd appellant was not an issue raised before the trial court; it is also not an issue raised in any ground of appeal and there is no cross appeal on the locus of the 2nd appellant in this matter, it cannot therefore be validly introduced through submissions, no matter how eloquent.

86. In the same vein, the Court of Appeal in *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others ex-parte Tom Mbaluto* [2018] eKLR stated:

> " Rule 104 of the *Court of Appeal Rules*, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.
>
> It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v Ruth Watiri Kibe*, CA No 39 of 2015 and *Openda v Ahn* [1983] KLR 165). .....As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance."

87. Leave has not been sought to introduce the issue of double compensation as alleged by the Appellants hence this Court on appeal will not render itself on the ground. Nevertheless the court would still be inclined to associate itself with the Court of Appeal in *Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Ltd* [2015] eKLR where the Judges of Appeal opined that there is no compulsion in law to make the deduction. The same position was opined by Majanja J.in *Richard Matheka Musyoka & another v Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased)* [2016] eKLR and Meoli J. in *Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased)*[2017] eKLR.

88. The court finds that ground 2 of the appeal that the Trial Magistrate failed to take into account the applicable statutory deduction will suffer the same fate for not being canvassed before the Trial Court.

89. It is trite that he who alleges he must prove. I associate myself with the decision in *Janet Kaphiphe Ouma & another v Marie Stopes International (Kenya)* Kisumu HCCC No 68 of 2007 where Ali-Aroni J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No 23 of 1997 held that:

> "In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

90. The award on special damages and funeral expenses has not been challenged. The Court will not interfere with the awards.

91. The Judgment by the Trial Court confirms the Trial Court referred to and considered authorities by each party in each limb or category and gave reasons why the Court departed from the amounts proposed. The assertion that the Trial Court failed to consider the Appellant's submissions is not borne out by the Judgment of the Trial Court.

92. The court finds that the Appellant have not been able to demonstrate that the Trial Magistrate did not consider their submissions on damages.

Disposition

a. In the premises, the court finds the Appeal is devoid of merit.

b. The Trial Court judgment in Machakos CMCC No 644 of 2016 is upheld

c. The Appeal is dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 3rd DAY OF AUGUST, 2022.

M.W. MUIGAI

JUDGE