Asin & another (Suing as the Administrators of the Estate of Martin Otieno Asin - Deceased) v Bake 'N' Bite Limited (Civil Appeal E050 of 2021) [2022] KEHC 13916 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13916 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CIVIL APPEAL E050 OF 2021

MN MWANGI, J

SEPTEMBER 22, 2022

BETWEEN

YURI ASIN ..... 1ST APPELLANT

BEATRICE SELINE OKODE ..... 2ND APPELLANT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF MARTIN OTIENO ASIN - DECEASED

AND

BAKE 'N' BITE LIMITED ..... RESPONDENT

(An Appeal from the judgment of Hon. D. Wangeci, Principal Magistrate, delivered on 16th August, 2021 in the Chief Magistrate's Court at Voi in CMCC No. 249 of 2017)

JUDGMENT

1. In the lower court, the appellants sued the respondent through a plaint dated August 29, 2017, on their own behalf and on behalf of the estate of the deceased, in their capacity as the joint administrators of the estate of Martin Otieno Asin (deceased). They later amended the plaint on May 22, 2018. They sought recovery of special damages and general damages for loss of expectation of life, loss of dependency, pain and suffering under the *Law Reform Act* and the *Fatal Accidents Act*, costs of the suit and interest at court rates. They also prayed for any further relief that this court may deem fit and just to grant.

2. The appellants averred that on or about March 1, 2016, the deceased was lawfully driving his motor vehicle registration No KCF 933D along the Mombasa-Nairobi Road within Voi Municipality in the Republic of Kenya,when the respondent and/or its agent, servant or driver so negligently drove, managed and/or controlled its motor vehicle registration No KCD 659S causing it to collide with or ram into motor vehicle registration No KCF 933D as a result of which the deceased lost his life.

3. The respondent was sued as the registered owner of motor vehicle registration No KCD 659S which was at all material times being driven, managed and/or controlled by its driver, agent or servant. The appellants averred that by reason of the said fatal accident, the deceased sustained fatal injuries resulting to his untimely death, and they and his estate had suffered loss and damage. They contended that the deceased's motor vehicle registration No KCF 933D was completely damaged and became a write off.

4. It was stated by the appellants that the deceased at the time of his death was aged 57 years and was in good health with bright prospects as he was the Office Commanding Police Division (OCPD) Mombasa Urban earning a monthly salary of Kshs 98,494.00. They further stated that the deceased was not only the bread winner of his family but also a loving father and husband whom they had lost. They claimed that the deceased's estate was entitled to special and general damages for loss, damage, pain and suffering. The appellants averred that the respondent was charged and convicted for the offence of causing death by dangerous driving.

5. In the lower court, the respondent filed its statement of defence dated March 6, 2019, where it denied the appellants' claim in its entirety. It specifically denied the occurrence of a road traffic accident on March 1, 2016 involving motor vehicle registration No KCF 933D and motor vehicle registration No KCD 659S along the Nairobi-Mombasa Highway at Voi Municipality/or thereabouts. The respondent averred that in the event the said accident occurred, the same was caused/or substantially contributed by the negligence of the deceased.

6. In the lower court, the trial court delivered its judgment on August 16, 2021 and apportioned liability equally between the appellants and the respondent. In regard to damages, the appellants were awarded the sum of Kshs 1,961,936.00 in general damages and special damages of Kshs 1,059,500/= making a total of Kshs 3,021,436 less 50% contribution The net award was Kshs 1,488,123.00 The appellants were also awarded costs of the suit and interest at Court rates.

7. The appellants were dissatisfied by the decision of the Trial Magistrate and filed a memorandum of appeal on September 14, 2021 raising the following grounds of appeal-

    i. That the learned trial magistrate erred in law and fact in failing to weigh and assess the totality of the evidence adduced by the plaintiffs thereby coming to a wrong conclusion on the issues of negligence and liability;

    ii. That the learned trial magistrate erred in law and fact in holding that the deceased was equally to blame for the accident when uncontroverted and unchallenged evidence adduced by the plaintiffs/appellants clearly proved that the defendant/respondent was wholly to blame for the same;

    iii. That the learned trial magistrate erred in law and fact in misapprehending, and/or failing to apply section 47(A) of the *Evidence Act*;

    iv. That the learned trial magistrate erred in law and fact in failing to give due weight to the fact that the defendant/respondent did not adduce any evidence in rebuttal to the evidence adduced by the plaintiff;

    v. That the learned trial magistrate erred in law and fact in failing to give due weight to the fact that the deceased suffered excruciating pain for a considerable period of time before passing on thereby awarding (sic) a very low sum for pain and suffering;

    vi. That the learned trial magistrate erred in law and fact by failing to appreciate that the deceased would have continued earning even after retirement thereby awarding an inordinately low figure for loss of dependency;

vii. That the learned trial magistrate erred in law and fact in awarding an inordinately low sum for funeral expenses having found that considerable amounts must have been used during the burial; and

viii. That the findings of the learned trial magistrate goes against the weight and totality of the evidence adduced by both parties thereby coming to wrong findings on both law and fact.

8. The appellant's prayer is for the appeal herein to be allowed with costs and for this court to set aside the judgment of the lower court and substitute it with such findings and awards that are in accordance with the law; and in the alternative this court substitutes the lower court judgment with such judgment/ orders as this court may deem fit, just and expedient.

9. This appeal was canvassed by way of written submissions. The appellants' submissions were filed on March 3, 2022 by the law firm of Ochieng Omolo & Co Advocates whereas, the respondent's submissions were filed on March 7, 2022 by the law firm of Murimi, Ndumia, Mbago & Muchela Advocates.

10. Mr Ochieng, learned Counsel for the appellants submitted that all the documents listed in the appellants' list of documents were produced by consent and that the evidence by the appellants was not fundamentally shaken or challenged in cross-examination. He stated that it was not disputed that there was a collision between the deceased's motor vehicle and the respondent's motor vehicle as a result of which the deceased sustained fatal injuries. He further submitted that the driver of the respondent's motor vehicle was subsequently charged and convicted for the offence of causing death by dangerous driving. In addition, he stated that at the time of the trial herein, the said driver had not appealed against the conviction against him in the Traffic case.

11. The appellants' counsel submitted that copies of the proceedings and the judgment before the traffic court were produced by consent as exhibits but PW1 was not cross-examined on this piece of evidence and the materiality of the proceedings and the judgment was not challenged nor controverted by the respondent. Mr Ochieng contended that in the authorities relied on by the Trial Magistrate, the defence had led evidence to challenge the testimony of witnesses in the previous trial but since the facts and the circumstances were totally different, the outcome had to be different. He submitted that *prima facie*, the appellants had proved that the material accident had been caused by the respondent's negligence hence the burden of proof shifted to the respondent to explain how the accident occurred and why the deceased either caused or contributed to the same.

12. Mr Ochieng submitted that the Trial Magistrate misapplied and misapprehended the judgment of Apaloo JA in *Chemwolo & another v Kubende* [1986] eKLR 492 and that a correct application of the said authority would have led the learned trial magistrate without any evidence from the respondent challenging the *prima facie* evidence of conviction, to hold that the issue of contribution would not have arisen hence the averments in the statement of defence remained mere allegations. He stated that on a balance of probabilities, the surviving driver was to blame for the collision herein.

13. The appellants' Counsel relied on the case of *Charles Ocharo Momanyi v United Millers Limited* [2017] eKLR, where it was held that where there is a conviction and both parties do not adduce evidence, there would be no evidence on record in respect of contribution by the person who was not convicted. It was submitted by Mr Ochieng that the deceased's estate and the defendants suffered loss of dependency going beyond the deceased's retirement age. He stated that the deceased would have secured alternative gainful employment after retirement and/or he would have received lump sum pension together with monthly pension thereafter. Therefore, the amount payable

under loss of dependency considering all the relevant circumstances should have worked out as 73,414x12x10x2/3=5,873,120.00.

14. He submitted that the deceased was a senior police officer holding the rank of Senior Superintendent of Police and that he was the Officer Commanding Mombasa Central Police Division. He contended that the funeral budget presented to Court was not contested or challenged by the defence as unreasonable and further, the fact that the said claim was inclusive of all the expenses involved from the day the deceased passed on, to the date of the funeral, the Trial Magistrate should have made a higher award noting that the funeral budget is itemized and falls within a reasonable funeral budget. He proposed that an amount of Kshs 846,648.00 for funeral expenses would be sufficient.

15. Mr Ochieng submitted that the deceased's motor vehicle was assessed on August 18, 2017 and it returned a pre-accident value of Kshs 900,000/=. He contended that the Assessor's report was produced by consent hence the contents thereof were unchallenged. He invited the Court to take Judicial Notice of the fact that the vehicle must have depreciated considerably and an assessment done at the time of the accident would have returned a higher value than the stated sum of Kshs 900,000/=. He submitted that an award of Kshs 2,206,148.00 in special damages would be sufficient. He urged this Court to find and hold that the appellants proved their case against the respondent on liability at 100%.

16. Mr Nzaro, learned Counsel for the respondent submitted that the 1st appellant, who was the son of the deceased testified before the trial court as PW1 but he did not witness the occurrence of the said accident. In citing the case of *Evans Mogire Omwansa v Benard Otieno Omolo & another* [2016] eKLR, the defendant's Counsel submitted that the appellants did not call the Investigating Officer to corroborate their testimony as to the circumstances surrounding the occurrence of the accident. Mr Nzaro relied on the case of *Robinson v Oluoch* [1971] EA as cited in Mutisya Muthangya v Paul Manundu Musili [2018] eKLR and submitted that the mere fact that the respondent's driver was charged and convicted of a traffic offence does not necessarily mean that the said driver was a 100% liable for causing the accident.

17. He also relied on the case of *Philip Kiptoo Chemwolo & Mumias Sugar Co Ltd v Augustine Kubende* [1982-88] 1KAR 1036 which was cited in the case of *Mutisya Muthangya v Paul Manundu Musili* [2018] eKLR, where the Court held that contributory negligence may arise on the strength of proceedings in a traffic case therefore despite conviction, the issue of contributory negligence may still be alive. Mr Nzaro contended that Section 47(A) of the *Evidence Act* is only applicable in criminal proceedings and cannot be applicable in civil proceedings. He submitted that whereas the respondent did not call any witnesses in support of its case, the evidence adduced by PW1 could not be said to be uncontroverted. He relied on the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another* [2016] eKLR where Mulwa. J described the nature of uncontroverted evidence. He stated that taking into account that there were no eye witnesses called to tender evidence, this Court should adopt the approach in *Kennedy Macharia Njeru v Packson Githongo Njau & another* [2019] eKLR.

18. Mr Nzaro stated that the principles in assessment of damages are those set out in *West (H) & Sons Ltd v Shepherd* [1964] AC 326 at page 345. He submitted that the two pertinent considerations that should have guided the Trial Court in the assessment of damages were summarized by the Court of Appeal in *Jabane v Olenja* [1986] KLR 661 which was cited in the case of *Odinga Jacktone Ouma v Mourine Achieng Odera* [2016] eKLR. He relied on the case of *Chunibhai J Patel & another v PF Hayes and others* [1957] EA 748 at 749 in submitting that dependency is a question of fact and one of hard pounds and pence; and the sum awarded under the said head is never a conventional one, but compensatory for a pecuniary loss.

19. The respondent's counsel submitted that the deceased's age and earnings were derived from the pay slip and the death certificate furnished by the appellants during trial hence the multiplier applied by the trial magistrate was accurate considering the deceased was to retire at the age of 60 years, pursuant to the provisions of section 76 of the *National Police Service Act*. Mr Nzaro contended that the appellants' claim that the Trial Court ought to have adopted a multiplier of 10 years had no factual basis whatsoever.

20. On the issue of loss of motor vehicle registration No KCF 933D, Mr Nzaro cited the case of *Solomon Mwangi Kihara v Rift Valley Bottlers Ltd & another* [2017] eKLR and submitted that the assessment by Xenon Auto Assessors & Valuers was prepared on August 18, 2017, which was more than a year after the occurrence of the accident hence the appellants had a legal duty to mitigate their losses by taking urgent measures to dispose of the salvage at the earliest opportunity.

21. On the issue of the funeral budget and related expenses, the respondent's counsel submitted that no evidence was adduced before the trial court as to how the figure of Kshs 846,648.00 in the proposed budget for the deceased was arrived at. He cited the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR and submitted that the said proposed budget could not be proof of actual expenditure since the amount expended on a funeral budget must be reasonable. He further submitted that the appellants must have been issued with proof of payments for obituary appearances, cost of transport and other large expenses, thus the appellants failed to properly document and substantiate their claim.

Analysis and determination.

22. This being a first appeal, this court is enjoined to analyze and re-assess the evidence afresh and reach its own conclusion, while bearing in mind that it neither saw nor heard the witnesses testify and make due allowance for the said fact. I have re-examined the record of appeal and given due consideration to the submissions by the parties' respective counsel. See *Williamsons Diamonds Ltd v. Brown* (1970) EA 1 and *Ramji Ratna and Company Limited v Wood Products (Kenya) Limited*, Civil Appeal No 117 of 2001.

23. It is also worth noting that an appellate court will only interfere with a lower court's judgment and/or finding if the same is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion. See *Mwangi v Wambugu* [1984] KLR 453.

24. The following issues arise for determination –

    i. Whether the deceased was liable to contributory negligence; and

    ii. Whether the award of general damages assessed by the trial court was inordinately low in the circumstances of the case.

Whether the deceased was liable to contributory negligence.

25. It is not disputed that the deceased died as a result of a road traffic accident that occurred on March 1, 2016 along Mombasa- Nairobi Highway, at Voi Municipality. It is also not disputed that the said accident involved motor vehicle registration No KCF 933D belonging to the deceased and motor vehicle registration No KCD 659S belonging to the respondent. Notably, the driver of the respondent's motor vehicle was charged with the offence of causing death by dangerous driving and subsequently, he was found guilty and convicted. The appellants contended that in view of the finding by the traffic court and the fact that copies of the proceedings and the judgment therein were produced

by consent of the parties in the civil suit in the lower court, the trial magistrate ought to have reached a conclusion that the respondent herein was a 100% liable for the occurrence of the said accident. They also stated that their evidence before the trial magistrate was unchallenged and uncontroverted since the respondent did not call any witnesses to rebut and/or challenge the appellants' testimony.

26. It is not disputed that the 1st appellant who testified as PW1 before the trial magistrate did not witness the occurrence of the said accident. The respondent averred that the 1st appellant was the only one who testified on behalf of the appellants before the trial court, and the appellants did not call the investigating officer as a witness to testify and corroborate PW1's testimony as to the circumstances surrounding the occurrence of the said accident. It contended that the mere fact that the respondent's driver was charged and convicted of a traffic offence does not necessarily connote that the driver was a 100% liable for causing the accident.

27. Under the provisions of sections 107 and 108 of the *Evidence Act*, the burden of proving a fact is on the party who asserts the existence of any fact in issue relevant to form the onus of proof. The appellants had a duty under Section 107 of the *Evidence Act* to present admissible material for the trial court to give judgement in their favour on the proven facts to support negligence on the part of the respondent. The appellants herein therefore had the burden of proving that the accident herein occurred as a result of negligence on the part of the respondent.

28. The trial magistrate at page 6 of her judgment held that the appellants had the duty of proving the facts constituting negligence on the part of the respondent even if the latter chose to remain silent. She also stated that a case such as the present one would fail if the appellants failed to prove that the accident was caused by the negligence of the respondent. The trial magistrate relied on a number of authorities and proceeded to apportion liability equally between the deceased and the respondent herein. I am of the considered view that the trial magistrate by apportioning liability meant that the respondent raised rebuttal and presumptive evidence on the pleaded facts that the deceased contributed equally to the cause of the accident.

29. The appellants herein have challenged the said finding by the trial magistrate and are urging this court to find that the respondent herein was a 100% liable for the occurrence of the accident that caused the death of the deceased. In *Amani Kazungu Karema v Jackmash Auto Ltd & another* [2021] eKLR, Nyakundi J, when dealing with the issue of contributory negligence held that-

> " A case involving contributory negligence calls upon the trial court to question of what the other party ought or ought not to have done under the circumstances in that particular accident to apportion negligence. Two things must concur to support a finding on contributory negligence, an obstruction on the road being used by the parties and the default of each of the drivers, and their want of ordinary care to avoid it."

30. As explained in this judgment, the respondent's driver was charged before the traffic court for causing death by dangerous driving as a result of the accident herein. he was found guilty and the proceedings and judgment before the traffic court were produced before the trial court in the civil case in the lower court by consent of the parties herein. The Court of appeal in the case of *Kenneth Nyaga Mwige v Austin Kiguta and 2 others* [2015] eKLR had this to say on production of documents-

> " Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document.

> Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the reference and veracity of the contents. This is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the documents when called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone, but would take into consideration all facts and evidence on record."

31. Having considered the evidence of the 1st appellant (PW1) before the Trial Magistrate and bearing in mind that the respondent's driver did not appeal the decision by the Traffic Court, this Court finds that the appellants proved on a balance of probabilities that the occurrence of the accident that led to the death of the deceased was as a result of negligence on the part of the respondent's driver, thus the respondent was vicariously liable for its driver's actions. This is supported by the Trial Court's finding on liability to the effect that the respondent was 50% liable for the occurrence of the accident in issue. The respondent herein did not file a cross-appeal against the said finding. In the respondent's statement of defence, it averred that the said accident was caused or substantially contributed by the negligence of the deceased. It is my finding that by virtue of the said averment, the burden of proof shifted from the appellants to the respondent, who had a duty to prove, show and/or demonstrate to this Court that the occurrence of the accident herein was contributed to and/or caused by the deceased.

32. To this end I am guided by the Supreme Court's holding in *Raila Amolo Odinga & another v IEBC & 2 others* [2017] eKLR where it was held that-

> "(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, this, evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."

33. In determining contributory negligence, Lord Denning in *Jones v Livox Quarries Limited* [1952] 2 QB 608 stated that-

> " A person is guilt of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable prudent man he might hurt himself and in his reckonings he must take into account the possibility of others being careless."

34. In order for the respondent to succeed on contributory negligence, it ought to have at the very least proved the probability that the harm would not have occurred if the deceased took care to mitigate the loss and damage. I am therefore of the view that where any person suffers damage as the result partly of his own fault and partly of the fault of the defendant, the Court can only apportion contributory negligence based on the pleadings and evidence. In the case herein, all that the respondent did was to plead and/or allege contributory negligence, it did not call any witnesses such as the driver of motor vehicle registration No KCD 659S to testify on how the accident occurred, in order to prove the negligence of the deceased. The appellants were thus denied the opportunity to have the respondent's allegations in its statement of defence to be challenged in cross-examination by the appellants in line with Article 50(2)(k) of the *Constitution* and it did not produce any documents in support of the said allegation.

35. It is therefore my finding that there was no material presented by the respondent in the lower court case to controvert/challenge and/or rebut the appellants' testimony. it is this court's finding that the trial magistrate erred in fact and law and applied her discretion wrongly in apportioning 50% liability on the deceased. Consequently, the appeal succeeds on the issue of liability.

Whether the award of general damages assessed by the trial court was inordinately low in the circumstances of the case.

36. Under the *Fatal Accidents Act*, there are three heads of compensation; loss of expectation of life, pain and suffering and loss of dependency. The award of pain and suffering and loss of expectation of life were not challenged, thus the Court shall not deal with these two heads of compensation. On the issue of loss of dependency, the appellants contended that they and the deceased's estate suffered loss of dependency going beyond the deceased's retirement age since the deceased would have secured alternative gainful employment after retirement and/or he would have received lump sum pension together with monthly pension thereafter. The respondent on the other hand stated that the deceased's age and earnings captured on the pay slip and the death certificate furnished by the appellants during Trial, showed he was 57 years old hence the multiplier applied by the Trial Magistrate was accurate considering the deceased was to retire at the age of 60 years pursuant to the provisions of section 76 of the *National Police Service Act*.

37. The formula for assessment of loss of dependency was ably stated by Ringera J, in *Beatrice Wangui Thairu v Hon Ezekiel Bangetuny & Another* Nairobi HCC No 1638 of 1988 (UR) as hereunder-

> " 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 called the multiplicand. In determining the same, the important figure is the net earnings of the deceased (emphasis mine). The court should then multiply by a reasonable figure representing so many years purchase. 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 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 lump sum and would if wisely invested yield returns of an income nature".

38. In view of the foregoing and the fact that under the provisions of Section 76 of the *National Police Service Act*, the deceased was to retire at the age of 60 years, the issue of whether or not the deceased would have secured another employment after retirement is not an issue for this Court to determine. As correctly submitted by the respondent, dependency is a question of fact and one of hard pounds and pence and the sum awarded under this head is never a conventional one but compensatory for a pecuniary loss. On the issue of the deceased receiving lump sum pension together with monthly pension after retirement, I am of the considered view that this forms part of the estate of the deceased which is a purview of the succession Court. Therefore, this Court finds that the Trial Magistrate did not apply her discretion wrongly. Consequently, the appeal fails on this limb.

39. On the loss of the motor vehicle, the appellants submitted that the motor vehicle was assessed on August 18, 2017 and it returned a pre-accident value of Kshs 900,000/=. The Assessor's report was produced by consent and the contents thereof were not challenged. The respondent submitted that at page 101 of the record of appeal, the assessor noted that the appellants had removed the wheels of the

vehicle for safe keeping and ideally, any sum awardable under this heading would have to be discounted by the estimated value of the body of the vehicle together with the four wheels (rims & tyres) which were removed to form part of the salvage value, in addition to the depreciation sum of the salvage motor vehicle from the date of the accident.

40. The Court of Appeal in *Nkuene Dairy Farmers Co-operative Society Limited v Ngacha Ndeiya* [2010] eKLR has held that an accident damage assessment report is sufficient evidence of the extent of damage incurred. This was addressed by the said Court in the following terms-

> " In our view special damages in a material damage claim need not be shown to have actually been incurred. The claimant is only required to show the extent of the damage and what it would cost to restore the damaged items to as near possible condition as it was before the damage complained of. An accident assessor gave details of the parts of the respondents' vehicle which were damaged. Against each of them, he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty."

41. In the present case, the motor vehicle in question was assessed more than a year after the occurrence of the accident. The assessor's report indicated that the pre-accident value of motor vehicle registration number KCF 933D as Kshs 900,000 and it was produced before the trial court by consent of the parties. I am of the considered view that even if the assessment was done immediately after the accident had occurred, it would not have changed the estimated pre-accident value, this is because a pre-accident value ideally means the market value of the motor vehicle, immediately before the accident. However, the other aspects of the assessment report on the state of the motor vehicle and its accessories would have been different since by the time the assessment herein was done, the motor vehicle in question had deteriorated.

42. It is also noteworthy that the assessor who carried out the assessment did not indicate the salvage value of the motor vehicle but indicated that all the wheels were missing. The appellants indicated that they had removed them for safe keeping. It is trite that under this head, the Court can only order compensation for the pre-accident value less salvage value as assessed. This position was advanced in the case of *Concord Insurance Company Limited v David Otieno Alinyo & another* [2005] eKLR, where the Court of Appeal while discussing the measure of damage to chattels agreed with the principles laid down by Herman LJ in *Darbishire v Warran* [1963] 1 WLR 1067 at page 1070 thus-

> " The principle is that of restitution integrum, that is to say, to put the plaintiff in the same position as though the damage never happened. It has come to be settled that in general the measure of damages is the cost of repairing the damaged article, but there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages ...".

43. I therefore hold that the appellants had a duty to have the assessment done at the earliest time possible and keep the suit motor vehicle to mitigate its rate of depreciation so as to minimize damages. It was also the duty of the appellants to guide the Court on the value of the salvage inclusive of the wheels that were removed for safekeeping which was not done. Therefore, the Trial Magistrate was left to exercise her discretion and approximate the value of the salvage. The Trial Magistrate in her judgment held that it was unfortunate in the present case that the salvage value was not provided. In the interest of justice, she awarded Kshs 500,000/= as compensation for the loss of motor vehicle registration No KCF 933D. This Court therefore finds that the Trial Magistrate did not apply her discretion wrongly and the appeal fails on the said limb.

44. On funeral expenses the appellants contended that where a party cannot show the amount of expenses incurred, the Court would weigh the scales of justice in order to address issues involved in the matter. Therefore, had the learned Magistrate considered the status of the deceased, and the fact that the funeral budget presented to Court was not contested and that the said claim was inclusive of all the expenses involved from the day the deceased passed away, to the date of the funeral, she would have made a higher award under this head of damages. The respondent on the other hand submitted that the proposed funeral budget cannot be proof of actual expenditure since amounts expended on funeral budget must be reasonable. The Trial Magistrate in her judgment awarded the appellants the sum of Kshs 150,000/= as funeral expenses and stated that the amount of Kshs 150,000/= pleaded as transport was not proved.

45. The only documents produced by the appellants in support of their claim for compensation for special damages was Kshs 15,000/= for grant of letters of administration, Kshs 388,000/= mortuary charges and Kshs 6,500/= motor vehicle valuation fees. The appellants also produced a funeral budget. It is trite that special damages should be specifically pleaded and strictly proved. I am of the considered view that a funeral budget cannot be equated to receipts. The Trial Court had no way of confirming that the items in the budget were actually bought and utilized during the funeral. The appellants ought to have produced receipts in support of the said amount if they wanted to be awarded the same.

46. However, it is now proper to allow reasonable funeral expenses without strict proof. In *Premier Dairy Limited v Amrit Singh Sago & Another*, CA No 312/2009, the Court of Appeal took judicial notice of the fact that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved. Consequently, I am persuaded that the trial court properly made the award of Kshs 150,000/= for funeral expenses. Therefore, the appeal also fails on this aspect.

47. In light of the foregoing, this court finds that the appeal herein is merited, but it succeeds only to the extent of liability. This court will however not disturb the awards on quantum for reasons already explained in this judgment.

48. This court sets aside the judgment by the trial court on liability and finds that the respondent was a 100% liable for the occurrence of the accident in which the deceased died. This court also affirms the trial court's assessment on quantum as set out here below -

a) Pain and suffering	-Kshs	100,000.00
b) Loss of expectation of life	-Kshs	100,000.00
c) Loss of dependency	-Kshs	1,761,936.00
d) Special damages	-Kshs	1,059,500.00
Total	**-Kshs**	**3,021,436.00**

49. The appellants are awarded the costs of the lower court case. Since the appellants have partially succeeded in this appeal, each party shall bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED AT VOI ON THIS 22ND DAY OF SEPTEMBER, 2022. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ochieng Omollo for the Appellant

No appearance for the Respondent

Mr. Otolo – Court Assistant.