**Peris & another v Kiilu & another (Civil Appeal 378 of 2018)**
**[2022] KEHC 14468 (KLR) (Civ) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEHC 14468 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 378 OF 2018**

**JN NJAGI, J**

**OCTOBER 27, 2022**

**BETWEEN**

**KIARIE PERIS ..... 1ST APPELLANT**

**EMMATA BRANDEN MUSAVAKWA ..... 2ND APPELLANT**

**AND**

**TITUS MUENDO KIILU ..... 1ST RESPONDENT**

**PETER KIILU NTHUKU (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF THE LATE TITUS MUENDO KIILU) ..... 2ND RESPONDENT**

***(Being an appeal from the judgment and decree of Hon PM Gesora, CM, in Nairobi CM`s Court Civil Suit No 3035 of 2013 delivered on 31/7/2018)***

## JUDGMENT

1. The Respondent herein sued the Appellants at the lower court in his capacity as the administrator of the estate of his deceased brother, Titus Mwendo Kiilu wherein he was claiming special damages and general damages under both the *Fatal Accidents Act* and *Law Reform Act*, after the deceased met his death in a road traffic accident involving the motor vehicle of the 1st appellant which at the time of the accident was purportedly being driven by the 2nd appellant. The trial court in its judgment found that the 2nd appellant was the one to blame for occasioning the accident in that he lost control of the vehicle, veered off the road and fatally hit the deceased. The court consequently found the 1st appellant to have been vicariously liable for the accident and awarded damages as follows:

    Pain and suffering ..... ..Ksh 50,000/=

    Loss of expectation of life .....Ksh 150,000/=

Loss of Dependency .....Ksh 2,688,720/=

Special damages .....Ksh 1,400/=

The appellants were aggrieved by the judgment and filed the instant appeal.

2. The grounds of appeal were that the trial court erred in blaming the driver of the motor vehicle for causing the accident; erred in awarding Ksh 50,000/- for pain and suffering when there was glaring evidence on record that the deceased died on the spot; that there was no basis for the trial magistrate awarding Ksh 2,688,720/- for loss of dependency and that the trial magistrate failed to consider the submissions by the appellants.

**The Evidence –**

3. The respondent testified in the case and called one witness. The respondent adopted his witness statement as his evidence in court. He stated in the said statement that on the May 25, 2010 he was informed by his sister Bendeta Muinde that his brother, the deceased herein, had been involved in an accident on the previous day along Jogoo road in Nairobi and died. That the deceased was survived by a wife, a daughter and 2 sons. He further stated in the statement that the deceased was working with Africa Expeditions where he was earning a monthly salary of Ksh 22,406/=. That he died at the age of 48 years. That he did a search of motor vehicle registration and found that it was registered in the name of the 1st Appellant while the police abstract indicated that the 2nd appellant was the driver of the vehicle at the time of the accident.

4. In his evidence in court the respondent produced a pay slip from Africa Expeditions, a post mortem report and a receipt in support of funeral expenses. The respondent called one witness in the case, a police officer PW2, who produced the police abstract as exhibit in the case.

5. The defence did not call any evidence in the case.

**Submissions –**

6. The appeal was canvassed by way of written submissions.

**Appellants` submissions -**

7. The appellants challenged the appeal on the lower court`s findings on both liability and quantum. On liability, the advocates for the appellants, A M Kimani & Co Advocates, submitted that the respondent - who testified as PW1 in the case - did not witness the occurrence of the accident. That he was informed of the accident by his sister who also informed him that the deceased was walking off the road when he was hit by the accident vehicle. That the said sister was not called as a witness in the case to confirm that the deceased was walking off the road when he was hit by the vehicle.

8. The advocates submitted that the police officer PW2 simply produced the police abstract in court and did not know how the accident occurred. That the said document indicated that the case was pending investigation and did not shed light on the occurrence of the accident.

9. It was submitted that the respondent never tendered evidence in support of his pleadings that the deceased was hit by the motor vehicle when he was walking off the road and that the 2nd appellant was to blame for occasioning the accident. That in the premises the trial court was wrong in making a finding that there was enough evidence on record to show that the 2nd appellant was negligent and that he was the one to blame for the accident.

10. The advocates for the appellants submitted that he who alleges must prove. That the respondent should have availed an eye witness to explain to the court how the accident occurred. They relied on the following cases where the cases were dismissed for want of proof:

*John Kiria & others v Kaunda Musyoka & another* (2010) eKLR where Okwengu J (as she then was) held as follows –

> "Sgt John Kamau who produced the police abstract report, was not the investigating officer. He admitted that he never visited the scene of the accident, and merely produced the police file to the Court as a public record. At best the police abstract report was only prima facie evidence that an accident involving motor vehicle KXF 502 and motor vehicle KAH 685J was reported to the station.
>
> Without evidence regarding how that information was procured, the contents of the police abstract report with regard to the persons involved in the accident, and ownership of the vehicles alleged to have been involved in the accident, is of little evidential value and cannot be relied upon."

*Clement Mkangoma & another v TSS Transporters Co Ltd* (2021) eKLR where Chepkwony J while dismissing the case for failure to prove the particulars set out in the plaint stated that:

> " The question of the Court presuming adverse evidence does not arise in civil cases. The position in a civil case is that he who alleges has to prove. It is for the Plaintiff to prove her case on a balance of probability and the fact that the Defendant does not adduce any evidence is immaterial."

11. The appellants relied on the burden of proof as set out in section 107 of the *Evidence Act* that requires whoever alleges a fact to prove it. They consequently submitted that though they did not call evidence in the case, it was incumbent upon the respondent to place sufficient evidence before the court for the burden of proof to shift to the appellants. They submitted that the trial court erred in law in holding that there was sufficient evidence in support of the respondent`s case.

12. On quantum the appellants submitted that there was no factual basis to the award on loss of dependency. That the respondent pleaded in paragraph 8 of the plaint that the deceased was a businessman in Nairobi. That the death certificate indicated that the deceased was a businessman. That the respondent however stated in his witness statement that the deceased was in salaried employment and that he was earning Ksh 22,406/= per month. That a party is in law bound by his pleadings and is not allowed to lead evidence that is in contradiction with the pleadings. That the respondent in this case deviated from his pleadings. That the trial court erred in holding that the deceased was an employee and not a businessman as had been pleaded. To this end, the respondents relied on the case of *South Nyanza Sugar Company Ltd v Shadrack Oganda Onyimbi* (2020) eKLR where the High Court set aside the lower court`s judgment on the basis that the plaintiff had deviated from his pleadings.

13. It was further submitted that dependency was not proved as the wife to the deceased did not testify in the case. That the ages of the children of the deceased was not stated. That the respondent had not laid basis upon which the court could assess general damages for loss of dependency. That in the circumstances the court could only exercise its discretion and award a lumpsum as dependency is not in dispute in which case a sum of Ksh 400,000/= would be sufficient under this head. Counsel relied on the case of *John Wamae & 2 others v Jane Kituku & another* (2017) eKLR where Gikonyo J held that the lower court erred in adopting a multiplicand based on minimum earnings where there were contradictions as to what the deceased did for a living and consequently substituted an award of Ksh

720,000/= general damages for loss of dependency with a global sum of Ksh 400,000/= as general damages for loss of dependency.

14. On pain, suffering and loss of expectation of life, the appellants submitted that the post mortem report indicated that the deceased died on the spot. That the trial court stated in its judgment that the deceased died on the same day of the accident. That the award on pain and suffering had no factual basis and ought not to have been awarded.

15. It was further submitted that at the time of hearing at the lower court the respondent did not have capacity to act as an administrator of the estate of the deceased as the grant was revoked by the court on June 20, 2016. Therefore, that the two awards ought not to have been made.

16. It was submitted that the trial court failed to consider the submissions of the appellants as there is no reference of them in the judgment.

**Submissions by the Respondent –**

17. The advocates for the respondent, Janet Jackson & Susan Advocates, submitted though there was no eye witness to the accident, the doctrine of res ipsa loquitor applies and that circumstantial evidence pointed to the fact that the deceased was hit by the suit motor vehicle.

18. It was submitted that the appellant did not adduce evidence in the case and therefore that the evidence of the respondent was uncontroverted. For this proposition, they relied on the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* (2012) eKLR.

    Similarly in the case of *Interchemie EA Limited vs Nakuru Veterinary Centre Limited* Nairobi (Milimani) HCCC No 165B of 2000 Mbaluto, J held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted.

19. The respondent also cited the case of *Janet Njoki Kigo (Suing as the personal representative of the estate of the late Benson Irungu Wanjohi v Daniel Karani Gichuki* (2016) eKLR where the Court was guided by the Court of Appeal decision in *Rahab Micere Murage (Suing as a legal representative of the estate of Esther Wakiini Murage v Attorney General & 2 others* (2015) eKLR and stated that:

> "From the above authoritative and binding decision, which was delivered in 2012- quite recently, this court has no option but to adopt the whole decision which was based on a case that was in *parimateria* with the instant case and d facts, that the burden of proof lies on he who alleges is not in dispute. However, where it is trite clear like in the instant case that the plaintiff was not present when the fatal accident occurred and the defendant who was the driver of the material motor vehicle involved in the accident is possessed of the evidence of how the accident occurred but deliberately fails to adduce that evidence with the sole intention of frustrating the plaintiff's suit, Section 112 of the Evidence Act would be invoked by the court to deal with such a situation. The defendant in this case having pleaded particulars of negligence or contributory negligence against the deceased, it was incumbent upon him to adduce evidence to prove those facts of the deceased's negligence that contributed to or caused the fatal accident. The rebuttable presumption of fact therefore, is that the defendant was negligent, which negligence caused the accident in which the deceased died, and it is not a presumption which arises out of the doctrine of *Res Ipsa Loquitur*, but from the evidential burden as imposed under Section 112 of the Evidence Act. The cause of the accident being a matter especially within the defendant's knowledge but he failed to tender any evidence in that regard as required by law, it follows that the defendant was to blame and therefore liable in damages to the plaintiff. It also follows,

therefore, that all the decisions relied on by the defendant in his very persuasive submissions are inapplicable in the circumstances of this case as the burden of proof is concerned. In addition, it follows that even the doctrine of *Res Ipsa Loquitur* relied on by the plaintiff is inapplicable in the circumstances of this case. The doctrine of *Res Ipsa Loquitur* would only be applicable where the subject matter is entirely is under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence (see Bikwatirizo V Railway Corporation [1971] EA 82. Thus, to successfully apply this doctrine of Res Ipsa Loquitur, there must be proof of fact that is consistent with negligence on the part of the defendant as against any other cause."

The respondent accordingly submitted that the appellants were wholly to blame for the accident.

20. The respondent defended the awards on pain and suffering in that the deceased died on the same day of the accident. They defended the award on loss of dependency and stated that the multiplier of 15 years adopted by the trial court was justified. They defended the multiplicand of Ksh 22,406/= per month in that a pay slip was produced to prove the earnings. They submitted that it was evident from the pleadings the deceased had a wife and 3 children. That the dependency ratio of 2/3 adopted by the trial court was justified.

**Analysis and Determination –**

21. This being a first appeal the court is guided by principles that were re-stated by the Court of Appeal in *Thomas Nyawade v Richard Sule Odongo & 4 others* (2015) eKLR that:

> "The principles guiding the determination of appeals are now well settled. In a first appeal like this one, the appellate court is obliged to take the appeal as a re-trial. As such, it is required to re-evaluate the evidence on record and come to its own conclusions – Selle & Another - Vs- Associated Motor Boat Co Ltd & Others [1968] EA 123. In doing so, however, the first appellate court should give allowance for the fact that as the trial court had the advantage of seeing and hearing the witnesses testify, it was better placed to observe their demeanour and assess their credibility. In the circumstances, the appellate court should be slow to overturn the trial court's decision unless the trial court's decision is perverse or is not based on the evidence or is based on a misapprehension of the evidence on record. Mwanasokoni Vs Kenya Bus Services Ltd, [1985] KLR 931."

22. It was the case for the respondent as pleaded in the plaint that the cause of the accident that led to the death of the deceased was the negligent act of the 2nd appellant in that he lost control of the vehicle, veered off the road and hit the deceased when lawfully walking off the road. The respondent was under duty to prove that this was the cause of the accident. It is an elementary principle of law that he who alleges must prove. Section 107 of the *Evidence Act* provides that:

    1. "whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

23. This legal burden was succinctly put forth by Ringera J (as he then was) in the case of *Lucy Muthoni Munene Vs Kenneth Muchange & Aother* NBI HCC No 858 of 1998 ( cited by Kemei J in *Kerai Ghanshyam v James Wambua Muendo* [2021] eKLR) as follows:

> " ..it is an elementary principle of law that whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. In a personal injury claim that betokens that the plaintiff must make out that the defendant is negligent as alleged. The legal burden of proof is clearly on the plaintiff and he must show that the loss is to be attributed to the negligence of the defendant. If he does not discharge that burden by adducing evidence from which it can be inferred that on a balance of probability the defendant is negligent, then he cannot succeed even though the court may be welling with sympathy for him."

24. In *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* (2010) eKLR, Ibrahim J (as he then was) considered this question of burden of proof in negligence cases and stated as follows: -

> "On question of proof, and burden thereof, it is stated in Charlesworth & Percy On Negligence, 9th edition at P387:
>
> "In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferior (?) and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred."

25. In the instant case the respondent conceded that he did not witness the occurrence of the accident and that it is in fact his sister who told him as to how the accident had occurred. It was not stated in evidence whether his sister witnessed the occurrence of the accident as she did not testify in the case. The policeman who testified in the case PW2 only came to court to produce the police abstract and had no idea on how the accident had occurred. At the close of his case the respondent had not tendered evidence on how the accident had occurred. He therefore did not discharge his burden of proof by establishing a prima facie case against the appellants so as to shift the burden of proof to the appellants for them to be required to explain how the accident occurred.

26. A similar scenario was obtained in the case of *Charles Kavai (Suing as the Administrator of the Estate of the Late Kevin Kioko Charles) v Bonface Mutunga & another* [2020] eKLR where the appellant also did not witness the occurrence of the accident and did not call witnesses to testify on how the accident occurred. While dismissing the appeal, odunga J (as he then was) held that the Appellant had the duty of proving the facts constituting negligence on the part of the Respondent even if the Respondent chose to remain silent. The learned Judge cited the case of *Grace Kanini vs Kenya Bus Services* Nairobi HCCC No 4708 of 1989 where Ringera J (as he then was) when faced with a similar circumstances held that:

> " In the instant case the plaintiff did not adduce any evidence beyond stating that the accident was reported to police and produced a Police Abstract of the accident and all that is recorded therein is the fact of an accident involving the deceased and the 1st defendant's motor vehicle which was being driven by the 2nd defendant. The burden of proof was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant who offered

not to adduce evidence. It is equally probable that it was caused by the negligence of the deceased. And it is equally probable that it was caused partly by the negligence of the deceased and partly by the negligence of the defendant. Without the advantage of divine omniscience, the court cannot know which of the probabilities herein coincides with the truth and it cannot decide the matter by adopting one or the other probability without supporting evidence. It can only decide the case on a balance of probability if there is evidence to enable it say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, the court must, not without a little anguish dismiss the plaintiff's suit on the ground that fault has not been established against the defendants be that as it may, it is enjoined."

27. I am in agreement with the position of the law as postulated in the above authorities. I find that the appellant in the instant appeal did not adduce evidence that the 2nd respondent was to blame for occasioning the accident. The respondent was in the first place required to adduce evidence on how the accident occurred so as to shift the evidential burden of proof to the appellants. The burden of proof in this case did not shift to the appellants. The doctrine of res ipsa loquitor did not apply as it is not known how the accident occurred. Liability was thus not proved on the part of the appellants. The trial court erred in making a finding that the appellant were liable for occasioning the accident.

**Quantum -**

28. The trial magistrate awarded Ksh 50,000/= for pain and suffering. The award seems to have been based on the ground that the deceased died on the same day of the accident.

29. It was pleaded in the plaint that the accident occurred on May 25, 2020 at 11:30 pm. The post mortem report indicated that the deceased was reported to have died on the spot. The respondent did not mention in his evidence in court whether the deceased died on the spot or hours later. The post mortem report indicates that the respondent was one of the persons who identified the body to the doctor during post mortem. It is therefore likely that he is among the persons who reported to the doctor that the deceased died on the spot. I therefore find that the deceased died on the spot.

30. The question is whether the award for Ksh 50,000/= was excessive for death occurring on the spot.

31. In the case of *Sukari Industries Limited vs Clyde Machimbo Juma* Homa Bay HCCA No 68 of 2015 [2016] eKLR where the deceased had died immediately after the accident and the trial court had awarded Kshs 50,000/= for pain and suffering, Majanja J stated as follows;

> "(5) On the first issue, I hold 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."

32. In *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), Sewe J reduced an award of instantaneous death from Ksh 150,000/= to Ksh 50,000/=. In *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, Mativo Mativo J (as he then was) upheld

an award of Kshs 50,000 where the deceased was said to have died on the spot. In *Joseph Gatone Karanja v John Okumu Soita & Esther Chepkorir (Suing as admin of the estate of Benard Soita Nyongesa (DCD)* (2022 eKLR, Ogola J upheld an of Ksh 50,000/= for pain and suffering on death occurring on the spot and said that he did not find the award to be manifestly excessive as there were High Court authorities to support it. Taking into consideration the above authorities I do not think that the award of Ksh 50,000/= for pain and suffering was excessive for death occurring on the spot.

33. The trial court awarded Ksh 150,000/ for loss of expectation of life. Though the conventional award under this heading has been Ksh 100,000/=, I do not find the award of Ksh 150,000/= to be excessive particularly when putting inflation into mind. The award compares well with similar awards made courts under this heading. In *Tipper Hauliers Limited & Salim Jalala Mwaita v Mercy Chepngeno Towet & another* [2021] eKLR, Chemitei J upheld an award of Kshs 200,000/= for loss of expectation of life. In *Agnes Mutinda Ndolo & another v Mboya Wambua & 2 others* [2017] eKLR, Sergon J upheld an award of Ksh150,000/= under this head. In the case of *Moses Akumba & Another –Vs- Hellen Karisa Thoya* (2017) eKLR Chitembwe J. held that an award of Ksh 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In *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) Sewe J upheld an award of Ksh 200,000/= under this head while citing the case of *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR where an award of Kshs 200,000/= was made. In view of these comparative authorities I do not find the award of Ksh 150,000/= to have been excessive for loss of expectation of life. The fact that another court may have awarded a lesser sum is not a ground for reducing the award.

**Loss of Dependency –**

34. The death certificate that was produced in the case indicated that the deceased died at the age of 48 years. The trial magistrate adopted a multiplier of 15 years. He found that the deceased was an employee with Africa Expeditions Ltd where he was earning Ksh 22,406/=. The respondent produced a pay slip to support the earnings. The magistrate adopted a multiplier of 15 years and a dependency ratio of 2/3. He consequently awarded loss of dependency as follows:

    22,406 x 15 x12 x2/3 =2,688720/=.

35. Paragraph 9 of the plaint indicated that the deceased was an “excellent businessman” in Nairobi. The death certificate that was filed with the plaint indicated the occupation of the deceased as being that of a businessman. To the contrary, the witness statement of the respondent stated that the deceased was in salaried employment with a company called Africa Expeditions.

36. The applicant submitted that the respondent never pleaded that the deceased was in salaried employment. That the witness in cross-examination admitted that he is the one who processed the said death certificate wherein it was stated that the deceased was a businessman. The Appellant thus submitted that a party is bound by its pleadings. That the trial court erred in holding that the deceased was in salaried employment when the same was not pleaded.

37. Indeed, a party in a hearing is bound by its pleadings. Any evidence that is at variance with the pleadings goes into no issue and must be disregarded. This position was succinctly captured in *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR where it was held that:

    "11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for

rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

12. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs IEBC & 2 others (2017) eKLR found and held as follows in respect to the essence of pleadings in an election petition: -

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……"

38. In view of the above legal principles, I find that the trial court erred in holding that the deceased was a businessman when the same was not pleaded. The respondent is the one who processed the death certificate on the July 22, 2010 wherein he indicated that the deceased was a businessman. He thereafter filed his witness statement on the July 5, 2015, which was about 5 years later, and stated that the deceased was in salaried employment. There was no explanation to the variation in his assertions. When did the deceased cease to be an "excellent" businessman as pleaded in the plaint to that he was in salaried employment? The evidence that the deceased was in salaried employment was suspicious. No witness from the purported employer was called to support the assertion. Neither was there a contract of employment produced. That evidence was for dismissal. The trial court erred in admitting it. There was no basis for adopting the figure of Ksh,22,406/= as the monthly earnings of the deceased.

39. In face of the conflicting evidence as to what the deceased did for a living, I am of the view that the trial court should have awarded a global sum for loss of dependency. In *Antony Njoroge Ng'ang'a (Legal representative of the Estate of the late Fred Nganga Njoroge aka Fred Ng'ang'a Njoroge) v James Kinyanjui Mwangi & 2 others* [2022] eKLR, Chemitei J awarded a global sum of Kshs 400,000/= for

loss of dependency while citing *Albert Odawa vs Gichimu Gichenji [2007] eKLR) and John Wamae & 2 others v Jane Kituku Nziva & another* [2017] eKLR where global lump sums of Ksh 400,000/= were made. In *Intex Construction Company Ltd v John Mbere Iguna & Japhet Mugambi Iguna (Suing as legal representative of John Kiura Iguna (Deceased)* [2020] eKLR, Limo awarded a lump of Kshs 650,000/= for loss of dependency. In *M'rarama M'nthieri v Luke Kiumbe Murithi* (2015) eKLR, Gikonyo J made a global award of Kshs 500,000/= for loss of dependency.

40. The deceased in the instant case had a wife and 3 children. I would have awarded the estate a global sum of Ksh700,000/= for loss of dependency.

41. The above notwithstanding, the case is for dismissal as liability was not proved. The appeal is thereby upheld. The judgment of the lower court is consequently set aside and the respondent`s suit is dismissed with costs to the Appellant.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.**

**J. NYAGA NJAGI**

**JUDGE**

**In the presence of:**

Miss Kimani for Appellant

Mr. Munyaka holding brief for Mr. Muia for Respondent

Court Assistant: Miss Mumo

30 days R/A