



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 77 OF 2018**

**CATHOLIC DIOCESE OF MACHAKOS.....1<sup>ST</sup> APPELLANT**

**JOSEPH MULWA MBOLU.....2<sup>ND</sup> APPELLANT**

**-VERSUS-**

**JANET MUNAA MUTUA & DENNIS MWANZIA NGOYA**

**(Suing as the administrators of the estate of the late SIMON**

**MUKONZI Deceased).....RESPONDENTS**

***(An appeal against the decree and judgment delivered by Hon. Martha Opanga senior resident magistrate at Kangundo, in PMCC No. 33 of 2017 on 12<sup>th</sup> June, 2018)***

**=BETWEEN=**

**JANET MUNAA MUTUA & DENNIS MWANZIA NGOYA**

**(Suing as the administrators of the estate of the late SIMON**

**MUKONZI Deceased).....PLAINTIFF**

**=VERSUS=**

**CATHOLIC DIOCESE OF MACHAKOS.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MULWA MBOLU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. The Respondent herein, **Janet Munaa Mutua & Dennis Mwanzia Ngoya**, in their capacities as the the administrators of the estate of the late **Simon Mukonzi** -Deceased, instituted civil proceedings against the appellants herein seeking general damages, special damages and costs. The suit was premised on a road traffic accident which occurred on or about the 13<sup>th</sup> September, 2014 along Miselini-Kabaa earth road. It was pleaded that on that day the deceased was lawfully and carefully riding his motor cycle thereon when motor vehicle reg. no. KBR 704D registered in the name of the 1<sup>st</sup> Appellant but beneficially owned by the 2<sup>nd</sup> Appellant, was so negligently and carelessly driven, managed and/or controlled that the same lost control and knocked the deceased as a result of which the deceased sustained fatal injuries. The particulars of negligence and statutory particulars and particulars of special damages were pleaded and the Respondent claimed special damages in the sum of Kshs 21,800/-, General Damages and Costs of the suit. The Respondents also pleaded *res ipsa loquitur*.

2. It was pleaded that at the time of his death the deceased was aged 30 years and was working as a mason and was the sole breadwinner to his family and the dependants and that by reason of his death his dependants were subjected to loss and suffering and were deprived of their sole source of livelihood and the deceased was denied his natural expectation of life.

3. In their statement of defence, the Respondents denied that they were the registered or beneficial owners of the said vehicle and further denied that the said accident occurred as alleged. In the alternative they pleaded that if the said accident occurred, it was caused by the sole or contributed to by the negligence of the deceased or the owner of the motor cycle particulars whereof their pleaded. The particulars pursuant to statute were similarly denied as well as particulars of damage and it was sought that the suit be dismissed with costs.
4. After hearing the case, in which only the Plaintiffs adduced evidence, the learned trial magistrate found the defendants 100% liable. She proceeded to award the Respondents Kshs 100,000.00 for pain and suffering, Kshs 200,000.00 for loss of expectation of life, Kshs 3,000,000/= for loss of dependency, special damages of Kshs 21,800/- hence totalling Kshs 3,32,800/- interests and costs.
5. Aggrieved by the said decision, the Appellants have preferred this appeal in which they challenge the award of damages and seek that the same be assessed downwards.
6. PW2, **Dennis Mwanzia Ngolya**, in his statement which was adopted as part of his examination in chief stated that he was a brother to the deceased. Relevant to this appeal, he stated that after the accident, they rushed the deceased to Mwala Dispensary where the deceased succumbed to the injuries while undergoing treatment. Later the organised for his funeral which cost them more than Kshs 150,000.00. At the time of his death the deceased was married with three children and was working as a mason.
7. In his evidence in court, the witness testified that the deceased was 30 years old and was a trained mason.
8. PW3, **Janet Munaa Mutua**, the widow of the deceased, in her statement stated that she received the information that the deceased was involved in a road traffic accident and died while undergoing treatment at Mwala Dispensary.
9. According to her, at the time of the deceased's death, he was the sole breadwinner and was working as a mason and would on the average get Kshs 30,000/= per month which amount he would spend on the family of three school going young children. She stated that the burial arrangements cost them more than Kshs 150,000/=. As a result of the aid accident and subsequent death, the witness was left a widow and her children were orphaned and she sought for compensation to assist in raising the children.
10. In her evidence, in court, the witness testified that the deceased who was aged 30 years left her with three children. The deceased was the sole bread winner of the family since she was a housewife. She produced the documents filed in her list of documents as exhibits. In cross-examination, she stated that the deceased died immediately and was taken to Mwala Dispensary. While she insisted that the deceased was a mason, she did not have records of his earning and did not have any certificate. She stated that her children were aged 11, 8 and 3 years old but admitted that she had not produced their birth certificate.
11. In cross-examine, she stated that the deceased used to give him money for upkeep but he did not make him sign for it. She testified that the Chief's letter named her children as having been left by the deceased. She also stated that the death certificate stated that the deceased was a mason.
12. In arriving at the decision on quantum, the learned trial magistrate found that there was evidence that the deceased was taken to the hospital after the accident hence it must have taken some time before he died in hospital while undergoing treatment hence the death was not instantaneous. Based on the authorities submitted it was her view that an award of Kshs 200,000.00 was adequate considering the passage of time and the cost of living. As for loss of dependency, she adopted a global award based on the age of the deceased.
13. In this appeal, it is submitted on behalf of the appellant that the Memorandum of Appeal raises 3 grounds seeking this Honourable Courts intervention on liability and quantum thereof. This court was urged to re-examine and find that the respondent has failed to discharge the duty of proving all the elements of negligence so as to attribute liability to the defendant. According to the Appellants, the Police Constable while producing a copy of the Police Abstract stated that the matter was still pending under investigation. On cross examination, he told the court that he did not visit the scene of the accident, he was not the investigative officer and was never briefed on the circumstances leading to the accident. He was only summoned to court to produce the abstract, nothing more. According to the Appellants, the Police have not concluded investigations into the accident from the 13<sup>th</sup> September 2014 up to the date of the hearing on 13<sup>th</sup> February 2018 and there are no charges preferred against the Appellant up until this point. It is then impossible to impute liability on the Appellants just on account of death of the Deceased.
14. As for PW2, his evidence should be taken sparingly, since he did not record a statement with the police to help in investigation of the matter. According to the Appellants, it is very curious that a witness to an accident and who is known and so closed to the deceased could not record a statement. It was submitted that this evidence reeks or deceit, and should not be relied upon to prove liability.
15. It was submitted that the Appellants submissions on liability should have guided the Honourable Court to find a fair judgment on liability based on the probability of facts presented to it, and more specifically on the quoted authority of **Ann Wangare Mwombe & 2 others vs. Peter Mukiri Gateri [2014] eKLR** where the Police officer testifying produced the Police Abstract that showed the matter was pending under investigation the court adopted the reasoning of the appellate court in **Anne Wambui Nderitu (Suing as Administrator for the Estate of George Nderitu Kuria vs. Joseph Jiprono Ropkoi & Four by Four Safaris Co Ltd. C.A. 345 of 2000.**
16. On quantum, the Respondents submitted that from the evidence of PW3, the Deceased's wife, the deceased was a mason and earning Kshs. 30,000/= per month despite no documentation to prove this was given. She further testified that they had three children and that the deceased was the sole bread winner. She testified that the deceased died on the same day. It was submitted that the figure of Kshs. 10,000/= is sufficient for pain and suffering as the deceased passed away on the same day.
17. On the figure of loss of expectation, it was submitted that the award of Kshs. 200,000/= was excessive as the learned magistrate relied on a case where a child had lost his life. According to the appellant, the figure of Kshs. 70,000/= is sufficient.

18. Under the heading for loss of dependency, it was submitted that there was no contention that the deceased was 30 years at death. However, there was nothing to prove that he was earning Kshs. 30,000/= from masonry. What would have been sufficient was to use the minimum wage at the time and not for the court to award a figure that has no evidentiary backing. There was no evidence or calculation as to why the court arrived at the figure of Kshs. 3,000,000/=. Further, the deceased was a mason and this nature of job is a very physical in nature and one cannot be able to do such manual jobs till old age. According to the Appellant, the retirement age in Kenya is 55 years and the fact that the deceased was not employed on permanent basis there are no guarantees on being employed, therefore these uncertainties and contingencies of life, reduces the number of active years the deceased would have had, culminated with the nature of his job. Therefore, since he would have most probably worked until the age of around 45 years, the appellant proposed a multiplier of 15 years as fair and reasonable based on **Mary Kerubo Mabuka (Suing as the Legal Representative of the Estate of Ritah Moraa Gichana-deceased) vs. Newton Mucheke Mburu & 3 Others (2006) eKLR** where the court held that:

**“...however this court is not oblivious of the fact that the average standard of living has plummeted due to increased incidences of poverty, the HIV/AIDS pandemic and road traffic accidents. This has resulted in the reduction of the life expectancy of an average Kenyan.”**

19. On the issue of the multiplicand, it was submitted that there was nothing produced in court to prove that the deceased was earning Kshs. 30,000/= per month. The award thereof was erroneous as court should have taken into consideration our submissions using the Legal Notice Number 197; **Regulation of Wages Order (2013)** which provides that a general labourer was entitled to Kshs. 5,218/= per month as the minimum wage. However, the Honourable Magistrate did not show how the figure of Kshs. 3,000,000/= was arrived at.

20. The appellants therefore prayed that the Appeal be allowed and the Respondents pay the costs of the Appeal.

21. On behalf of the Respondent it was submitted that on the substantive grounds of appeal raised, it is evident that the appellants contest the learned trial magistrate's findings and assessment in regard to award under **Fatal Accident Act** and **Law Reform Act** as awarded by the learned trial Court. In the Respondent's view, the issues before this honourable Court for determination therefore is whether the trial learned magistrate applied the correct principles of law and available facts in assessment on damages payable under **Law Reform Act** and **Fatal Accident Act**. It was submitted that although the appellants have submitted on the issue of Liability we find that the same was never pleaded as per the memorandum of appeal herein. According to the Respondent, each party is bound by its own pleadings and cannot be allowed to raise a different or fresh case without amendment properly made. However, the issue of liability is not among the grounds of appeal raised by the appellant and appellant's submissions on the same are baseless and misleading.

22. That notwithstanding, the Respondents submitted that they called 2 witnesses and produced documents that proved that indeed there was a road traffic accident on 13<sup>th</sup> September, 2014, involving motor vehicle registration number KBR 704D that was permitted to knock the deceased. According to the Respondent, the testimony by the respondent's witnesses was never challenged and the defendants/appellants never called any witness and/or produce any evidence in terms of documents to contradict or refute the plaintiffs/respondents claim. In this regard the Respondent relied on **William Kabogo Gitau vs. George Thuo & 2 Others [2010]** and **Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 Others [2012] eKLR** and **Mary Njeri Murigi v Peter Macharia & another [2016] Civil Case 318 of 2012**, and submitted that the learned trial magistrate did not err in finding the defendants/appellants 100% liable for the subject accident.

23. As regards the award of General Damages in terms of loss of expectation of life and pain and suffering, it was submitted that it is not in contention that the deceased sustained pain and suffering occasioned by the subject accident. After the accident the deceased was taken to hospital where he succumbed to the injuries while undergoing treatment. He must have endured severe pain from the scene of the accident to the hospital and while under treatment.

24. It was submitted that from the authorities, the learned trial magistrate did not err in any law or principle in making award for loss of expectation of life and the said awards cannot be termed as inordinately too high as to present an entirety erroneous estimate of compensation to which the respondents were entitle.

25. As regards the award for loss of dependency, it was submitted that in their submissions, the appellants do not connote that the award was excessive but the appellants' argument is that the learned trial magistrate did not show how the award was arrived at. According to the Respondent, since the respondents did not produce a copy of monthly income for the deceased or his employment documents, it was wise for the learned trial magistrate to adopt the global sum approach based on **MNM & Another vs. Solomon Karanja Githinji [2015] eKLR, Civil Case 303 of 2011** and the case of **Moses Mairua Muchiri vs. Cyrus Maina Macharia (Suing as the Personal Representative of the Estate of Mercy Nzula Maina (Deceased) 2016**, and **Albert Odawa vs. Gichimu Gichenju HCCA No. 15 of 2003 (2007)**.

26. According to the Respondents, the minimum wage can only be used were the occupation of the deceased has been clearly proven by production of documents and the same is not in dispute and/or in doubt and reliance was placed on the reasoning in the case **John Wamae & 2 Others vs. Jane Kituku Nziva & another [2017], Civil Appeal 119 of 2017** and **Beatrice W. Murage –vs- Consumer Transport Ltd & Anor (2014) eKLR**.

27. In their submissions the Respondents relied on the case of **Mary Njeri Murigi vs. Peter Macharia & Another [2016] Civil Case 318 of 2012** where court awarded a lump sum of Kshs. 4,000,000/= for the deceased person who was 60 years old at time of death and was a businessman.

28. According to the Respondents, the law on assessment of damages is that it invokes judicial discretion, is a difficult task and an appellate court would not lightly interfere therewith unless it be shown that the trial court in coming to its assessment considered irrelevant issues or failed to consider relevant issues and thereby arrived at an assessment that was wholly and evidently to high and excessive or overly law as to amount to a complete erroneous estimate of damages.

29. In the Respondents' view, the learned magistrate did not error in adopting a global sum approach and in awarding Kshs. 3,000,000/= as

damages, as the award is comparable to awards in previous cases and the same has been adjusted in light of the inflation. Being guided and persuaded by the authorities cited in the respondent's submission, this court was urged to uphold the learned trial magistrate's judgment and dismiss the Appellant's appeal with court.

### **Determinations**

30. I have considered the submissions made by the parties herein. It is important to set out the grounds of the appeal as well as the prayer sought in this appeal. According to the Appellants:

- 1) The Learned Trial Magistrate erred in fact and law and misdirected herself in finding that the Respondent is entitled to general damages under Law Reform Act of Kshs 321,800.00 and under Fatal Accidents Act for loss of dependency of Kshs 3,000,000.00 which amount is excessive;**
- 2) The Learned Trial Magistrate erred in fact and law and misdirected herself in failing to consider the submissions by the appellants together with the authorities relied on by the appellants; and**
- 3) That the Learned Trial Magistrate wholly erred in fact and law in arriving at the said decision.**

31. It was sought that the appeal be allowed, the Court be pleased to assess downwards the quantum of damages awarded to the Respondent and the Respondent pay the costs of the appeal.

32. Order 42 rule 1(2) of the *Civil Procedure Rules* provides that the memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against. In this case, it is clear that the memorandum of appeal did not expressly and specifically set out a ground challenging the finding on liability. In the prayers sought, none sought that the finding on liability be disturbed. I associate myself with the decision of the Supreme Court of Uganda in Adonia Makudi vs. Christ K. Mukasa SCCA No. 2 of 1986 where it was pointed out that:

**“The second ground of appeal does not comply with the law governing memorandum of appeal in as far as it offends the elementary rules relating to framing of grounds of appeal. It is common knowledge that Memorandum of Appeal must set out concisely without narrative or argument the grounds of objection to the decision appealed from, specifying the points of law or fact, which have been wrongly decided. The second ground does not point out the ground of objection to the decision appealed from nor does it specify the points of law or fact which have been wrongly decided. The ground merely contains the appellant's argument, which is left in the air without indication of the wrong decision made by the trial Judge. It is surprising that this defect was not cured when the learned Counsel for the appellant filed, with the leave of the court, a supplementary Memorandum of Appeal.”**

33. That notwithstanding the only evidence as to how the accident occurred was adduced by the Respondents. In cross-examination no serious challenge was taken as to how the accident occurred. It was not put to the witnesses that the accident did not occur in the manner suggested by PW2. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:-

**“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”**

34. What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear limited vs. Gopitex Knitwear Mills limited Nairobi (Milimani) HCCC No., 834 of 2002, Lessit, J citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 appreciated that:

**“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”**

35. Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 others Nairobi (Milimani) HCCS No. 1243 of 2001 the learned judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

36. In the case of Karuru Munyororo vs. Joseph Ndumia Murage & another Nyeri HCCC No. 95 of 1988, Makhandia, J (as he then was) held that:

**“The plaintiff proved on a balance of probability that she was entitled to the orders sought in the plaint and in the absence of the defendants and or their counsel to cross-examine her on the evidence, the plaintiff's evidence remained unchallenged and uncontroverted. It was thus credible and it is the kind of evidence that a court of law should be able to act upon.”**

37. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J. citing the decision in Edward Muriga Through Stanley Muriga vs. 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 1<sup>st</sup> 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.”**

38. Similarly, in the case of Interchemie EA Limited vs. Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165 B 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.

39. The Appellants have taken issue with the fact that by the time of the hearing the traffic matter was still pending under investigation. This issue however brings into focus the relevancy of traffic proceedings to civil proceedings. In Ochieng vs. Ayieko [1985] KLR 494, O’kubasu, J (as he then was) held that:

**“Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate’s Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored.”**

40. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence. This was the position adopted by the Court of Appeal in Calistus Ochien’g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

41. Therefore, proof of negligence being on a balance of probabilities does not solely depend on the opinion of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. In Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR it was held:

**“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”**

42. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In Peter Kanithi Kimunya vs. Aden Guyo Haro [2014] eKLR it was held:

**“A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was ‘reported’ at a particular police station.”**

43. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

**“It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial of the criminal case. But the proceedings and the result of the criminal trial cannot be made the basis for proof of a civil claim...”**

44. Consequently, the issue whether or not the driver of the vehicle was charged is neither here nor there as long as there was evidence on record on the basis of which the learned trial magistrate could arrive at the decision he did. I have considered the evidence on record and there is no basis upon which I can interfere with his findings that the Appellants were 100% liable for the accident.

45. The Appellants complain that their submissions were never considered. The role of submissions was clarified by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR as hereunder:

**“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”**

46. Similarly, in Ngang’a & Another vs. Owiti & Another [2008] 1 KLR (EP) 749, the Court held that:

**“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the**

main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

47. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

**“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”**

48. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

**“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”**

49. In other words, a court is not bound to decide a matter in accordance with the submissions cited before it by the parties. A court of law, in my view, is obliged to carry out its research and study in the area under litigation and ought not to swallow the material placed before it, line, hook and sinker as it were.

50. As regards the challenge on quantum, the Court of Appeal in Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

**“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”**

51. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989 where it was held that:

**“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased’s age, his expectation of working years, the ages of the dependants and the length of the dependant’s expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow’s probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”**

52. The same Judge in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barnetuny & 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.”**

53. In this case, the learned trial magistrate awarded the Respondents Kshs 100,000.00 for pain and suffering, Kshs 200,000.00 for loss of expectation of life, Kshs 3,000,000/= for loss of dependency, special damages of Kshs 21,800/- hence totalling Kshs 3,32,800/- interests and costs. From the evidence of PW2, the deceased passed away in Hospital while undergoing treatment. In those circumstances, I find no reason to interfere with the award for pain and suffering. As for loss of expectation of life, the deceased was 30 years old. He was in the prime of his life. Accordingly, I don’t have any reason to interfere with the award of Kshs 200,000.00.

54. As for loss of dependency, the evidence was that the deceased was 30 years old earning Kshs 30,000.00per month. In Warren Kenya Ltd & Another vs. Kabena [1987] KLR 225, it was held that:

**“There is no useful purpose in distinguishing the approach to the quantum of the dependency in Kenya from that in England**

because of the so-called welfare state in England. There is no evidence of any such difference, or any such extra benefit; and something as vague as the welfare state is not a matter of which these courts can take judicial notice, or indeed quantify. There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future possibilities.”

55. In Albert Odawa vs. Gichimu Gichenji Nakuru HCCA No. 15 of 2003, Koome, J (as she then was) expressed herself as hereunder:

“On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased’s earnings and thus the multiplicand of Kshs. 8,100.00 was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased’s income by applying the basic salary, which is paid to unskilled workers, and this would also have been difficult, as the age of the deceased was not stated. So the best option would have been to apply the global award. So an award of Kshs. 400,000.00 awarded.”

56. In my view, a global figure ought not to be resorted to merely because the Plaintiff has failed to prove the deceased’s pleaded earnings. Global awards is generally suitable in cases involving minor and adolescents whose income cannot be ascertain. However, in cases of adults who, it is alleged are earning, there ought to be proof of the same. However, as was held by Court of Appeal in Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR:

“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. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed.”

57. In Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR it was held that where income is not proved, the income of an unskilled worker ought to apply. According to the *Regulation of Wages (General) (Amendment) Order, 2015* the deceased would fall under the category of general workers whose minimum wage was be Kshs. 10,954.70.

58. Accordingly, I find that it would have been prudent to adopt the minimum age as opposed to awarding a global figure.

59. I agree with Ringera, J in Marko Mwenda vs. 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.”

60. The deceased was according to the Respondents statement aged 30 years old. He was a mason. Since the deceased’s dependants were his wife and children, I would apply a dependency ratio of  $2/3^{\text{rd}}$  with multiplicand of 25 years.

61. Accordingly, the loss of dependency would be:  $10,954.70 \times 25 \times 2/3 \times 12 = 2,190,940.00$ . Consequently, the appeal succeeds and I hereby set aside the award of Kshs 3,000,000.00 as loss of dependency and substitute therefor an award of Kshs 2,190,940.00. As the Appellants have not entirely succeeded in their appeal, there will be no order for the costs of this appeal. Save for that the appeal otherwise fails.

62. It is so ordered.

Read, signed and delivered in open Court at Machakos this 22<sup>nd</sup> day of February, 2021

G V ODUNGA

JUDGE

In the absence of the parties

CA Geoffrey