REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO.44 OF 2018

NJOWAMU CONSTRUCTION COMPANY LIMITED.....APPELLANT

VERSUS

GRISHON KATUA NDOLO

TITUS NDOLO KATUA

(Suing as Administrators and Legal Representatives of the Estate of

MICHAEL WAMBUA KATUA.....RESPONDENTS

(Being an appeal from the judgement and decree of the Chief Magistrates Court at Machakos by the Hon. C. A. Ocharo (PM) dated the 3rd April, 2018 in CMCC No. 404 of 2016)

BETWEEN

GRISHON KATUA NDOLO

TITUS NDOLO KATUA

(Suing as Administrators and Legal Representatives of the Estate of

MICHAEL WAMBUA KATUA (Deceased) .....PLAINTIFFS

VERSUS

NJOWAMU CONSTRUCTION COMPANY LIMITED.....APPELLANT

JUDGEMENT

1. By an amended plaint dated 20th June, 2016, the Respondents herein instituted a suit as the legal representatives of the estate of **Michael Wambua Katua** (deceased) against the Respondents herein claiming General Damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***, Special Damages in the sum of Kshs 151,336.00, Costs and interests.

2. The cause of action, as pleaded in the plaint was that on or about 23rd May, 2015 at around 23.10 hours, the deceased was a lawful passenger aboard motor vehicle registration number KAT 451E (hereinafter referred to as KAT) which was being driven along Nairobi-Mombasa Road. The said vehicle, it was pleaded, was registered in the name of the Appellant which was 1st Defendant before the trial court. It was pleaded that the driver of the said vehicle lost control of the same and permitted or caused it to ram into motor vehicle reg. no. KAU 309T/ZB 6537 which was carelessly and/or negligently parked. The said Motor Vehicle Registration No. KAU 309T/ZB (hereinafter referred to as KAU) was registered in the name of the 2nd Defendant, one Nighbma Enterprises Limited. The particulars of negligence of the drivers of both vehicles and statutory particulars and particulars of special damages were pleaded

3. As a result of the said accident, the deceased sustained fatal injuries from which he later succumbed 2 days after his admission to Kenyatta National Hospital.

4. It was pleaded that the deceased was, at the time of his death aged 28 years old and had just earned a job promotion on 21 st May, 2015 as an Automobile Supervisor/Assessor – Heavy Commercial Division at Autoline Limited where he was earning a monthly gross salary of Kshs 45,ooo/- by the time of his death. It was pleaded that he was full of life, enjoyed good health and had a vigorous, joyful and happy life.

5. In its defence, the appellant denied all the particulars of the plaint save for the occurrence of the accident. In the alternative, it pleaded that the same was caused by the negligence of the driver of motor vehicle registration number KAU.

6. After hearing the evidence, the learned trial magistrate found that the accident was caused by the negligence of the appellant's driver and entered judgement against the appellant while disallowing the suit against the 2nd Defendant. She then proceeded to award damages which she assessed as pain and suffering (Kshs 200,000.00), Loss of Expectation of Life (Kshs 600,000.00), Special Damages Kshs 13,850.00, Funeral Expenses (Kshs 50,000) and Loss of Dependency (Kshs 3,225,420.80), totalling Kshs 4,089,270.80. Aggrieved by the said decision, the appellant preferred this appeal in which it challenges the assessment of damages.

7. On behalf of the Appellant it was submitted, while acknowledging that under section 4 of the ***Fatal Accidents Act*** that the deceased's parents as listed in the pleadings are amongst his possible dependants, that the courts have repeatedly held that a person seeking to benefit on damages for loss of dependency has to prove that they depended on the deceased. This submission was based on the decision in **Elizabeth Chelugat Tanui & Another vs. Arthur Mwangi Kanyua [2013] eKLR** and **Bhupendra M. Patel vs. George Omwanza Kinanga [2017] eKLR**. In this case it was submitted that the appellant being a son of the deceased failed to prove that he depended on his deceased father. On the other hand, PW1 testified that he deceased was his last born son and that they depended on him but stated that he was engaged in farming.

8. As regards the award, the Appellant relied on **Kemfro Africa Limited T/A Meru Express Services & Another vs. Lubia & Another, [1987] KLR 30** and **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)** and submitted that the Learned Trial Magistrate erred in using an unreasonably high multiplier thus arriving at an inordinately high award. According to the appellant, the court did not take into consideration the expectation of earning life of the deceased, expectation of life dependency of the dependants and chances of life of the deceased and dependants.

9. It was submitted that in awarding of multiplier 32 years, the Learned Trial Magistrate did not consider the deceased's working life as a mechanic would not have gone to 60 years, that the deceased's chances of life could not have been to 60 years, considering the vagaries life and that the life expectancy of the deceased's dependants, who were his parents, was way below the life apex of the deceased. This position was based on the decision in **Roger Dainty vs. Mwinyi Omar Haji & Another [2004] eKLR** where a multiplier of 10 years was applied for the deceased who was 27 years old as well as in **Vincent Sululu & Another vs. Rose Wanjiru [2016] eKLR** in which the decision in **Chunibhai J. Patel & Another vs. P. F. Hays & Others [1957] EA 748** in which the court observed that the factors to be considered in determining the multiplier include the age and expectation of life of the deceased's dependants. It was submitted that in this case the deceased's dependants had reached the apex old ages of 67 and 62 and could not be expected to have lived for 32 years more. It was suggested that the multiplier be reviewed to 10 years hence the award for loss of dependency should be assessed at 10 x 12 x 25,198.60 x 1/3 = Kshs 1,007,944.00. In the alternative it was submitted that the multiplier be reviewed to 18 years as suggested in the submissions before the trial court based on the decisions in **Anwaraji Brothers Limited & Another vs. Joyce Muindi & Another Machakos HCCA No. 126 of 2007** and **Esther Nduta Mwangi Kamau Muturi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007** where the deceased who were 32 and 33 years were awarded a multiplier of 18 and 17 years respectively.

10. In opposing the appeal, the Respondent submitted based on the decision of the the Court of Appeal in **Stallion Insurance Company Limited vs. Ignazzio Messina & C S.P.A [2007] eKLR** that it is trite law that an Appellate Court will not consider or deal with issues that were not canvassed, pleaded and or raised at the lower court and that for a matter to be a ground of appeal; it has to have been sufficiently raised and succinctly made an issue at trial.

11. According to the Respondents, the issue of whether dependency was not proved was not raised at the hearing before the subordinate court. Indeed, the Appellant's submissions on the issue of dependency addressed the issue of the multiplier and the multiplicand to be used in assessing damages for loss of dependency and not that the Respondents had not proved that the pleaded dependants were dependent on the deceased. It was submitted that having failed to raise the issue that dependency was not proved at the hearing before Honourable C. A. Ocharo, the Appellant cannot now be heard to mutate its case and base its appeal on this issue since it is by law and in the interests of justice precluded from raising the issue at the Appellate stage.

12. It was nevertheless submitted that it was proved that **Grishon Katua Ndolo** and **Mary Kavuli Katua** were dependants of the deceased as pleaded in the Plaint dated 20th June, 2016 since it is common ground that they were the parents of the deceased. Citing section 62 of the ***Evidence Act*** which provides that all facts, except the contents of documents, may be proved by oral evidence, it was submitted that from the foregoing, it is clear that PW 1's oral evidence in Court confirmed that he and his wife were depended on the deceased. He confirmed that they relied on him to pay their shamba boy/foreman and he would shop for their need. This is proof of dependency. In support of this submission, the Respondents relied on **Henry Waweru Karanja & Another vs. Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2107] eKLR** the court expressed itself as follows concerning the issue of proof of dependency:

> **"20. I need to dispose off several aspects of the appeal here quickly. First, the Appellant says that the Plaintiff did not prove that they are entitled to any sums for loss of dependency or lost years because she did not prove that she was the mother of the deceased. I do not agree that the Respondent did not prove that she was entitled to this head of damages. She testified quite straightforwardly that she was the mother of the deceased and that the deceased used to give her Kshs. 10,000 every month. In cross examination, all the Appellant's counsel did was to ask her if she had come to court with a letter from the Chief to prove that she was, indeed, the mother to the deceased. The Respondent responded in the negative. The lack of a**

Chief's letter is not an automatic proof of the negative: that the Respondent is not the mother of the deceased. Indeed, her oral testimony, believed by the Learned Magistrate was sufficient to prove that she was the mother.

21. The same is true about the proof of dependency. She testified that the Deceased used to give her Kshs. 10,000 per month. It is true that she did not produce any document to prove this – but the law does not say that a document must be produced to prove such an assertion. The law demands that each allegation must be proved on a balance of probabilities. Here, the Respondent testified that she received Kshs. 10,000 per month from the Deceased. She was not cross-examined on the claim. The Learned Trial Magistrate was therefore entitled to make a finding that that was the amount of money she received from the Deceased. In any event, the Learned Trial Magistrate used the sum of Kshs. 10,000/= not as the amount the Deceased used to give to the Respondent but as the total earnings per month for the Deceased."

13. According to the Respondents, the 1st Respondent's statement that "*at the moment we are managing because I farm" c*an only be taken to refer to his current state after the death of his son - post the deceased's death (at the moment). His claim is for compensation for the lost support he received from the deceased due to his death on 23rd May, 2015. His proof of dependency on the deceased cannot therefore be based on his state after the death of the deceased herein as the Appellant wishes it to be. It can only be based on the facts during the life time of the deceased.

14. The Respondents also relied on the sentiments of the Court of Appeal in **Kenya Breweries Ltd vs. Saro [1991] eKLR** that:

"…But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others [1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:

> **"In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced thorough out Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is "outrageous and pernicious" is not well-founded and must be rejected. ...**

In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. The High Court authorities which were cited to us, such as Abdullahi v Githenye [1974] EA 110, Maurice Miriti v Feroze Construction Co Ltd HCCC No ... 1979, NRB, (unreported) and so on; all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi v Githinye, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In Miriti v Firoze, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred."

15. According to the Respondents, the foregoing passage is the summation of the law in Kenya that a parent is deemed to be dependent on their child, irrespective of their age and financial abilities, for under African customary law and practice children are expected to perform house hold chores to assist their parents during their early ages and take care of their elderly parents when they attain the age of majority. These sentiments were echoed in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** as follows:

"Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the deceased, I differ from his contention. Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.

The evidence of PW2 was that he was a priest and was not getting an income to support his parents. The fact that the deceased's wife was working does not remove her dependency on her late husband. The evidence was that the deceased used to pay for expenses of housing, school fees, food and other items for upkeep of the children. I find that there was dependency by all who were listed in the plaint……."

16. According to the Respondents, PW 1's testimony simply proved that the deceased practiced this African custom and as such, PW 1 and his wife were his dependants as he cared for them in their advanced age. The fact that the deceased had visited his parents before he boarded the motor vehicle that led him to his death is testament of this practice.

17. As regards the allegation that the multiplier adopted was too high, it was submitted that there is no hard and fast rule on the assessment of damages for loss of dependency. Traditionally, Courts have taken the global award or the multiplier award approach and as regards the guiding principles, the Respondents relied on the case of **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** and submitted that there is no hard and fast rule on how a court is to arrive at the figures to be adopted as the multiplicand, the multiplier and the dependency ratio. The question of the figures to adopt is an issue of fact to be determined on a case to case basis, that is, each case is to be decided based on its unique set of facts. Therefore, when a Court adopts a certain figure as the appropriate multiplier, the same is a finding of fact**.**

18. The principles on the basis upon which an Appellate Court can then interfere with a finding of fact of the trial Court and the relevant factors to take into account in arriving at a multiplier are the age of the deceased, number of years the deceased is expected to remain in employment, the life expectation of the deceased and his dependants, and the period his dependants are expected to depend on him as was pointed out in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** where it was stated as follows:

> **"The multiplier is determined by the years of expectation of earning life of the deceased and the dependency of the dependants."**

19. According to the Respondents, the aforesaid sentiments were echoed in **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR** where it was noted as follows:

> **"7. I have considered the Defendant Counsel's submissions together with cited authorities in support of the theory of imponderables of life. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of farm manager would remain in active work and retire. That period was acknowledged to be 60 years of age. And in BEATRICE WANGUI THAIRU VS. HON. EZEKIEL BARNG'ETUNY & ANOTHER (Nairobi HCCC No. 1438 of 1998 (unreported), and referred to in Rev. Fr. Leonard O. Ekisa & Another vs. MAJOR BIRGEN [2005] eKLR, Ringera J said inter alia -**
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> > **"... there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case. [….] In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum (HANNAH WANGATURI MOCHE & ANOTHER VS. NELSON MUYA (Nairobi HCCC No. 4533/1993)."**
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> **9. The deceased was at the time of his death 44 years of age. The Defendant adduced no evidence of the vicissitudes of life or other imponderables which would have shortened his working life to 6 years, or to 50 years and retire from work. The deceased was in the employment of Makindi Mahoti and Jumapili Farmers Cooperative Society as a Farm Manager. His salary was Ksh 15,000/= per month. […]11. Secondly, in the absence of any vicissitudes of life which would have curtailed his working to 50 instead of the expected 60 years retirement age, I reject the multiplier of 6 years suggested by the Defendant's Counsel. As the deceased was 44 years of age at the time of the accident, he would, but for the accident, have worked for another 16 years. I would therefore give a multiplier of 16 years…"**

20. In this case, the trial Court found that the deceased was aged 28 years old. It found that life expectancy in Kenya is now seventy (70) years. It found the vigour's of the deceased's occupation as a mechanic could not allow him to work to the age of sixty six (66) years but could work up to the age of sixty (60) and in the end, a multiplier of thirty two (32) years was applied.

21. It was however submitted that the trial court's finding that as at the time of the deceased's death his work designation was a mechanic was an error. As seen from the promotion letter dated 21st May, 2015 and accepted by the deceased on 22nd May, 2015, indicated that the promotion took effect immediately. As such, the deceased was a supervisor/Assessor – heavy commercial division as from 22nd May, 2015 hence his was a supervisory/managerial task and not the manual and tasking work noted in the learned trial magistrate's finding. Since the deceased was employed in the private sector, it was submitted that the retirement age in the sector is sixty (60) years. As such, the deceased could have worked up to the age of sixty (60) years. As the deceased was twenty eight (28) at the time of his death, his balance of working years was 32 years as it was not shown that there were any vicissitudes of life which would have curtailed his working life from 60 years.

22. In view of the foregoing, it was submitted that the learned magistrate's adopted multiplier of 32 years was not too high in view of the circumstances of the deceased's work.

23. As far as life expectancy of the deceased and his dependants is concerned, it was submitted that life expectancy in Kenya has generally being on the upward spiral from fifty two (52) in the year 2000 to the current life sixty seven (67) years and is projected to rise to seventy two (72) in the year 2022 as per the Kenya to 2030 and Beyond Report published in August, 2018. The population of persons above the age of sixty five (65) in the country is expected to grow from 1.3 million in 2015 to 2.7 million in 2030 as per the aforesaid report. According to the Respondents, that the deceased's parents will live to the age of ninety and beyond is not a reality which is beyond reach. Granted the learned trial magistrate had the advantage of seeing PW 1 in person and assessing his situation, from the fact that PW 1 is still able to carry subsistence farming as pointed out during re-examination is a clear indication that he is still an active person of good health. As such, a multiplier of 32 years based on the life expectancy of the deceased's dependants is fair and reasonable.

24. As for the deceased's life expectancy, it is not a wild dream to say that he would have attained the age of 65 and beyond but for the

accident. This is because as at 2017, life expectancy in Kenya was 67 years as per the Kenya to 2030 and Beyond Report published in August, 2018. As such, a multiplier of 32 years based on the deceased's life expectancy is fair and reasonable.

25. Finally, as for the period of dependency of the deceased's dependants herein, it was submitted that they were elderly and unable to find any formal employment. Their output would also diminish with advancement in age. As such, it is expected that the deceased dependants herein would depend on him for the rest of their lives due to their advanced age. In view of the foregoing, it was submitted that the learned magistrate's adopted multiplier of 32 years was not too high in view of the circumstances of the deceased's dependent's expected period of dependency on him.

26. While the above factors are relevant in determining the appropriate multiplier, it ought to be noted that Courts prefer to work out the balance of the deceased's working life as this approach is not as speculative as the rest of the other approaches. For this submission, the Respondents relied on **Benedeta Wanjiku Kimani vs. Changwon Cheboi & another [2013] eKLR** where it was noted as follows:

> **"7. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of farm manager would remain in active work and retire. That period was acknowledged to be 60 years of age"**

27. In that case, it was submitted that the court arrived at a multiplier of 16 years after finding that the deceased's employment's official retirement age of 60 years gave her a balance of 16 years of working life as she was aged 44 years at the time of death. Similarly, in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** the court found the deceased's official retirement age to be 55 years. As he was aged 45 years at the time of death, the court adopted a multiplier of 10 years as this was the balance of his working life.

28. Finally, on the issue of the learned trial magistrate departing from the principle of precedents, the Respondents reiterated the sentiment of Ringera J. (as he then was) quoted in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** and submitted that the findings in Machakos HCCA No. 126 of 2017 and Machakos HCCC No. 46 of 2007 on the applicable multipliers were not statements of law but findings of fact in the said cases. The same could not be applied mutatis mutandis by the learned trial magistrate in this claim. Besides, the Respondents also advanced the decision in **Francis Wainanina Kirungu vs. Elijah Oketch Adellah [2015] eKLR** in their submissions in which a multiplier of 35 years was applied for a deceased aged 28 years. The case fits the bill of the current claim as the deceased therein was aged 28 years just like the present claim. The case was also decided later in time compared to the two authorities advanced by the Appellant and by a Court of equal jurisdiction to the two authorities advanced by the Appellant. The Court therein noted:

> **"32. On the multiplier considering the vagaries of life the plaintiff proposed a multiplier of 35 years while the defendant proposed 15 years. I find that the deceased died at 28 years assuming he was in employment he would have retired at 65 years. Putting into account the vicissitudes of life I give the deceased 60 years. I will adopt the multiplier proposed by the plaintiff of 35 years."**

29. Applying the principle of precedents, it was submitted that **Francis Wainanina Kirungu vs. Elijah Oketch Adellah [2015] eKLR** ought to have prevailed as it was decided later in time and its circumstances are similar to those of the claim herein. Accordingly, it was submitted that the learned magistrate's multiplier of 32 years was not too high and was based on proper principles of law and the same ought not be interfered with.

30. It was therefore prayed that the Appellant's Appeal lacks merit and should be dismissed with costs to the respondents.

Determinations

31. I have considered the submissions made in this appeal as well as the material comprised in the record of appeal.

32. In this appeal, the appellants are only challenging the quantum of damages awarded in form of loss of dependency. 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."**

33. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

34. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

35. As regards the claim for loss of dependency, the only challenge is with respect to the multiplier. **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held 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."**

36. It is not in dispute that **Grishon Katua Ndolo** and **Mary Kavuli Katua** were parents of the deceased. As rightly appreciated by the appellant, under section 4 of the ***Fatal Accidents Act*** a deceased's parents as listed in the pleadings are amongst his possible dependants. This is a reflection of the views expressed in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) that:

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

37. As regards the expectation of assistance to the parents by the children, the Court of Appeal in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others Civil Appeal No. 123 of 1983 [1986] KLR 457; [1982-1988] 1 KAR 946; [1986-1989] EA 137** expressed itself as hereunder:

> **"Today parents and children in most Kenya families do expect their children when adults to help their parents if they need it and that should be encouraged and not fulminated against as a "system of gerontocracy at its worst". In Kenya parents are of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer economic loss. The financial assistance relative to the ability of the deceased, which is normally expected and readily provided, is obliterated by the death…The cost of bringing up the deceased and the expense of his/her education is lost, never to be redeemed. All the benefits that would accrue to the parents, and where it applies, to the younger brothers and sisters of the deceased as the deceased natured physically and materially are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise. The sole issue all the same is the assessment of a fair award in the circumstances of any one case. The award, the subject matter of this appeal was obviously affected by the sympathy the trial Judge had arising from a judgement which related to a different society with a different culture. The Judge had before him a suit involving Kenyan parties and he was therefore duty bound to apply the decision of the English High Court having due regard to the customs and reasonable expectations under the culture of the parents of the deceased who are Kenyans. It was an error on the part of the Judge to approach the case as if the appellants were citizens of the UK and as if the trial was held in London. The error improperly influenced the Judge to make a very low figure. In Scotland a parent has the right to be supported by his child, and vice versa and each will accordingly have an insurable interest in the life of the other, limited to the amount reasonably necessary to protect the assured against the contingency of the death of the life assured…To assert therefore that the Kenya custom is anathema and will hinder development is tantamount to saying that no other developed people anywhere practice that custom and this is fallacious…In general, in Kenya children are expected to provide and do provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practised throughout Kenya both by Africans and Asians and the application of the custom at family level is the basis of the national ethos of being mindful of others' welfare. In the Asian community the custom is supported by Hindu religion whose influence on the life of the Hindu community is well nigh total…The Courts in Kenya exercise their respective jurisdictions *inter alia* to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial Judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act (Chapter 8) and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religions of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial Judge's view that it is "outrageous and pernicious" is not well founded and must be rejected. A judge should be very slow to criticize any particular custom of people. There always is a purpose for the practice of a custom. Human beings do not partake for too long in customs, which are not beneficial to them. If a Judge is required to apply a custom, it is often safe to summon to its assistance one or more competent assessors from the tribe or community of the parties to the action under section 87 of the Civil Procedure Act – before making critical comments on custom. It was improper for the Judge to describe the humane practice of children looking after and maintaining their parents in advancing years as "outrageous and pernicious". It is nothing of the kind, and both common law and its applicability must be tempered and adjusted to the**

circumstances, needs and generally held views of the people of Kenya who come to its courts to receive justice from tribunals appointed to consider those very circumstances, needs and views."

38. The same Court in **Kenya Breweries Ltd vs. Saro [1991] KLR 408**, held that:

> **"In the assessment of damages to be awarded, the age of the deceased is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet to be ascertained. But the issue of some damages being payable in both cases is nolonger an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents and that is the reason why we still do not have "homes" for the aged since an African son or daughter may well find it offensive to have his or her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare"…Damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution."**

39. According to **Udo Udoma, CJ**, in **Suleimani Muwanga vs. Walji Bhimji Jiwani and Another [1964] EA 171**:

> **"It is right also that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school, and after school on gaining employment, to make contribution towards maintenance of the family, the term family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as kindred or extended family. In which case it seems to be nothing strange that the deceased should have been said to have been serving not only her mother but also her grand-parents when she was alive and even if she had to train as a nurse she would still have had to serve them any time she came home in addition to her financial contributions."**

40. A similar view was expressed in **Akol vs. Industrial Sales Promotion Ltd [1973] EA 248**, where **Opu, J** stated that:

> **"For the purpose of clarifying the matters in this case, a distinction must be drawn between suits where a parent claims for loss of prospective financial assistance consequent on the death of his child and those whose claim is based on the loss of services of the child as a result of the child's death. It is right that the court should take judicial notice of the fact that African children are usually educated by their parents and guardians at considerable expense involving more often than not great personal sacrifice. Such children are naturally in turn expected to assist in domestic work while at school and after school, on gaining employment, to make a contribution towards the maintenance of the family, the family being used here, not in the European sense, but in the African sense, which anthropologists usually refer to as the kindred or extended family. Therefore owing to the peculiar circumstances of the African family as distinct from the English or European family, an African parent can sue for loss of prospective financial support caused by the death of his child due to negligence on the part of the defendant."**

41. It is therefore clear that even in the absence of evidence that the parents depended on the deceased, the court is not barred by that mere fact from awarding damages to the parents as long as there is evidence on record that the parents were either being assisted by the deceased or that they expected some assistance from the deceased. That is my understanding of the decision in **Henry Waweru Karanja & Another vs. Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2107] eKLR** where the court expressed itself as follows concerning the issue of proof of dependency:

> **"20. I need to dispose off several aspects of the appeal here quickly. First, the Appellant says that the Plaintiff did not prove that they are entitled to any sums for loss of dependency or lost years because she did not prove that she was the mother of the deceased. I do not agree that the Respondent did not prove that she was entitled to this head of damages. She testified quite straightforwardly that she was the mother of the deceased and that the deceased used to give her Kshs. 10,000 every month. In cross examination, all the Appellant's counsel did was to ask her if she had come to court with a letter from the Chief to prove that she was, indeed, the mother to the deceased. The Respondent responded in the negative. The lack of a Chief's letter is not an automatic proof of the negative: that the Respondent is not the mother of the deceased. Indeed, her oral testimony, believed by the Learned Magistrate was sufficient to prove that she was the mother.**
>
> **21. The same is true about the proof of dependency. She testified that the Deceased used to give her Kshs. 10,000 per month. It is true that she did not produce any document to prove this – but the law does not say that a document must be produced to prove such an assertion. The law demands that each allegation must be proved on a balance of probabilities. Here, the Respondent testified that she received Kshs. 10,000 per month from the Deceased. She was not cross-examined on the claim. The Learned Trial Magistrate was therefore entitled to make a finding that that was the amount of money she received from the Deceased. In any event, the Learned Trial Magistrate used the sum of Kshs. 10,000/= not as the amount the Deceased used to give to the Respondent but as the total earnings per month for the Deceased."**

42. That dependency can be proved by oral evidence was appreciated in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** as follows:

> **"Though Mr. Magare for the defendant has argued that dependency was proved on only one person, that was the wife of the**

deceased, I differ from his contention. Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependants. There is no social welfare system that caters for old people in this country. Expenses on children also do not need to be proved by documents. It is not possible to keep receipts for each of such expenditures. Each case has to depend on its own circumstances.

The evidence of PW2 was that he was a priest and was not getting an income to support his parents. The fact that the deceased's wife was working does not remove her dependency on her late husband. The evidence was that the deceased used to pay for expenses of housing, school fees, food and other items for upkeep of the children. I find that there was dependency by all who were listed in the plaint……."

43. As for what the court ought to consider in determining the appropriate multiplier, in **Henry Waweru Karanja & Another vs. Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2107] eKLR** the court expressed itself as follows concerning the issue of proof of dependency:

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44. Similarly, in **Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR** it was stated as follows:

"The multiplier is determined by the years of expectation of earning life of the deceased and the dependency of the dependants."

45. In this case the deceased was aged 30 years old. His parents were 67 and 62 years respectively. The court adopted a multiplier of 32 years. As noted above, 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. With due respect the court seemed to have only been influenced by the deceased's personal circumstances but did not consider the personal circumstances of the dependants. She ought to have considered the advanced age of the deceased's parents as well as their expectations of earning life, the expected length of their dependency on the deceased and the vicissitudes of life. While the parents may well have lived up to 100 years, in my view 32 years was unreasonable. I agree with the proposal made by the appellant before the learned trial magistrate that the court ought to have adopted 18 years as the multiplier. In arriving at this decision I am guided by the decision in **Benedeta Wanjiku Kimani vs. Changwon Cheboi & another [2013] eKLR** where it was noted as follows:

"7. I have considered the Defendant Counsel's submissions together with cited authorities in support of the theory of imponderables of life. There are indeed many imponderables of life, and life itself is a mystery of existence. It is not however the province of the court to determine or explore those imponderables. The duty and province of the court is to apply the generally known period during or about which an employee in the deceased's occupation of farm manager would remain in active work and retire. That period was acknowledged to be 60 years of age. And in BEATRICE WANGUI THAIRU VS. HON. EZEKIEL BARNG'ETUNY & ANOTHER (Nairobi HCCC No. 1438 of 1998 (unreported), and referred to in Rev. Fr. Leonard O. Ekisa & Another vs. MAJOR BIRGEN [2005] eKLR, Ringera J said inter alia -

"... there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extent of dependency is a question of fact to be established in each case. [….] In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum (HANNAH WANGATURI MOCHE & ANOTHER VS. NELSON MUYA (Nairobi HCCC No. 4533/1993)."

9. The deceased was at the time of his death 44 years of age. The Defendant adduced no evidence of the vicissitudes of life or other imponderables which would have shortened his working life to 6 years, or to 50 years and retire from work. The deceased was in the employment of Makindi Mahoti and Jumapili Farmers Cooperative Society as a Farm Manager. His salary was Ksh 15,000/= per month. […]11. Secondly, in the absence of any vicissitudes of life which would have curtailed his working to 50 instead of the expected 60 years retirement age, I reject the multiplier of 6 years suggested by the Defendant's Counsel. As the deceased was 44 years of age at the time of the accident, he would, but for the accident, have worked for another 16 years. I would therefore give a multiplier of 16 years…"

46. It is therefore my view the award for loss of dependency ought to have been as hereunder:

18 x 12 x 25,198.60 x 1/3 = Kshs 1,814,299.20

47. I reduce the award for loss of dependency accordingly. In the premises, the appeal is allowed to that extent.

48. Each party will bear own costs of the appeal since the appellant has not wholly succeeded in the appeal and the appellant did not comply with the directions to furnish soft copies in word format.

49. It is so ordered.

Judgement read, signed and delivered in open Court at Machakos this 22nd day of February, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Maluki for the Respondent

CA Geoffrey