



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MIGORI**

**CIVIL APPEAL NO. 16 OF 2020**

**CALEB JUMA NYABUTO.....APPELLANT**

**-VERSUS-**

**EVANCE OTIENO MAGAKA**

**CHARLES OYUGI AMUOMO (Suing as legal representatives of the estate of**

**James Magak Kawere (DECEASED.....RESPONDENTS**

***(An Appeal from the Judgement and Decree of Hon. R.K. Langat Senior Resident Magistrate***

***Rongo in Rongo SRMCC No. 138 of 2016)***

**JUDGEMENT**

This is an appeal by **Caleb Juma Nyabuto** against the judgement and decree of the Hon. R.K. Langat Senior Resident Magistrate Rongo dated and delivered on 21<sup>st</sup> January 2020.

The appellant was the defendant while the respondents were the plaintiffs in the lower court suit.

The appellant is represented by the firm of Omwenga & Co. Advocates whilst the respondents are represented by the firm of Khan & Associates Advocates.

By a plaint dated 17/12/2016 filed on 21/12/2016, the respondents acting as the legal representatives of the estate of the deceased (formerly the plaintiffs) sued the appellant (formerly the defendant) for the wrongful death of the deceased.

The respondents pleaded that the appellant was the proprietor (either registered, insured, equitable, beneficial or otherwise of motor vehicle registration mark KBT 499T (hereinafter 'suit motor vehicle') which was in the lawful control of his authorized driver, servant, agent employee one Victor Ouma Ogembo who has since been charged with causing death by dangerous driving in Traffic Case No. 33 of 2016.

On or about 20<sup>th</sup> December, 2015, the deceased being aboard the suit motor vehicle, was travelling along Rongo Awendo road when near Kanga machine area, the appellant's driver negligently and or recklessly drove the suit motor vehicle thereby causing it to lose control and overturn and the deceased sustained fatal injuries. The respondents pleaded that the appellant should be held vicariously liable for the tortious acts or omissions occasioned by the driver.

The respondents prayed that judgement be entered against the appellant for special damages and general damages assessed and pursuant to the Law Reform and Fatal Accidents Act. The Respondent called three witnesses in support of the case.

The appellant filed a defense dated 22/02/2017 filed in court on 7/03/2017, in which he generally denied the allegations raised by the respondents in the plaint and prayed that the suit be dismissed with costs. Notably, the defendant did not call any witnesses in support of its case and/or did not file any submissions in the lower court suit.

After the hearing, the court entered judgement in favour of the respondents as follows: -

**Liability - 100% in favor of the appellants.**

**General damages under the Fatal Accident Act**

<b>Pain and Suffering</b>	<b>- Kshs. 100,000/-</b>
<b>Loss of dependency</b>	<b>- Kshs. 1,800,000/-</b>
<b>Special damages</b>	<b>- Kshs. 20,085/-</b>

**Damages under the Law Reform Act**

<b>Loss of expectation of life</b>	<b>- Kshs. 100,000/-</b>
<b>Total</b>	<b>- <u>Kshs. 2,020,085/-</u></b>

**Less Kshs. 100,000 (Loss of expectation of life) - Kshs. 1,920,085/-**

Costs and interest awarded to the plaintiff.

Being dissatisfied with the judgement and decree of the subordinate court the appellant preferred this appeal by way of a Memorandum of Appeal dated 15/05/2020 filed in court on 18/05/2020. The 17 grounds of appeal can be summarized in the following 14 grounds as follows:

- I. That the court erred in over relying on the evidence of the respondents which was not corroborated.**
- II. That the court erred in holding the appellant 100% liable for the accident when there was no sufficient evidence to support that finding.**
- III. That the court erred in awarding Kshs, 100,000/- for pain and suffering an amount which was excessive in the circumstance.**
- IV. That the court erred in awarding Kshs. 100,000/- as damages for loss of expectation to life an amount which is excessive in the circumstances.**
- V. That the court erred in awarding the Respondent's estate a sum of Kshs. 1,970,085 as general damages, an amount which was excessive thus it amounts to an erroneous estimate of loss or damages suffered by the estate of the deceased.**
- VI. That the court erred in awarding Kshs. 50,000 for funeral expenses that were not pleaded and proven to the required standard.**
- VII. That the court erred by using the multiplier approach in awarding damages to the estate of the deceased under the Fatal Accidents Act instead of applying the global award approach.**
- VIII. That the court erred in applying a multiplicand Kshs. 15,000 which figure was not proved to the required standard.**
- IX. That the court erred in applying a dependency ratio of 15 years without any lawful justification.**
- X. That the court erred by double awarding the Respondents' estate twice both under Law Reform Act and Fatal Accidents Act.**
- XI. That the court erred in awarding the Respondents special damages of Kshs. 20,085 which were not proved to the required standard.**
- XII. That the court erred in failing to consider the Appellant's submissions and legal authorities relied upon in support of their defence thereof.**

The appellants prayed that: -

- i. The appeal herein be allowed.**
- ii. The judgment of the lower court delivered on 21/01/2020 be set aside and same be substituted with a proper finding/judgement.**
- iii. The Respondent to pay costs in the lower court and in this appeal.**

On 6/10/2020 Hon. Chitembwe J directed that the appeal be canvassed by way of written submissions and on 1/03/2021 both parties had filed their respective submissions.

## SUBMISSIONS ON THE APPEAL

The appellant filed his submissions dated 11/11/2020 on 16/2/2021.

The appellant submitted that the appellate court can only interfere with an award if the judgement was not based on any evidence or where the award was too high or too low as to amount to an erroneous estimate, as was held in the case of **Jabane vs Olenja (1986) KLR 661**.

The issues for determination as outlined by the appellant are as follows: -

- i. Whether the learned trial Magistrate erred in law and fact in holding the Appellant was 100% liable for the accident without sufficient evidence.**
- ii. Whether the learned trial Magistrate erred in law and in fact in making awards under the Law Reform Act and the Fatal Accidents Act.**
- iii. Whether the learned trial Magistrate erred in law and fact in making awards under special damages without any proof thereof.**

On the issue of liability, the appellant combined grounds 1, 2 and 3 of the memorandum of appeal and submitted that it was upon the respondent to prove that the appellant's suit motor vehicle was being negligently and/or recklessly driven, lost control and overturned thus causing fatal injuries to the deceased;

That under Sections 107 and 108 of the Evidence Act Cap 80 Laws of Kenya, the burden of proof is on he who alleges. Further provisions contained in Section 112 of the Evidence Act place the burden of proof on the party with knowledge of certain facts;

That **PW1 Corporal Ngati Joseph** the investigating officer did not witness the accident. PW1 did not have the court file with him, there were no sketch plan produced in court rather the only document produced in court was the police abstract which is not conclusive prove for causation of the accident. Thus, the learned trial Magistrate erred in both law and in fact to conclude that the police abstract which was not supported by other documentary evidence was enough evidence to hold the appellant 100% liable for the occurrence of the said accident. The appellant relied in the case of **Kennedy Nyagoya vs Bash Hauliers (2016) eKLR** where the court held that the evidence of the police abstract produced by PW1 who was not the investigating officer did not assist the plaintiffs' case.

It was also submitted that no charge sheet was produced before court to prove that there were criminal proceedings preferred against the driver for causing death by dangerous driving; that the fact that a party charged in a traffic offence is not an automatic proof that he is liable in a civil suit as held in **James Gikonyo Mwangi vs D.M. (Minor suing through his mother and next friend IMO) (2016) Eklr**.

Counsel urged that the testimony of **PW3 Esther Ouma** as an eye witness ought to be disregarded as she was not listed as a witness, and could not state at what speed the suit motor vehicle was being driven; that she did not state whether she sustained any injuries as a result of the alleged accident. Her testimony is mere allegations with no probative value to this case and ought to be disregarded;

That although the appellant did not call any witness it was wrong for the court to make a decision relying on the testimony of PW3. The burden of proof does not shift to the appellant at any point as was held in **Evans Mogire Omwansa vs Benard Otieno Omolo & Anor (2016) eKLR**.

On the allegations of double awards under the Law Reform Act and the Fatal Accidents Act the appellant jointly addressed the grounds 4,5,6,8,9,10,11,12,14,15 and 16, it was submitted that from the testimony of **PW2, Charles Oyugi** the deceased succumbed to his injuries on the same day of the accident as evidenced by the death certificate produced as PEXH5. The trial court relied on the case of **Sukari Industries and Clyde Machimbo Juma (2016) eKLR**.

Under the head of loss of expectation of life, the appellant submitted that the award of Kshs. 100,000 was excessive. The appellant prays that an award of Kshs. 60,000 ought to be awarded as the deceased was aged 50 at the time of his death. The appellant urged the court to consider the findings in **Mohamed Abdi Ali v Paul Muturi Mwangi (2019) eKLR Nyeri HCCA No. 1 of 2017**.

The appellant submitted that under the Fatal Accident Act, an award is made for loss of dependency, that the deceased's estate had suffered. They are made pursuant to the following subheadings;

- a) Multiplier**
- b) Multiplicand**
- c) Dependency ratio**

The appellant submitted that from the evidence on record the multiplier approach is not applicable in determining damages awardable under this limb as applied by the trial court because there was no documentary evidence that the deceased used to earn Kshs. 30,000 as alleged; there was only one defendant from the pleadings while during the hearing, it was stated that the deceased had left behind six dependants; that there were no birth certificates produced to prove the relationship between the deceased and the alleged dependants.

That in such instances, where income and dependants ration is uncertain, the courts have always applied the global/lumpsum approach.

The appellant relied on **Mwanza vs Ngalali Mutua Kenya Bus Ltd** which was quoted in the case of **Albert Odawa vs Gichimu Githenji in Nakuru HCCA No. 15 of 2003 (2007) eKLR** where the court held inter alia that the multiplier approach method is practical where the factors such as age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are well known or are knowable without undue speculation.

Under this limb, the appellant submitted that the learned trial Magistrate erred in by applying the multiplier approach. The appellant submitted that the global award of Kshs. 300,000 would be adequate compensation in the circumstances. The appellant relied on the case of **Multiple Hauliers (EA) Limited & Another vs Williman Abiero Ogeda (Suing as the representative of Christine Arglera Obiero (Deceased) & 2 Others (2016) Eklr** where the court held that since there was no evidence adduced that the deceased was a mechanic and the earnings as search, he was treated as a casual laborer.

The appellant submitted that the award of Kshs. 50,000 as funeral expenses and Kshs. 20, 085 for special damages were not pleaded yet it is trite law that special damages must be specifically pleaded and proven as was held in the case of **Francis Muchee Nthiga vs David N Waweru (2013) eKLR**.

The appellant submitted that the receipt for Kshs. 20, 085 produced as PEXH 7(a) being the payment for obtaining the letters of grant do not clearly portray what the payments were made for that because they do not contain the deceased's name to show that indeed that were brought for his burial.

The respondents did not spend the alleged amount of money and the said receipts do not bear a K.R.A Stamp to prove the requisite stamp duty was paid on such receipt as required under the provisions of Sections 19 and 20 of the Stamp Duty Act for a court of law to attach any probative value on such receipts. The above position was stated in the case of **Leonard Nyongesa vs Derrick Righa Gula (2013) eKLR** whereby Hon. Kasango J declined to award damages for those receipts which had not been presented for stamp duty payment in compliance with section 19 and 20 of the Stamp Duty Act.

In conclusion, the appellant prayed that this appellate court re-looks and re-evaluates the trial magistrate's decision and award as follows:-

**Liability** - 80:20% in favour of the Respondents.

**Fatal Accidents Act** - Kshs. 300,000

**Less**

**Law Reform Act**

**Pain and Suffering** - Kshs. 20,000

**Loss of expectation of life** - Kshs. 60,000

**Sub - total** - Kshs. 220,000

**Add Special Damages NIL**

**Funeral Expenses Not Pleaded**

**Sub-total** -Kshs. 220,000

**Less 20%** -Kshs. 44,000

**Total** -Kshs. 176,000

#### **RESPONDENTS' SUBMISSIONS**

The respondents opposed the appeal and filed their submissions dated 08/01/2021 on 23/01/2021.

The respondents submitted that courts can only interfere with the trial court's decision on an award on both liability and quantum where it is satisfied that trial court took into account an irrelevant factor or left out a relevant factor or the award was too high or too low as to amount to an erroneous estimate or that the assessment was not based on evidence as was held in **Kemfro Africa Ltd vs A.M. Lubia & Another (1982-88) 1 KAR**.

On liability, the respondents submitted that PW2, testified that the deceased was aboard the said motor vehicle and had no control of it. Her evidence was corroborated by PW1 who testified that the driver of the suit motor vehicle was to blame since it was a self-involving accident. The driver was charged with causing death by dangerous driving as per the police abstract produced in court. The evidence was uncontroverted since no evidence was adduced by the appellant.

The respondents urged the court to uphold the finding of the lower court on liability at 100% in favour of the Respondent and relied on the case of **Joseph Kahinda Maina vs Evans Kamau Mwaura & 2 Others (2014) e KLR** where the learned Judge quoted with approval the

finding of Lenaola J (as he then was) in the case of **Esther Nduta Mwangi & Another vs Hussein Transporters Ltd (Machakos HCCC No. 46 of 2007)** where the court held that *“although the defendant denied the accident but pleaded in the alternative that the accident was a result of the negligence on the part of the deceased the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations...”*

On the loss of dependency, the respondent submitted that the dependency ratio of 2/3 would suffice as the deceased had a family and would spend 75% of his income for the basic needs of the house, maintaining the wife and son. The deceased was 50 years old and a carpenter at the time of his demise. He was not subjected to retirement age and a multiplier of 15 years would be reasonable under the circumstances. Since there was no proof of income, the court settled on a multiplicand of Kshs. 15,000 and relied upon the regulation wages (General) (Amendment) Order 2015.

On special damages, the respondents relied on a bundle of receipts of Kshs. 20,085; and Kshs. 50,000 being the funeral expenses, the respondent relied on the case of **Jacob Ayiga Maruja & Another vs Simeon Obayo (2005) eKLR** where the court awarded Kshs. 60,000 as funeral expenses.

The respondent also relied on the decision by Gikonyo J in **JNK (Suing as the legal representative of the Estate of the Estate of KMM(Deceased) vs Chairman Board of Governors [...] Boys High School (2018) Eklr** where it was held that

*“In spite of lack of receipts this Court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”*

The respondent further relied on the case of **Capital Fish Kenya Limited vs The Kenya Power & Lighting Company Ltd (2016)** made the same finding and stated in part *“...we are of course aware of the Court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc.”*

The respondent urged the court to dismiss the appeal.

After carefully considering the evidence adduced before the Trial Court by both parties, the grounds of appeal and submissions together with the plethora of authorities cited by the parties, it is this court’s considered view that the following are the issues for determination: -

Whether the Learned Trial Magistrate erred in the award made;

- a) **On liability.**
- b) **Under Fatal Accidents Act and Law Reform Act.**
- c) **Special Damages.**

Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.

The above provisions was espoused in the court decision of **Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123**. The court held:-

*“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).” See also Peters v Sunday Post Limited [1958] EA 424 and Lazarus Ombogo Kombo vs Sospeter Kibanga (2016)eKLR.*

Revisiting the evidence on record during the trial, PW1 Corporal Ngati Joseph testified that he had come to court to produce the police abstract (PEX1) in respect of the accident which happened on 20/12/2015. PW1 further testified that the accident was self-involving whereby one person died and some were injured, and there is a traffic case pending before court which was yet to be concluded where the appellant’s driver was charged. On cross-examination, PW1 admitted that he was not the investigation officer.

PW2 Charles Oyugi Amuomo testified as an uncle to the deceased, that the deceased died on 20/12/2015 as a result of the accident at Kanga area. He was not present at the scene of the accident but the deceased was taken to Rongo sub-county hospital where he was admitted for one day. The deceased was then transferred to Kisii Level Five Hospital. Later on, he was taken to Aga Khan Hospital in Kisumu, and died the following day.

It was the testimony of PW2 that the deceased was 56 years old at the time of his death and had 6 school going children in both primary and secondary schools. The funeral expenses amounted to roughly Kshs. 100,000. The post mortem cost him Kshs. 15,000. He prayed for compensation.

In support of his case, PW2 produced and marked the following documents:-

- i. Transfer Referral Summary – PEXH3.
- ii. Post Mortem Report – PEXH4.
- iii. Death Certificate – PEXH5.
- iv. Letter from Chief – PEXH6.
- v. Letters of Administration – PEXH7.
- vi. Receipt of Obtaining the Letters of Administration – PEXH7(b).
- vii. Paternal Cards – PEXH 8a, 8b, 8c, 8d, 8e and 8f.
- viii. Demand Letter – PEXH 9.

Esther Ouma Okuku PW3, was a passenger in the suit motor vehicle heading to Migori. She was seated behind the deceased. The driver was driving in a zig zag manner. They rolled and landed in a sugar plantation. The deceased sustained serious injuries and was taken to hospital. PW3 knew the deceased as they went to church together; that he died 2 weeks from after the accident. Upon re-examination, she affirmed that she only heard the deceased was taken to several hospitals and he died as a result of the accident.

After close of the Respondent's case, the matter was adjourned severally but the appellants failed to avail their witnesses.

On liability, Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya places the burden of proof lies on the person who alleges. It was therefore upon the respondents to prove that there was negligence on the part of the appellant in the manner that the vehicle in which the deceased was a passenger managed.

The standard of proof in civil cases is on a balance of probabilities. PHIPSON ON EVIDENCE 16<sup>th</sup> Edition (2005) at pp. 154-55 line paragraph 6-53 observes the following as regards to standard of proof in civil cases:-

*“The standard of proof in civil cases is generally proof on the balance of probabilities. If, therefore, the evidence is such that the tribunal can say “we think it more probable than not”, the burden is discharged, but if the probabilities are equal it is not.”*

In similar wording section 3 (2) of the Evidence Act -

*“A fact is proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it exists.”*

From the evidence on record, there was no rebuttal on the part of the appellant on how else the accident would have occurred for the court to apportion blame on the deceased. The testimony of the eye witness, PW3 was corroborated by PW1 who affirmed that the accident was self-involving.

In particular, PW3 stated as follows:

*“ I was seated behind James Magak Kawere. At Kanga, motor vehicle was driven in zig zag manner. It rolled and we ended up at sugar plantation.”*

PW1 produced a police abstract confirming occurrence of the accident in which James Magak was killed. There is no evidence to the contrary.

In *Civil Appeal No. 7 of 2019 Isaac K. Chemjor & Another vs Laban Kiptoo (2019) eKLR*. The Learned Judges observed as follows on paragraph 9:-

*“...There being no evidence that could lead to any other probability that another person was involved or the cause of the accident, the Court on a balance of probabilities test believe the explanation for the accident as given by the respondent, and there was in it no reasonable hypothesis that another vehicle or person was involved in the cause of the accident. The respondent had discharged his burden of proof under sections 107 and 108 of the Evidence Act in showing that the accident was occasioned by the 2<sup>nd</sup> appellant in his driving fast beyond his ability to control the vehicle when he encountered another road user. There being no evidence of involvement in the cause of the accident by any other person the Court finds on a balance of probabilities that the events as related by the respondent are more probable than not.” (emphasis mine).*

I agree with the above findings that the burden of proof shifted to the appellant to prove that the accident did not happen as alleged by the appellant.

A similar observation was made in the Court of Appeal Civil Appeal No. 100 of 2017 Rosemary Mwasya vs Steve Tito Mwasya & 2 Others (2018) eKLR.

*“Our reasons for affirming the Judges conclusions are that the deceased as a passenger had no control over the manner in which the appellant drove/managed and or controlled the accident vehicle prior to the accident.”*

In the absence of evidence to the contrary from the appellant on how else the accident would have occurred and the fact that the deceased had no control on how the suit motor vehicle was being driven, I agree with and affirm the findings of the Learned Trial Magistrate which blamed the occurrence of the accident on the appellant at 100% in favour of the respondents.

**Awards under the Fatal Accidents and Law Reform Act:-**

For the award made under Law Reform Act, the appellant proposed an award of Kshs. 20,000 for pain and suffering, Kshs. 60,000 be awarded for the loss of expectation to life as opposed to the award of Kshs. 100,000 each awarded under the different respective heads in the lower court judgement. The respondents on the other hand asks this court not to disturb the awards as made.

This court is guided by the holding 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 facts, 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.”* Also see *Kemfra v Lubia (Supra)*.

PW2 testified that the deceased died on the following day while PW3 was not sure when the deceased died. The documents produced in support of the respondents’ case show that the deceased was transferred from Rongo District Hospital to Kisii Level Six Teachers’ Referral hospital but it seems that the deceased was instead taken to The Aga Khan Hospital Kisumu. The death certificate indicates that the deceased died on 20<sup>th</sup> December 2015 the same date of the accident.

The testimonies are contradictory as to when the deceased died and the court can only place reliance on the death certificate issued, which document was not challenged by any party.

The respondent proposes that since the deceased died on the same day, the award for pain and suffering should be less. This court takes the view that the deceased did not die instantaneously. The deceased suffered some pain as he was being transferred from one hospital to another before succumbing.

The learned Trial Magistrate observed as much in his judgement where he held:

*“In the current case, the undisputed fact is that the deceased died on the same day of the accident. The evidence on record is that the deceased was taken to Aga Khan Hospital after the accident. He had initially been treated at Rongo Sub-County Hospital and transferred to Kisii teaching and Referral Hospital. He sustained a spinal injury and he must have endured a lot of pain while he was being shuttled to the different hospital for treatment...”*

In Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J observed:-

*“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).*

Similar emphasis was placed in Civil Case No. 56 of 2014 Beatrice Mukulu Kang’uta & Another vs Silverstone Quarry Limited & Another (2016) eKLR where Hon. P. Nyamweya observed:-

*“As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason.” (emphasis mine).*

There is no doubt that the deceased died after sometime which included taking him to different hospitals. Therefore, the deceased must have suffered some considerable pain before dying. This court finds no reason to interfere with the award made by the trial court.

**Loss of expectation of life**, this court is guided by the decisions in *Lucy Wambui Kohoro v Elizabeth Njeri Obugong (2015) eKLR* and in

Civil Appeal No. 113 of 2012 Makano Makonye Monyanche v Hellen Nyangena (2014) eKLR in which the Learned Judge R.N. Sitati held:-

***“I find no reason to interfere with the award on loss of expectation of life under Law Reform Act as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries.”***

**This court finds no good ground adduced to disturb the award made under the loss of expectation of life. The award shall eventually be taken into consideration when making the final award to avoid double compensation to the estate of the deceased.**

**On loss of dependancy;** the appellant submitted that a global award of Kshs. 300,000 would have been adequate compensation in the circumstances. There was no evidence that the deceased earned Kshs. 30,000 as a carpenter. He left behind six dependants as evidenced by through production of documents like birth certificates.

The deceased was 50 years old and a carpenter at his demise. He was not entitled to retirement age and in my view, the deceased may have worked for 15 more years and therefore a multiplier of 15 years would be reasonable. Since there was no proof of income, the court in settling for a multiplicand of Kshs. 15,000 relied upon the regulation of wages (General) (Amendment) Order 2015.

On the profession of the deceased, the trial court observed:-

***“PW2 testified that the deceased was a carpenter. The death certificate indicates the occupation of the deceased as a carpenter. The uncontroverted evidence on record is thus the deceased was a carpenter. The applicable minimum wage of Kshs. 15,000 thus suffices.”***

Without any evidence to the contrary, I am persuaded that the deceased was a carpenter. It is not uncommon for people in the rural areas to practice such trade without evidence of qualification or proof of practice by keeping of books of accounts. I would have graded the deceased as an ungraded artisan I do not know why the trial court adopted Kshs. 15,000/=as multiplicand but Guided by Legal Notice No. 116 of 2015 which provides the minimum wages for skilled and semi-skilled employees, this court shall adopt the sum of Kshs. 11,279.50 per month being monthly earnings for ungraded artisan.

Section 4(1) of the Fatal Accidents Act Cap 32 Laws of Kenya provides as follows:-

***Action to be for benefit of family of deceased***

***“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:...”***

The appellants contend that the global sum award should be awarded since there was no proof of dependency. PW2 testified that the deceased had 6 children. The evidence produced before the trial court to prove this fact were baptismal certificates where the parent is indicated as the deceased. There is no mention of the wife anywhere.

This court takes judicial notice of the challenges that parents, undergo to obtain crucial documents like birth certificates especially those in the rural areas. Baptismal cards are documents that have been used as proof of date of birth or parentage. The trial court did not err in relying on them. The ages of the children are as follows:-

- a) ***Geoffrey Ochieng Magak born on 27/03/1999 - 22 years.***
- b) ***Evans Otieno Magak born on 4/07/1992 - 29 years.***
- c) ***Emily Akoth Magak born on 07/02/1996 - 25 years.***
- d) ***Collins Odhiambo Magak born on 2/02/2004 - 17 years.***
- e) ***Emmacualte Anyango Magak born on 25/11/2006 - 15 years.***
- f) ***Bonface Oluoch Magak born on 11/5/2009 - 12 years.***

The deceased had 3 children aged below 18 years thus they shall be considered as minors and the deceased’s dependants as per the definition of a dependant under Section 4(1) of the Fatal Accidents Act Cap 32 Laws of Kenya. The court therefore adopts a 2/3 dependency ratio and 15 years multiplier since the deceased being self-employed, may have worked till 65 years.

Under the head of loss of dependency, the court finds as follows:-

**Kshs.  $9,808.10 \times 15 \times 12 \times \frac{2}{3} = 1,353,540.$**

On special damages, it is trite law that they should be specifically pleaded and strictly proved. The respondents claimed a sum of Kshs. 20, 085 being the legal fees charged for obtaining the letters of administration herein. A receipt to that effect was produced. The court will not disturb this award.

As regards to funeral expenses, though alluded to in the plaint, there was no specific plea for what was spent. The court cannot imagine what the expenses were or even a reasonable award to make. The same was not specifically pleaded and proved as required by law.

Before downing its tools, the court would like to address the issue raised by the appellant on ground 12 of its appeal that the learned trial Magistrate erred in law and fact by double awarding the respondents estate both under the Law Reform Act and Fatal Accidents Act. This court associates itself with the position taken by the Learned Judges in the Court of Appeal decision **Civil Appeal No. 22 of 2014 Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja) vs Kiarie Shoe Stores Limited (2015) eKLR**. The Court of Appeal held inter alia:-

***“This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under The Law Reform Act and dependants under The Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under The Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under The Law Reform Act, hence the issue of duplication does not arise.”***

In this case, the court will therefore subtract the award made for loss of expectation of life.

The final assessment of damages is as follows:-

**Liability 100% in favour of the respondents.**

<b>Pain and suffering</b>	<b>100,000/-</b>
<b>Loss of dependency (9,808.10×15×12×2/3)</b>	<b>1,353,540/-</b>
<b>Special damages</b>	<b>20,085/-</b>
<b>Sub Total</b>	<b>1,373, 625/-</b>
<b>Loss of expectation of life</b>	<b>Less (100,000/-)</b>
<b>Total</b>	<b>1,373,625/-</b>

Since the appeal partially succeed, the appellant will have half the costs of this appeal but the respondents are awarded the costs the lower court.

**DATED, SIGNED AND DELIVERED AT MIGORI THIS 26TH DAY OF APRIL, 2021**

**R. WENDOH**

**JUDGE**

**Judgment delivered virtually :-**

Ms. Nyakundi for appellant

Ms Kusa for Respondent

Ms Oloo Court Assistant