



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 50 OF 2018

NDETI MULI.....1ST APPELLANT

ALBERT PHILLIP KATITI.....2ND APPELLANT

VERSUS

HOGLA MKANDO OMARI.....1ST RESPONDENT

JOHN KILELU.....2ND RESPONDENT

(Being Appeals from Judgement of the Hon. Magistrate at Machakos Law Courts by

Hon. Kibiru dated 18/4/2018 from Machakos Chief Magistrates Court Civil Case Nos. 197 of 2013)

BETWEEN

HOGLA MKANDO OMARI and

JOHN KILELU Suing as administrators of the

Estates of Francis Mwatembo Mulonza (Deceased).....LAINTIFF

VERSUS

NDETI MULI.....1ST DEFENDANT

ALBERT PHILLIP KATITI.....2ND DEFENDANT

KETER KIPROTICH.....3RD DEFENDANT

JUDGEMENT

1. The subject of this appeal is Machakos CMCC No. 197 of 2013, a suit instituted by the Respondents herein against the Appellants for damages arising from a road traffic accident which occurred on 18th August, 2010 in which the deceased sustained fatal injuries.

2. On 16th January, 2018, a consent judgement was entered in the said matter in which liability was entered for the Respondents against the Appellant at the ratio of 80:20 and the parties agreed that the plaintiff's claim supporting documents be admitted as evidence without calling the makers and that the parties proceed to file written submissions on quantum of damages.

3. On 18th April, 2018, the Learned Trial Magistrate awarded Kshs 15,000/- as general damages for pain and suffering, Kshs 100,000/- for loss of expectation of life and Kshs 2,080,000/- as damages for loss of dependency. In arriving at the latter sum the court took into account the fact that the deceased was aged 31 years old and was a driver. Though it was pleaded that the deceased was earning approximately Kshs 30,000.00 per month, the Learned Trial Magistrate applied a multiplier of 26 years and a multiplicand of Kshs 10,000.00 per month. He also

awarded Kshs 40,750/- as special damages.

4. In this appeal, it is submitted that the award of Kshs 2,080,000/- was excessive and unwarranted in light of the evidence adduced and in light of the finding that there was no evidence to support the monthly income. According to the Appellant, the trial court ought to have adopted Kshs 6,221/- which was the minimum wage as per Legal Notice No. 98 of 2010 instead of Kshs 10,000.00. In support of this submission, the appellant relied on **Kimilili Hauliers Ltd vs. Maurice Msindano Musungu [2012] eKLR** where the court adopted Kshs 5,000/-.

5. It was further submitted that the trial court erred in adopting a multiplier of 2/3rds despite the evidence that the deceased was unmarried and his dependants were his mother and brother as his wife and children died in the said accident. According to the Appellants it was error on the part of the learned trial magistrate to have awarded Kshs 100,000/- as loss of expectation of life. It was argued that the court ought to have taken into account the possibility of double compensation and deducted the award from the final figure as the beneficiaries entitled to the deceased's estate are the same under ***Fatal Accidents Act*** and the ***Law Reform Act***

6. It was argued that the trial court having found that the receipts only amounted to Kshs 15,000/- erred in assuming that Kshs 25,000.00 was spent in funeral expenses.

7. In opposing the appeal, it was submitted on behalf of the Respondents that the Court did not act on wrong principle by awarding Kshs. 40,750/- as Special Damages. Prior to his demise, **Francis Mwatembo** (now deceased) was a productive 31 year old husband and father, working as a driver, and earning a salary of Kshs. 30,000/- per month and the bread winner to his family comprising his wife **Eva Njeri** with 2 children and supporting his mother and brothers. His untimely death was therefore a great loss of love, life and income support for the family. It was further submitted that the Respondents cannot be denied earnings or any other claims because she did not keep the records at that traumatic and difficult time. Denying the Respondents justice because they did not keep the records is also contrary to Article 159 (2) of the Constitution of Kenya 2010, which obliges Courts to do justice without procedural technicalities. In urging the court to dismiss the appeal with costs, the Appellant relied on **John Kipkemboi Civil Appeal No. 88 of 2017.**

8. According to the Respondents, the magistrate did not act on principles and since assessment of damages is more of an exercise of discretion, the Appellate Court should not interfere with award on the question of amount of damages unless it is satisfied that the magistrate acted on wrong principle of law or has misapprehended the facts, or for other reasons made a wholly erroneous estimate of damage suffered. The question is not what the Appellate Court would award, but whether the lower Court Judge acted on the wrong Principles. According to the Respondents, there is nothing to demonstrate that the Trial Magistrate took into consideration irrelevant matters and the magistrate did not act in error, and his estimate was not excessive.

9. In the absence of receipts, reliance was placed the case of **HCC No. 237 of 2013 Lucy Wambui Kihoro**, where the Court held that the Courts have always given a reasonable award of funeral expenses because death was proved and expenses incurred hence Kshs. 40,750/- should be considered reasonable.

10. In this case it was submitted that in CMCC 197/2013 in the Estate of **Francis Mwatembo Mulonza**, the deceased died at the age of 31 years; he was a driver earning about Kshs. 30,000/- p.m. but the Hon. Judge gave a minimum global award of Kshs. 10,000/- a multiplier of 26 years, hence: $10,000 \times 26 \times \frac{2}{3} = 2,080,000$.

Determination

11. I have considered the material placed before me in this appeal. It is clear that the record does not contain all the documents. For example, the judgement placed in this record is that of CMCC No. 199 of 2018. The original court file is not available. What is a Court of law expected to do when the Court file for some unexplained reasons cannot be traced in the registry before an order made by the Court is extracted? It is unfortunate that in this era we still operate in circumstances under which a party may by simply engineering the misplacement of a Court file, thwart the course of justice. It was this state of affairs that made the judiciary to authorise parties to make copies of the handwritten proceedings. Whereas in this case the Court cannot state with certainty the circumstances under which the original Court file was misplaced, to leave the petitioner in limbo where the Court is certain in its mind that it granted an order in favour of the petitioner and the nature of the said order would be to abet an injustice occasioned by acts of persons who are intent in obstructing the course of justice. To fail to give a remedy to the petitioner would amount to unjustly conferring an undeserved benefit on a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice

12. The course of justice must not be deflected and interfered with and those who strike at it, strike at the very foundation of our society. As was appreciated by the Court of Appeal in **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited & Another Civil Appeal No. 276 of 1997.**

“To review a consent order on the ground that the original court file went missing can only bring the law into disrepute and provide a field day for unscrupulous litigants who wish to obstruct the course of justice. If by simply arranging for the Court file to disappear you can put back the clock and postpone the day of reckoning, the Courts will be forced to enlist the services of armed guards to secure the safety of its files.”

13. Similar circumstances were dealt with in a criminal case in **John Ngangá Kimani & Another vs. Republic Nairobi Criminal Appeal No. 100 of 1990** where the Court of Appeal expressed the following sentiments:

“We have given this matter careful consideration and it cannot be said that the appellants were responsible for the disappearance of the judgement of the High Court. It has been submitted by the appellants' counsel that his clients have suffered but sight should not be lost of the fact that the appellants were sentenced according to law by a court of competent jurisdiction. It has not been suggested anywhere that their trial before the learned Senior Resident Magistrate was a

mistrial.”

14. Where the Court finds that it would in effect be abetting such actions, it is my view that the Court is entitled to take appropriate measures to right the wrong in order to send a strong message to persons who believe that by simply engineering the disappearance of the Court file they would have their way. That message must be clear that such actions would not pay.

15. Mercifully, in this case, there was a consent judgement on liability and the court, in arriving at its decision relied on the submissions and the documents filed which were admitted by consent. Further, the judgement of the trial court is available.

16. In this appeal, the Appellant is challenging quantum of damages.

17. 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.”

18. 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...”

19. 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.”

20. An issue was taken with the award for loss of expectation of life. Consideration the past authorities in respect of that award, it is my view that the sum of Kshs 100,000.00 cannot be said to have been manifestly excessive in the circumstances even if this court, sitting as the trial court would have arrived at a different figure.

21. As regards the claim for loss of dependency, 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.”

22. It is not in dispute that the appellants herein were mother and brother of the deceased. As rightly appreciated by the appellant, under section 4 of the *Fatal Accidents Act* a deceased’s parents 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.”

23. 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.”

24. 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 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 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.”

25. 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.”

26. 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.”

27. 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.”

28. 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.....”

29. 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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30. 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.”

31. In this case, it was pleaded that the deceased was aged 30 years old. The ages of the Respondents was not indicated. It is however agreed that the deceased lost his wife and children in the same accident in which he lost his wife. No issue was taken as regards the multiplier. In **Benedeta Wanjiku Kimani vs. Changwon Cheboi & Another [2013] eKLR** 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...”

32. As regards the multiplicand, the court adopted Kshs 10,000/-. Section 2 of the *Insurance Motor Vehicle Third Party Risks Amendment Act, 2013* states that:-

“‘earnings’ means revenue gained from labour or services and includes the income or money or other form of payment that one receives from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the Labour Relations Act, 2007 or the determination of the reasonable income, whichever is higher.”

33. In **Priscilla Mwathimba-vs-Simon Kaibunga & Another Meru CA 132 of 2008**, the Court opined as follows:-

“While the Appellant did not produce evidence of earnings of Kshs. 30,000.00 per month, it was not disputed that the deceased had a business and was also farming. The trial court did not give reasons why it chose a sum of Kshs. 5,000.00 as the deceased's monthly earnings and not any other sum. There was unchallenged evidence before court that the deceased had a wife and six children...can both a shop and farming be producing only Kshs. 5,000.00 per month? This court finds it's unreasonably low to sustain such a family. It is quite clear that in rural Kenya, people rarely keep books of accounts nor do they file returns. They however do live and cater for their own livelihood. They pay for their food, clothing, other bills (including hospital) and pay school fees for their children. This is a fact of life. To expect them to meticulously keep records of their income and expenditure would in my view be expecting too much and by itself unreasonable. It would not only be unfair but outright unjust in such a situation to deny such rural folks compensation for reason that there are no proper records of income.”

34. The *Regulation of Wages (General) (Amendment) Order 2015, Legal Notice No 117 of 2015* provided that the wage of a general labourer in a Town Council was Kshs 10,107.10. In this case it was pleaded that the deceased was a driver. In those circumstances the learned trial magistrate cannot be said to have adopted a multiplicand that was excessive in the circumstances.

35. As for the dependency ratio, I agree that the application of 2/3rds was not justifiable in the circumstances. The reasonable ratio could not have been more than ½ since the deceased had been taking care of his wife and children. It is therefore my view the award for loss of dependency ought to have been as hereunder:

$$26 \times 12 \times 10,000.00 \times 1/2 = \text{Kshs } 1,560,000.00.$$

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

37. As regards award for funeral expenses, **Mbogoli Msagha, J in Humphrey Okuku Kwoba vs. Moses Muthee Nyambura & Another Busia HCCC No. 29 of 2002** held that:

“Although the plaintiff pleaded special damages amounting to Kshs 35,250/=, he only proved, by producing a receipt, that he paid Kshs 15,000/= legal fees. The standard fee for police accident abstract and the death certificate is Kshs 100/= and Kshs 250/= respectively and the production of the two documents is sufficient proof for such cost. It may not be easy to quantify funeral expenses since rarely would receipts be retained for some expenditure and therefore the Kshs 20,000/= claimed is modest enough to justify the award.”

38. As regards the double award, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) 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. Similarly, the Court of Appeal in Eliphias Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004 held that:

“As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards...Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-.”

39. The Court of Appeal (Waki, Nambuye and Kiage JJA) in the case of Mombasa Maize Millers Limited vs. Chrispine Asoyo (Suing as Personal Representative/ Administrator of the Estate of Martina Asoyo Akinyi) [2018] eKLR similarly stated that:

“...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 are the same, and consequently the claim for lost years and dependency will go to the same person. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise... The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction.”

40. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. I see no reason to interfere with the award on that score

41. In the premises I set aside the award made by the trial court and substitute therefore the following award:

- a) Pain and suffering.....Kshs 15,000.00
- b) Loss of Expectation of Life.....Kshs 100,000.00
- c) Loss of Dependency.....Kshs 1,560,000.00.
- d) Special Damages.....Kshs 40,750.00
- e) Less 20%.....Kshs 343,150.00
- Total.....Kshs 1,372,600.00**

42. Only to that extent, does this appeal succeed otherwise the same is dismissed. The Respondents will have half the costs of the appeal.

43. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF MAY, 2021

G V ODUNGA

JUDGE

Delivered in the presence of:

Ms Odembo for the Respondent

CA Geoffrey