



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(APPELLATE SIDE)**

**(Coram: Hon. D. K. Kemei – J)**

**CIVIL APPEAL NO. 39 OF 2020**

**JAMES MUTUNGA MBINDA.....APPELLANT**

**VERSUS**

**STEPHEN MWALULA MULWA &**

**GEORGE MULWA KILEE (suing as the Legal representatives of the estate of**

**WINFRED MBATHA MWALULA (DECEASED).....RESPONDENTS**

**(Being an appeal from the judgment and decree of the Senior Principal Magistrate at Kangundo (Hon. M. Oponga) delivered on the 29<sup>th</sup> day of October, 2019)**

**BETWEEN**

**STEPHEN MWALULA MULWA &**

**GEORGE MULWA KILEE (Suing as the legal representatives of the estate of**

**WINFRED MBATHA MWALULA (DECEASED).....PLAINTIFFS**

**VERSUS**

**JAMES MUTUNGA MBINDA.....DEFENDANT**

**JUDGEMENT**

1. By a Plaint dated and filed on 2<sup>nd</sup> July 2018, the Plaintiffs herein after referred to as the Respondents on behalf of Winfred Mbatha Mwalula (Deceased) sought general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 457,330.00/- plus costs and interest of the suit. The deceased is said to have been run over by the Appellant's motor vehicle registration number KCC 782W while walking from church at the junction of Kakuyuni-Machakos road.
2. The Appellant herein filed a statement of defence dated 3<sup>rd</sup> August 2018 to which the Respondents filed a reply to the statement of defence dated 9<sup>th</sup> August 2018.
3. On 20<sup>th</sup> August 2019 the Appellant and Respondents compromised the suit partly on liability by recording a consent thereon in the ratio of 85:15 in favour of the Respondents. The case proceeded for hearing on assessment of quantum of damages.
4. **Stephen Mwalula Mulwa PW1**, one of the legal administrators of the deceased and Respondent herein, adopted his witness statement dated 29<sup>th</sup> June 2018 as evidence in chief. He stated that the deceased had been his wife. He added that he obtained letters of administration ad litem, (exhibit 1) and death certificate (exhibit 2). He informed the court that they had 3 children and produced birth certificates marked as exhibit 3 (a) (b) and (c). According to PW1, the deceased died two hours after the accident and he produced postmortem as exhibit 4. He

stated that he reported the accident at Kangundo police station and a police abstract marked as exhibit 5 was issued to him. According to PW1, motor vehicle registration number KCC 782W caused the accident. It was his testimony that he incurred Kshs. 500,000.00/- to conduct the funeral of his wife and he produced a bundle of receipts as exhibit 6. He also produced a copy of motor vehicle record as exhibit 7(a) and payment receipt of kshs.500 as exhibit as 7(b). Again, he produced a copy of the demand notice and statutory notice as exhibits 8(a) and (b). He testified that the deceased sold vegetables and fruits and they used to help each other to provide for their children and pay school fees. According to him, the deceased earned Kshs. 20,000.00/- per month as income.

5. In cross-examination, PW1 stated that he is a teacher. He stated that he earns Kshs. 30,000.00/- on average. PW1 testified that he partially gets food from his shamba and buys the rest. It was PW1's testimony that he has built a house and does not pay rent. PW1 stated that he does not have proof of the deceased's earning of Kshs. 20,000.00/-. H stated that he did not witness the accident but was present when the deceased passed on. The Respondents case was closed. The Appellant's case was closed as well without calling any witness.

6. The Appellant pleaded that the deceased failed to have due regard for her own safety, exposed herself to a risk of danger which she knew or ought to have known, absent mindedly failed to anticipate an accident, failed to keep proper lookout as a pedestrian, failed to pay attention or take heed of the presence of motor vehicle registration number KCC 782W and failed to observe traffic rules. The Appellant placed reliance on the doctrine of *Re Ipsa Loquitur*. The Appellant denied the particulars of loss and damage suffered by the dependants due to death of the deceased. According to the Appellant, he is not liable to settle the claim. The Appellant averred that if any injuries were sustained by the deceased, then the same were occasioned by the deceased due to her negligence hence entirely to blame for the cause of accident. The Appellant denied having been served with demand and notice of intention to sue.

7. The Respondents pleaded that the Appellant or his driver, drove motor vehicle at an excessive speed, failed to stop, slow down and/or control or manage motor vehicle to avoid the accident, drove the motor vehicle without sufficient care or effective control, failed to maintain proper look out for other road users, failed to follow traffic rules and drove the motor vehicle on the wrong lane. According to the Respondents, the accident was solely caused by the negligence of the Appellant or his driver. The Respondents pleaded that the deceased was survived by

Stephen Mwalula (Husband) and John Mulwa Mwalula, Joseph Muia Mwalula, Samuel Kilee Mwalula who are sons of the deceased. Special damages of Kshs. 457,330.00/- incurred by the Respondents were particularized at paragraph 7 of the Plaint. According to the Respondents, the Appellant has failed to make good the Respondents claim despite sending demand notice to the Appellant.

8. The Appellant and Respondents filed written submissions on 20<sup>th</sup> August 2019 before the trial court. The Respondents counsel proposed Kshs. 200,000/- each for loss of expectation of life and pain and suffering. On loss of dependency, counsel proposed a multiplicand of Kshs. 20,000.00/-, multiplier of 21 years and dependency ratio of 2/3 totaling to Kshs. 3,360,000.00/-. Counsel submitted special damages of Kshs. 457,330.00/- to be awarded as prayed plus costs and interest of the suit. Reliance was placed on the cases of *Nairobi HCCC 396/10 Leah Wairimu Zakaria & Anor. Vs John Lundu Kahi & 2 Others* and *Nakuru HCCC 229/04 Loise Wairimu Mwangi & Another (Suing as the Legal and Personal Representative of the Estate of James Ndungu(Deceased) vs Joseph Wambue Kamau*.

9. The Appellant's counsel proposed Kshs. 50,000/- and Kshs. 100,000/- for Pain and suffering and loss of expectation of life respectively. Reliance was placed on the cases of *FMM & Anor vs Joseph Njuguna Kuria & Anor, DMM (Suing as the administrator and legal representative of the Estate of LKM vs Stephen Johana Njue & Anor, Hassan Salat Gudow (Suing as legal representative of the Estate of Ali Hassan Salat) vs Mohammed Adan & 2 Others [2015] eKLR* and *Benedeta Wanjiku Kimani vs Changwon Cheboi & Anor [2013] eKLR*. On loss of dependency, counsel proposed a multiplicand of Kshs. 6,896.15 provided for under the Regulations of Wages (General) (Amendment) Order 2017 on the basis that no evidence was tendered in court to prove the deceased income, multiplier of 10 years and dependency ratio of 1/3. Reliance was placed on the case of *Benedeta Wanjiku Kimani vs Changwon Cheboi & Anor [2013] eKLR*. The total amount under this head was tabulated at Kshs. 275,846.00.

10. Counsel placed reliance on the case of *Kemfro vs A.M Lubia & Anor. [1982-1988] KAR 727* and *Charles Omwenga Ongiri & Anor. Vs Daniel Muniko[2017]eKLR* to submit that damages for loss of expectation of life and pain and suffering should be deducted from the damages for loss of dependency to ensure that the deceased's estate does not benefit twice. On special damages, counsel submitted that no receipts were provided for obtaining letters of administration at kshs. 27,300/-, Kshs.200/- for obtaining police abstract and Kshs.780/- for motor vehicle search certificate.

11. On 29<sup>th</sup> October 2019 the trial magistrate vide her judgement, awarded the Respondents Kshs. 50,000/- for pain and suffering, Kshs. 100,000/- for loss of expectation of life. On loss of dependency, the trial magistrate considered a multiplicand of Kshs. 20,000/-, dependency ratio of 2/3 and multiplier of 16 years. The award was computed at Kshs.2,560,000.00/-.The trial magistrate was guided by the cases of *Kenya Power and Lighting Ltd vs Monica Otiang Oluoch(Suing as administrators of the Estate of Ibrahim Obura Oluoch Kisumu Civil Appeal No.7 of 2015* where the case of *Hellen Waguru Waweru ( Suing as legal representative of Peter Waweru Mwenja vs Kiarie Shoe Stores Limited Nyeri Civil Appeal No.22 of 2014[2015]eKLR* was quoted, declined to deduct the damages awarded under loss of expectation and pain and suffering from loss of dependency. Special damages were awarded as prayed. The total award was subjected to 15% contribution to remain at **Kshs. 2,692,230.50/.**

12. Aggrieved by the judgement, the Appellant lodged his memorandum of appeal dated 17<sup>th</sup> June 2020 citing the following grounds of appeal:-

(1) **THE** learned trial magistrate erred in law and in fact and misdirected herself by adopting an unjustified, inordinately high multiplicand unsupported by the pleadings and evidence.

(2) **THE** learned trial magistrate erred in law and in fact in adopting the sum of Kshs. 20,000/- as the multiplicand for income applicable to the deceased which was not supported by the evidence on record thereby giving an inordinately high award.

(3) ***THE*** learned trial magistrate erred in law and fact by adopting a multiplier of 20 years to the deceased aged 44 years without considering vagaries of life and contrary to the evidence adduced by the Plaintiff, thereby giving an inordinately high award.

(4) ***THE*** learned trial magistrate erred in law and fact in adopting the dependency ratio of 2/3 instead of 1/3 contrary to the evidence adduced by the Plaintiff, thereby giving an inordinately high award against the Appellant.

(5) ***THE*** learned trial magistrate erred in law and in fact by giving an inordinately high and manifestly excessive award as loss of dependency which award is unsupported by law so as to amount to an erroneous award in the circumstances of the case.

(6) ***THE*** learned magistrate erred in law and fact by failing to deduct the award under the Fatal Accident Act from that awarded under the Law Reform Act.

(7) ***THE*** learned magistrate erred in law and fact in proceeding on the wrong principles vis-a-vis the evidence before him and laid down principles of law in awarding special damages.

(8) ***THE*** learned trial magistrate further erred in law and in fact by failing to appreciate, consider and take into account the Appellant's submissions on the quantum of damages awardable in the circumstances.

(9) ***THE*** learned trial magistrate erred by making a decision on quantum that was erroneous, without proper basis and against the weight of evidence.

(10) ***THE*** learned trial magistrate erred in law and in fact in proceeding on the wrong principles vis-à-vis the evidence before him and laid down principles of law in awarding general and special damages.

(11) ***THE*** learned trial magistrate erred in law and in fact by taking into account irrelevant consideration/factors while awarding general and special damages.

(12) ***THE*** learned trial magistrate erred in making a decision on quantum of damages that was erroneous, without proper basis and against the weight of the evidence.

13. The Appellant seeks the following reliefs:

(a) ***The appeal be allowed.***

(b) ***The whole Judgement and decree be set aside.***

(c) ***The award on quantum of damages be quashed in entirety.***

(d) ***The finding of the trial court on quantum of damages be adjusted accordingly to reflect fair amounts justifiable by the law and evidence and in accordance with conventional awards in previous similar cases.***

(e) ***Costs of this appeal and lower court be awarded to the Appellant.***

13. The appeal was disposed of by way of written submission. The Appellant's submissions are dated 24<sup>th</sup> February 2021 and filed on 25<sup>th</sup> February 2021 while the Respondents submissions are dated 5<sup>th</sup> March 2021 and filed on 9<sup>th</sup> March 2021. I note that the Appellant and Respondents have reproduced their trial court written submissions which submissions have already been captured in paragraphs 8-10 above.

14. I have considered the pleadings, record and submissions by the parties. As liability is not in dispute, I find the issue for determination is whether the trial court properly considered the quantum of damages that it awarded to the respondents.

15. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. It was held in the case of ***Selle –vs- Associated Motor Boat Co [1968] EA 123*** as follows: -

***“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal from the trial court by the high court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions through 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 the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”***

19. However, in ***Peters vs Sunday Post Ltd [1958] EA 424***, the Court held that: -

***“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that***

***the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide***

16. Liability was compromised vide a consent that was recorded by the Appellant and Respondents and adopted in court on 20<sup>th</sup> August 2019 in the ratio of 85:15 in favour of the Respondents and hence the issue left for determination is on quantum. The Appellant submitted that the trial court awarded damages that were inordinately high and also failed to deduct damages under Law Reform Act from the Fatal Accident Act.

17. The Court of Appeal in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR* held that:-

***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

18. In the case of *Butler V Butler, (1984) KRR 225* the court held as follows:-

***"The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result arrived at a wrong decision."***

19. The bone of contention is in regard to how the trial magistrate arrived at the award under the loss of dependency. The trial magistrate considered Kshs. 20,000/- per month as appropriate. According to the trial magistrate, 2/3 was an appropriate dependency ratio noting that the deceased was married and left behind three children of school going age. On the expected years the deceased would have worked, the trial magistrate was of the view that the deceased would have worked up to the age of 60 years. It is not disputed that the deceased was 44 years old at the time of her death.

20. The formulae proposed by *Ringera J.* (as he then was) in *Beatrice Wangui Thairu -Vs- Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1988 (UR)* while others prefer global awards. *Ringera J.* had stated:-

***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

21. According to Appellant's counsel, the trial magistrate failed to consider the fact that the Respondents was a general worker with no skills hence entitled reliance was to be placed on the *Regulations of Wages (General) (Amendment) Order 2017*. It was submitted that there was no proof of Kshs. 20,000/- income per month. Counsel placed reliance on the case of *Philip Musyoka Mutua vs Veronica Mbula Mutiso (2013) eKLR* where *Mutende J.* held that:-

***"Therefore, in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee which by then stood at approximately 6,000/- in the circumstances I would set aside the multiplicand of Ksh.10, 000/- adopted by the trial court and substitute it with Ksh.6, 000/-."***

22. Further the learned Judge stated that:-

***"A liquor licence was produced for the year 2005. This was evidence that in the year 2005 the deceased was operating bar. No evidence was however adduced to prove that he engaged in the same business at the time of his demise. There was no proof of his actual earning at the time of his demise. Had the Respondent produced any statement of account it would have proved his estimated monthly earning."***

23. Respondent's counsel submitted that on a balance of probability, PW1 proved during the hearing that the deceased sold vegetable and fruits at her stall earning Kshs. 20,000/- per month from the sales. According to Respondent's counsel it is not a requirement that the parties produce documentation to prove income. Counsel placed reliance on the case of *Jacob Ayiga Maruja & Another vs Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR* where the Court of Appeal stated:-

***"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."***

24. In cross-examination, PW1 stated that the deceased earned an average of Kshs. 20,000/- per month but he did not have proof of the earnings. PW1 produced birth certificates for the children as exhibit 3(a) (b) and (c). In re-examination, PW1 stated that the deceased did not

have a business license since her stall was on the road side and not in the market where licenses are a requirement.

25. In my view there was sufficient evidence to conclude that the deceased earned an income from her stall. It is only when there is absence of income that the trial magistrate will apply the *Regulations of Wages Order* as held by **Asike-Makhandia J.** in ***Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR***. In the absence of receipts of income, I must agree with the appellant's counsel's submission that the Regulation of Wages (General) (Amendment) Order, 2017 which at the time placed wages for an unskilled worker at Kshs 6,896.15 as monthly earning. This will be the figure as multiplicand.

26. On dependency ratio, it is not disputed that the deceased was survived by three children whose birth certificates were produced as exhibits. According to Appellant's counsel, based on the birth certificates only one child who was a minor would be depending on the deceased. Respondent's counsel expounded on the age of the children, by submitting that the children were aged 20, 16 and 10 years hence two minor children were dependent on the deceased.

27. Appellant's counsel submitted that despite PW1 earning more than the deceased and deceased assisting PW1 to fend for the children, there is no evidence that the deceased took more responsibilities than PW1 hence a dependency ratio of 1/3 was appropriate than 2/3. Respondent's counsel placed reliance on the case of **Board of Governors of Kangubiri Girls High School & another vs Jane Wanjiku Muriithi & another [2014] eKLR** where the Court of Appeal adopted the findings of **Nambuye, J.A** in ***Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005***:-

***“The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.”***

28. Respondent's counsel submitted that the reliance on 2/3 as dependency ratio was correct for the reason that PW1 stated that the deceased was assisting him both financially and emotionally. Indeed, the extent of dependency is a question of fact as held by **Ringera J.** (as he then was) in ***Leonard Ekisa & Another V Major Birgen [2005] e KLR*** where the learned Judge stated:“

***“There is no rule of law that 2/3 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 the dependant, the life expected, length of dependency, the visciditudes of life and factor accelerated by payment in lump sum.”***

29. Taking into account that PW1 was earning higher than the deceased, the deceased was said to be assisting PW1 to fend for the family, 1/3 would be appropriate dependency ratio as proposed by Appellant's counsel. PW1 and deceased used to help each other and no evidence that the deceased was the sole bread winner for the family. I therefore substitute dependency ratio of 2/3 to 1/3 as the appropriate ratio.

30. Under ground 3 of the memorandum of appeal, the Appellant pleaded that the trial magistrate failed to take into consideration vagaries of life. It is not disputed that the deceased was aged 44 years at the time of her demise. According to the trial magistrate, the deceased would have lived up to the age of 60 years hence a multiplier of 16 years was applied by court. Appellant's counsel submitted that taking into account the uncertainties of life, 10 years extra was sufficient. Respondent's counsel submitted that it was not proved that the deceased suffered from any physical ailment hence 16 years adopted by the trial magistrate had a basis.

31. In the submissions filed before the trial court, Appellant's counsel placed reliance of the case of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Anor [2013] eKLR** where a multiplier of 10 years was adopted for a deceased aged 44 years. Upon perusal of the judgement, I note that the court adopted a multiplier of 16

years not 10 years. Respondent's counsel placed reliance on the decision of **Innocent Keti Makaya Denge vs Peter Kipkore Cheserek & Anor [2015] eKLR** where **Githua J.** upheld a multiplier of 26 years for a deceased aged 34 years. The learned Judge noted that there was evidence that the deceased was of good health prior to his death.

32. The Court of Appeal in **Roger Dainty v Mwinyi Omar Haji & Another MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR** added that;

***“To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life.”***

33. Again **Ringera J.** in ***Leonard Ekisa & Another V Major Birgen(supra)*** stated that in determining the right multiplier, the right approach is to consider *the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the visciditudes of life and factor accelerated by payment in lump sum.*

34. It is noted that in the Plaintiff, it was pleaded that the deceased was in good health. That evidence was not led in court by PW1 neither was it cross-examined by the Appellant's counsel. The court will then presume that the deceased was in good health. It was PW1's testimony that the deceased worked with him to fend for the family. The deceased was not in employment and therefore there is a possibility that she would have worked for more than 60 years but taking into consideration the uncertainties of life, in my view the trial magistrate was correct to apply 16 years as the multiplier. The decision of **Benedeta Wanjiku Kimani vs Changwon Cheboi & Anor (supra)** is relevant. The amount on loss of dependency will work out as 6,896.15 x 12 x 16 x 1/3 = Kshs 441,353/60.

35. On whether the award under the Fatal Accident Act should be deducted from the award under the Law Reform Act, Appellant's counsel placed reliance on the case of **Kemfro Africa Limited vs A.M Lubia & Another [1982-1988] KAR 727** and the case of **Charles Omwenga Ongiri & Another vs Daniel Muniko [2017] eKLR** where **Mrima J.** placed reliance on Kemfro Africa case and held that:

**“As to whether the court erred in not offsetting the award on loss of expectation of life from that of the loss of dependency, I think the Appellants are right. That is the general practice in law and its purpose is to avoid instances where a litigant benefits twice from both the Law Reform Act as well as the Fatal Accident Act”**

36. However, I note in *Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Ltd [2015] eKLR* where Court of Appeal noted the confusion in regard to the concept of double compensation put across by Kemfro Africa Limited case. The learned Judges expressed themselves as follows:-

**“.....The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:**

**An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislature intended that it should be considered.”**

37. The interpretation found support by *Majanja J.* in *Richard Matheka Musyoka & another vs Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR* where then learned Judge restated the principle by Court of Appeal in *Kemfro v A. M. Lubia & Another [1982-1988] KAR 727* where it was held that the court cannot make an award for lost years and loss of dependency to beneficiaries as it would amount to double compensation. At paragraph 10 *Majanja J.* guided by the Court of Appeal decision in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited NYR CA Civil Appeal No. 22 of 2014 [2015] eKLR* held that:-

**“The principle 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 regarding that aspect of the award.”**

38. In the case of *Chen Wembo & 2 others v I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR* counsel for the Appellant submitted that an award under the Law Reform Act must be deducted in full from the award made under the Fatal Accident Act as the deceased’s estate cannot benefit twice but *Meoli J.* disagreed with counsel by stating at paragraph 23;

**“With respect, that is not the dictum of the Kemfro case. The brief passage in Hellen Waruguru quoted on this appeal by the Appellants does not do justice to the true import of the dictum therein”**

39. I will associate myself with the learned judges in the above decisions to find that the trial magistrate did not err in not deducting the award under the Fatal Accident Act as submitted by the Appellant.

40. The Appellant contends that the trial magistrate erred in awarding special damages as pleaded in the Plaintiff. I find no reason to disturb the award of special damages as the same were pleaded and receipts produced by PW1.

41. In the result, the Appellant’s appeal partly succeeds on the issue of the multiplicand and the dependency ratio. Consequently, the trial court’s judgement on quantum dated 29/10/2019 is hereby set aside and substituted with judgement as follows:

a) Pain & suffering.....Kshs.	50,000/-
b) Loss of expectation of life.....Kshs.	100,000/-
c) Loss on dependency.....Kshs.	441,353/60
d) Special damages.....Kshs	457,330/-
<b>SUB TOTAL.....Kshs.</b>	<b>1,048,683/60</b>
<b>Less 15% contribution.....Kshs.</b>	<b>157,302/54</b>
<b>Net Damages.....Kshs.</b>	<b>891,381/06</b>

As the appeal has partly succeeded, the Appellant is awarded 1/5 of the costs while the Respondent will have full costs in the lower court.

It is so ordered.

Dated and delivered at **Machakos** this **28<sup>th</sup>** day of **June, 2021.**

**D. K. Kemei**

**Judge**