REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO 60 OF 2019

MONALISA HOTEL LIMITED.....APPELLANT

VERSUS

ELIZABETH HABIN TELEPHONE & BETTY NAKADOBHOYO MATSEKI

***suing as the administrators and legal representatives of* FRANSIS SPINKS**

KOMORA (DECEASED).....RESPONDENT

CORAM: Hon. Justice R. Nyakundi

Ameli Inyangu & Partners for the Respondent

Musinga & Co. Advocates

J U D G M E N T

The appellant had originally been sued by the respondent in **SRMC No. 439 OF 2018** for an award of damages in tort arising in one of a road traffic accident, which occurred on 23. 06.2017. The aforesaid accident involved motor vehicle registration number **KBS 6187V** and the deceased **Francis Spinks Komora.**

As a result through the legal representatives **Elizabeth Habin Telephone** and **Betty Nakadobhoyo** duly issued with grant of Letters of Administration filed that suit seeking both general and special damages pursuant to the Fatal Accident Act and Law of Reform (Misc. Act of Kenya).

The respondents alleged that the appellant offending motor vehicle under control of their authorized driver, agent or servant drove it so negligently resulting in the fatal injuries against the deceased. At the conclusion of the trial on the merits, it was the decision of the learned trial Magistrate that the appellant was vicariously wholly responsible for the accident. In view of assessment of damages, the estate of the deceased was awarded compensation as follows:

a) **Damages for pain and suffering - 42,500**

b) **Damages for loss of expectation of life Ksh - 100,000.00**

c) **Loss of dependency Ksh - 2,968,840**

d) **Special damages Ksh - 43,625.00**

e) **Net Total award ksh - 3,154,963**

f) **Plus costs and interest**

On appeal as clearly stated in the memorandum of appeal both liability and assessment of damages are all in issue as canvassed by the appellant. In this appeal which was disposed of by way of written submissions, the appellant concentrated substantially on errors and misdirections committed by the Learned trial Magistrate in arriving at the various heads and cumulatively the resultant award. In support of these issues and particulars, Learned Counsel for the appellant relied on the following authorities; -

Beatrice Wangui Thairu V Hon Ezekiel Bargentunny & Another (HCC No. 1638 of 1988), Benedeta Wanjiku Kimani v

Changwan Cheboi & Another (2013) EKLR. Gordoin Ouma Sudi v Adan Abdikadir Omar (2019) eKLR Dickson Taabu Ogutu *suing as a legal representative of the estate of* ***Wilberforce Ouma Wanyama v Festus Akoko (2020) EKLR Mini Bakeries LTD V Oscar Ogada Orengo, David Kajogi Muugaa v Francis Muthimi (HCA No 118 OF 2010) Eklr.***

The gist of learned counsel submissions was that the rights conferred by the Fatal Accident Act under Section 4, were erroneously construed and interpreted by the trial court. It was therefore not right for the learned trial Magistrate to adopt a dependency ratio of 2/3 and at the same time ignoring the deceased, victim of the accident was not married. To such evaluation of evidence learned counsel opined that there was no credible evidence in support of the 2/3 ratio in calculating dependency.

According to learned counsel contention, issues on family expenses and the extent of dependency is a question of fact to be proved on a balance of probabilities. That standard of proof submitted learned counsel remained in the realm of the unknown. On these issues, learned counsel proposed an approach of 1/3 instead of the 2/3 adopted by the learned trial Magistrate. In addition, Learned Counsel submitted that the learned trial magistrate failed to factor the effect of vagaries, vicissitudes and other imponderables of life.

Therefore, learned Counsel urged the court to agree with the submissions by setting aside the judgment with a substitution of interfering with the loss on dependency.

When it came to the respondent version learned counsel submitted on the two issues as framed in the Memorandum of appeal. Indeed, in his quest to demonstrate that the deceased injuries arose out of the negligence of the appellant's driver a re- appraisal of the evidence on the circumstances of the accident was undertaken to position clear pointers on negligence. In this appeal learned counsel for the Respondent submitted that there was no evidence placed before the court to establish contributory negligence by the deceased. As to the standard to be applied to proof negligence learned Counsel referred the court to the principles in ***Inter chemia E.A Ltd V Nakuru Veterinary Centre Ltd, PNM & Another legal representative of estate of LMM in Telcom Kenya LTD (2015) EKLR Paul Nnga Opija v East Africa Sea food Ltd (2013) EKLR Acceler Global Logistics v Gladys Nasambu Waswa (2020) EKLR.***

In the forceful submissions by learned counsel it seems clear from the record that the appellant elected to offer no evidence to counter the prima facie case of the Respondent on the contentious issue of liability and assessment of damages. It was the contention by learned counsel that there are no cogent errors of facts or in law to impeach the multiplier or multiplicated adopted by the learned trial Magistrate. The brief analysis relied upon by learned counsel was the evidence on the income of the deceased, the high probability of him working until the age of 60(sixty) years, the level of dependency as driven by the parameters provided for in section 4 of the fatal Accidents Act. With this in mind Learned Counsel placed reliance on the following authorities. ***Accelar Global Logistics (Supra), Benedeta Wanjiku Kimani (supra) Sheikh Mushataq Hassan V Nathan Mwangi Kamau Transporters & 5 Others (1986) EKLr Daniel Kahiga & Another v Janet Jeruto suing as a legal representative of the estate of Maureen Jepkoech Chpkwony (deceased) (2019) eKLR.***

In a nutshell learned counsel submitted that upon the findings made by the trial court, there is no material to conclude that the learned trial Magistrate misapplied the law to the facts of the case to warrant this court to interfere with the decision. On all other aspects also, although the respondent addressed each head of the award *in situ*, admittedly from the appellant case on appeal, there was no challenge canvassed to that effect. I take it, therefore that the outcome of the appeal would turn on the decision arrived at by the learned trial Magistrate. In this regard that on the assessment of damages on loss of dependency. As far as the issue on negligence is concerned as a first appellate court though raised only in the memorandum a commentary or so would suffice.

Analysis and determination

As indicated in the judgements of ***Peters v Sunday Post Ltd (1958) E.A and Selle & Another v Associate Motor Boat Co. Ltd (1968) E. A 123.*** Quite apart from the trial court, an appeal court's duty is to subject the whole evidence into a fresh scrutiny, so as to draw its own inference and conclusions on the matter, giving due advantage to the trial court which saw and heard witnesses. In those circumstances any aspects on demeanor or truthfulness of witnesses remain within the preview of the trial court.

The dicta in **Rahma Tayab and others Anna Mary Kinamu C.A No. 29 OF 1983 KLR 114** emphasized as such in the following words; -

> ***"An appellant court would be slow to interfere with a judge's findings of fact based on his or her assessment of the credibility and demeanor of a witness who has given evidence before him or her at the trial"***

Its further in my view that the duty to scrutinize evidence afresh be undertaken within the framework of this analysis and resolution of the appeal. The starting point therefore would be on the issue of liability.

The Law

I am reminded of taking judicial notice of the provisions under section, 43, 46, 47 & 49 of the Traffic Act which places a statutory obligation on motorists to ensure the safety of other road users. For example, the driver of the motor vehicle is restricted in driving at high speed, to drive with due care and attention or not to drive dangerously likely to endanger other fellow users. On the same road /highway the drivers of motor vehicles can only escape liability in the event of an accident if they can demonstrate the statutory duty of driving with due care and attention was fulfilled.

The factors instructive of the Traffic Act provisions include, the speed at which the offending motorist was driving at the time of the accident whether he or she also did observe the speed limits in the various highways or roads, the nature of the location where the accident occurred and the contemplated road users.

What exactly was the position of the applicant at the trial? In the judgment of the Learned Trial Magistrate, it was a case of vicarious liability. As encapsulated elsewhere in the legal texts, vicarious liability in a broader sense is a doctrine of principal agency relationship. In

Cheseren V H2 & Co. Ltd (1982) eKLR, Muwange V A.G of Uganda (1967|) EA 17. The Legal position is quite clear and has been quite clear for some considerable time. A master is liable for the acts of his servant committed within the course of his employment. The master remains so liable, whether the acts of the servants are negligent or deliberate or wanton or criminal. The test is, were the acts done exclusively on his own business.

In comparative jurisprudence the court in ***Rain Barrarra v Gurru Charran (1970) All EKRL 749*** observed; -

> ***"Although ownership of a motor vehicle is prima facie evidence that the driver was the agent or servant of the owner and that the owner is therefore liable for the negligence of the driver, that inference may be displaced by evidence, that the driver had the general permission of the owner to use the vehicle for his own purposes, the question of servant or agency on the part of the driver being ultimately a question of fact. Additionally, the onus of displacing the presumption is on the registered owner and if he fails to discharge, that this, the prima facie case remains and the plaintiff succeeds against him."***

In ***Anthony Clarke V Daniel Jankine (2010) EWCA and Devon Higgins & Shanice Brown Uriah Campbell & another Campbell*** the Courts observed;-

> ***"A driver of a vehicle on the road owes a duty of care to take proper care and not to cause damage to other road users which he reasonably foresees, and likely to be affected by his driving.***
>
> ***In order to satisfy this duty, he should keep a proper look out, avoid excessive speed and observe traffic rules and regulations"***

In ***Tabitha Nduhi Kinyua V Francis Mutua Mbuvi & Another CA 186 of 2009 (2014) eklr***. The Court affirmed as follows;

> ***"The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed. The test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this Court's decision in Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986"***

As deduced from the trial court record, this was an accident which occurred in broad day light, on 23.6.2017 along Mombasa – Kilifi road. The deceased apparently was on purpose crossing the aforesaid road. The surrounding circumstances prior and during the accident were recorded by an eye witness (PW2) Jefferson Mambo Ngaudi. The language used by the witness in his testimony is to the effect that the deceased was trying to cross the road when motor vehicle registration KBS 618V pushed him on the ground to the wall of Umoja Rubber Company.

The collision therefore occurred between the deceased pedestrian and the appellants motor vehicle. In the plaint, it was alleged that the appellant's motor vehicle from nowhere suddenly emerged and hit the deceased. That burden of proof as cast by the respondent established existence of a fact of an accident caused by the negligence of the appellant's driver, agent or servant at the time. That, it was the issue throughout the trial. That in the circumstances of the accident there was no evasive step taken by the driver to stop or avoid the accident. The learned trial magistrate stressed as a fact that indeed at the close of the respondent's case, no evidence was adduced to contribute to the features on causation contained in PW2 testimony.

On appeal I am being asked to consider the elements on contributory negligence. The burden of proving that the deceased was negligent and that he had contributed to the accident lay squarely on the appellant at the time of the trial. He however elected not to call any evidence in rebuttal of PW2 testimony on the probable cause of the accident in which the deceased sustained fatal injuries. The yardstick therefore is as stated in ***Dare v Pulpham (1982) 148 CLR 658***. The court made the following observations; -

> ***"Pleadings and particulars have a number of functions; they furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it. They define the issues for discussion in the litigation and thereby enable the relevance and admissibility evidence to be determined at the trial."***

I cannot in my view accept that this court decides the appellant's case on the basis of pleadings alone, in absence of any evidence, on its part that the accident in question occurred comprising of contributory negligence. The fact that the appellant's elected not to call any evidence in rebuttal to the version given by the respondents conclusively set in motion a prima facie case in favor of the respondent. It would have been at that juncture issues like evasive steps taken to stop or avoid the accident by the appellants driver were to emerge in response to the accident. I am unable to vary the findings on liability arrived at by the Learned trial Court without tactical credible and cogent evidence to that effect.

It is obviously useful to assess the impact of the appellant assertion. In an adversarial system of justice like ours, the court generally cannot conduct its own search for evidence concerning X's liability to the accident; - it must rely on the nature of the evidence the parties present for evaluation and scrutiny. The calculus of plausible proposition in a clear scenario of a prima facie case, the appellant needed to adduce evidence to show the weakness in the respondent's case, on liability. This is due to the fact that the Respondent generally bears the burden of proof in the civil case on negligence against the appellant.

As the ***learned author Dennis in his book on the law of Evidence 2nd Edition (Reported) 2004, at 371*** thus ***"when a party has discharged an evidential burden and raised an issue for the court to consider, there is at least a tactical onus on the other party to respond with some rebutting evidence. There is no legal obligation to adduce further evidence on the issue, but the party against which the evidence has been adduced increased the risk of losing on the issue if nothing is done to challenge the evidence."*** As section 107 (1) of the evidence act expressly provides it was the turn of the appellant to meet the requirement that a fact in issue on occurrence of the accident as proved by the

respondent in the whole of the case did not arise but for contributory negligence. The respondent on a balance of probabilities proved the appellant to be vicariously liable for the accident, and it is not possible to apportion liability and blame the deceased without sufficient evidence. In the case of ***Froom V Butcher [1976] Q.B.286 per Lord Denning M.R*** the Court took the view;-

> ***"That contributory negligence amounts to a conduct when a man's carelessness in looking after his own safety he is in breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence. The duty here is that he ought reasonably to have foreseen that if he did not act as a reasonable prudent man he might be hurt himself."***

In determining liability on the basis of apportionment the Court has a duty to take into account the elements of causation and blame worthiness of the parties to an accident. It is noteworthy that the trial court had no evidence suggestive of contributory negligence in the circumstances being contemplated by the appellant. Furthermore the analogy drawn by the learned trial magistrate cannot be faulted to allocate risk in the tort. This only leaves the situation where the appellant driver, agent or servant was wholly vicariously liable for the accident. It is for that reason the ground on liability fails.

Secondly, was whether the measure of damages due to the estate was erroneously assessed, capable of being interfered by this court? As was decided in the cases of ***Idi Ayub Omari Shabani & Another V City Council of Nairobi & Another E. A (1985) 1KARL, Kemfro Africa Ltd T/A Meru Express Services Gathogo Kanini v A.M.M Lubia & Another, Jeremiah & Brothers Contractors & Another V Francis Egusangu Kaguli (2019) eKLR.***

"As a general principle. The appeal court is not to interfere with an award of damages unless it has been shown that the sum awarded is demonstrably wrong or that the award was based on a wrong principle or is so manifestly excessive or in adequate that a wrong principle may be inferred".

In similar terms, the court only interferes where the award is inordinately high or inordinately low. Thus, the court must exercise its discretion judiciously on the basis of the law and evidence presented at the trial. In the case of ***H. West and Son Ltd V Shephard (1964) A.C 26***. The Court drew attention to the principle that the differences in two amounts would, not be a justification for interfering with the award, bearing in mind that the assessment of damages is basically a matter of judicial discretion.

I must now make a determination as to whether the learned trial Magistrate erred in fact and law in awarding the respondent Ksh. 2,968,840.00 under loss of dependency. The test to be applied is found in Section 4 of the Fatal Accident Act and the pertinent principles developed over time by the superior courts in ***Cookson V Knowles (1979) AC 556*** the court held as follows that; -

> ***"The court has to make the best estimates. That it can having regard to the deceased's age and state of health and to his actual earnings immediately before his death as will as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognized, and is clearly sensible, that with events have recorded, between the date of death, and the date of trial, which enable the court to rely on ascertained facts rather than on or mere estimating. They should be keen into account in assessing damages***." Also in ***Pickett v British Rail Engineering Ltd (1980) AC 136"***

In my view the estate of the deceased is entitled to damages for lost years underscoring the following principles in ***Gammell V Wilson (1981, 1All ER. 578*** in which the evinced as follows;

> ***a) Parents cannot insure the Life of their children***
>
> ***b) The decision of a victim of negligence does not increase or reduce the reward for lost years.***
>
> ***c) The sum to be awarded is neither a conventional sum one but compensation for preliminary loss.***
>
> ***d) It must be assessed justly with moderation***
>
> ***e) Deduct the victims living expenses during the lost years for that would be care of the Estate.***
>
> ***f) Calculate the annual gross loss***
>
> ***g) Apply the multiplier estimate number of lost years accepted as reasonable in each case***
>
> ***h) Deduct the victims probable living expenses of reasonably satisfying enjoyable life for him or her and reasonable expenses, reasonable costs of housing, healing, food, electricity, other utilities, covering insurance, travelling or any social amenities and so forth.***

The principles were then followed in ***Beatrice Wangu Thairu v Hon Ezekiel*** and ***another Hcc NO. 1638.***

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the court must bear. I 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 the dependants. The sum thus arrived at must then be discounted to allot 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……..I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case……unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellant bench in Boru Onduu[1982-1992]2KAR 288."

The issue before the Court is on assessment of damages for loss of dependency which in tangible terms is the crux of the matter in this appeal. What the appellant counsel was unhappy revolves around the question of multiplier and multiplicand as a model to assess damages for loss of dependency. This was countered by the respondent's counsel who took the view that all factors being held constant there was no error by the trial court adopting the multiplicand of 35 years and multiplier of 2/3 ratio.

The question for this Court is whether, the appellant has put forth sufficient grounds to interfere with the assessment of damages. In the case at bar the deceased died at the age of 25 years. At the time of his death he worked as a labourer earning a monthly income of Kshs.10, 603/-. The evidence from (Pw 1) which was admitted showed that he supported his immediate family members especially his mother. The learned trial magistrate accepted the evidence on employment and the income of Kshs.10, 603/= which was supported by documentary evidence in the form of a payslip. It was clear that the annual income of the deceased amounted to Kshs.127, 236/-. There is no evidence elected from (Pw 1) that established or ascertained a true picture of the deceased deductions or expenses. It is plausible to state that with time the monthly income kshs.10, 603/- was never to remain a static figure. It was bound to increase overtime. Essentially the multiplier and multiplicand model under the Fatal Accidents Act takes the trajectory of determining the number of years that the deceased could have lived if it is not for the wrongful death. That is what it takes to ascertain a multiplier, being a number of years purchase in calculating lost years.

In the circumstances of this case the Court is being asked to examine the record and the final judgement of the learned trial magistrate with regard to the relevant principles and factors applied in arriving at the impugned quantum on loss of dependency. One has to ask whether the relevant parameters were applied in apportioning the proper multiplier and multiplicand. The multiplicand is based on the deceased net income that is the income which could have remained at the disposal of the deceased after deduction of his living expenses except for the premature death. This is arrived as stated in the case of ***Beatrice Wangu Thairu*** *(supra)* which denotes that the deceased living expenses have to be deducted from his net earnings. In reference to living expenses they are imputed to include a portion he would have spent exclusively on himself at the standard he had set to actualize enjoyable and happy life. In the actual sense the judgement of the trial court must explain itself on matters around this question. In addition it was incumbent upon the respondents to demonstrate the extent to which the mother was dependant on the deceased. It's trite that damages for lost years are recoverable in an action under Fatal Accidents Act for the years the dependants could have been supported by the deceased during his life time. In general, the Court is to determine a multiplicand, which is an estimate of the sum that the dependant would have expected to regularly receive from the deceased. This will then be multiplied by a multiplier, which is an estimate of the annuity that the dependant would have expected to regularly receive from the deceased. A discount is then applied to the figure to account for uncertainties and vicissitudes of life as well as the accelerated lump sum payment.

In terms of specifying which compelling norm/ratio should predominate the assessment on lost years, my view remains to be the peculiar facts of each case. In the instant case the elements that go to make up living expenses of the deceased did not come out clearly in the evidence of the Respondent. The measure of damages in my own assessment is to be based on the reasonable expectation of pecuniary benefit to the estate subject to the element of reasonable expectation on future probabilities of life expectancy. With respect the trial court had no doubt as to the sustainability and permanency of the deceased's terms of employment. Although the basis of the 35 years of purchase was influenced by the age of retirement of public servants in Kenya, apparently that was not the case for the deceased employment. He could as have worked beyond the age of 60 or longer than the operational statutory age in the public service.

So the facts of this case calculating compensation of loss of dependency by factoring the issues discussed above the application of 2/3 ratio ought to be interfered with by the court for being erroneous estimate of the award. The estate can only recover pecuniary sum subject to the principles in ***Beatrice Wangu Thairu(supra) case and Benham(supra)***. These are clear principles of law as there can be no perfect compensation. The evidence shown that the deceased was single and the mother was living alone. This should have had a bearing in the direction the Court could have taken to calculate loss of dependency. In line with this proposition I rely on the case of ***Benham V Gambling [1941] 1ALL ER 7 WHERE Viscount Simon SC*** stated that;-

"I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actuarial test. Figures calculated to represent the expectation of human life at various ages are averages arrived at from a vast mass of vital statistics. The figure is not necessarily one which can be properly attributed to a given individual. In any case, the thing to be valued is not the prospect of length of days, but the prospect of a predominantly happy life. The age of the individual may, in some cases, be a relevant factor--for example, in extreme old age the brevity of what life may be left may be relevant--but, as it seems to me, arithmetical calculations are to be avoided, if only for the reason that it is of no assistance to know how many years may have been lost unless one knows how to put a value on the years. It would be fallacious to assume, for this purpose, that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation, to be paid to the deceased's estate, on a quantitative basis. The ups and downs of life, its pains and sorrows as well as its joys and pleasures--all that makes up "life's fitful fever"--have to be allowed for in the estimate. In assessing damages for shortening of life, therefore, such damages should not be calculated solely, or even mainly, on the basis of the length of life which is lost. Asquith J appreciated this view, as his judgment shows, but I think that, in the light of the large amounts awarded in some previous cases in respect of quite young children, the figure he arrived at was unduly swollen by the consideration that the child might otherwise have had many years of life before it. The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness. Such a problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the judgment of a court of law, but, in view of the earlier authorities, we must do our best to contribute to its solution. The judge observed that the earlier decisions quoted to him assumed "that human life is, on the whole, good." I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead, on balance, to a positive measure of happiness, of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual

were calculated to lead him to a future of unhappiness or despondency, that would be a circumstance justifying a smaller award. It is significant that, at any rate in one case of which we were informed, the jury refused to award any damages under 8 this head at all. As Lord Wright said in Rose v Ford, special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury, or, at any rate, as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness. The test is not subjective, and the right sum to award depends on an objective estimate of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects. The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risks and uncertainties of childhood, and having in some degree attained to an established character and to firmer hopes, his or her future becomes more definite, and the extent to which good fortune may probably attend him at any rate becomes less incalculable. I would add that, in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position or prospects of wordly possession are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be attained by a human being does not depend on wealth or status. It remains to observe, as Goddard LJ pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth, of course, is that, in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that, in assessing damages under this head, whether in the case of a child or an adult, very moderate figure should be chosen. My noble and learned friend Lord Roche was well advised when he pointed out in Rose v Ford the danger of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award."

In light of the above as for this court I partially affirm the trial court judgement on 35 years of purchase with corresponding ratio of 1/3 in substitution of the 2/3 initially adopted by the learned trial magistrate. In the case of ***Francis Wachana Kimungu*** (suing as personal representative of the ***Estate of John Karanja V Elijah Odera Advocate Civil case No. 191 of 2013***. The Court appealed a multiplier of 35 years for a deceased aged 28 years at the time of the accident. I take note of the fact that the deceased was in good health enjoying the fruits of his youth with only his mother as the dependant. It is presumptive that he will use most of the income to meet the personal living expenses. This means that multiplier and multiplicand ought to be in consonant with the evidence. In support of the claim of the loss on behalf of the Estate of the deceased the court in ***Leonard Erisa & another V Major Bingen (2005) eKLR*** held on this principle as follows;-

"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 age of dependant, the life expectancy, length of dependency, the uncertainties in life and the factor on accelerated payment in a lump sum. Similarly in support of this I rely in the case of ***Mincan See Powers vs John Njega Khuyu Hccc NO. 12 of 1985*** the court adopted a multiplier of 35 years for a deceased who died at the age of 26 years old.

The only difficulty experienced on this jurisprudential question is the fact of the court's exercising discretion on account of which one can describe inherently unscientific determinant based on past awards to leverage on life expectancy and monetary value for the future. I sometimes pause the question as to whether assessment of damages relying on past awards can produce a measure which is fair and just in compensation claims.

That proposition aside for this appeal in adherence to the laid down guidelines loss of dependency is varied and substituted as herein under;- **10,603/= x 12 x 35 x1/3=1,484,420/=.** In addition it is hereby declared that the issues on other limbs of assessment will not be adversely affected as a result of the arguments advanced by the parties. In all the circumstances I saw it fit to partially allow the appeal with costs to be shared equally by the parties.

DATED, SIGNED AND DELIVERED *via email* AT MALINDI THIS 22nd DAY OF JUNE, 2021

.....

R. NYAKUNDI

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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