REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: D. K. Kemei – J)

CIVIL APPEAL NO.54 OF 2019

DAVID KIMILU MUTINDA (Suing as the Legal Representative of the

estate of **WYCLIFF KIMILU (DECEASED).....APPELLANT**

VERSUS

MASINDE WAMELA SAMUEL alias

SAMUEL WAMELA MASINDE.....RESPONDENT

(Being an appeal from the judgement of Hon. L. P Kassan (SPM) in Mavoko

SPMCC No.734 of 2017 delivered on 28/06/2018)

BETWEEN

DAVID KIMILU MUTINDA (Suing as the Legal Representative of the

estate of WYCLIFF KIMILU (DECEASED).....PLAINTIFF

VERSUS

MASINDE WAMELA SAMUEL alias

SAMUEL WAMELA MASINDE.....DEFENDANT

JUDGEMENT

1. By a plaint dated 9th June 2017, the Appellant herein on behalf of Wycliff Kimilu (Deceased) sought for general damages under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 87,490/- plus costs and interest of the suit against the Respondent. The Respondent opposed the suit by filing a statement of defence dated 29th August 2017.

2. In support of the Appellant's case, two witnesses testified while for the defence, the Respondent testified.

3. In his judgement, the trial magistrate in dismissing the Appellant's case held inter alia; that no sketch map for the scene of accident was drawn; that no motor vehicle inspection was done; that the accident was reported by the Respondent; that there was no zebra crossing at the point of impact; that no alcohol blow test was done to prove that the Respondent was drunk hence the balance tilts in favour of the defence. The learned trial magistrate held that there was no sufficient evidence and proceeded to dismiss the appellant's case with costs.

4. Aggrieved by the said judgement, the Appellant lodged his memorandum of appeal dated 15th April 2019 citing the following grounds of appeal: -

(1) THAT the learned trial magistrate erred in law and in fact by dismissing the Appellant's claim.

(2) THAT the learned trial magistrate erred in law and in fact by failing to consider the Appellant's testimony and evidence on record.

(3) THAT the learned trial magistrate erred in law and fact by failing to consider the Appellant's submissions and authorities on record on both liability and quantum.

(4) THAT the learned trial magistrate erred in law and fact by dismissing the Appellant's suit despite admission by both the Appellant and the Respondent and their witnesses, including the police officer of the occurrence of the accident.

(5) THAT the learned trial magistrate erred in law and in fact by dismissing the Appellant's suit despite admission by both the Plaintiff and Defendant and their witnesses including the police officer that the deceased died as a result of the accident.

(6) THAT the learned trial magistrate erred in law and fact in considering evidence that was never on record and issuing judgement on presumption on issues not established in evidence.

(7) THAT the learned trial magistrate's judgement was quite brief and did not disclose any proper reasoning in reaching the decision and was thus unjust against the weight of the evidence, submissions and authorities relied upon by the Appellant and was based upon misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

5. The Appellant urges the court to:-

a. ***Allow the appeal.***

b. ***Set aside the trial magistrate Judgement with costs to the Appellant.***

c. ***Enter judgement against the Respondent on both liability and quantum of damages.***

d. ***Assess damages as prayed in the Plaint.***

e. ***Costs of the appeal and in the trial court be awarded to the Appellant.***

Submissions

6. The Appellant placed reliance on his written submissions filed before the trial court found at page 28 of the record of appeal. According to the Appellant, the trial court overlooked the fact that the occurrence of the accident was not disputed and that the deceased died as a result of accident. It was also submitted that the motor vehicle ownership was not denied by the Respondent.

7. On quantum, the Appellant has submitted that the failure to assess damages despite dismissal of the suit renders the trial court's judgement void and thus ought to be set aside. Reliance was placed on the case of ***Lei Masaku vs Kaplama Builders Ltd Civil Appeal No.40 of 2007 (2014) eKLR***. The Appellant has quantified Kshs. 200,000/- for pain and suffering. On loss of expectation of life, the Appellant quantified Kshs.300, 000/-.Reliance was placed on the cases of ***Benedetta Wanjiku Kimani vs Chagwon Ckheboi & Another, Nakuru HCC No.373 of 2008*** and ***Johness Eshapaya Olumasayi & Another vs Manial Lalji Koyedia & Another HCCC No.1386 of 2006.***

8. On loss of dependency, Kshs. 20,000/- was proposed despite failure to produce documentary evidence. Reliance was placed on the cases of ***Jacob Ayiga Maruja & Another vs Simon Obayo (Suing as the administrator of the Estate of Thomas Ndaya*** and ***Priscilla Mwathimba vs Simon Kaibunga & Another Meru CA 132 of 2008***. According to the Appellant, the multiplicand cannot be below Kshs. 20,000/- as the Regulations of Wages (General) (Amendment) Order 2017 provides similar wage. According to the Appellant, since the deceased was aged 20 years and had no pre-existing condition, the deceased would have worked until the age of 60 years hence 40 working years were robbed by his death. The Appellant has proposed 2/3 of the deceased's income was being used by the family. Reliance was placed on the case of ***Berly Betha Malowa Were vs Kenya Ports Authority MSA HCCC No.246 of 2009*** and ***VKM (Legal Representative of SM) vs Alfonso Muteria & County Council of Tharaka Meru HCCC No. 133 OF 2008***. The final computation being ***Kshs. 20,000/ x 2/3 x 12 x 40= Kshs. 6,400,000/-.***

9. The Appellant anticipated that the Respondent will raise the issue of double compensation and submitted that the Appellant is entitled to both award under the Law Reform Act and Fatal Accident Act. Reliance was placed on the cases of ***Mombasa Maize Millers Ltd vs Chrispine Asoyo (Suing as a personal Representative/Administrator of the Estate of Martina Asoyo Akinyi) KSM CA 23 of 2017***, ***Hellen Waruguru Waweru vs Kiarie Shoes Stores Ltd Nyeri CA 22 of 2014*** and ***David Kahuruka Gitau vs Nancy Anne Gitau (2016) eKLR***.

10. The Appellant urges the court to find the Respondent 100% liable and award *Kshs. 6,987,490/-* as damages plus costs of appeal and in the lower court and interest thereof.

11. On the part of the Respondent, it is submitted that the trial court did not err in dismissing the suit since the Appellant failed to prove his case on a balance of probabilities. According to the Respondent, the Appellants claim was based on mere speculations not to be relied upon by the court for the reason that the sketch map was not produced; no witnesses at the time of the accident; police and deceased's relatives are not eye witness; the police officer who testified was not the investigating officer. Reliance was placed on the case of ***Treadsetters Tyres Ltd vs John Wekesa Wepukhulu [2010] eKLR*** on the proposition that the Appellant did not discharge the burden of proof.

12. The Respondent has submitted that assessing damages when the suit has been dismissed is a waste of judicial time and an exercise in

futility. However, in the event the court finds the contrary, the Respondent has quantified Kshs. 100,000/- for loss of expectation of life, Kshs. 10,000/- for pain and suffering. On loss of dependency, the Respondent has urged the court to consider Kshs. 7,000/- per month as income indicated by PW1 in his testimony. On dependency ratio, 1/3 was proposed on the basis that the deceased did not have any children. Reliance was placed on the case of ***Comply Industries & Another vs Martha Ngima Muthini (Suing as the Legal Representative of the Estate of the Late Stephen Mirau Muthini) [2014] eKLR***. Given the uncertainty in life, the Respondent proposed 25 working years that the deceased would have worked. Reliance was placed on the case of ***Lochub Transporters Ltd vs Arison Obara & Winnie Moraa Obara (Suing as Administrators of the Estate of Dominic Mogaka (Deceased) & 2 Others [2019] eKLR***. The Respondent's computation was as follows: ***Kshs.7, 000 x 12 x 25 x 1/3= Kshs. 700,000/-.*** The Respondent has urged the court to uphold the trial court's judgement.

Determination

13. I have considered the pleadings, the evidence before the trial court, the grounds of appeal and the rival submissions filed before the trial court and this court. The Appellant contends that the occurrence of the accident that led to the demise of the deceased is not disputed by the Respondent and hence the trial magistrate should have found the Respondent liable.

14. Based on the evidence placed before the court, the only issue for determination is *whether the Appellant proved his case on a balance of probabilities.*

15. In ***Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR***, the Judges of Appeal held that:

> ***"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-***
>
> ***"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.***
>
> ***This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained."***

16. This being the first appellate court, it role is to re-evaluate and subject the evidence before trial court 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. The court in ***Selle –vs- Associated Motor Boat Co [1968] EA 123*** held 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."***

17. 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"***

18. The court is therefore called upon to exercise its appellate mandate with caution. It has to bear in mind that it didn't have the benefit of seeing and hearing the witness unlike the trial court which had that opportunity.

19. The Appellant did not witness the accident. According to PW1 PC Kihoi from Athi River Traffic, testified that the deceased was pedestrian. The police abstract produced as Exh.2 indicated that the accident occurred at 0050 hours at night along Namanga road and that the accident involved the deceased and motor vehicle registration number KCC Toyota Station Wagon. PW1 stated that there was no witness at the scene of the accident.

20. On cross-examination, PW1 stated that the driver of the motor vehicle reported the accident to the police and on re-examination, he stated that he drove to Kitengela and left the body on the road. According to DW1, he was driving at midnight and upon reaching at savanna he saw a pedestrian running abruptly across the road and hit the pedestrian despite hooting, exerting brakes and swerving to avoid the accident.

21. On cross-examination, DW1 seems to admit that the deceased died as a result of the accident. He defends himself by stating that there was no zebra crossing along the said road and hence the deceased should have crossed where there was one. According to DW1, there was no eye witness. He stated that he was driving at 60 Km/hr which is not too fast but stated that at that speed you can hit a pedestrian and cause death.

22. The trial magistrate was of the view that if the Respondent had not reported the accident then nobody would have known that motor

vehicle KCC 819M had been involved in an accident. The trial magistrate also pegged his decision on the fact that no traffic offence charges have been preferred against the Respondent. Further that there was no zebra crossing at the point of impact and no evidence was adduced that the Respondent was drunk. According to the trial magistrate, the balance tilted in favour of the Respondent as there was no sufficient evidence to find the Respondent negligent.

23. It is trite that the legal burden of proof lies with the person who alleges. Section 107 (1) of the ***Evidence Act***, Cap 80 Laws of Kenya provides that:

> ***''Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.''***

24. Upon the Plaintiff discharging the legal burden of proof, the burden is now shifted to the Defendant to adduce evidence against the Plaintiff's claims. The burden shifted to the Defendant is captured under sections 109 and 112 of the same Act as follows:

> ***Section 109***
>
> ***The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.***
>
> ***Section 112***
>
> ***In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

25. In ***Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334***, the Court of Appeal held that:

> ***"As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."***

26. In ***Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR*** the Court of Appeal held that:

> ***"It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."***

27. The Appellant lays blame on the driver of motor vehicle KCC 819M by pleading particulars of negligence in the Plaint as well as the Respondent in his statement of defence. In my view despite the Respondent attending court to substantiate his case, he did not controvert the negligence claims against him. He admitted that he hit the deceased but that the deceased ought to have used a zebra crossing. On cross-examination, he admitted that at 60 km/hr you can hit a pedestrian and cause death.

28. In the case ***Nadwa -vs- Kenya Kazi Ltd (1988) eKLR***, the Court of Appeal observed:

> ***"In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendants evidence provides some answer adequate to displace that inference."***

29. In my view the fact that no charges had been preferred against the Respondent is not sufficient to controvert the Appellant's evidence when the Respondent has admitted that he hit the deceased person. I associate myself with ***Mwera, J*** (as he then was) in ***Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007*** who was of the opinion that:

> ***"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it…Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the***

eyewitness in the traffic case, as final in the civil case before him."

30. The Respondent admitted that he was driving at midnight. He did not state whether as a result of the darkness he could not see the deceased well. He only stated that the deceased abruptly crossed the road. His defence that there was no zebra crossing does not give the Respondent the right to drive as he drove. This to me is sufficient evidence to lay blame on the Respondent.

31. In the case of ***Masembe vs. Sugar Corporation and Another [2002] 2 EA 434,*** it was held that:

> ***"When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his car at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object ..... Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."***

32. In my view the trial magistrate did err in dismissing the suit against the Respondent who has not disputed the occurrence of the accident that led to the demise of the deceased. I find the Respondent did contribute to the accident. The Respondent was expected to observe the highway code of traffic by ensuring that he considered other road users. His claim that there was no zebra crossing at the time is no defence or excuse to have hit the deceased. The Respondent owed a duty of care to other road users such as the deceased herein. The deceased also ought to shoulder some bit of blame as he was expected to exercise care and caution when crossing highways at night. No evidence was shown that the deceased took certain measures to avoid being hit such as dodging the Respondent's vehicle in a bid to save his life. Even though the sketch maps were not produced, I am of the view that both appellant and respondent should share liability in the ratio of 50% to 50%. This is informed by evidence of the Respondent that the deceased emerged from the left side of the road and after the impact the vehicle stood in the middle of the road.

33. In respect of assessment of damages, the trial magistrate did not assess for the reason that he had dismissed the suit. To fault the trial magistrate, the Appellant has placed reliance on the case of ***Lei Masaku vs Kaplama Builders Ltd (supra)*** where ***Mabeya J*** stated that the trial court must assess damages despite dismissing the suit.

34. Similarly, in ***Frida Agwanda & Ezekiel Onduru Okech vs Titus Kagichu Mbugua [2015] eKLR Onyancha J*** held that:-

> ***"Indeed even when the learned trial magistrate dismissed the claim, in such a case, he should have assessed damages, notwithstanding the dismissal. That now will be done by this court, for convenience, instead of returning the file to the lower court for assessment."***

35. Assessment of damages is discretionary as held by the Court of Appeal in ***Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55.***

36. The trial magistrate did not award damages. I note that the Appellant and Respondent had filed written submissions before the lower court which I have considered. Before this court, in his written submissions as regards an award for pain and suffering, the Appellant has proposed an award of Kshs. 200,000/- on the basis that the deceased died hours later after the accident occurred. The Respondent has proposed Kshs. 10,000/- stating that the deceased died on the spot. According to PW1, he was told that the deceased died. PW2 stated that the deceased died on the spot despite him not being a witness. According to DW1, he left the deceased at the scene of the accident to report the accident and found the deceased's body had been taken by police. PW2's evidence that the deceased died on the spot is believable since the police took away the body. I will award under this head Kshs. 10,000/- as proposed by the Respondent.

37. As regards loss of expectation of life, the Appellant has proposed Kshs. 300,000/- while Respondent proposed Kshs. 100,000/-. Reliance was placed on the case of ***Johness Eshapaya Olumasayi & Another vs Minial Lalji Koyedia & Another HCC No.373 of 2008*** where the deceased aged 27 years worked with Kenya Air force. As the trial magistrate did not award damages under this head I will invoke my discretion to award the same. I am guided by the decision of ***Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR*** where the court observed that:-

> ***"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/- while pain and suffering the awards range from Kshs. 10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."***

38. The deceased died on the spot and there is no evidence that he endured a lot of pain before breathing his last and hence I find a conventional sum of Kshs. 100,000/- reasonable. I award under this head Kshs.100,000/-.

39. The issue of deducting the award under loss of life from the award under the Fatal Accident Act, I find that the position is settled by the Court of Appeal 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 Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decindendi 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 legislation intended that it should be considered."

40. Therefore the request by the Respondent to deduct the sum is declined.

41. As for the computation under the head on loss of dependency, PW1 stated that the deceased gave him Kshs. 5,000/- and sometimes Kshs. 7,000/- per month. In my view it means therefore that the deceased might have earned more than the amount since he also had to sustain himself. The Appellant has submitted that the deceased earned approximately Kshs. 20,000/- monthly. In the Plaint, it was pleaded that the deceased earned Kshs. 25,000/- per month.

42. The Appellant did not produce any document to support the earnings but that does not mean that his case would collapse for that deficiency. 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."

43. It is urged by the Appellant in the alternative to adopt the minimum wage approach based on the *Regulations of Wages (General) (Amendment) Order, 2017* wherein an Artisan Grade III earns a wage of Kshs. 21,942.35. It is therefore submitted that the deceased's income cannot be below Kshs. 20,000/-

44. In ***Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR*** it was held that where income is not proved, the income of an unskilled worker ought to apply. It is only when there is absence of income that the court 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.*** PW1 submitted that the deceased earned Kshs.500 per day which translates to Kshs. 15,000/- in a month. The amount in my view was reasonable to enable the deceased take care of his needs and that of PW1. The said sum is within the acceptable wages under the Regulation of Wages (General) (Amendment) Order 2017 for an artisan grade 11.

45. I will therefore adopt Kshs. 15,000/- as the income earned by the deceased and hence the multiplicand.

46. On the dependency ratio, it was PW1's evidence that the deceased used to give him Kshs. 5,000/-. According to PW1, the deceased supported the family and since his demise they have suffered a lot. The Appellant has proposed dependency ratio of 2/3. The Respondent has proposed 1/3 on the basis that the deceased was unmarried and childless and his only dependents were his parents. I note that in the Plaint, the Appellant pleaded that he himself and other beneficiaries suffered loss and damage.

47. In ***Mombasa Maize Millers Ltd vs WIM Suing as the representatives of JAM (Deceased) [2016] eKLR Majanja J.*** held that pursuant to section 4(1) of the Fatal Accident Act, brothers of the deceased are not dependants for purposes of the Act hence not entitled to the proceeds of the judgement. Under section 4(1) it is only the wife or husband, Parents and child or children of the deceased person that will benefit under the Act.

48. 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 viscisittudes of life and factor accelerated by payment in lump sum."

49. In my view 1/3 of the income was a reasonable dependency ratio used by PW1. I adopt 1/3 as the dependency ratio.

50. On the choice of multiplier, the Appellant has submitted that the deceased who was aged 20 years at the time of death, would have worked upto the age of 60 years hence 40 years would be the multiplier. The Appellant did not lay basis on any authority. The Respondent submitted that a multiplier of 25 years was reasonable. Reliance was placed on the case of ***Lochub Transporters Ltd vs Arison Obara & Winnie Moraa Obara (Suing as Administrators of the Estate of Dominic Mogaka (Deceased) & 2 Others [2019] eKLR*** where ***Majanja J.*** applied 26 years for deceased aged 20 years.

51. ***Ringera J.*** in ***Leonard Ekisa & Another V Major Birgen [2005] e KLR*** 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 viscisittudes of life and factor accelerated by payment in lump sum.*

52. Taking into account the evidence that was adduced in court that the deceased did not have any pre-existing health conditions but also considering the uncertainties of life, I will adopt a multiplier of 30 years.

53. The Appellant's claim for special damages in the sum of Kshs. 87,290/- was proved save for Kshs.200 for obtaining the police abstract which is deducted.

54. Accordingly, the award that ought to have been made to the Appellant ought to be as hereunder:

(a) Liability.....50% to 50% as between the Appellant and Respondent

(b) Pain and Suffering…. Kshs. 10,000/

(c) Loss of expectation of life…… Kshs. 100,000/

(d) Loss of dependency…. Kshs. 15,000 x 12 x 30 x 1/3 = Kshs

1,800,000/

(e)Special damages…… Kshs. 87,090/

55. In the result, I find the Respondent was 50% liable for the death of the deceased while the deceased shouldered the remainder of 50% liability. I award damages to the Appellant in the sum of *Kshs. 1,997,090/-* which is subjected to 50% contribution thereby leaving a net sum of **Kshs 998,545/.**

56. In the result, it is my finding that the appellant's appeal has merit. The same is allowed. The judgement of the trial court is hereby set aside and substituted with judgement being entered for the Appellant against the respondent as established vide paragraphs **54** and **55** above. The appellant is awarded the costs of the appeal and in the lower court.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 28TH DAY OF JULY, 2021.

D. K. Kemei

Judge