



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CIVIL APPEAL CASE NO. 92 OF 2017

ELIZABETH GATHONI THUKU

(suing as the legal representative of the estate of Charles Gitonga Wathuta).....APPELLANT

VERSUS

PETER KAMAU MAINA.....1ST RESPONDENT

EDWARD KARIUKI GIKONYO.....2ND RESPONDENT

(AND APPLIES IN HCA 95 OF 2017)

JUDGEMENT

1. The Appellant herein filed a memorandum of appeal dated 5th October 2016, against the judgement of Hon A.P. Ndege, Senior Resident Magistrate, Nyahururu delivered on 15th September 2016 in *Nyahururu C.M.C.C no. 158 of 2014 Elizabeth Gathoni Thuku (suing as legal representative of estate of Charles Gitonga Wathuta) vs Peter Kamau Maina & Another*. The Appellant appealed against the said judgement in its entirety on the following grounds *inter alia*:

- a) That the learned trial magistrate erred in law and in fact for apportioning liability at 50:50% whereas the deceased did not contribute at all to the accident.***
- b) That the learned trial magistrate erred in law and fact in finding that the deceased was unlawfully ridden on the road and by shifting the burden of proof to the Plaintiff.***
- c) That the learned trial magistrate erred in law and in fact for applying a multiplicand of kshs. 5,000/- per month.***
- d) That the learned trial magistrate erred in law and in fact for applying a multiplier of 6 years.***
- e) That the learned trial magistrate erred in law and in fact for declining to order payment of the amount awarded under the Law Reform Act in the final orders.***
- f) That the learned trial magistrate erred in law and in fact for failing to award a total sum of Kshs.83,710/- as special damages specifically pleaded and proved.***

2. Reasons wherefore the Appellant prays for the judgement read on 15/9/2016 to be set aside and for damages to be awarded as prayed in the lower court plus costs of the appeal and interest.

APPELLANT'S SUBMISSIONS:

3. On liability, the Appellant submitted that liability ought to have been apportioned at the ratio of 100% in favour of the Appellant as against the Respondent as the driver was at high speed and he ought to have slowed down. The Appellant averred that the lower court had apportioned liability at a ratio of 50:50% because the deceased did not have a valid driving license, valid insurance, a helmet and reflector jacket.

4. Yet PW1 indicated that her husband indeed had a driving license and insurance and that some of those documents were stolen during the accident and she has indicated so to the police. Additionally, PW1 testified that the deceased was hit from behind by Lorry Registration No.

638J that was being driven by the 2nd Respondent and owned by the 1st Respondent.

5. Further, the Appellant averred that PW2 confirmed that the motor cycle was hit from behind and it was the driver of the lorry who was charged in court vide **Traffic Case 298/2014**. That the investigating officer clearly indicated that the motor vehicle was damaged thus not able to tell whether or not the insurance cover was there. More so, a copy of the inspection report dated 9/1/2014 proves that the motor bike was damaged.

6. It was the Appellant's submissions that the 2nd Respondent was over speeding and that after investigations, the police officers concluded that the 2nd Respondent was to blame for the accident and therefore liability ought to have been apportioned to the ratio of 100% in favour of the Appellant as against the Respondent. Reliance was placed on the cases of **High Court of Kenya at Nairobi Civil Appeal No. 943/03 Mungai Kama vs James Kariuki Gatimu**, **High Court Civil Appeal No 40 of 2003, Agnes Akinyi Okeyo vs Marie Stopes Kenya** and **Kimunya Abednego alias Abednego Mungao vs Zipporah S. Musyoka & Anor (2019) eKLR**.

7. On liability, the Appellant submitted that the trial court failed to take into consideration the fact that the deceased died as a result of the accident which was fully occasioned by the Respondents and in turn proceeded to award an inordinately low award on damages.

8. The Appellant proposed a multiplicand of 2/3rd being that he had a family that was wholly dependent on him and a multiplier of 10years based on the fact that he was of good health and active prior to the accident and more so, age is not a conclusive factoring awarding damages for loss of dependency. Further, on the amount of monthly earnings at Kshs.100,000/- the court should take into account and judicial notice that farming and timber merchant is not a formal mode of employment and as such there are no proper records on income at any given point. Reliance was placed on **Nelson Rintari vs CMC Group Ltd (2015) eKLR**

9. On pain and suffering, the Appellant averred that the deceased died on the same day of the accident and as such the amount sought Kshs.20,000/- was reasonable and ought to have been awarded as so.

10. The Appellant submitted that the amount of Kshs.100,000/- sought for loss of expectation of life is a conventional global figure ordinarily awarded by courts based on the decisions of **Makano Makonye Monyanche vs Hellen Nyangena (2014) eKLR** and **Lucy Wambui Kohoro vs Elizabeth Njeri Obuong (2015) eKLR** as cited in the case of **Kimunya Abednego alias Abednego Munyao (supra)**

11. It was the Appellant's assertion that having pleaded and proved kshs. 75,400/- as special damages the same ought to have been allowed and not interfered with.

12. In conclusion the Appellant submitted that their appeal is merited and pray that the judgement delivered on 28/7/2016 be set aside and judgement be entered in favour of the Appellant as follows:

· **Liability be apportioned at 100% in favour of the Appellant against the Respondent**

· **On quantum under the Fatal Accidents Act and the Law Reform Act**

· **Pain and suffering** **Kshs.20,000/-**

· **Loss of expectation of life** **Kshs.100,000/-**

· **Loss of dependency**

· **100000×2/3×12** **kshs. 8,000,000/-**

· _____

· **Total** **Kshs.8,120,000/-**

· _____

· **Special damages specifically pleaded and proved** **kshs75,400.00**

· **Costs of the suit plus interest.**

RESPONDENT'S SUBMISSIONS:

13. On liability, the Respondents submitted that although it was their motor vehicle that hit the deceased's motorcycle from behind, the trial court in practicing the principle of fairness looked at the issue of whether the deceased was lawfully being ridden or riding on the road given that the accident's spot was in the middle of the road in apportioning liability at 50:50.

14. Additionally, PC Bernard Makoha on being cross examined by the Respondent's advocate confirmed that the deceased rider ought to have a valid driving license, a valid insurance, helmet and a reflector jacket in contravention of **Section 103b of the Traffic Act**. The Respondent asserted that the Appellant failed to prove that the deceased was lawfully aboard the ill-fated motor cycle therefore this court

should uphold the decision of the trial court on liability.

15. On quantum, the Respondents asserted that the trial court was right to place the figure of the multiplicand at Kshs.9,500/- since the earnings of the deceased was no proved. Reliance was placed on the cases of *Beatrice Murage vs Consumer Transport Ltd 2014 eKLR* and *Gachoki Gathuri (suing as Legal Rep. of the Estate of James Kinyua Gachoki (Deceased) V John Ndiga Njagi Timothy & 2 others (2015) eKLR*. The Respondent also submitted that the application of the multiplier of 3 years was reasonable and the decision by the trial court to give the estate of the deceased 2/3 of his estimated income because of his widow the plaintiff herein and his son who was still a dependant was fair.

16. The Respondents averred that the trial court's award on general damages for pain and suffering and for loss of life was fair. On special damages, the Respondent asserted that special damages must not only be pleaded, they must be strictly proved as they are not the direct natural or probable consequences of the act complained of. They also relied on the case of *Total Kenya Limited Vs. Janevams Limited (2015) eKLR*.

17. They asserted that the court awarded the Appellant special damages of Kshs.26,000/- which was the amount that was particularly pleaded. The same was subjected to the 50% liability and thus the awarded amount was Kshs.13,000/-. They reiterated that the funeral expenses were not particularly pleaded and therefore not awardable.

18. In conclusion, the Respondents submitted that the net award of Kshs.72,000/- was fair and reasonable given the merits of the case and it was their prayer that the decision of the trial court be upheld and that the appeal be dismissed.

ANALYSIS AND DETERMINATION

19. After considering the memorandum of appeal and the parties' written submissions lodged herein, the issues for determination are both on liability and the quantum of damages awarded.

20. Being an appellate court, this court is mandated with evaluating and re-examining the evidence adduced in the trial court in order to reach a finding, taking into account the fact that this court had no opportunity of hearing or seeing the parties as they testified and therefore make an allowance in that respect. Moreover, an appellate court can only interfere or reverse a decision made by the trial court if it is satisfied that the decision was not based on any evidence or it was based on a misapprehension of the evidence or was based on wrong legal principles.

21. In the case of *Peters vs Sunday Post Limited (1958) E.A.*, the court held as follows:

“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 of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide”.

22. (See *Selle & Another vs Associated Motor Boat Co. Ltd & Another (1968) EA 123*, ;*Nairobi HCCC Appeal No. 213 of 2006, Oluoch Erick Gogo vs Universal Corporation Limited (2015) eKLR* and; *Sumaria & Another vs Allied Industrial Limited (2007)2 KLR*)

a. Who was to blame for the accident and to what extent?

23. Turning to the appeal on liability, that Appellant submitted that that liability ought to have been apportioned at the ratio of 100% in favour of the Appellant as against the Respondent as the driver was at high speed and he ought to have slowed down. On the other hand, the Respondent averred that although it was their motor vehicle that hit the deceased's motorcycle from behind, the trial court in practicing the principle of fairness looked at the issue of whether the deceased was lawfully being ridden or riding on the road given that the accident's spot was in the middle of the road in apportioning liability at 50:50.

24. During the trial, the parties entered consent to adopt the evidence of an eye witness to the accident herein, Esther Nyawira Moreithi who testified a PW2 in a related claim *Nyahururu CMCC 148/2014* as evidence to be used to determine liability herein. She testified that she saw the deceased who was a neighbor carrying a woman on his motorcycle and a white lorry following them at a speed. That she was 100m away and she heard bang from inside the lorry like something was cut. That the lorry then started to wobble in a zigzag motion along the road and it hit the motorcycle. That the lorry then went again to the right side of the road. That it left the road and went to the grasses while still facing Nyeri direction and then overturned on the right side.

25. Further, PW2 testified on behalf of the investigating officer stating that from the findings they concluded that the driver of the motor vehicle KBJ 638J Isuzu Canter was to be blamed for the accident. That on the material date and time the motor vehicle and motor cycle KMCF 088K both were moving from Nyahururu towards Nyeri when the canter hit the motorcycle on the rear. That the rider died on the spot while the pillion passenger died on arrival at Nyahururu hospital.

26. In apportioning the liability, the trial Magistrate expressed himself as follows;

“.....At first I do agree with the learned counsel for the Plaintiff that the Defendant's account of how the accident happened when he was driving at a slow speed of 45kph as claimed by him is not reliable as he could avoided the accident at such a speed.

.....On that note, I agree with the evidence of the independent eye witness and the police investigations that it is his vehicle

that hit the motor cycle with the deceased from behind.

However the main issue on the other hand is whether the deceased was lawfully on the road, given that the investigations revealed that the accident's spot was in the middle of the road.

.....

The burden of proving that the deceased was rightfully riding in the middle of the road lies on the Plaintiff herein. She failed to prove that fact on a balance of probability. Still, however, one is not allowed to be negligent to the extent of causing death of a human being even if he could be driving or riding unlawfully on the road. I shall in the circumstance apportion liability equally to both parties herein at 50%:50%. The deceased for unlawful riding in the middle of the road where the accident is said to have occurred, and failing to prove that the deceased was rightfully and lawfully on the road i.e. wearing a helmet, reflector jacket, riding an insured motor cycle and competently riding on the road, having been licensed to ride a motorcycle; and the Defendants for being negligent, by failing to completely control the motor vehicle so as to avoid the accident."

27. Consequently, I find that without a shadow of doubt the Respondent was negligent and contributed to the accident but the trial court reasoning for apportioning liability at 50:50 was solely based on the fact that the motor cycle rider lacked a driving license and the motor cycle was not insured hence failing to prove that the deceased was rightfully and lawfully on the road.

28. However, I am of the view that in a civil claim liability trickles down to the question of who actually caused the accident. Primarily, the same would need to be determined by analyzing who acted in a careless and reckless manner to cause the accident. I cannot discount the fact that the motorcyclist could indeed be driving without a license and yet not be at fault for the accident which appears to be the case in the present matter.

29. Lacking a driving license or insurance is not ultimately what caused the accident as is evident in the trial court and from the testimonies of the independent eyewitness and PW2; the Respondent's negligence is what caused the accident. I believe that the accident would have still occurred as it did regardless of the deceased having a driving license and motor cycle insurance. I find that it was proven during the trial court proceeding that the aforementioned documents did not necessarily factor into what caused the collision.

30. In the case of Stapley vs. Gypsum Mines LTD (2) (1953) AC 663 the Court held that:

"To determine what caused the accident from the point of view of legal liability is a most difficult task. If there is any valid logical scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but does not mean that the accident must be regarded as having been caused by the faults of all of them....."

31. I wholly agree with the learned trial magistrate that:

"One is not allowed to be negligent to the extent of causing death of a human being even if he could be driving or riding unlawfully on the road."

32. In Winfield and Jolawicz on Tort, 11th Edition (S&M) 1979 at page 99 it stated:

"In order to discharge the burden of prove placed upon him, it is usually necessary for the Plaintiff to prove specific acts or omissions on the part of the Defendant which qualify as negligent conduct"

33. On the question of what amounts to proof on a balance of probabilities. **Kimaru, J** in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

"In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.

34. It is apparent that the Respondent in this case was negligent while driving and thus occasioning the accident resultantly causing death. Liability depends on where negligence lies therefore the Respondent was liable for the accident. He failed to act safely and responsibly while driving and failed to control his motor vehicle thus hitting the motorcycle from the rear. I agree with the trial court that the Respondent couldn't have been driving at a slow speed as he would have been able to avoid the accident. Although he did brake as evidenced by the skid marks on the road it was a little too late.

35. In the case of Joshua Muriungi Ng'anatha –vs- Benson Kataka Lemureiyani [2016] eKLR, Kamau J expressed herself as follows;

"This does not, however, follow that such a convicted person will be found wholly liable in civil proceedings that a complainant institutes arising out of such criminal or traffic proceedings because the civil case will be determined on a balance of probability. This is notwithstanding that the witnesses who testified in the criminal proceedings are the same ones who testified in the civil

proceedings.

In the same breathe; the fact that a person has been exonerated in an inquest does not discharge him from any liability in tort if negligence is actually established. Similarly, a person who has been found wholly liable in inquest proceedings need not necessarily be found to be wholly liable in civil proceedings”

36. In the case of Chemwolo & Another –vs- Kubende [1986] KLR 492 at page 498, the Court of Appeal expressed itself as follows:-

“With respect, it was not for the learned judge to read proceedings in the 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, while not disturbing a conviction, but it is also well-known that both parties to an accident might have driven carelessly and each could be convicted to careless driving for their respective types of carelessness.....It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of proceedings in the traffic case.”

37. Further, in the case of Charles Munyeki Kimiti –vs- Joel Mwenda & 3 Others [2010] eKLR Lenaola J rendered himself as follows: -

“It is clear that the Resident Magistrate upon inquiry absolved them from blame. It does not however follow that the inquest exonerates the Respondents from tort. If negligence is established...just as a person who has been convicted for careless driving under the Traffic Act is entitled to show in subsequent civil proceedings against him for damages that the driver of the other vehicle or the victim of the accident is equally liable for contributory negligence...”

38. Following the reasoning of the above determined cases, I find that this being a civil matter the tort of negligence on the part of the Respondent was established on a balance of probabilities despite the outcome of the related traffic case and the motorcyclist’s lack of a driving license and motorcycle insurance. The fact in issue is who was to blame for the accident and the clear answer is that the Respondent was to blame for causing the accident. The unlicensed motorcyclist is not automatically liable simply by virtue of being without a license rather it lies on who acted carelessly in some way causing the collision. In any case, the appropriate charges should have been raised for the lack of a driving license and insurance. I therefore find reason to interfere with the apportionment of liability and find that the Respondent was 100% liable for the accident.

39. Turning to the appeal on quantum, I must start by pointing out that it is settled law that the award of damages is always at the discretion of the trial court. An appellate court should not interfere with the trial court’s award on damages unless it is satisfied that in awarding the damages, the trial court misapprehended the facts or applied the wrong legal principles or that the award was either too high or too low as to lead to an inference that it was an erroneous estimate of the loss or damage suffered. See: Mariga V Masila, [1984] KLR 251

40. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated:

“[I]t is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.”

41. Moreover, in Butt V Khan (1977) 1 KAR the Court of Appeal held as follows;

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low....”

42. On quantum in determining whether to interfere with the same or not the court has to bear in mind the following principles on assessment of damages:

- *Damages should not be inordinately too high or too low;*
- *Damages are meant to compensate a party for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered,*
- *Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts*
- *Where past awards are taken into consideration as guide, an element of inflation should be taken into account as well as the purchasing power of the Kenyan Shilling then at the time of the judgment*

(See Power Lighting Company limited & Another -v- Zakayo Saitoti Naingola & Another (2008) eKLR.)

43. In the instant case, the Appellant proposed a multiplicand of 2/3rd being that he had a family that was wholly dependent on him and a multiplier of 10years based on the fact that he was of good health and active prior to the accident and more so, age is not a conclusive factoring awarding damages for loss of dependency.

44. Further, on the amount of monthly earnings at kshs. 100,000/- the court should take into account and judicial notice that farming and timber merchant is not a formal mode of employment and as such there are no proper records on income at any given point. On pain and suffering, the Appellant averred that the deceased died on the same day of the accident and as such the amount sought Kshs.20,000/- was reasonable and ought to have been awarded as so.

45. The Appellant submitted that the amount of Kshs.100,000/- sought for loss of expectation of life is a conventional global figure ordinarily awarded by courts. It was the Appellant's assertion that having pleaded and proved Kshs.75,400/- as special damages the same ought to have been allowed and not interfered with. In conclusion the Appellant submitted that their appeal is merited and pray that the judgement delivered on 28/7/2016 be set aside and judgement be entered in favour of the Appellant as follows:

o *Liability be apportioned at 100% in favour of the Appellant against the Respondent*

o *On quantum under the Fatal Accidents Act and the Law Reform Act*

o *Pain and suffering* *Kshs.20,000/-*

o *Loss of expectation of life* *Kshs.100,000/-*

o *Loss of dependency*

o $100000 \times 2/3 \times 12$ *Kshs.8,000,000/-*

• _____	
• Total	<i>Kshs.8,120,000/-</i>
• _____	

o *Special damages specifically pleaded and proved* *kshs75, 400.00*

o *Costs of the suit plus interest.*

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

· *Multiplier*

· *Multiplicand*

· *Dependency ratio*

47. I agree with the trial court's reasoning and finding on the award under the Fatal Accidents Act specifically the loss of dependency, that:

"..... Without actual proof of the deceased's income and because of the third dependant herein, I do enhance the figure to Kshs.9500/- per month as the minimum sum that he could have earned as income. It shall therefore also base the multiplicand herein on that amount.

Next is the multiplier.....

The deceased was 62 years old and I do agree that he could not have actively continued with the power saw business actively beyond 65 years, the age at which a person in Kenya is legally deemed to be elderly. Also some vagaries of life could have made him unable to continue actively with his business. For that reason, I do find a multiplier of 3 years as proposed by the learned defence counsel to be reasonable herein. I will give his estate 2/3 of his estimated income because of his widow the Plaintiff herein and his son who is still dependant,"

48. However, I find that the trial court erred in subjecting the damages awarded to apportionment of liability at 50:50.

49. Therefore the damages awardable for loss of dependency shall be:-

$9500 \times 12 \times 3 \times 2/3 = 228,000$

50. Secondly, are the damages to be awarded under the Law Reforms Act, I find that the Kshs.10,000/- awarded for pain and suffering and Kshs.100,000 on lost life to be fair and reasonable. I find no reason to disturb this award.

51. On special damages, the trial court awarded finding that the Plaintiff particularly pleaded and proved post mortem charges of Kshs.4,800/- vide P-Exhibit No. 4, motor cycle repairs of Kshs.6,200/- only vide P-Exhibit No. 10 and Kshs.15,000/- costs for the succession cause, vide P-Exhibit No. 12b. The trial court held that the funeral expenses were not particularly pleaded and are therefore not awardable and that the Plaintiff was required to particularize the expenses in the plaint before specifically proving the same during the hearing.

52. In Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR the Court of Appeal held that:

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses”.

53. I disagree with the trial court’s finding that the funeral expenses were not pleaded as upon perusing the record of appeal they were pleaded on the plaint under the heading particulars of special damages. (pg. 4 record of appeal) thus denying the Appellant the same on grounds that they were not particularized was faulty.

54. Additionally, the Plaintiff adduced receipts to prove the same as evidenced by the bundle of receipts provided. I also find that the Appellant had specifically pleaded and proved the costs in respect to the motor vehicle repairs and cannot find reasons as to why the trial court chose to award some and leave others. I therefore award the Appellant special damages as prayed for at **kshs75, 400.00**.

55. The upshot of this judgment is that the Appellants’ appeal on liability succeeds and the appeal on quantum partially succeeds. The judgment of the trial court is hereby set aside and is substituted with a judgment of this court in favour of the Appellant against the Respondent as follows:

Liability – the Respondent was 100% liable for the accident

Special damages----- Kshs. 75,400/-

Fatal Accident Act

Loss of dependency -----Kshs. 228,000/-

Law Reform Act

Pain and suffering -----Kshs 10,000/-

Lost life -----Kshs 100,000/-

56. As a general rule, the trial court has discretion to award damages in civil suits, the discretion must be exercised judiciously on the basis of the law and evidence presented in a suit and not arbitrarily or capriciously and not to enrich either party therefore I do agree with the trial court that the court must take into account the award under the Law Reforms Act while dealing with the Fatal Accidents Act but not meaning deduction of awards under Law Reform Act.

57. Section 15(5) of the Law Reform (Miscellaneous Provisions) 1934 Act* which declares that-*‘the right conferred by this Act for the benefit of the estate of deceased persons shall be in addition to and not in delegation of any rights conferred on dependants of the deceased by the Fatal Accidents Act’...anyway, the principle that if a pecuniary gain which accrues to him or her from the same death of a person is logical and appropriate anywhere and in my judgment should be applied in Kenya.”

58. Despite the above case law, the proper position held by the courts today is that there no deductions required. In John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR it was held:

“In my view, the requirement in the Law Reform Act is to “take into account” and does not make it mandatory to deduct any sums awarded to the estate of a deceased from damages awarded for lost dependency.”

59. Justice Mabeya in Peres Wambui Kinuthia And Another v S.S. Mehta & Sons Limited, Nairobi Civil Appeal NO. 568 OF 2010 (UR) held that:

“In the case of Kemfro Africa t/a Meru Express Services (1976) & Anor –vs- Lubia & Anor (No 2) (1987) KLR 30 the Court of Appeal was categorical that the words “to be taken into account” and “to be deducted” are two different things. That the words used in Section 4(2) of the Fatal Accidents Act are “taken into account.” That the Section says what should be taken into account and not necessarily deducted. That it is sufficient if the judgment of the trial court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial court bears in mind or considers what has been awarded under the Law Reform Act for the non-pecuniary loss. There is absolutely no requirement in law or otherwise for the court to engage in a mathematical deduction”

60. Therefore, judgement is hereby entered against the Respondent herein for the sum of **Kshs.413,400/-**. Additionally, I award the Appellant the costs of both the lower court suit and the appeal.

61. These orders shall also apply in Civil Appeal No. 95 of 2017 but in the following terms

Liability – the Respondent was 100% liable for the accident

Special damages----- Kshs. 83,170, /-

Fatal Accident Act

Having found that the trial court only erred in adopting a multiplier of 6 years as opposed to 15 years which this court finds to be reasonable and appropriate. The loss of dependency shall therefore be calculated as follows: -

5000×12×15×1/3 = 300,000/- Thus Loss of dependency -----Kshs. 300,000/-

62. Therefore, judgement is hereby entered against the Respondent herein for the sum of **Kshs. 383,170/-**. Additionally, I award the Appellant the costs of both the lower court suit and the appeal.

(i) Thus the end results the judgement in HCA 92 of 2017 is Para 58 and 63 above.

(ii) The judgement in HCA 95 of 017 is in terms of para 64 above.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 21ST DAY OF OCTOBER, 2021.

.....

CHARLES KARIUKI

JUDGE