



**Peter & another v Kimeu (Civil Appeal 129 of 2018)
[2021] KEHC 281 (KLR) (22 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 281 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 129 OF 2018
MW MUIGAI, J
NOVEMBER 22, 2021**

BETWEEN

KIOKO PETER 1ST APPELLANT

DENNIS KAVUU MBONDO 2ND APPELLANT

AND

**JOSEPHINE N'THENYA KIMEU (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF JUSTUS KIOKO MUTISYA (DECEASED)) ... RESPONDENT**

*(Being an appeal from the judgment of the Honourable Magistrate at Machakos Law
Courts Hon. L. M Mbugua in Civil Case No. 17 of 2016 dated 17th November, 2016)*

JUDGMENT

BACKGROUND

1. By a Complaint dated 20th January, 2016 and filed on 21st January, 2016, the Respondent suing as the Legal Representative of the estate of Justus Kioko Mutisya (Deceased) sought general damages under the Fatal Accident Act and the Law Reform Act, special damages of Kshs.400,000/- plus the costs of the suit and interest.
2. The Respondent at paragraph 6 of the Complaint pleaded that on or about 3rd November, 2014, the deceased was lawfully travelling in motor vehicle registration number KAH 034S along Machakos - Kitui Road when the 2nd Appellant drove the 1st Appellant's motor vehicle registration number KBX 382V so negligently onto motor vehicle registration number KAH 034S lane causing a collision. As a result of the accident, the deceased succumbed to his fatal injuries.
3. The Particulars pursuant to the Statute pleaded by the Respondent being that the deceased aged 41 years old at the time of his death. According to the Respondent, the deceased worked and earned



- Kshs.21, 000/- per month. The Respondent pleaded that the estate of deceased has suffered great loss and damage. It is pleaded that the deceased had a wife and two children aged 11 years and 1 month.
4. In opposition, the Appellants filed a joint statement of defence on 14th March, 2016. The Appellants denied the particulars pursuant to the Fatal Accident Act, special damages, loss and damage suffered by the estate.
 5. Aggrieved by the Judgement, the Appellants have appealed citing the following grounds:-
 - (1) THAT the learned trial magistrate erred in law and in fact in awarding Damages for Loss of Dependency of Kshs.2,352,000/- which award was excessive and not strictly proved.
 - (2) THAT the learned trial magistrate erred in law and in fact in awarding Damages for Loss of Expectation of Kshs.100,000/- which award was not strictly proved
 - (3) THAT the learned trial magistrate erred in law and in fact in awarding Damages for Pain and Suffering of Kshs.150,000/- which award was not strictly proved.
 - (4) THAT the learned trial magistrate erred in law and in fact in awarding Special Damages of Kshs.75, 000/- which award was not strictly proved.
 - (5) THAT the learned trial magistrate erred in law in not taking into account entirely the submissions of Appellants.
 - (6) THAT the learned trial magistrate finding and decision on Damages for Loss of Dependency of Kshs. 2,352,000/-, Damages for Loss of Expectation of Kshs.100, 000/-, Damages for Pain and Suffering of Kshs.150, 000/- and Special Damages of Kshs.75, 000/ was against the weight of the evidence adduced.

HEARING

6. PW1, JOSEPHINE NTHENYA KIMEU stated that the deceased was her husband. She stated that she was a casual worker at Akamba Timber opposite Machakos General Hospital. The deceased died on 3rd November, 2014 in a road accident along Machakos-Kitui Road. She stated that the deceased was hit by a Lorry KBX 382V owned by Kioko Peter (1st Appellant) and driven by Dennis Kavuu Dando as per the copy records. She testified that she was not present during the accident. She said her husband died in hospital. She stated that when she arrived at the hospital, her husband died shortly thereafter. Dennis Kavuu (2nd Appellant) was charged with the offence of causing death by dangerous driving in Traffic Case No. 1488 of 2014. She stated that her husband was aged 41 years, was well and healthy at the time of his death. According to her, the deceased would have worked up to the age of 60 years. She stated that the deceased was a technician at Komesha earning Kshs. 21,000/- per month as per his letter from Komesha. According to PW1, the deceased gave her Kshs.18, 000/- per month to pay children school fees, buy food and clothes for even the deceased. It was her testimony that at the time of deceased death they had one child and she was also pregnant so now two children. The older child was aged 12 years studying at St. Marys School while the other was aged 1 year and 5 months. She stated that they incurred funeral costs in the sum of Kshs.400, 000/- to cater for food, tent and chairs. According to her, she had a bundle of receipts for Kshs.399, 340/- for funeral expenses. She stated that she is looking after the children solely, struggling in life and his children lifestyle has changed. She asked for general damages, special damages and costs.
7. PW1 produced the following exhibits:-Death certificate as P.exhibit 1, copy records as P.exhibit 2, Copy of letters of administration P.exhibit 3, Copy of the police abstract as P.exhibit 4, Letter from Komesha



as P.exhibit 5, Copies of two birth certificate as P.exhibit 6(a) and (b), Bundles of receipts for funeral expenses as P.exhibit 7 and Demand letter as P.exhibit 8.

8. In cross-examination by Ms Wangari, PW1 stated that she was not at the scene of the accident. Dennis Kavuu was charged in a traffic case. Her husband was technician earning a net pay of Kshs.21, 000/-. She stated that she didn't avail the pay slip or P9 Form. According to her, her husband was giving her Kshs.18, 000/- per month although sometimes it would be more after her husband did extra work. She stated that she also did casual work to cater for the family.
9. PW2, Moses Wambua Mulandi adopted his witness statement dated 20th September, 2016 as his evidence. According to him, he witnessed the accident. He stated that at 7.30 pm he was from Jamco at his grandmother's place going to his home at Mutituni. According to him, he was near Machakos Girls High School going uphill when he saw a vehicle going towards Kitui downhill and another vehicle going towards Machakos. The lorry started to overtake a car in the lane of vehicles going uphill towards Machakos. There was pickup that was at the front of vehicle going uphill, so the lorry went onto the lane of the pick-up and the pick-up swerved off the road but the lorry followed it there and collided with it. According to him, he went near and saw two people crying for help. He stated that shortly people came to check. He stated that he went home.
10. According to PW2, the impact occurred off the road as the lorry had followed the pick-up off the road. He stated that the lorry driver had tried to go off the road completely to avoid the accident. According to him, he left before the police came at the scene. He later knew that the deceased was Josephine's husband. He blamed the lorry driver who was at high speed. According to him, he could see the driver was at a high speed but there was no speed sign on the road. The lorry was at a high speed.

DEFENCE

11. The defence case was closed without calling any witness.

TRIAL COURT'S JUDGMENT

12. In the Judgment, by the Trial Magistrate dated 17/11/2016 observed that the evidence of PW2 was not challenged and the traffic offence charges of causing death by dangerous driving corroborated PW2 testimony. The judgment of the court was read in the following terms:
 - (a) Liability 100% against both defendants
 - (b) Damages for Loss of dependency (Kshs.21,000x12x14x2/3= Kshs.2,352,000/-
 - (c) Damages for loss of expectation of life Kshs.100,000/-
 - (d) Damages for Pain and suffering of Kshs.150, 000/-,
 - (e) Special damages of Kshs.75, 000/-
 - (f) Costs and interest

APPEAL

13. Aggrieved by the Judgment, the Appellants have appealed citing the grounds set out above. The Appellants have urged the court to allow their appeal by setting aside and reducing the awards appropriately against them and the costs of the appeal be awarded to them.

CROSS APPEAL



14. Similarly, the Respondent filed the cross appeal dated 9th October, 2019 citing the following grounds:
- (1) THAT the learned trial magistrate erred in law in awarding the Respondent Kshs.75,000/- as Special Damages when she had proved special damages of Kshs.405,000/-
 2. THAT the learned trial magistrate erred in law and in fact in finding that the Respondent availed receipts of Kshs.405,000/- and proceeded to award Kshs.75,000/-.
15. The Respondent urged the court to set aside the special damages of Kshs.75, 000/- and substitute with an award of Kshs.405, 000/-.

APPELLANTS SUBMISSIONS

16. As regards Ground 1 and 6, it is submitted that the award of Kshs. 2,352,000/- was excessive and unwarranted in light of the evidence. According to the Appellant, the letter from Komesha was not a pay slip and the maker did not testify. The Trial Magistrate failed to factor in the statutory deductions. It is submitted that the income was not proved hence the Trial Magistrate ought to have adopted the minimum wage of a general labourer of Kshs.10,351/- stipulated in the Legal Notice No.197 of 2013. Reliance is placed in *Kimilili Hauliers Limited Vs. Maurice Msindano Musungu (Suing as dependant of Jackson Odhiambo Okoth Deceased) [2012] eKLR*.
17. On Ground 2, it is submitted that the award of Kshs.100, 000/- ought to have been deducted under the rule of the thumb to avoid double compensation. Reliance is placed in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another vs. Lubia & another (1982-85)1 KAR 727* and in *JOSEPH WACHIRA MAINA & another vs. MOHAMMED HASSAN [2006] eKLR*.
18. As regards Ground 3, it is submitted that the deceased died on the same day (3rd December, 2020) as per the pleadings and the death certificate hence the award of Kshs.150, 000/- was excessive. Reliance is placed in *New Kenya Co-operative Creameries Ltd (Formerly Kenya Co-Operative Creameries) & another vs. Chebusit Arap Langat [2013] eKLR* where the court awarded Kshs.10, 000/- where the deceased died on the same day. It is submitted that Kshs.150, 000/- should be set aside and substituted with Kshs.10, 000/-.
19. On Ground 4, it is submitted that the receipts did not adhere to the provisions of the [Stamp Duty Act](#). According to the Appellants, the Trial Magistrate awarded Kshs.75, 000/- without any justification. It was not strictly proved hence should be set aside. Reliance is placed in *Zacharia Waweru Thumbi vs. Samuel Njoroge Thuku [2006] eKLR*.
20. The Appellants have urged the court to uphold this appeal and the lower court award be adjusted accordingly as submitted on their behalf.

RESPONDENT SUBMISSIONS

21. On behalf of the Respondent, it is submitted that despite the Appellants not appealing on liability, the Respondent and her witness evidence remain uncontroverted. The Appellants did not testify. The Appellant filed Defense denying the accident and set out particulars of negligence against driver of motor vehicle Reg No KAH 034 and those were not proved. The Defendant did not take out 3rd party proceedings.
22. As regards Ground 1, it is submitted that income was proved by a letter from Komesha and the Appellant did not insist on calling the maker of the letter during the trial. PW1 stated that she was given by the deceased Kshs.18, 000/- per month. It is submitted that the deceased was a healthy man. According to the Respondent, proof of earnings are not only proved through pay slips and documents since it would cause injustice to many Kenyans who are illiterate and keep no records. Reliance is placed



in the Kisumu Court of Appeal Civil Appeal No.167/2002 *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR.

23. As regards Ground 2, it is submitted that the deceased was a healthy man but his life was cut short by the accident hence the award of Kshs.100, 000/- as loss of expectation was reasonable. According to the Respondent, while awarding damages under the Law Reform Act, the court must take into account the award under the Fatal Accident Act and it does not mean that only one should be awarded. Reliance is placed in *South Nyanza Sugar Co. Ltd. Vs. James Martin Matoke, Kisumu Civil Appeal No. 91 of 1998*.
24. On Ground 3, it is submitted that the award of Kshs.150, 000/- as damages for pain and suffering should not be disturbed for the reason that it was PW2 evidence that the deceased was crying for help at the scene of the accident. To the Respondent, the evidence clearly shows that the deceased experienced a lot of pain and did not die at the scene but at the hospital. According to the Respondent, this evidence was uncontroverted.
25. As regards Ground 4, it is submitted that the award of Kshs.75, 000/- was contrary to the amount of Kshs.400, 000/- pleaded in the Plaintiff. According to the Respondent, she pleaded and produced receipts for the amount. It is submitted that the receipts were not challenged in trial. According to the Respondent, it cannot be doubted that the funeral was conducted hence costs in food, transport, grave preparation and announcements were to be incurred. It is submitted that the Respondent produced receipts of Kshs.405,000/- but the court recorded Kshs.399,340/- as per the court proceedings found in page 65 line 19 of the record of appeal. According to the Respondent, she was not cross-examined on how the amount was spent. It is urged that Kshs.75, 000/- should be substituted with Kshs.400, 000/- pleaded and proved through receipts. Reliance is placed in *Rosemary Wanjiru Kungu vs. Elijah Macharia Githinji & another* [2014] eKLR.

DETERMINATION

26. I have considered the pleadings and written submissions filed on behalf of respective parties.
27. In this appeal, the Appellants have challenged the Trial Magistrate's entire award on quantum of damages. The Respondent has challenged the Trial Magistrate award of Kshs.75, 000/- as special damages instead of Kshs.405,000/-.
28. 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.
29. Once the Plaintiff discharges the legal burden of proof, the burden is then shifted to the Defendant to adduce evidence against the Plaintiff's claims. This burden is well 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.



30. 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.”

31. Based on the grounds in the Memorandum of Appeal and Cross appeal, the court finds the issues for determination are:-

- a. Whether the trial court erred in awarding excessive damages for loss of dependency
- b. Whether the trial court erred by failing to deduct the award of Kshs.100, 000/-under loss of expectation from the award under the Fatal Accident Act (Loss of dependency).
- c. Whether the Respondent proved his claim of special damages.

32. The Appellants have urged this court to set aside and reduce the quantum of damages for being excessive and not strictly proved.

33. This court is guided by the Court of Appeal in *Bashir Ahmed Butt vs. Uwais Ahmed Khan* (1982-88) KAR where the Learned judges set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

“An appellate court will not disturb an award for general damages unless it is so 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...”

34. In the case of *Southern Engineering Co. Ltd vs. Musungi Mutia* [1985] KLR 730, the court held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case...”

Whether the trial court erred in awarding excessive damages for loss of dependency

35. Based on the Appellants written submission, the Court notes that their challenge to the award under this head is majorly in respect of the deceased income (multiplicand). The Court notes that at page 3 and 4 of the judgment, the Trial Magistrate considered the proposed income by both the Appellants and Respondent. The Trial Magistrate was persuaded by the Respondent’s submissions that the deceased earned Kshs.21,000/- per month. The Appellants proposed Kshs. 10,315 as the deceased income.



36. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another vs. P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the Fatal Accidents Act and held as follows:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. (Emphasis added)”

37. It therefore follows that the method to find loss of dependency is the multiplicand (annual net income) multiplied by a suitable multiplier (expected working life lost by the deceased by the premature death), and further by a dependency ratio (ratio of the deceased’s income utilized on her dependents).

38. The undated letter from Komesha Photo Studio exhibited in court shows that the deceased earned Kshs.21, 000/- per month. The Respondent stated that the deceased worked as a technician. According to the Appellants, the letter was not a pay slip and the statutory deduction were not factored in by the Trial Magistrate. Further the Appellants asserted that the letter was not produced by the maker hence want of compliance with the rules of evidence.

39. The Respondent asserted that the Appellants did not insist for the author of the letter to be called in court to produce it. To the Respondent, the Appellant never doubted the deceased worked at Komesha Photo Studio despite her admission that she didn’t have a copy of the pay slip or P9 Form. According to the Respondent, the Appellant used to give her Kshs.18,000/- per month or sometimes more when the deceased did extra work.

40. The court’s view is that the failure to have the documents does not make it fatal to the case. This was the position taken by the Court of Appeal in *Jacob Ayiga Maruja & Another vs Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR* where the court 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.”

41. The Court notes that the letter from Komesha Photo Studio did not state whether it was net or gross pay. The Trial Court would have addressed statutory deductions if they were rendered as it is now, this court would be on a fishing expedition based on speculation. The letter on the letterhead of Komesha Photo Studio-Machakos reads;

Refer to the above mentioned who is deceased. Justus Kioko worked with us from 1999 upto his demise on 3rd November 2014 as a Professional Machine Technician. He was paid Ksh 21,000/- month end.....

42. Whereas, the position is that the Court should consider the net pay to calculate for annual dependency, and in this case the figure of Ksh 21,000/- is not deemed to be gross or net, the issue ought to have been raised and canvassed at the trial and the outcome subjected to appeal by the aggrieved party.



43. In *D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR* the court stated that it cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants. In *Chunibhai J. Patel and Another vs. P. F. Hayes and Others (supra) 749* the court held that the multiplicand will be a proportion of the deceased’s net income. In *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)*, Ringera J. held that the important figure is the net earnings of the deceased. It therefore follows that statutory deduction were to be taken into account while adopting the multiplicand.
44. According to the Appellants, no income was proved hence the trial magistrate should have applied the minimum wage of a general labourer of Kshs.10, 351/- as per the Legal Notice No.197 of 2013. Under the Order, 2013 at (d) Machine attendant in all municipalities and Mavoko, Ruiru and Limuru Town Councils will earn a monthly income of 10,315.95. Based on that provision then the deceased would fall under that category of pay noting that he is described as a professional machine attendant.
45. The question would when do court revert to the minimum wage? In *Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR* where the court was dealing with a similar issue, it stated:
- “ [23] In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.”
46. This Court takes the view is that there was/is tangible proof of employment and income. The Plaintiff proved the claim on a balance of probabilities which extends to the deceased’s pay. The Letter from Komesha Photo Studio though not a payslip was not challenged as forged or fraudulently misrepresenting the deceased’s employment and earnings. The deceased had a wife and two children as shown by the birth certificate hence it would be expected that the deceased had to take care of them by earning an income.
47. 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. The court notes the deceased was a professional Machine Technician as described by a letter from Komesha Photo Studio, the Court finds the letter was sufficient in the circumstances. The deceased was therefore not an unskilled worker for the Minimum wage to apply.
48. In the case of *Jackline Myeni Nzioka .v. Jetha Ramji Kera, NRB C.A. 154 & 155 of 1966 (UR)*, it was held that dependency is a question of fact. The Plaintiff produced birth certificates exhibit 6a and 6b of the 2 children of the deceased and she was/is wife/widow of the deceased. The Respondent evidence on dependency remains uncontroverted.
49. The Court upholds the Trial Court’s finding on loss of dependency that the figure of Ksh 21,000/- is applicable as the deceased’s earnings and the ration of 2/3 is not in dispute. The deceased was aged 41 years and could have lived well beyond 60 years and taking into account the vicissitudes of life a



multiplier of 14 years was/is reasonable. The court will not disturb the ratio. The amount of Ksh 2,352,000/- is upheld.

Whether the trial court erred by failing to deduct the award of Kshs.100, 000/- under loss of expectation from the award under the Fatal Accident Act (Loss of dependency).

50. The award under the Law Reform Act comprises of the award for pain and suffering and loss of expectation of life. The trial magistrate awarded Kshs.100, 000/- as damages for loss of expectation of life.
51. The Appellants submitted that the awards ought to have been deducted from the award under the Fatal Accident Act (Loss of dependency) to avoid a possibility of double compensation.
52. Was the award supposed to be deducted? I find the position has been 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 the court 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:-

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

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

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damage.... there is no compulsion in law to make the deduction.”

53. The court is fortified by the decision of Majanja J. in *Richard Matheka Musyoka & another vs. Susan Aoko & another (suing s the administrators ad litem of Joseph Onyango Owiti (Deceased) [2016] eKLR* where the learned Judge guided by the Court of Appeal decision in *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited (supra)* held at paragraph 10 and 20 that:-

“10. The principal does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act hence the issue of duplication does not arise regarding that aspect of the award.”

“20. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased’s estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of



duplication does not arise.” See *Meoli J. in Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) (supra)*.

54. The court finds the Appellant’s argument misconceived. The failure to deduct the award was not error in law. The ground fails.

55. The Appellants have not submitted on the award for pain and suffering of Kshs. 150,000/- despite raising a ground of appeal on it hence the ground fails.

Whether the Respondent proved his claim of special damages.

56. The Appellants submitted that the receipts produced did not comply with the [Stamp Duty Act](#) hence the award of damages ought to have failed. The court notes that the Appellants did not cite the relevant provision of the law under the Act yet it is trite that whoever alleges must prove as per Section 107 of the Evidence Act. The Court’s view is that the Respondent was not the author of the receipts, hence it was the duty of the Appellants to call for cross-examination of the maker. In any case the court finds that their admissibility was not challenged before the Trial Court. (*Benjamin Muela Kimono vs. Daniel Kipkirong Tarus & Another, (2015) eKLR* guided by *Benedetta Wanjiku Kimani vs. Chanaw Cheboi & Another, HCCC No 373 of 2008* and *Irene Ngombo Mshingo V Miriam Kadogo, [2000] KLR*). The bundle of receipts were produced as exhibit 7 without any objection from the Appellants advocate.

57. The Appellants contend that the Trial Magistrate unreasonably without any justification awarded Kshs.75, 000/- since the same was not strictly proved by production of original receipts. The Trial Court file has the original receipts. In any case, Section 69 of the Evidence Act; allows production of photocopies in Court. Similarly, the argument fails for the reason that the Appellants advocate did not cross-examine and/or raise objection to the production of the receipts as exhibits.

58. The Court notes at page 5 of the Trial Magistrate’s judgment, the Trial Magistrate was of the view that the Respondent was dependent on her husband for upkeep and the fact that the deceased was earning Kshs. 21,000/- per month, then it was unreasonable to incur such a huge bill for funeral expenses.

59. In support of the cross appeal, the Respondent contends that Kshs.400, 000/- was pleaded and strictly proved. The Respondent faults the Trial Magistrate for awarding Kshs.75, 000/- when the receipts were not challenged during the trial. The particulars pleaded in the Complaint were; Costs of obtaining Limited Grant Kshs. 50,000/- and Funeral related expenses of Kshs.350, 000/-

60. Indeed, Bowen LJ’s judgment at 532-533 in *Ratcliffe v Evans [1892] QB 524*, an English leading case of pleading and proof of damage.

“The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry.”

61. It is trite that special damages must not only be specifically pleaded but must be strictly proved. Court of Appeal in *Tracom Limited & another vs. Hassan Mohamed Adan [2009] eKLR*.

62. The Trial Magistrate considered the Deceased’s family position at the time and that it was unreasonable to incur huge expenses not directly related to the burial of the deceased. This Court has perused the receipts as follows;



- a. Montezuma Funeral home Ltd Ksh 50,000/-
 - b. Montezuma Ksh 50,000/-
 - c. Montezuma Ksh 5,000/-
 - d. Transport Ksh 22,500/-
 - e. Printing Ksh 18,000/-
 - f. Tents Ksh 1800/-
 - g. Motor Vehicle Ksh 500/-
 - h. Food & Refreshments Ksh 200,000/-
63. The court notes that the receipts were produced as a bundle. The particulars show ‘funeral related expenses’. It therefore calls for the court to scrutinize the receipts tendered in court. In his evidence, the Respondent stated that the receipts amounted to Kshs. 399,340.
64. In *Jacob Ayiga Maruja & another vs. Simeon Obayo (supra)* 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. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on...”
65. Upon perusal of the trial court file, the court was able to compute the total funeral expenses from the original receipts which amounted to Kshs. 338,300/-. A receipt of Kshs.500 to obtain search for the suit motor vehicle was produced as exhibit hence awardable.
66. The court notes that Kshs. 50,000/- was a cost deposited into the Client’s account to obtain a limited grant in court. The court’s view is that it is a cost to be assessed by the trial court under Schedule 7 of the Advocates Remuneration Order, 2014 hence not awardable by this court.
67. Based on the receipts available, the court finds the receipts tendered in court amount to Kshs. 338,800/-.
- DISPOSITION
68. Accordingly, the award that ought to have been made to the Respondent was as hereunder :-
- (a) Pain and Suffering Kshs. 150,000/-
 - (b) Loss of expectation of life Kshs. 100,000/-
 - (c) Loss of dependency Kshs 2,352,000/-
 - (d) Special damages Kshs. 338,800/-
Kshs. 2,940,800/-
69. The appeal is dismissed and the cross-appeal has succeeded in full. In the premises, the court will award half of the costs of the cross appeal to the Respondent. The Appellants will pay full costs of the Trial Court.
70. The general damages shall attract interest at court rates from the date of judgment of the lower court while special damage will attract interest from the date of filling the suit.



Judgment accordingly.

DELIVERED, DATED AND SIGNED AT MACHAKOS VIRTUALLY THIS 22nd DAY OF NOVEMBER 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

No appearance - for the Appellant

Ken Oguya for the Respondents

Geoffrey- Court Assistant

