REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. 1 OF 2019

ACCELER GLOBAL LOGISTICS.....APPELLANT

VERSUS

GLADYS NASAMBU WASWA & CHRISTOPHER OBEDI HANNA (Suing as the administrators

and legal representatives of the estate of **AGRIPA MELISE WILLIEM.....RESPONDENTS**

(Appeal from the Judgment and decree of Hon. Mr. Ndungi, delivered on 19th December 2018 in Mariakani SPM No. 604 of 2016)

JUDGMENT

Introduction

1. This appeal challenges the judgment rendered by the learned Senior Principal Magistrate in SPMCC No. 604 of 2016 at Mariakani. In the said case, the learned Magistrate entered judgment on liability in favour of the Respondent against the appellant on 100% basis and awarded damages as follows:-

a. Pain and suffering……..Ksh. 50,000/=

b. Loss of expectation of life……..Ksh. 170,000/=

c. Loss of dependency……Ksh. 2,129,184/=

d. Special damages..……Ksh. 61,850/=

e. Loss of consortium……..Ksh. 150,000/=

Total …… ***Ksh. 2,561,034/=***

The Duty of a first appellate court

2. A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in *Selle & another –vs- Associated Motor Boat Co. Ltd.& others*[1] as follows:-

> "… Briefly… this court must reconsider the evidence, evaluate it itself and draw its own conclusions though 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, this 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."

3. The Court of Appeal for East Africa in *Peters v Sunday Post Limited*[2] stated as follows:-

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

4. A first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.[3]

5. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust.[4] The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section **78** of Civil Procedure Act,[5] a court of first appeal can appreciate the entire evidence and come to a different conclusion.

The pleadings

6. The Respondents, as the legal representatives of the estate of the late Agripa Melie Willelim (deceased) sued the appellant in the lower court seeking recovery of damages under the Fatal Accidents Act[6] and the Law Reform Act.[7] They also sought special damages, costs of the suit and interests. The first Respondent also claimed damages for loss of consortium.

7. The deceased died on the spot on 13th February 2016 as a result of injuries sustained in a road traffic along Mombasa-Nairobi Road. He was a lawful passenger in motor vehicle KCC 135R which collided with the appellant's motor vehicle KBP 476 A. The Respondents blamed the accident on the negligence of appellant's driver.

8. In its statement of defence, the appellant denied the occurrence of the accident and/or the alleged negligence. It denied the injuries and the alleged loss. In the alternative, it averred the accident was caused by the negligence of the owner of the motor vehicle KCC 135R.

The evidence

9. The Respondents case stood on the testimony of three witnesses. Namely, a one Jackson Musera, the Deputy in charge of Traffic, Mariakani. He testified that a fatal road accident occurred on 13th February 206 at Bonje along Nairobi-Mombasa Road involving motor vehicle KBP 476 A/Trailer ZC 2679 driven by a one Bernard Wambua Kuu and KCC 135 R driven by Benson Mwanza Munguti. He testified that the semi-trailer lost control, veered to the other lane and crushed KCC 135 R, killing 8 passengers among them the deceased. He testified that Bernard Wambua Kuu was to blame for the accident and that he was charged with a traffic offence in Mariakani Traffic Case No. 306 of 2016. He produced the police abstract report in court. On cross-examination he said that he took over the file from the investigating officer who had since left the station. He showed a sketch plan of the accident scene to the court and stated that motor vehicle KBP 476A veered off the road.

10. The second to testify was the first Respondent Gladys Nasambu Waswa, the deceased widow. She testified that she sued the appellant as a result of her husband's death. She produced a copy of the death certificate and stated that the deceased was aged 41 years and that he died on the spot. She stated that it's the trailer that left its lane and caused the accident. It was her testimony that she paid Ksh. 1,150/= to obtain Grant of letters of Administration, that they spent Ksh. 14,900/= on mortuary expenses, Ksh. 15,000/= for the coffin and transport costed Ksh. 30,000/=. She also stated that she paid Ksh. 500/= for the search of the vehicle, totalling to Ksh. 61,550/=. In addition, she stated that she paid d Ksh. 15,000/= to her advocate to obtain the grant of letters of administration.

11. She testified that the deceased as working as a driver earning Ksh. 25,000/= per month, and that he used to support the family and his mother. She gave her age as 38 years and stated that she lost consortium as a result of her husband's death. She also said after his death they were forced to move out of the rented house which the deceased used to pay Ksh, 5000/= per month. She said life after his death became miserable life. She was recalled later and produced the Post Mortem report.

12. The defence did not call any witnesses.

The judgment

13. In his judgment, the learned Magistrate found that the Respondent was 100% to blame for the accident. On damages for pain and suffering, the learned Magistrate noted that the deceased died at the scene and awarded Ksh. 50,000/= The learned Magistrate cited Kenya *Ports Authority v Beryl Malowa*,[8] *James Gakinya Karience & Another v Perminus Kariuki Githinji*[9] and *David Njunge Mwangi v The Chairman of the BOG Njiri High School*[10] in support of his finding.

14. On loss of life expectation, the learned Magistrate noted that the deceased was aged 42 years. He awarded Ksh. 170,000/= on this head and placed reliance on *Kenya Ports Authority v Beryl Malowa* (supra) in which the court awarded Ksh. 150,000/= under the same head where the deceased was aged 28 years.

16. On loss of dependency, the learned Magistrate applied the minimum wage of Ksh. 14,786/= and adopted a multiplicand of Ksh. 18 years and a dependency ratio of 2/3. He arrived at an award of Ksh. 2,129,184/=. He awarded proved special damages of Ksh. 61,850/=.

16. Lastly, on loss of consortium, the learned Magistrate observed that the deceased's wife was aged 34 years. He noted lack of uniformity in high court decisions on the subject and cited *William Wambua Ngunda v Annwe Wangui Mwicharo*[11] in which the court awarded Ksh. 90,000/= under a similar head. He also cited *Innocent Katie Makaya v Peter Kipkore Cheserek & Another*[12] in which the High Court at Eldoret declined to award damages under the said head citing lack of law on the subject. The learned Magistrate awarded Ksh. 150,000/= under the said head which he considered to be fair and just.

The appeal

17. The appellant's seek to overturn the said judgment citing the following grounds:-

a. That the learned trial court erred in law and in fact in the assessment of damages awardable to the respondent leading to excessive amounts contrary to the well-established principles of law.

b. That learned Magistrate erred in law and fact in making an award of Ksh. 50,000/= for pain and suffering when the deceased died on the spot and there was therefore no basis for an award for pain and suffering.

c. The learned Magistrate erred in law and fact in making an award of Ksh. 170,000/= for loss of expectation of life. The Magistrate failed to appreciate the uncertainties of life when awarding under the head of loss of expectation of life.

d. The learned trial Magistrate erred in law and fact in awarding the plaintiffs Ksh. 150,000/= as damages for loss of consortium when loss of consortium is not among the general damages awardable under the Law Reform Act and the Fatal Accidents Act.

e. The learned trial Magistrate erred in law and fact in failing to discount the multiplier under loss of dependency. The Magistrate failed to appreciate the vagaries, vicissitudes and contingencies of life when awarding under the head loss of dependency.

f. The learned trial Magistrate erred in law and in fact in ignoring the weight of the evidence consequently arriving at the wrong decision.

18. The appellant prays that:-

a. That the appeal be allowed.

b. That judgment of 19th December 2018 be set aside and be substituted with an order that the Respondents/plaintiffs case be dismissed with costs.

c. The costs of the appeal be awarded to the appellant.

Determination

19. My reading of the grounds of appeal and the appellants advocates submissions leaves me with no doubt that the appellant is not challenging the Magistrate's finding on liability. However, it is within the ambit of section 78 of the Civil Procedure Act[13] for this court to examine the evidence tendered on liability and satisfy itself whether the learned Magistrates finding of liability are supported by the evidence.

20. It is trite that the onus rests on the plaintiff to prove the defendant's negligence on a balance of probabilities. In order to avoid liability the defendant must produce evidence to disprove the inference of negligence on his part, failing which he/she risks the possibility of being found to be liable for damages suffered by the plaintiff. Where the defendant pleads negligence or contributory negligence or an apportionment, the plaintiff would have to adduce evidence to establish negligence on the part of the defendant on a balance of probabilities.

21. The appellant opted not to adduce evidence at all. However, the appellant's counsel cross-examined the Respondent and her witness. Thus, the only evidence on record is the evidence tendered by the Respondent and his witnesses. In *Interchemie EA Limited v. Nakuru Veterinary Centre Limited*[14] it was held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. In *Jamlik Muchangi Miano v AG*[15] the court made a similar finding.

22. Perhaps I should add that where a party fails to call evidence in support of his case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate his pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against the defence is uncontroverted and therefore unchallenged.[16]

23. The appellant's counsel participated in the pleadings and cross-examined the Respondent and her witnesses. The purpose of cross-examination is three-fold: - (a) *To elicit evidence in support of a party's case;* (b) To *cast doubts on, or undermine the witness's evidence to weaken the opponent's case; and to undermine the witness's credibility*; (c) To lay out a party's case and challenge disputed evidence. However, once a party cross-examines an opponent's witness, he can only rebut the issues raised during cross-examination by calling witnesses. Hence, failure to call witness left the Respondent's evidence on liability unchallenged. It follows that the as far as liability is concerned, the evidence on record remains uncontroverted.

24. However, it will help to state the legal test of causation is indeed the *litmus* test on which the conduct, or omission, of the defendant must be judged. The following passage is useful:-[17]

> "The criterion applied by the court a quo for determining factual causation was the well-known but- for test as formulated, eg by Corbett CJ…What it essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensured. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty."

25. An assessment of probabilities is not possible without analysing the facts of the case which are contained in oral and documentary evidence. A court of law can only weigh up the proved facts without concerning itself with speculating on evidence that was never adduced, or which does not follow by reasonable inference from the proved facts. Inference, it was observed by Lord Wright in *Caswell v Powell Duffryn Associated Collieries Ltd* [18] must be carefully distinguished from conjecture or speculation:-

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjucture."

26. In the application of the but-for test in cases involving proof of negligent omissions, the substitution exercise is used in terms of which enquiry is conducted merely by mentally eliminating the unlawful conduct of the defendant and asking whether, the remaining circumstances being the same, the event causing harm to the plaintiff would have occurred or not. If it would, then the unlawful conduct of the defendant was not a cause in fact of this event; but if it would not have so occurred, then it may be taken that the defendant's unlawful act was such a cause.

27. The Respondent's evidence was that the trailer lost control and left its lane and it hit the vehicle the deceased was travelling in killing 8 passengers among them the deceased. The trial Magistrate had to weigh the believability of this allegation against all the evidence tendered. The appellant had a duty to rebut the said allegations by tendering evidence to the contrary. The appellant never adduced evidence. Tortuous liability arises from the breach of a duty primarily fixed by the law; such duty is towards persons generally and its breach is redress-able by an action for un-liquidated damages."[19] In *Halsbury's Laws of England*[20] it is stated as follows:-

> "The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which the breach of duty a casual connection must be established."

28. Thus, it is essential that a plaintiff proves that a defendant was negligent or guilty of an omission as a result of which the injury arose. The appellant's witness (the police) blamed the appellant's driver for the accident. This evidence was not rebutted. I find no reason to fault the trial Magistrate for findings on liability. I find that the trial Magistrate did not error or misdirect himself in finding that liability was proved at 100%.

29. I now address the question of damages. The law on circumstances under which an appellate court would interfere with an award of damages is settled. An appellate court will not interfere with an award of general damages by a trial court unless the trial court acted under a mistake of law, or, where the trial court acted in disregard of principles, or, where the trial court took into account irrelevant matters or failed to take into account relevant matters, or, where the trial court acted under a misapprehension of facts, or, where injustice would result if the Appellate court does not interfere; and, where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage.[21]

30. Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the prevailing economic environment. The Court of Appeal in *Kivati -vs- Coastal Bottlers Ltd*[22] in the following words:-

> "The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."

31. In *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates*[23] stated as follows:-

> "We agree that this court will not ordinary interfere with the findings of a trial judge on an award of damages merely because this court may take the view that had it tried the case it would have awarded higher or lower damages different from the award of the trial judge. To so interfere this court must be persuaded that the trial judge acted on wrong principles of law or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled."

32.Turning to the grounds of appeal, the appellant's counsel submitted that the learned Magistrate in awarding the damages proceeded on the wrong principle leading to inordinately high and erroneous estimate of damages.

33. On the damages awarded for pain and suffering, the appellant's counsel submitted that the contention that the deceased died while undergoing treatment is unsupported by evidence. He referred to *James Gakinya Kierienye & Another v Perminus Kariuki Githinji*[24] and *Catherine Mwendwa Mwirigi v Lucy Nkoyai Karwamba*.[25] In both cases the deceased died on the sport and the courts awarded Ksh. 10,000/=.

34. The Respondents counsel did not address this particular award, but he submitted that an appellate court cannot interfere with the decision of the trial court unless it is shown that the judge proceeded on the wrong principle of law and arrived at a misconceived estimate.

35. Contrary to the submission by the appellant's counsel that the deceased died in hospital, the learned Magistrate was very clear in his judgment that the deceased died on the spot and awarded Ksh. 50,000/= under this head.

36. It is settled law that the personal representative of a deceased person can recover damages that the deceased could have recovered had he survived and which were a liability on the wrong doer at the date of death. This was enunciated in the celebrated decision of Lord Green in *Rose v Ford*.[26]

37. It is not in dispute that the deceased sustained serious injuries and that the deceased died on the spot. This raises a fundamental question of what each unit of pain and suffering is worth. This question has in my view been authoritatively discussed in an article in the *International Review of Law and Economics**[27]*** entitled *"Pain and Suffering in Product Liability Cases: Systematic Compensation Or Capricious Awards"* by W. Kip Viscussi who argues that:-

> *"Pain and suffering is generally recognized as being legitimate component of compensation but one for which we have no accepted procedure of measurement....Pain and suffering is by no means a negligible component of awards....The general implication is that pain and suffering awards are not entirely random or capricious."*

38. The position laid down in *Rose vs Ford**[28]*** is that where the period of suffering is short, only nominal damages are awarded. That was in 1935 and 500 pounds was awarded for a two days suffering. I am persuaded that the amount of Ksh. 50,000/= awarded under the said head is not in my view excessive nor has it been shown to be erroneous or unreasonable. I find no reason to fault the award under this head.

39. As for loss of life expectation, the applicant's counsel cited *Wesley Kipyegon Mutai v Kipkelion Town Council & Another*[29] in which the plaintiff aged 40 years was awarded Ksh. 70,000/= under the said head and *Moses Muirua Muchiri v Cyrus Maina Macharia*[30] in which the deceased was aged 30 years and the court awarded Ksh. 80,000/=. Counsel invited the court to award Ksh. 70,000/= under this head.

40. The Respondent's counsel cited *West Kenya Sugar Co Ltd v Philip Sumba Julaya*[31] in which the judge citing authorities awarded Ksh. 200,000/= under this age. (However, counsel did not disclose the age of deceased in the said case).

41. Regarding for loss of life expectation, my review of authorities shows that the first time an award of Ksh. 100,000/= was made by Kenyan courts was by Justice Apaloo, then a Judge of the Court of Appeal in 1986. A review of subsequent decisions show that many years later our courts continued awarding the said sum describing it as the conventional sum. In my view, time has come for our courts to consider inflation and adjust damages under the said head upwards. The learned magistrate awarded Ksh. 170,000/= under the said head. I find no reason to fault the said award. It is not excessive nor is it inordinately low.

42. On loss of dependency, the appellants counsel relied on *Kimunya Abednego alias Munyao v Zipporah S Musyoka & Another*[32] in which the court appreciated that the preponderances of life cannot be denied. In addition, counsel cited *Florence Ngina Nyalando Achacha & Another v Daniel Munyua Njathii* where the deceased was aged 41 years and the court adopted a multiplier of 16 years. Counsel argued that the trial court erred in using a dependency ratio of 2/3 and argued that a ratio of 1/3 would have been adequate. He placed reliance on *Benedeta Wanjiku Kimani v Changwon Cheboi & Abo*[33] where the high court observed that there is no rule of law that two thirds of a person is taken as available for family expenses and that the extent of dependency is a question of fact to be established in each case. He suggested a multiplier of 16 years and a ratio of 1/3 but applied the same income of Ksh. 14,785.70 and arrived at a sum of Ksh. 946,284/=.

43. The Respondent's counsel urged the court to uphold the amount awarded by the trial court.

44. The most important group of torts in practice is that dealing with personal injuries, especially the tort 'Negligence.' In the Ghanian case of *Mensah v. Amakom Sawmill*[34] Apaloo, J did express how difficult the subject of assessment of damages was and turned to the judgment of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Limited*[35] for support. This case is regarded as the pointer to the practical way in which assessment of damages should be ascertained. Lord Wright said:-

> "There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a 'datum' or 'basic' figure which will generally be turned into a lump sum by taking a certain 'number of years purchase'. That sum, however, has to be tasked down by having due regard to the uncertainties..."

45. Some of the uncertainties or questions asked are:-

> *i. How long would the deceased have continued to live if he had not met this particular accident?*
>
> ii. How much working life did he have? This second question brings into focus the deceased's state of health and age.
>
> iii. Some of the uncertainties taken into account in rolling down the amount are:- the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiffs are young widows, the possibility of re-marriage in the shortest possible time.**[36]**

46. Lord Wrights rule, which was applied by other decided cases, was admirably summarized in *Charlesworth on Negligence*[37] as follows:-

> "***Method of calculating damages:*** When the income of the deceased is derived from his own earnings, 'it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.' The manner of arriving at the damages is; **(a)** to ascertain the net income of the deceased available for the support of himself and his dependants; (**b) (i)** to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or **(ii)** what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants, and then; **(c)** to capitalize the difference between the sums **(a)** and **(b) (i)** or **(b) (ii)** (sometimes called the 'lump sum' or the 'basic figure') by multiplying it by a figure representing the proper 'number of years' purchase arrived at having regard to the deceased's expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependants and the probable duration of the continuance of the deceased's assistance to the dependants during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependants in consequence of the death." (Emphasis added)

47. I find wisdom in the words of Holroyd Pearce, L.J. who said: - *"since the question is one of actual material loss, some arithmetical calculations are necessarily involved in the assessment of the injury."* He was however, of the view that arithmetical calculations do not provide a substitute for common sense.[38]

48. As to whether the court erred is arriving at a dependency ratio of 2/3, I take the view that dependency is fact which has to be established in evidence. In *Beatrice Wangui Thairu vs. Hon. Ezekiel Barng'etuny & Another**[39]***which was relied in *Rev. Fr. Leonard O. Ekisa & Another vs. Major Birgen*,[40] Ringera J said *inter alia*:-

> "... there is no rule of law that two thirds 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…"

49. Guided by the above decisions, I find no basis to fault the ratio of 2/3 adopted by the magistrate which is commonly adopted where the deceased was married as in the present case. In fact, a review of decided cases show that the 1/3 ratio is applied where the deceased was unmarried, but where the deceased had a family, it is reasonable and a matter of common sense that the dependency is higher. I find no basis to fault the learned Magistrate for applying a dependency ratio of 2/3 for the deceased who left behind a family.

50. On the issue of the question of the multiplier, I find guidance in the case of in *Hannah Wangaturi Moche & Another vs. Nelson Muya**[41]***where it was held as follows:-

> "In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum"

51. The deceased was been aged 41 years at the time of his death. He was a driver. While the retirement age for in public service is 60 years, as a driver, the deceased could have worked longer as long as his health permitted. Taking into account the uncertainties of life as enumerated in the above authorities, I conclude that a multiplier of 18 years adopted by the Magistrate is not unreasonable. At 41 years, the 18 years applied by the Magistrate mean that the deceased could have worked up to the age of 59 years, which is below the retirement age in the public service. As for the monthly income, the parties are in agreement on the minimum wage adopted by the court. It follows that under the head under consideration, I find no basis to fault the learned Magistrates findings.

52. Counsel for the appellant urged the court to find that by awarding damages under both the Law Reform Act[42] and the Fatal Accidents Act[43]the awards were duplicated. P. S. Atiyah on Accidents Compensation and the Law[44] states that:-

> "*... hard reality enters this extraordinary legal stage, the law will not allow double recovery. In practice, this* means the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from an award under the Fatal Accidents Act on the legal justification on pretext that the inheritance is a "gain" from the death which must be set off against the loss."

53. The Court of Appeal decision in *Kemfro vs. A. M. Lubia and Olive Lubia* **[45]**where that court inter alia said –

> ".. the net benefit will be inherited by the same Dependents under the Law Reform Act and that must be taken into account in the damages awarded under the Fatal Accidents Act because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act."

54. The court also proceeded to add –

> "This is so despite the provisions of 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 dependents 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."

55. The relevant and corresponding provision in our law is Section 2(5) of the Law Reform Act[46] which reiterates the provision in the following word: -

> "(5) the right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom."

56. Discussing the above provisions, Anyara Emukule J in *Benedeta Wanjiku Kimani v Changwon Cheboi & another**[47]* had this to say:-

> "In common law jurisprudence of which Kenya is part, the courts have evolved two principles, **loss of expectation of life and pain and suffering** by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering ….The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident… It is of course correct both awards for loss of expectation of life and for pain and suffering go to the benefit of the deceased's estate. These awards are therefore capped to a minimum, so that the estate does not benefit twice from the same death – under the Fatal Accidents Act and the Law Reform Act. Hence the greatest benefit is under the loss of dependency under the Fatal Accidents Act as already calculated above."

57. I am fully aware of numerous authorities where damages have been deducted to avoid double compensation but little has been stated about the true meaning and interpretation of Section 2 (5) of the Law Reform Act.[48] My natural and logical interpretation and understanding of Section 2 (5) of the Law Reform Act[49] is that the right conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on dependents by the Fatal Accidents Act.[50] I am fortified in my finding by the reasoning of in *Richard Omeyo Omino vs Christine A. Onyango*[51]where the learned judge discussing the provisions of Section 2 (5) of the Law Reform Act[52] had this to say:-

> "The Law Reform Act**[53]** Section 2 (5) provides that the rights conferred by or under the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act.**[54]** This therefore means that a party entitled to sue under the Fatal Accidents Act**[55]** still has the right to sue under the Law Reform Act**[56]** in respect of the same death.
>
> The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the Fatal Accidents Act**[57]** are "taken into account". This section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, **[58]** the trial judge bore in mind or considered what he had awarded under the Law Reform Act**[59]** for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

58. I stand guided by the above reasoning and interpretation of section 2 (5) of the Fatal Accident Act.[60] I am unable to fault the learned Magistrates award under the two heads. In addition, I find nothing to show that the award under these two heads is inordinately high, or is inordinately low, nor has it been shown that the award is based on wrong factors nor has it been demonstrated that the award is founded on wrong principles of law.

59. Lastly, for loss of consortium, the appellant's counsel submitted that the award is not provided for under the Fatal Accidents Act[61] and the Law Reform Act.[62] He relied on *Chege Kimotho & Others v Maria Vesters & another*[63] in which the Court of Appeal held that this claim can only be made by a spouse of a person who has suffered personal injuries which have affected his abilities to provide consortium. Counsel also relied on *Jeremiah Njuguna & Another v Anagleta J. Yator & Eldel J. Biwott*[64]in which the court opined that there is no law for award of damages to the spouse of a deceased person for loss of consortium, and that the Fatal Accidents Act[65] and the Law Reform Act[66] only recognize award of damages under three heads, namely, pain and suffering, loss of expectation of life and loss of dependency.

60. Counsel also relied on *Innocent Ketie Makaya Denge v Peter Kipkore Cheswerek & Another*[67] in which the court held that loss of consortium can only be subsumed in a claim for loss of amenities in an action instituted by a survivor of an accident in which it is claimed that owing to the injuries sustained in the accident in question, the plaintiff was incapable of enjoying consortium with his/her spouse and that his quality of life has as a result has been diminished.

61. The Respondent's counsel cited *FMM& FKS v Joseph Njuguna Kuria & Moses Gathogo Nungu*[68] cited in *Salvador De Lucia v Abdullahi Hamed & Another*[69] in which the court awarded Ksh. 70,000/= under the said head.

62. The right of one spouse to the society or services of the other spouse is generally referred to as the right of consortium – or, more accurately, *consortium et servitium*. It would be difficult to explain it more clearly than was done by a Canadian judge in the following words:-

> "The term 'consortium' is not susceptible of precise or complete definition but, broadly speaking, companionship, love, affection, comfort, mutual services, sexual intercourse – all belonging to the marriage state – taken together make up what we refer to as consortium."**[70]**

63. Any tortious act committed against one spouse that results in a deprivation of consortium may be actionable by the spouse who has suffered the deprivation. The law relating to the tortious interference with marital consortium is a matter of considerable uncertainty in a number of important respects. The extent of recovery is a matter of uncertainty.

64. When a person has, both intentionally or by neglect inflicted physical harm on a married person and thereby deprived the spouse of that married person of the society and comfort of that married person, the person who inflicted the physical harm is liable in an action for

damages by the spouse or in respect of the deprivation. The right of a spouse to bring the action is in addition to, and independent of, any right of action that the married person has, or any action that the spouse in the name of the married person has, for injury inflicted on the married person.

65. The law as I understand it is that when a spouse is injured to an extent that he cannot provide consortium to his spouse, either temporarily or permanently during the rest of his/her life, then the spouse of the injured person can sue and recover damages for loss of consortium. But this is not indefinite. In the event of death, then this claim is unavailable. This issue has been judicially considered several times in Alberta and by the Supreme Court of Canada. In *O'Hara v. Belanger**[71]* the court ruled that there is no award for **loss** of **consortium** in fatal accident cases **except for the period between the injury and death of spouse**. In other words, the time when the injured spouse was or is indeed alive. There is, therefore no "future" loss of consortium that is compensable. To me this statement represents the correct position of the law. In this regard, the deceased died on the spot. Had he survived the acceded and succumbed after sometime, then the award under this head would be available to the first Respondent. It follows that the learned Magistrate misdirected himself in making an award under the claim for loss of consortium in the circumstances of this case.

66. My reading is that the award on special damages is not challenged.

Final Orders

67. In view of my findings herein above, I find and hold that this appeal succeeds partially, to the extent explained above. The upshot is that the lower courts judgment is substituted with an order of this court as follows:-

a. That judgment be and is hereby entered in favour of the Respondents against the appellant on liability on 100% basis.

b. Judgment on damages be and is hereby entered in favour of the Respondents against the appellant as follows:-

i. Pain and suffering……Ksh. 50,0000/=

ii. Loss of life expectation……Ksh. 170,000/=

iii. Loss of dependency……..Ksh. 2,129,184/=

iv. Special damages……Ksh. 61, 850/=

*Total……**Ksh.2,411,034/=***

c. The above sums shall attract interests at court rates as awarded in the lower court.

d. Each party shall bear his/her/its respective costs for this appeal

Orders accordingly

Signed and Dated at **Nairobi** this **10th** day of **January** 2020

John M. Mativo

Judge

Dated, Signed and Delivered at Malindi this 23rd day of January 2020

Reuben Nyakundi

Judge

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[1] {1968} EA 123.

[2] {1958} E.A. page 424.

[3] See *Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs* {2001} 3 SCC 179.

[4] See *Kurian Chacko vs. Varkey Ouseph* AIR 1969 Kerala 316.

[5] Cap 21, Laws of Kenya.

[6] Cap 32, Laws of Kenya.

[7] Cap 26, Laws of Kenya.

[8] CA No. 244 of 2011.

[9] {2015} e KLR.

[10] {2001} e KLR.

[11] Mombasa HC CC No. 520 of 1994.

[12] {2015} e KLR.

[13]Cap 21, Laws of Kenya.

[14]{Milimani} Hccc no. 165b of 2000

[15] {2017} e KLR.

[16] *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others* Nairobi (Milimani) HCCS No. 1243 of 2001

[17] *ZA v Smith* 2015 (4) SA 574 (SCA) Brand JA states it as follows at para. [30].

[18] {1939} 3 All ER 722 (HL) at 733,

[19] Winfield, Province of the Law of Tort, Page 32.

[20] 4th Ed at Para 662 (page 476).

[21] The Court of Appeal of Nigeria discussing the same issue in the case of *Dumez (Nig) Ltd v Ogboli* {1972} 3 S.C. Page 196." Per BADA, J.C.A. (P. 28, paras. C-G).

[22] Civil Appeal No. 69 of 1984

[23] Court of Appeal, Kisumu, CA No 84 of 2009, Onyango Otieno, Azangalala & Kantai JJA

[24] {2015} e KLR.

[25] {2019} e KLR.

[26] {1935} 1 KB 99.

[27] {1988}, 8 (203-220}.

[28] Supra

[29]{2016} e KLR.

[30]{2016} e KLR.

[31] HCCA No. 7 of 2017, Kakamega.

[32] {2019} e KLR.

[33] {2013} e KLR.

[34] [1962] 1 GLR, 373,

[35] [1942] 1 All ER 657.

[36] De Graft Johnson v. Ghana Commercial Bank (Royal Exchange Assurance Ltd 3rdParty) [1977] 1 GLR 179, Edusel, J.

[37] (3rd Edition), pp 560 & 561, para. 909.

[38]See the case of Daniels v. Jones [1961] 1 WLR 1103 @ 1110 – C.A.

[39] *Nairobi HCCC No. 1438 of 1998 unreported.*

[40][2005] e KLR.

[41] *Nairobi HCCC No. 4533/1993.*

[42] Supra

[43] Supra

[44] 2nd edn. at p. 88

[45] {1982-1988} KAR 727.

[46] Supra.

[47] [2013]e KLR.

[48] Supra.

[49] Supra.

[50] Cap 32, Laws of Kenya.

[51] Kisumu Civil Appeal No. 61 of 2007.

[52] Supra.

[53] Ibid.

[54] Supra.

[55] Ibid.

[56] Supra.

[57] Supra.

[58] Ibid.

[59] Supra.

[60] Cap 32, Laws of Kenya.

[61] Cap 32, Laws of Kenya.

[62] Cap 26, Laws of Kenya.

[63] {1988} e KLR.

[64] {2016} e KLR.

[65] Ibid.

[66] Ibid.

[67] {2015} e KLR.

[68] HCCC No. 9 of 2013.

[69] {1994} e KLR.

[70] *Kungl v. Schiefer* (1960) 25 D.L.R. (2d) 344 per Schroeder J.A.

[71] {1989} 69 Alta. L.R. (2d) 158(Alta. Q.B.).