REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KABARNET

CIVIL APPEAL NO. 04 OF 2015

NYOTA TISSUE PRODUCTS.....APPELLANT

=VERSUS=

BENJAMIN OBONYO MUKATI (Suing as the Legal Representative

of the Estate of Edwin Mukati - Deceased).....1ST RESPONDENT

THE BOARD OF GOVERNORS NAMBALE SECONDARY....2ND RESPONDENT

NAMBALE SECONDARY SCHOOL.....3RD RESPONDENT

PASCAL DINDI OMUSA.....4TH RESPONDENT

LYDIA GATURUHU….....5TH RESPONDENT

[Being an appeal from the Judgment of the Principal Magistrate's Court at Eldama Ravine CMCC. No. 75 of 2013 delivered on the 3rd day of November, 2013 by Hon. R. Yator, RM]

JUDGMENT

Introduction

1. This is an appeal from the trial court's determination on quantum in the suit for damages for personal injury arising from a motor vehicle accident in which the 1st respondent together with others allegedly suffered injuries. The suit was part of a series of suit in which by a test suit on liability the trial court finally determined the issue of liability and the respective quantum in the thirty suits filed against the defendants. The trial court set Liability at 20:80 between the 1-3 defendants (herein 2-4 respondents) and the 4th-5th defendants (herein the 5th Respondent and the Appellant).

2. The background of the appeal is well set out in the submissions of the 2-4 Respondents as follows:

> *8. "The gist of the matter is that this was a road traffic accident which occurred on the 26th April, 2013 along Nakuru-Marigat road near Kimose and involving the **school bus motor vehicle Reg. No. KBG 200C**, that is the School bus owned by the Nambale Secondary School and the **Motor Vehicle Reg. No. KBU 186H** owned by the 5th defendant in the trial court, now the appellant in this appeal.*
>
> *9. In the filings before the court the plaintiff now the 1st respondent blamed the drivers of the two motor vehicles for the accident and the subsequent injuries occasioned, see paragraphs 8, 9 and 10 of the plaint found at page 4 of the record of appeal. In turn the 1st, 2nd and 3rd defendants in the lower court, now the 2nd, 3rd defendants in the lower court, now the 2nd, 3rd and 4th respondents in the appeal in **paragraph 5 of the statement of defence blamed the 4th defendant now the appellant as vicariously liable for the acts of the driver**. That after hearing of the case, that is the test suit being **Eldama Ravine SPMCC No. 22 of 2013**, the learned trial magistrate entered judgment on the 3rd November, 2015. Aggrieved by the judgment the appellant filed an appeal at the High Court and advanced various grounds of Appeal mainly on Liability and Quantum. Before dealing with the memorandum of appeal let us first submit on a burning issue which goes to the root of this appeal. Important to state here and as shown in the filings before during the arguments on the stay of execution application, the 2nd, 3rd and 4th respondents have since settled their share of Liability in full to all the thirty (30) claimants/plaintiffs in the lower court."*

3. The determination on the Liability was set aside and substituted with a 50:50 Liability ratio upon appeal to this court in a related appeal KBT HCCA NO. 27 of 2017 from the test suit aforesaid.

4. In the suit subject of this appeal, the quantum of damages was awarded as follows:

> "*I hereby enter Judgment for the plaintiff in SRMCC 75/2013 as summarized below.*
>
> ***i. Fatal accident Act male minor 18 years old***
>
> *a. Lost years Ksh.4,200,000*
>
> ***(ii) Law Reform Act***
>
> *i. Pain and suffering Ksh.20,000*
>
> *ii. Loss of expectation of life Ksh.100,000*
>
> ***Total Ksh.4,320,000.00***
>
> *iii. Special damages – Nil.*
>
> *iv. Cost plus interest at court rates.***"**

The appeal

5. The Appellant filed a Memorandum of Appeal dated 2nd December 2015 setting out the grounds of appeal as follows:

"<u>MEMORANDUM OF APPEAL</u>

> *The Appellant being dissatisfied with the judgment of Honourable R. Yator Resident Magistrate in ELDAMA RAVINE SPMCC NO.75 OF 2013 delivered on 3rd November, 2015 therein against the Appellant now appeals against the whole Judgment on the following grounds:*
>
> *1. THAT the judgment arrived at by the learned Magistrate was against the weight of evidence by the Investigating Officer.*
>
> *2. THAT the learned Magistrate erred in law and in fact by determining the matter without allowing the Appellants to file their submissions on quantum of damages on matters in this series.*
>
> *3. THAT the learned Magistrate erred in law and in fact by failing to take into account the evidence and the need for submissions on Liability given on behalf of the Appellant while considering her judgment.*
>
> *4. THAT the learned Magistrate erred in law and fact by failing to appreciate the totality of the evidence before her and in not considering the submissions on behalf of the Appellant.*
>
> *5. THAT the learned Magistrate erred in law and in fact by giving an award which is extremely high without regard to decided cases.*
>
> *6. THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellants thus failing to judiciously exercise her discretion.*
>
> *7. THAT the learned Magistrate erred in law and in fact by awarding special damages in the absence of strict proof thereof and proper receipts.*
>
> *8. THAT the learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant and considering extrinsic matters thereby basing her judgment on the same thus failing to judiciously exercise her discretion.*
>
> *REASONS WHEREOF the appellant prays that the appeal be allowed and;*
>
> *a. Judgment entered pursuant thereto be set aside.*
>
> *b. That the appeal be allowed as prayed.*
>
> *c. Costs of this appeal and of the Judgment in the subordinate Court be awarded to the Appellant.*

DATED at Nakuru this 2nd day of DECEMBER 2015.”

Submissions of parties on appeal

6. Counsel for the parties filed respective written submissions on the appellant and judgment was reserved. Principally, the point of contention taken by the appellant was that the trial court had erred in not taking submissions on the quantum of damages leading to its error in awarding an inordinately high amount of damages for the person injury herein. For the respondents, the general defence of non-interference with a trial court's discretion in award of damages was taken and the 2-4 respondents particularly raised an objection as to competency of the appeal in view of failure by appellant to attach a formal decree of the trial court appealed from and to file the memorandum appeal within 30 days of judgment.

Issues for determination

7. From the submissions, two issues arise for determination, namely: (a) whether the appeal is competent; and (b) whether the appellate court will interfere with the award of damages by the trial court.

DETERMINATION

Whether appeal competent

8. As held in related appeal KBT HCCA NO. 02 of 2015, the appellate court "is not hindered by the lack of the formal expression of the decree if the full judgment of the trial court is exhibited in the Record of Appeal, and this is the essence of the Order 42 rule 13 (4) (f) of the Civil Procedure Rules, which requires attachment only of "***judgment, order OR Decree appealed from***" and "rules of procedure must remain the *maidens,* and not *mistresses,* in the administration of justice", and accordingly, court will not consider the striking out of an appeal because of breach of a rule for attachment of the ***decree*** in addition to the **Judgment** of the Court, which is already exhibited in the Record of Appeal.

Failure to attach in the Record of Appeal some pleadings filed before the trial court.

9. There is merit, however, in the objection as to failure of the appellant to attach copies of the Defence by the 1-3 defendants (2-4 respondents herein). The appellate court requires to consider the pleadings of all the parties in the trial court in its determination whether the respective cases of the parties were proved on a balance of probabilities. Hence the requirement under Order 42 Rule 13 (b) of the Civil Procedure Rules that pleadings be attached in the Record of Appeal before the appeal proceeds to hearing. Of course, an appellant or any other party may with leave the court file a supplementary record attaching such document as are omitted. In this case, unlike in the case of omission of filing of the ***Decree*** where the ***Judgment*** is filed as in the related Appeals Nos. 02 of 2015 and 27 of 2017 (the former 03 of 2015), the appellate court would be in the dark as to the pleadings of the particular party before the trial court, and the appeal would be properly struck out for such default. However, for reasons set out below, the appeal on the **merits** is unfounded and is, therefore, ***dismissed*** rather than ***struck out*** for want of attaching in the Record of Appeal some of the pleadings filed before trial court as required by Order 42 Rule 13 (b) of the Civil Procedure Rules.

Delay in filing of the appeal

10. The Memorandum of Appeal herein dated 2/12/2015 was filed in the High Court on 3rd December 2015, hence its registration as **Appeal No. 04 of 2015,** as shown on the date stamping on the Original Memorandum of Appeal, which is within 30 days from the date of judgment, and I do not find that the appeal was filed late in view of the provisions of section 79G of the Civil Procedure Act which provides as follows:

> ***"79G. Time for filing appeals from subordinate courts***
>
> ***Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree*** *or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:*
>
> *Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.*
>
> *[Act No. 10 of 1969, Sch.]"*

11. An Appeal is filed when a **Memorandum of Appeal** is filed in accordance with Order 42 Rule 1 of the Civil Procedure Rules which provides as follows:

> ***"[Order 42, rule 1.] Form of appeal.***
>
> *1. (1) Every appeal to the High Court shall be in the form of a* ***memorandum of appeal*** *signed in the same manner as a pleading.*
>
> *(2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order*

appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

12. It would appear that the 2-4 respondents' objection hereon was based on the date stamping of a copy of the Memorandum of Appeal filed in the lower court file as 12/1/2016, when the Memorandum of Appeal, **which was already filed in the High Court at Kabarnet on 3rd December 2015 as Appeal No. 04 of 2015,** is shown to have been received by the trial court at Eldama Ravine as part of an affidavit in support of a Notice of Motion dated 12th January 2016 for stay of execution pending appeal seeking specific orders as follows:

*"**NOTICE OF MOTION***

*c. THAT this Honourable Court be pleased to stay the execution of the judgment/decree obtained herein pending the hearing and determination of the applicant's appeal **filed at the High Court of Kenya at Kabarnet as Civil Appeal No.02 of 2015, Civil Appeal NO.03 of 2015 and Civil Appeal No.04 of 2015.***

d. THAT this Court be pleased to order stay of execution of the judgment/decree on SPMCC No. 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 44, 45, 46, 47, 48, 50, 51, 52, 53, 54 of 2013."

Clearly, the appeals were filed within the 30 days period allowed under the rules of court and I do not find merit in this objection.

13. Nor do I find merit in the submission that there was no appeal from the determination in this case as the trial judgment was entered in PMCC case no. 22 of 2013 and the Memorandum of Appeal herein made reference to case no. 75 of 2013. The determination form which the appeal herein is preferred was made in reference to the suit no. 75 of 2013 as determination no. 30 in the test suit PMCCC no. 22 of 2013. The appeal is from the decision of the court made with respect to suit no. 75 of 2013 as part of the series in test suit and the reference to suit no 75 of 2013 rather than the test suit no. 22 of 2013 for which a separate appeal had already been filed as Appeal No. 03 of 2015 causes no embarrassment to the respondents as it is clear as to which decision the appeal relates, which is the purpose of a Notice of Appeal and Memorandum of Appeal.

Principles for appellate interference with award of damages

14. The interference of an award of damages by a trial court is justified on the well known principle of inordinately high or low award as to amount to an unreasonable estimate or plain error and misapprehension of evidence in the assessment of damages popularized by ***Bhutt v. Khan*** (19c81) KLR 349 cited in ***Shabani v. City Council of Nairobi*** (1985) KLR 516, 518-9 as follows:

*"The test as to when an appellate Court may interfere with an award of damages was stated by Law JA in **Butt v Khan**, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:*

"An appellate Court will not disturb an award of 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 the misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

See also ***Kemfro Africa Ltd t/a Meru Express Service (1976) & Another v. Lubia & Another*** (1987) KLR 30; (1982-88) 1 KAR 727.

Failure to call for submissions on possible awards of damages

15. The appellant's submissions in this regards were as follows:

5.2.3 Further, the learned magistrate while delivering her judgment, relied on the case of Radhakrishen M. Khemancy vs. Mrs Lachaba Murlidhat (1958) EA. The said case only set out guidelines on what the court should consider in such cases.

5.2.4 The learned magistrate awarded the Respondent Kshs.4,200,000/- as award for lost years, Kshs.20,000 for pain and suffering and Kshs.100,000 for loss of expectation of life. We submit that the judgment falls short of the required procedure as the said judgment fails to set out the points of determination, the decision and the reasons for such decision.

5.2.5 We submit that the learned magistrate did indeed erred in law and in fact by determining a matter without allowing the Appellants to file their submissions. Your lordship, even though awarding of general damages is in the discretion of court, the same has to be done with regard to decided cases. This was not the case herein. It is also our humble submissions that the amount awarded by the learned magistrate was inordinately high and the same should be set aside and substituted with a reasonable amount."

16. In urging the court not to interfere with the award, the 1st respondent made submissions as follows:

*"**THE 1ST RESPONDENTS WRITTEN SUBMISSIONS ON QUANTUM***

The trial magistrate judiciously arrived at the correct judgment in awarding the plaintiff the sum aforesaid and applied the correct principle.

What guides compensation in cases of this nature.

The compensation principle (restitution in integram), that an award for bodily injury is intended to be compensatory in nature and that the plaintiff should receive no more and no less than his actual loss.

Damages to be "fair" compensation.

That the amount payable as compensation to an accident victims should be fair, that the amount is entirely in the discretion of the Trial Courts subject to the supervision by the Superior Courts of Law if unreasonably large or unreasonable inadequate.

What we must interrogate in this appeal is whether the judgment of the learned Trial Magistrate ELDAMA RAVINE SPMCC NO 75 OF 2013 took into consideration these principles. It is our submission that it did contrary to the appellant's assertion.

The deceased at the time of death was aged 18 years in good health and a student at the 3rd respondent school in the computation for lost years. The learned trial magistrate considered a multiplier of 35 years which is reasonable in our view.

She further gave a minimum of Kshs.10,000/= which the deceased may have earned upon maturity which we find reasonable considering that the deceased died before joining the job market thus computing the amount payable for lost years as 35 x 10000 x 12= 4,200,000.

In our view the trial magistrate employed the correct principle of the law to arrive at the figure above and urge your lordship not to disturb it.

As for the award of 20,000/= for pain and suffering the same is also correct in the circumstances since the deceased died on the spot.

Loss of expectation of life awarded at Kshs 100.000/= is also a correct computation taking into account that this is a standard figure awarded under the head. It is therefore our humble submission that the judgment by the trial magistrate met the threshold in claims of this nature and ought not be disturbed."

17. Ï have already dealt with the issue of the ground of appeal that the court failed to take the parties' submissions on quantum in a related appeal **KBT HCCA NO. 02 of 2015** and taken the principled view that while it is desirable that the court takes submissions of the parties on quantum, because the court has discretion in assessing damages to be exercised judicially, that is upon granting parties opportunity to be heard, however, in view of section 79A of the Civil Procedure Act and the principles for appellate interference with trial court's assessment of damages, the appellant could only complain if it could be shown that in defaulting to take submissions the trial court arrived at an amount that was inordinately high or low as to be an erroneous estimate, or failed to take into account certain evidential circumstances, or was plainly wrong on principle.

Judgment of the trial court

18. In its Judgment in this matter, the trial court at paragraph 30 of its award held as follows:

"30. SPMCC No. 75 of 2013 – Benjamin Obonyo

Plaintiff claims for general damages under;

i. Fatal accident Act.

ii. Law Reform Act.

i. Law Reform Act Cap. 26 Laws of Kenya.

a. General damages for pain and suffering.

It is not clear from documents filed whether the deceased died instantly or whether he remained alive for a certain period prior to his death. Noting the conventional sum the High Court has been giving under the law I adopt a sum of Ksh.20,000 as nominal for the award of general damages for pain and suffering.

b. Loss of expectation of life; under this head and guided by High Court decisions I award a sum of Ksh.100,000.

ii. Fatal Accident Act Cap/ 32 Laws of Kenya.

a. Lost years; in assessing lost years, the principles on which damages should be assessed is set out in the case of ***Radhakrishen M. Khemancy Vs. Mrs. Lachaba Murlidhat*** *(1958) EA 268 where it cited the case of Peggy Frances Hayes & Another – Vs- Chunibhai J. Patel & Another (1961) E.A 129, where it observed that the task of the court is to find the age, wages and consider the expectations of the deceased and the properties of the net income the deceased would have made available for his dependents.*

In this particular case, the deceased was aged 18 years. He was presently still under the care of his parents.

Section 4 (1) of the Act outlines who is permitted to benefit from the estate as;

"Every action brought by notice of the provision of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was caused.

The deceased was the son to the plaintiff who is hence entitled to the claim under this head. There was no evidence as to what kind of person deceased may have been inspired to become. I would find that the deceased is entitled to lost years. I find that a multiplier of 35 years would be reasonable. The plaintiff would have worked up to the age of 50 years.

As to the income he may have earned, there was no suggested proof of evidence on this except of the statement that he was a student. I would therefore consider the minimum wage which is not exceeding Ksh.10,000 per month. Therefore lost years are calculated as hereunder;

35 x 10,000 x = 4,200,000/=

iii. Special damages

The plaintiff particularized special damages as follows;

i. Coffin Ksh.7,000

ii. Transport from Nakuru to Busia Ksh.40,000

iii. Food for mourners Ksh.10,000

iv. Filing succession cause Ksh.1,125

The law requires that special damages are pleaded specifically. There are no receipts to proof the said payments and as such I do dismiss each claim made under special damages.

I hereby enter Judgment for the plaintiff in SRMCC 75/2013 as summarized below.

ii. Fatal accident Act male minor 18 years old

b. Lost years Ksh.4,200,000

(ii) Law Reform Act

v. Pain and suffering Ksh.20,000

vi. Loss of expectation of life Ksh.100,000

Total Ksh.4,320,000.00

vii. Special damages – Nil.

viii. Cost plus interest at court rates."

Loss of expectation of life

19. A conventional sum of Ksh.100,000/- is reasonable. As noted in ***McGregor on Damages*** (2003) 17th Ed. para. 35-219/20, the common law position which held damages for loss of expectation of life recoverable as distinct head from the general damages for pain and suffering was superceded by the Administration of Justice Act which abolished the head of damages but the Kenyan position remains the pre statute position where damages for loss of expectation of life are recoverable as a conventional sum:

"In 1934 the Court of appeal in Flint v. Lovell [(1935) 1KB 354, CA,] decided that where the injury to the claimant shortened his expectation of life he was entitled to damages in respect of this shortening, thus establishing a head of damage since known as loss of expectation of life….

The right to claim damages for loss of expectation of life as a separate head of damage was abolished by s. 1(1) (a) of the Administration of Justice Act, 1982. At the same time s.1(1) (b) enacted that where the claimant's life expectation has been reduced by the injuries

"the Court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused by awareness that his expectation of life has been reduced".

The law was thus put back to the healthier position in it was before Flint v Lovell was decided in 1934. The courts are not now restricted to awarding the conventional sum: more or less may be awarded, depending essentially on the circumstances surrounding the particular claimant, such as his attitude to his loss and the number of years of life of which he has been deprived. There seems little doubt that the tendency should go upwards beyond the former conventional sum which by 1985 had risen to 1,750 pounds. "

20. Commenting on the position in England, Kneller, JA in ***Kemfro Africa Ltd t/a "meru Express Services (1976)" & Another v. Lubia & Another (No. 2)*** [1987] KLR 30, 37 said:

"The Law Commission in England proposed that (a) damages for loss of expectation of life should be abolished and (b) there should be no deduction from the damages under the Fatal Accidents Act in respect of benefits received from the deceased's estate. The courts there await any consequent changes that Parliament may make in the law. We have a law Reform Commission in Kenya and it has not made such a recommendation and nor has our parliament changed the law so, in my view, it would not be right for this court to do so."

21. At p. 35, Kneller, JA. explains the reason for conventional sum awards for loss of expectation of life as follows:

"In England, under the Law Reform Act, it is the deceased's own cause which survives for the benefit of his Estate: ***Rose v. Ford****, [1937] AC 826: so the estate should recover the damages the deceased would have recovered but for this death (and the expenses of his funeral). Damages for pain, suffering, loss of amenities and* ***earnings*** *are for the period he survived:* ***Rose v. Ford*** *(ibid): so if death is more or less instantaneous the only damages recoverable will be for the deceased's loss of expectation of life.* ***Yorkshire Electricity Board v. Naylor,*** *[1968] AC 529. What has to be valued is the loss of the victim's prospective happiness which Viscount Simmonds in* ***Benham v. Gambling****, [1941] AC 157 said: "might seem more suitable for discussion in an essay on Aristotelian ethics than in a judgment in a court of law" and because it is unreal arbitrary award it usually is the current conventional sum.* ***Yorkshire Board v. Naylor,*** *[ibid]. It was UK pounds 200 in 1941 and UK pounds 500 in 1968."*

22. As Shown in the decisions of Kenya courts, the conventional sum in Kenya has risen over time from 25,000/- (***Kemfro Africa Ltd t/a "Meru Express Services (1976)" & Another v. Lubia & Another (No. 2)*** [1987] KLR 30) through 50,000/- (***Jane Mbeyu & Another v. Trouistick Union & Anor.*** Msa HCCC 172/87); 60,000/- (***Kakiki v. Abdo & 2 Others*** (1990) KLR 327) and 70,000/- (***Wangari v Nkaru*** [2004] eKLR) to Ksh.100,000/- (***Mombasa Maize Millers Limited v W I M suing as the representative of J A M (Deceased)*** [2016] eKLR and ***Hyder Nthenya Musili & another v China Wu Yi Limited & another*** [2017] eKLR).

Lost years and loss of dependency

23. The trial court used the principle for assessment of damages under the Fatal Accidents Act for an adult working male with dependant widow and children as applied in ***Radhakrishen M. Khemaney v. Mrs. Lachaba Murlidhar*** [1958] EA 268, the decision of the Court of Appeal for Eastern Africa (Sir Owen Corrie, Ag. JA with whom Briggs, VP and Forbes, JA agreed) relied on by the trial court, citing at p.269 the 1956 decision of Sir Kenneth O'Connor, CJ. (as he then was) in ***Mrs. Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another*** [which for its oft-citation was later reported by the Editors of East African Law Reports in [1961] EA 1929] as follows:

"I no doubt as to the principles which have to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Frances Hayes and Others against Chunibhai J. Patel and Another, the principles applied by the learned chief justice , as he then was, were as follows:

"The Court should find the age and expectation of working life of the deceased, and consider the wages and expectations of he 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 dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.* ***The multiplier will bear aa relation to the expectation of earning life of deceased and the expectation of life and dependency of he widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon the number of estimates and imponderables) will be the lumpsum the court should apportion among the various dependants."***

Upon appeal against this judgment this court held ([1957] Ea 748, (C.A.)):

"That the method of assessment of damages adopted by the learned chief justice was correct.""".

24. In view of the trial court's apparently innocent mistake in using, for the case herein of an eighteen old un-employed student, the general method for assessment of damages under **Fatal Accidents Act** for damages for what she called ***lost years*** [properly recoverable under Law Reform Act], I think it is convenient to discuss the correct position as regards award of damages for lost years and related loss of dependency. Other courts, with respect, have labored under the same misconception. (See Bosire, J. (as he then was) in ***Kakiki v Abdo & 2 Others*** (1990) KLR 327 cited below.) As I understand the terms, ***lost years*** refers to damages for loss of prospective earnings recoverable by a person who is injured in such a way as to shorten his earning capacity, recoverable by the person during his shortened life and, upon his death, by the Estate under the Law Reform Act as damages for ***lost years.*** Damages for ***loss of dependency*** is a right under the Fatal Accidents Act for benefit of the dependants of the deceased injured person. See the separate discussion of each head of damages in ***Asal v.***

Muge & Another (2001) KLR 202, 206-206 where the requirement to take into account damages award in the one while considering the other is given effect, as follows:

> *"What of damages awarded to the respondent? We remind ourselves that the assessment of damages is essentially an exercise of discretion and the grounds on which this Court will interfere with the exercise of discretion by a trial Judge are now well known and we need not repeat all of them in this judgment. The only one we wish to deal with in this appeal is that the learned Judge may have applied a wrong principle when he awarded to Herma:*
>
> ***i. Loss of dependency*** *- Kshs 2,592,000/=*
>
> *and*
>
> ***ii. Lost years*** *Kshs 525,600/=*
>
> *On this aspect of the matter, the learned Judge seems to have had the correct principles in his mind for he said:*
>
> *"it is evident that the award made under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the former Act are the same beneficiaries of the estate of the deceased in the latter. Although Section 2 (5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act we cannot ignore the fact that the same parties benefit from awards made under both Acts. This is not done then there is a danger of duplication of awards…."*
>
> *This Court itself put the matter thus in the case of Maina Kaniaru & another v Josephat Muriuki Wangondu, Civil Appeal No 14 of 1989 (unreported):*
>
> *"**The rights conferred by Section 2 (5) of the Law Reform Act (Cap 26, Laws of Kenya) for the benefit of the estates of deceased persons are stated to be "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act".** This does not mean that damages can be recovered twice over but that if damages can be recovered twice over but that if damages recovered under the Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act…"*
>
> ***The learned Judge awards to the dependants of Bishop Muge Kshs 2,592,000/= for loss of dependency and this was obviously under the Fatal Accidents Act.*** *Then the learned Judge,* ***proceeded to award to the estate of the late Bishop Kshs 525,600/= as damages for lost years, obviously under the Law Reform Act.*** *This latter sum would obviously go to the same dependants who were the beneficiaries of the estate. Whether one designates it as failing to take into account the fact that Kshs 2,592,000/= had been awarded to the dependants or whether one designates it as a failure to apply the correct principle by the learned Judge, it is a matter which certainly entitles the Court to interfere with the award made by the learned Judge. We accordingly interfere and set aside in its entirety the award of Kshs525,600/= given by the trial Judge as damages for lost years, with the result that the total award of Kshs 3,217,750/= given by the learned Judge is reduced by Kshs 525,600 to Kshs 2,592,150/=. To that extent, the appeal is allowed and we award to the appellant one third of the costs of the appeal. Those shall be the orders of this Court."*

25. The position of damages for loss of prospective earnings or ***lost years*** in England as observed by ***McGregor,*** ibid. at para. 36-002 is that-

> *"[The] damages to which the estate of the deceased may lay claim under the Law Reform (Miscellaneous Provisions) Act 1934 have been severely, though sensibly, curtailed. By s.1 of the 1982 [Administration of Justice] Act the right to damages for prospective loss of expectation of life is abolished and* ***by s. 4 (2) the right to damages for prospective loss of earning capacity during the so-called lost years is taken away.*** *This does indeed leave recovery for loss by way of pain and suffering, loss of amenities, medical expenses and loss of earnings all accruing before the death, but whereas damages for loss of expectation of life and for prospective earnings were unaffected by the fact that the death, as is common, was instantaneous or followed swiftly upon the injury, damages for the remaining heads are likely to be of little or no consequence in such circumstances."*

The Kenyan position, there being no similar statutory amendments as in England, remains as held by Kneller, JA. in ***Kemfro*** case the pre-1982 position in England. **We must continue await review of the position by our own Law Reform Commission and statutory amendments appropriately.**

26. The following decisions of the Court will help clarify the correct current position in Kenya on the matter:

> ***1. Mariga v. Musila*** [1984] KLR 251, the Court of Appeal (Hancox JA, Chesoni & Nyarangi, Ag. JJA) held that:
>
> *"The interest that a person has in the earnings he might hope to make over a normal life has an economic value which can be assessed and if he, through the negligence of another, is deprived of the capacity of earning for that period, he is entitled to fair compensation for the lost period occasioned by the wrongdoer. The period in which the person would have worked if he had not suffered the injury constitutes the "lost years"."*

2. Hassan v. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457, where the Court of Appeal (Kneller, Hancox and Nyarangi, JJA.) held:

"*4. The trial judge overlooked the fact that the deceased had begun well enough on his career by being accepted to university….*

5. It is an established custom among various African and Asian communities in Kenya that children are expected to provide for their parents. The custom is not repugnant to justice and morality and the trial judge's view that it was outrageous and pernicious was not well founded and should be rejected.

6. Both the common law and its applicability must be tempered and adjusted to the circumstances, needs and generally held views of the people f Kenya."

3. Kakiki v. Abdo & 2 Others (1990) KLR 327, Bosire, J. (as he then was) said:

"*The last head is **lost years otherwise called loss of dependency.** The deceased had a wife, four children and his both parents who depended on him. He was aged 40 at the time of his death, was in good health and was in regular employment. He was earning a basic salary of Ksh.1190/- per month exclusive of house allowance. I consider that most of his income was being spent on his dependants. There may have been also services the deceased ws rendering to his family but no payments were made to him. No evidence was however led on that aspect. I do not therefore intend to fix a monetary figure to them.*

The first stage in the assessment of dependency is to find the multiplicand. I take it that the deceased was spending most of his earnings on his dependants, say 2/3 of his income. On the basis of that fraction the multiplicand works out to 794/- or Ksh.9,528/- per annum.

As for the multiplier, there are several factors which affect it. Mr. Pandya suggested 15years. The deceased was 40 years of age. He would have perhaps worked for a further 15 years. However, his type of job entailed exposure to many risks. He was a driver of a lorry, and at times would be required to drive along highways at night time. At the time of his accident on 8th June 1977, he was in control of his lorry, the time having been 1am. The deceased would perhaps have died in a road accident, from other causes or would have lost his job. There are several imponderables. There is also the fact that his children then depending on him were all at least 10 years and above. There is the fact that upon attaining majority age they would probably have ceased to be dependants. All of them are now adults, the last one having attained 18 years in November 1988. Regard being had of all those, he fact that his wife ad parents are still alive, a multiplier of 12 years will in my view be reasonable. **"**

4. Saro v. Kenya breweries Ltd. (1990) eKLR; (1990) KLR 395, 399, where Githinji, J. (as he then was) distinguished the claims under Law Reform Act and the Fatal Accidents Act and awarded a conventional sum for damages under the Fatal Accidents Act for a 6 year old child as follows:

"*The deceased was 6 years old. Mr H Jiwaji states that general damages under statutory law including loss of expectation of life is currently between Kshs 75,000 and Kshs 120,000.*

*Mr Shikeley for the defendant asks me to award not more than Kshs 50,000 on the basis of **Jane Mbeyu & Anor v Tronishk Union & Anor** HCCC 172/ 87 (MBS). In that case the court assessed damages for loss of expectation of life in respect of a man aged 65 at Kshs 50,000.*

*In the case referred to by Mr Shikeley, damages were given for loss of expectation of life under the Law Reform Act for the benefit of the estate. The damages here are being sought under the Fatal Accidents Act. In English Law damages are awarded under Fatal Accidents Act where the evidence shows that the parents reasonably expected a pecuniary benefit which they have lost as result of the death of the child. A mere possibility of pecuniary benefit is disregarded in English Law – see–**Abdullahi v Githinye**, [1974] EA 110. But from the nature of our society, the courts have taken a more realistic view that parents expect financial help from their children when they grow up. In our rural society, the children continue to render useful services to the parents which otherwise would be offered by paid workers. No doubt then that the parents are saving money from the free services of the children and those services should be converted into money.*

Further, even when the children grow up and get married, they generally continue to give financial help to their parents.

It is perhaps for those reasons that the courts are now giving substantial awards.

The case of Cosmos Ogutu v Makairo Bus Trading Co Ltd HCCC 3003/ 84 is often referred to. In that case the deceased boy was 10 years old and in school – Class III. Court awarded Kshs 70,000 in June 1985. The deceased child in this case is much younger and there is no evidence that he was in school. He was living in town.

In all the circumstances, an award of Kshs 100,000 would be reasonable."

5. On appeal from Githinji, J.'s decision, the Court of Appeal in ***Kenya Breweries Ltd v. Saro,*** (1991) eKLR; (1991) KLR 408, 411-412 upheld the trial judge as follows:

"*It is clear to us that the burden of Mr Pandya's submissions, supported by these authorities, is that, as the deceased boy was only six years old, he could not have been in a position to make any contribution of a pecuniary nature to the family welfare and that was why the respondent was unable to prove any such contribution. Mr Pandya contends that even if damages were to be awarded, this factor had to be taken into account and this latter contention must be the basis of ground 2 in the memorandum of appeal which complains that the Shs 100,000/- awarded was in any event excessive.*

We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four year old one who has not been to school and whose abilities are yet not ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have "homes" for the aged; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a "home" while he or she is still able to look after them. At the national level, the concept now finds expression in the popular phrase "being mindful of other people's welfare". If any legal authority is required in support of our views we would quote this court's decision in ***Sheikh Mushaq v Nathan Mwangi Kamau Transporters & Five others*** *[1985 – 1986] 4KCA 217, wherein the late Nyarangi, delivered himself as follows:-*

"In general, in Kenya children are expected to provide and to provide for their parents when the children are in a position to do so and to the extent of their abilities. The children are expected to do that by the established customs of the various African and Asian communities in Kenya. This particular custom is broadly accepted, respected and practiced thoroughout Kenya both by Africans and Asians. I would say the application of the custom at family level is the basis of the national ethos of being mindful others' welfare. In the Asian community, the custom is supported by the Hindu religion whose influence on the life of the Hindu religion whose influence on the life of the Hindu community is well night total. That is common knowledge. With regard to Africans, the courts in Kenya exercise their respective jurisdictions inter alia to the extent the circumstances of Kenya and its inhabitants permit and subject to the qualifications those circumstances render necessary. The trial judge's contemptuous remarks about the custom of the people is contrary to section 3(1) of the Judicature Act cap 8 and therefore to be regretted and disapproved. The custom could not possibly be said to be repugnant to justice and morality. The custom is well within the tenets of the great religious of Hinduism, Christianity and Islam. It is a custom the practice of which appeals to ordinary people in Kenya, is not malevolent and the trial judge's view that it is " outrageous and pernicious" is not well-founded and must be rejected. ...

In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. *The High Court authorities which were cited to us, such as Abdullahi v Githenye [1974] EA 110, Maurice Miriti v Feroze Construction Co Ltd HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi v Githinye, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In Miriti v Firoze, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life.* ***We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the Fatal Accidents Act. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred."***

6. Dainty v. Haji & Another (2004) eKLR; (2004) 2 KLR 125 where the Court of Appeal (Omolo, Githinji JJA. & Onyango Otieno Ag.JA.) explained the difference in damages for lost years under Law Reform Act and under the Fatal Accidents Act (really loss of dependency) in the cases respectively of a living plaintiff and the deceased's loss of earnings as follows:

"*The principles on which damages for lost years under Law Reforms Act are assessed are admirably articulated by Lord Scarman in* ***GAMMEL V WILSON*** *[1981] 1 All ER 578 at page 593 paragraphs g – j thus:*

"The problem in these cases which has troubled the judges since the decision in Picketts case, has been the calculation of annual loss before applying the multiplier (i.e. the estimated number of lost working years accepted as reasonable in the case). My Lords, the principle has been settled by the speeches in the House in Picketts case. The loss to the estate is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of death would suggest was reasonably likely to achieve. Subtle mathematical calculations, based as they must on events or contingencies for a life which he will not live, are out of place, the judge must make the best estimate based on the known facts and his prospects at time of death".

Mr. Satchu, learned counsel for the appellant, submitted that the superior court erred in principle in failing to take into account the multiplier applied in other cases which according to him show an established practice. He referred to several decisions of the High Court mainly dealing with loss of dependency under the Fatal Accidents Act where higher multipliers for similar age have been applied and urged us to apply a multiplier of 17 – 20 years.

The decisions of the High Court referred to include the case of ***MUSA ALULWA V THE ATTORNEY GENERAL & ANOTHER*** *Nairobi H.C.C.C. No. 1597 of 2000 where a multiplier of 20 was applied to a 26 year old man.*

We do not, with respect, agree with Mr. Satchu that courts have established as a matter of practice the appropriate multiplier to be applied to different age groups of victims of accidents. What is a reasonable multiplier in our jurisdiction is a question of fact to be determined from the peculiar circumstances of each case. By way of analogy, in ***BORU V ONDUU*** *[1988-1992] KAR 299, the court was asked to follow the pattern of court decisions showing that in claims for loss of dependency under the Fatal Accidents Act, the court had, as a rule, taken one third of a deceased net income as his living expenses and two thirds of his net income as dependency rule. The court rejected the rule and re-asserted that dependency is a question of fact. Hancox CJ said in part at page 291:*

"The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will

analyse the available evidence as to how much deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation".

*To ascertain the reasonable multiplier in each case the court would have to consider such relevant factors as the income of the deceased, the kind of work deceased was doing, the prospects of promotion and his expectation of working life.***"**

7. In ***Muchoki v. Attorney General*** (2004) eKLR; () 2 KLR 518, 522- 3, Visram, J. (as he then was) following (as he then was) Musinga, J's decision in on the question of availability of damages for loss of dependency for a parent in cases of death a child as follows:

"*The next issue is the quantum of damages payable.*

In his written submissions, counsel for the plaintiff has argued that damages are payable under the following 3 heads:

1. Law Reform Act

2. Fatal Accidents Act, and

3. Special Damages.

I agree with him, and will attempt to assess the damages under the above heads.

Law Reform Act

The deceased child was only four at the time of her unfortunate death. But she was a happy and healthy child, and a source of joy and love to her parents. I will follow the judgment of Hon Musinga J who awarded Kshs 80,000/= under this head to the parents of a three year old child in ***Patrick Nthenge vs Tawfiq Bus Services Limited*** *(HCCC 178 of 1997 – Nakuru) and award the same amount in respect of this four year deceased child.*

Following the same case I will award Kshs.10,000/= for pain and suffering.

Fatal Accidents Act

Once again, I find parallels between this case and the ***Patrick Nthenge*** *case (supra) and will adopt the reasoning outlined in that case as follows:*

"Under the Fatal Accidents Act damages are awarded for loss of dependence as well as special damages. In Sheikh Mushtaq Hassan vs Nathan Mwangi Kamau Transporters and Five Others (1982 – 1988) I KAR 946 the Court of Appeal held that in Kenya parents are entitled to rely on their children in old age to support them. However, in that case, the deceased had been admitted to a university to study architecture and so the parents of the deceased had a reasonable expectation of some income from the deceased son. The situation is quite different in the case of a 3 years old child as there is no pointer as to what he would have done in life. It would therefore be purely speculative and therefore judicially wrong to hold that such a minor child would have grown up, go through education successfully, get employment and earned a given amount of money and supported his parents with a specified amount of money over a given period. Therefore the damages to be awarded under Fatal Accidents Act for loss of dependency can only be conventional.

In Kenya Breweries Ltd vs Mohamed Saro, Civil Appeal No 144 of 1990 where the deceased was aged 6 years, the Court of Appeal approved an award of Kshs 100,000/=. In Yahya Hamisi Hussein & Another vs Mwawira Charo & Another, Civil Appeal No 269 of 1998, the Court of Appeal upheld an award of Kshs176,000/= where the deceased was 6 years old. In 1994, Justice Githinji, as he then was, awarded general damages of Kshs120,000/= where the deceased was 7 years old.

I therefore believe that an award of Kshs 200,000/= is reasonable under the Fatal Accidents Act."

Following the above case, I have also come to the same conclusion, and award Kshs 200,000/= under the Fatal Accidents Act."

27. In this case, the child was not so young as to make his prospects of successful completion of his education and his employment even at the minimum wage level speculative as to call only for a conventional award, and this court accepts following ***Asal v. Muge, Saro v. Kenya Breweries,*** and ***Kenya Breweries Ltd v. Saro,*** supra, that, in accordance with our Kenyan Society and especially African customs, the 18 year old Form Four student had on maturity and upon gainful employment or engagement a duty to provide for his parents and the parents were in turn entitled, to expect such provision and, therefore, to a recompense for loss of dependency by the early death of their child.

Disposal

28. The plaintiff herein was the deceased's father suing as personal representative of the estate of his son who died in the traffic accident subject of the suit for damages under the Law Reform act and the Fatal Accidents Act , and the court does **not** find that in adopting a multiplicand of Ksh.10,000/- for an 18 year old Form 4 student died shortly before he completed his secondary school, and who, therefore, could be expected to have entered the job market at the very least in the level of minimum wage, and a multiplier of 35 bearing in mind the official retirement age of 60 years is plainly wrong. Although the court assessed the Fatal Accidents Act damages under a heading ***Lost***

Years [proper for damages under Law Reform Act] the same was calculated on the appropriate principles of the loss of dependency for the deceased's dependants. The court, however, failed to discount the claimant's living expenses, which courts have assessed at 1/3 of the earnings in cases of a male spouse with children, [I consider that for a child spending on his parents the position ought to be the reverse, spending 2/3 on himself and 1/3 on his parents], and treated the 10,000/- as the net wage which would have gone to the support of the deceased's dependant parents, but in view of the modest earnings at minimum wage when the deceased may well have entered the job market at a higher rank, the effect on the quantum of such deduction from the modest wage, whose adoption as the multiplicand has taken care of life's imponderables, did not result in so excessive an award as to invite interference by an appellate court, and may be overlooked.

To interfere or not

29. On the principle of ***Butt v. Khan,*** supra, I do not find any justification to interfere with the trial court's award of general damages in the **sum of Ksh.4,200,000/-** for pain and suffering, loss of expectation of life and ***lost years*** (really loss of dependency).

Special damages

30. The record of appeal does not show any documents to prove the special damages pleaded as ksh.5,200/-. The court agrees with the trial court that the special damages were not proved and could not, therefore, lawfully have been awarded.

Orders

31. Accordingly, for the reasons set out above, the appellant's appeal herein is without merit and it is dismissed.

32. The appeal may have been necessitated by the trial court's default in taking submissions on ***quantum*** of damages and this Court, therefore, does not make any order as to costs in the appeal.

Order accordingly.

DATED AND DELIVERED THIS 30TH DAY OF APRIL 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kinyanjui & Co. Advocates for the Appellant.

M/S Keboga & Co. Advocates for the 1st Respondent.

M/S Arusei & Co. Advocates for the 2nd, 3rd and 4th Respondents.