REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL. NO. 50 OF 2019

MAINA MARY.....APPELLANT

VERSUS

ULBANUS NZUVE NDUVE & DORCUS MBULA NDAMBUKI

(Suing as the administrators to the estate of the late

PETER NDUVA-Deceased.....1ST RESPONDENT

KINATWA SACCO.....2ND RESPONDENT

(Being an appeal against the decree and judgment delivered on 21ST January, 2019 by Hon. Y.A Shikanda SRM at Machakos law Courts, Machakos, Civil Suit No. 708 of 2016)

BETWEEN

ULBANUS NZUVE NDUVE & DORCUS MBULA NDAMBUKI

(Suing as the administrators to the estate of the late

PETER NDUVA-Deceased.....PLAINTIFFS

VERSUS

MAINA MARY .....1ST APPELLANT

KINATWA SACCO.....2ND APPELLANT

JUDGEMENT

1. The 1st Respondents herein, **Ulbanus Nzuve Nduve & Dorcus Mbula Ndambuki,** in their capaciy as the administrators to the estate of the late **Peter Nduva**-Deceased, instituted civil proceedings against the appelalnt and the 2nd Respondents herein seeking general damages, special damages and costs. The suit was premised on a road traffic accident which occurred on 12th September, 2015 along Machakos-Kitui Road. It was pleaded that on that day the deceased was travelling as a lawful passenger aboard motor vehicle reg. no. KBY 552L registered in the name of the Appellant but beneficially owned by the 2nd Respondent. According to the 1st Respondent, due to the negligence of the driver of the said vehicle, the same lost control, veered off the road and overturned as a result of which the deceased sustained fatal injuries to which he succumbed. The particulars of the injuries, statutory particulars and particulars of special damages were pleaded.

2. Pursuant to notice of withdrawal, the suit against the 2nd Respondent was on 18th June, 2018 marked as withdrawn with no order as to costs.

3. PW1, **Ulbanus Nzuve Nduva**, relied on his witness statement in which he stated that his son, the deceased, was involved in a road traffic

accident while a passenger on board motor vehicle registration no. KBY 552L and succumbed to the said injuries. Thereafter, they made funeral arrangements towards the deceased's burial which cost them over Kshs 150,000/=. According to PW1, at the time of the deceased's death he was 29 years old, married with two minor children who was school going. According to PW1, the deceased was earning Kshs 60,000/= per month which amount he used to spend on his wife, children, his wife and PW1.

4. In his oral evidence, he reiterated that the deceased was his son on whose behalf he was suing. It was his testimony that his co-plaintiff, **Dorcas Mbula** was his said son's wife and that they had obtained a grant of representation which he exhibited. According to him, on 12th September, 2015, the deceased, who was aboard motor vehicle KBY 552, was involved in a road accident along Machakos-Kitui Road though he did not witness the same. He was however issued with a police abstract which he exhibited. He also obtained a copy of the records which indicated that the Appellant was the registered owner and he exhibited the same. For that he paid Kshs 500/= and exhibited the receipt. He confirmed that his advocate issued a demand letter as well as the statutory notice both of which he produced.

5. According to PW1, the deceased was a Plant Operator at Grex Company Ltd where he drove an excavator and he produced the deceased's driving licence, the chief's letter, post mortem report, death certificate, burial permit, receipts for the expenses incurred and the grant. It was his evidence that the deceased was aged 29 years at the time of his death and that he died on the spot. He therefore sought compensation as the deceased's family depended on him.

6. In cross-examination, he stated that he did not witness the accident and that he received the report from the police. He stated that according to the copy of the records, which he exhibited, the Appellant herein was indicated as the registered owner of the said vehicle. However, the abstract which he collected on 12th October, 2015 indicated that the accident vehicle was KBY 552L and that its owner was Kimatwa Sacco. It was his evidence that the licence showed that the deceased was a plant operator operating special types of motor vehicles and the certificate of death showed that he was a driver. He however did not know when the deceased was employed though he worked for several companies. He admitted that he had not produced the deceased's payslip. He denied that there was a fundraiser for the deceased's funeral expenses and reiterated that the deceased's family burden was now on him.

7. In re-examination, he explained that the police abstract indicated that the motor vehicle was under the care of Kinatwa Sacco.

8. PW2, **Jacob Nzoka**, testified that he was a manager of Grex Company which was owned by the Catholic Diocese of Kitui. According to him, he had been with the company for about 5 years and knew the deceased who worked at the said company as a Plant Operator earning Kshs 60,000/= per month. According to him deceased's payment voucher for April 2014 was for Kshs 54,320 while the payment voucher for September was for the sum of Kshs 57,000/=. He proceeded to produce both vouchers as exhibits. According to him the deceased's gross salary was Kshs 60,000.00 and the deceased died in a road accident.

9. In cross-examination he confirmed that the deceased worked under his supervision at the company where he was still working. It was his evidence that he was employed in 2013 though he could not remember the exact date while the deceased joined the company in 2014. He admitted that he had not produced the deceased's letter of appointment. According to him, the payment vouchers were not subjected to tax and he did not have the deceased's tax compliance certificates. According to him the Plant Operators were sometimes paid on daily basis. He confirmed that he never witnessed the accident but was informed about it the same day through a phone call.

10. In re-examination, he explained that a plant operator earned Kshs 2,000/= per day.

11. PW3, **Alphonce Kayene Mongo,** in his statement which he relied on as examination in chief stated that on 12th September, 2015 he was seated outside his retail shop at Iluduimuni area along Machakos-Kitui road at Wamunyu when he saw motor vehicle reg. no. KBT 552L being driven at high speed. The said vehicle then lost control and rolled severally after the left tyre came off. After the accident a crowd gathered there and later the police arrived at the scene and took the injured to the hospital and those who died on the spot to the mortuary. It was his evidence that at the time of the accident he did not know the deceased.

12. In his oral evidence he clarified that the vehicle was KBY 552L of Kinatwa Sacco and that the same overturned near his place of work about 5-7 metres away from where he was. He stated that he heard a screeching sound and then saw the vehicle zig-zagging when one of the tyres disengaged. After that the vehicle overturned. According to him the accident was caused by over speeding. He however did not record his statement with the police.

13. In cross-examination he stated that the accident occurred at around 8:45 am while he was seated outside his retail shop. According to him the vehicle was from Machakos direction heading towards Kitui and at the time of the accident, the traffic was not heavy.

14. The Appellant did not adduce any evidence after the close of the plaintiff's case.

15. In this appeal, it is submitted that though the learned trial magistrate appreciated that the deceased was an on and of casual worker, he proceeded to fix his income at Kshs 30,000.00 per month thus giving the deceased a permanent income. It was submitted that the court did not state why it resorted to the sum of Kshs 30,000/= when the respondent had sought Kshs 60,0000.00 while the appellant relying on section 2 of the ***Insurance Motor Vehicle Third Party Risks Amendment Act, 2013*** proposed Kshs 12,416/-. According to the appellant the failure to give reasons amounted to an error on the part of the trial court since net income, based on **Beatrice Wangui Thairu vs. Hon. Ezekiel Bargetuny & Another NBI HCCC No. 1638 of 1988** as applied in **Nguku Julius alias Julius Kioko Nguli vs. Stephen Musau Kilonzo & Another [2019] eKLR**, should be factual and evidential and the amounts of taxes and statutory deduction ought to have been stated. Accordingly, it was wrong for the trial magistrate to have conjectured the figure of Kshs 30,000/= as the deceased's net income without evidence.

16. It was submitted that the evidence adduced was that the deceased would earn 2,000/= per day and worked for the said company between 9th March, 2014 and 9th April, 2014 and in August of the same year. The accident however occurred on 12th September, 2015, one year after his last casual work and there was no evidence that the deceased worked after September, 2014 and if he did, how much he earned. In those

circumstances, it was submitted that the trial court was obliged by the aforesaid section to reckon the minimum wage under the ***Labour Relations Act, 2007*** which was applicable at the time of the deceased's death and which prescribed Kshs 12,416/=.

17. It was further submitted that the said sum of Kshs 60,000/- was not pleaded hence the same ought to be disregarded.

18. As regards the dependency ratio of 2/3rds, it was submitted that the same was inapplicable based on the said decision in **Nguku Julius alias Julius Kioko Nguli vs. Stephen Musau Kilonzo & Another [2019] eKLR** in which it was held that dependency is a matter of fact whose existence is to be proved. It was submitted that there was no evidence that the deceased was married as contended since the alleged wife did not testify and no marriage certificate or any form of evidence in that respect adduced. Further the birth certificates of the children were not produced hence there was no evidence that the deceased had any children. Accordingly, there was no evidence of the amount he was spending on his family in order to justify the application of the 2/3rds ratio. According to the appellant the trial court ought to have applied a dependency ratio of 1/3rd.

19. According to the appellant the court having made an award under the ***Fatal Accidents Act***, the same ought to have been taken into consideration in making an award under the ***Law Reform Act*** in order to avoid double compensation.

20. On the issue of vicarious liability, it was submitted that the respondent ought to have proved that the vehicle was being driven with the authority of the appellant, or for the appellant's benefit or mission. According to the Appellant it was important for the driver to have been sued since the evidence of fault against the driver can only be reached if he was a party to the proceedings. It was therefore submitted that the case was fatally defective.

21. In the foregoing premises, the Appellant urged the court to allow the appeal and dismiss the case with costs.

22. On the part of the Respondent, it was submitted that since the learned trial magistrate carefully and elaborately considered the doctrine of *res Ipsa liquitor* and without duplicating his judgment word by word, there no reason to interfere with his determination on this head. According to the Respondents, although the defendant/appellant filed a statement of defence, he failed or omitted to formally produce any evidence in terms of documents, object and/or witness before court to substantiate there claim on the circumstances of the accident and as such it is clear that no evidence was tendered by the defendant/appellant against the plaintiffs/respondents.

23. In support of their position, the Respondents relied on Section 8 of the ***Traffic Act*** regarding the presumption of ownership of motor vehicles as well as the case of **Superfoam Ltd & Another vs. Gladys Nchororo Mbero [2014] eKLR**, **HCCA 133 of 2002,** that certificate of search (Copy of record) is a prima-facie proof of ownership which can be rebutted through evidence. It was submitted that since there is no contrary evidence, to the one tendered by the respondents the appellant was the registered owner of the accident motor vehicle at the material time.

24. It was noted that it is clear from the proceeding before the trial court that the appellant herein never tendered any evidence disputing that the driver in control of the accident motor vehicle on the material time of the accident was unauthorized driver. Worthy of note is that there was no pleading in the defence that the Appellant's driver was on a frolic of his own or that he was not authorized to carry any passengers. In this regard the Respondents relied on **Limpus vs. London General Ominibus Company [1862] 1 H & C 526, 32 LJ EX 34, 7LT 641** and **Karisa vs. Solanki [1969] EA 318.**

25. It was therefore submitted that the respondents have proven their case on a balance of probability and the evidence before court is that the defendant/Appellant is wholly to liable for the occurrence of the subject accident. Accordingly, the learned trial magistrate did not err in any law or in any fact and as such the appellant's appeal on the above grounds cannot be sustained and must fail.

26. Regarding the loss of dependency, reliance was placed on the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Limited [2015], Civil Appeal 22 of 2014** where court held that;

> **"As a general principle, assessment of damages lies in the discretion of the trial court and a*n 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 he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.* The Court must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."**

27. It was submitted that the learned trial magistrate based his finding on the evidence available before court and the appropriate principles of law. It was contended that the respondents called witnesses and tendered documents before court clearly stating that the deceased was working as a plant operator earning a salary of Kshs. 60,000/=. As per the learned trial magistrate, it was evidently clear that the deceased was working and earning some income what was not clear was his monthly income. He stated that although documents were produced showing the deceased monthly income, the said amount was not a clear reflection of his monthly earning considering the fact that the same was not taxed and that the deceased was a casual employee who would be paid according to the work done. Based on these facts the learned trial magistrate adopted a net of Kshs. 30,000/=. It was submitted that t**he learned trial magistrate had explained how he came to the figure adopted, given that the documents provided gave him guidance and as such, the learned trial magistrate indeed had basis in adopting the said multiplicand.**

28. According to the Respondents, it is not in dispute that the deceased was aged 29 years at the time he met his death. The learned trial magistrate adopted a multiplier of 27 years, while relying on the case of **Alice O. Alukwe vs. Akamba Public Road Services Ltd and 3 Others (2013)** where court adopted a multiplier of 30 years for the deceased who died at the age of 24 years. Further he relied on the case of **Cornelia Elaine Wamba vs. Shreeji Enterprises Ltd & Others (2012)** where court adopted a multiplier of 25 years for the deceased who died at the age of 31 years. In this regard, it was their position that a multiplier of 27 years was fair and reasonable and as such the learned

trial magistrate's finding on this head cannot be termed as erroneous.

29. It was noted that it was not in dispute that the deceased was a married man, with a wife and 2 children. Further he had his elderly parent who also used to depend on him. As a husband, the deceased provided every daily needs as a father for his family. In an African family and more so in Kenya, there are responsibilities shouldered by every father in a family. A father with 2 children is expected to provide for their food, clothing, health care and day to day running of the family. Since no evidence was ever brought forth by the appellants to suggest that the deceased had absconded is responsibilities, the claim by the appellant baseless and without merit.

30. The Respondents contended that the learned trial magistrate did not apply wrong principles and/or consider irrelevant facts or evidence in finding that 2/3 of the deceased income was used in support of her elderly parent and his young and needy family.

31. With respect to the allegation that the learned trial magistrate failed to consider the award made under the ***Law Reform Act*** when making the award under the ***Fatal Accidents Act***, it was submitted that that averment was based no evidence. If he didn't consider the award in the law ***Reform Act*** may be he could have awarded a higher figure under the ***Fatal Accidents Act***. The learned trial magistrate took time to explain the issue of double compensation. This is a clear indication that the award in the ***Law Reform Act*** was well in his mind while giving an award under the ***Fatal Accidents Act***. In this regard, the Respondents relied on the case of **Chen Wembo & 2 Others vs. I K K & Another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR, Civil Appeal 32 of 2014,** where **Meoli, J** held that**;**

> **"In my considered view, it would be a futile exercise for a court to labour to make an award under the Law Reform Act only to completely deduct it from the award under the Fatal Accidents Act. Effectively such 'complete' deduction would nullify the benefits intended by the two Acts of Parliament for deserving claimants."**

32. It was therefore submitted that there is no reason for this court to interfere with the learned trial magistrate judgment and the court was urged to dismiss the Appellant's appeal.

Determinations

33. In this appeal, the Appellant is challenging both liability and quantum of damages. In respect of liability, it is contended that the respondent ought to have proved that the vehicle was being driven with the authority of the appellant, or for the appellant's benefit or mission. In other words, the Respondent ought to have proved that the driver was not acting on a frolic of his own or against the interest or for the benefit or mission of the Appellant. What the appellant was seeking was that the Respondent proves a negative. However, as was held by **Seaton, JSC** in the Uganda Case of **J K Patel vs. Spear Motors Ltd SCCA No. 4 of 1991**:

> **"The proving of a negative task is always difficult and often impossible, and would be a most exceptional burden to impose upon a litigant."**

34. As regards vicarious liability, the general rule is as stated in **Karisa vs. Solanki [1969] EA 318** at page 322 paragraph 9G, that -

> **'Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v. Sully (1931) 47 TLR 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver.'**

35. That was the same finding in the East African Court of Appeal decision in **Vyas Industries vs. Diocese of Meru [1976-1985] EA 596; [1982] KLR 114** where it was held that:

> **"It is plain that the ownership of the car cannot itself impose any liability…It is true that if a plaintiff proves that a car was negligently driven, and that the defendant was its owner, and the court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner thereof or some servant or agent of his…Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person whose negligence the owner is responsible… In the instant case, the person sued was a firm, a person who cannot drive whether negligently or otherwise and could only be liable vicariously and therefore the Judge should have insisted upon the plaint being appropriately amended. However the plaint did allege ownership and negligence, which is sufficient to raise a presumption that at the time of the accident, the lorry was being driven by a person for whose negligence the defendant was responsible and to that extent it disclosed a reasonable cause of action."**

36. That was the same position adopted in **Kenya Bus Services Limited vs. Humphrey [2003] KLR 665; [2003] 2 EA 519** where it was held that:

> **"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver."**

37. According to the Appellant it was important for the driver to have been sued since the evidence of fault against the driver can only be

reached if he was a party to the proceedings. It was therefore submitted that the case was fatally defective. However, as was held in in **Kenya Bus Services Limited vs. Humphrey** (supra):

> **"The failure to sue the driver of the motor vehicle and the omission by the plaintiff to directly refer to the owner's liability as being vicarious is not necessarily decisive as it is sufficient that the relevant primary facts are pleaded and evidence led showing the legal relationship between the driver of the vehicle and the owner from which vicarious liability can be inferred as a matter of law. In a matter concerning the master's liability for his servant's tort it is the existence of the relationship of the master and servant which gives rise to vicarious liability."**

38. It follows that it was upon the appellant to plead and prove that the vehicle was at the time of the accident not being driven for his own benefit. Secondly, it does not necessarily follow that if a driver of a motor vehicle is not sued, then vicariously liability cannot be proved against the owner thereof.

39. Regarding quantum, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

40. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

41. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

42. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

> **"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."**

43. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which **Ringera J.** as he then was, held at page 248 that:

> **"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

44. In this case, the appellants have taken issue with the dependency ratio. In this case, PW1's evidence was that the deceased was aged 29 years was married with a wife and two children. In **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another** (supra) the court:

> **"…constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track."**

45. In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, it was the opinion of the Court of Appeal that:

> **"There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss…"Dependancy" or "dependency" is the relation of a person to that by which he is supported…The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the 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…But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person…In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."**

46. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held that:

> "In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

47. In this case the deceased was married with a young family. In those circumstances I find that a dependency ratio of 2/3rds cannot be said to have been unreasonable.

48. As regards the multiplier, the parties agreed on 26 years. The learned trial magistrate adopted a multiplier of 27 years, while relying on the case of **Alice O. Alukwe vs. Akamba Public Road Services Ltd and 3 Others (2013)** where court adopted a multiplier of 30 years for the deceased who died at the age of 24 years. Further he relied on the case of **Cornelia Elaine Wamba vs. Shreeji Enterprises Ltd & Others (2012)** where court adopted a multiplier of 25 years for the deceased who died at the age of 31 years. In my view the multiplier is a matter of fact based on the evidence presented before the court.

49. I agree with **Ringera, J** in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** that:

> "In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased… The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

50. As for the multiplicand, it is true that there was no evidence as to the deceased's income at the time of the accident. However, there was evidence that before that accident he was engaged in an income generating job from where he was earning Kshs 2,000/= per day. It is true that he had no documentary evidence of his earning. The Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** had this to say on the issue:

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."**

51. In **Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR** it was held that where income is not proved, the income of an unskilled worker ought to apply. According to the ***Regulation of Wages (General) (Amendment) Order, 2015*** the deceased would fall under the category of general workers whose minimum wage was be Kshs. 10,954.70.

52. The appellant has argued that the trial court was obliged by the aforesaid section to reckon the minimum wage under the ***Labour Relations Act, 2007*** which was applicable at the time of the deceased's death and which prescribed Kshs 12,416/=. In this case however, the deceased was not an unskilled worker. He was a skilled worker operating an excavator. In my view the sum of Kshs 30,000.00 adopted by the learned trial magistrate cannot be faulted in the circumstances.

53. As regards the double award, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) the capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. Similarly, the Court of Appeal in **Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004** held that:

> **"As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award 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 Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. 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 the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards…Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-."**

54. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award leaving a balance of Kshs 1,818,882.20. Less 20% agreed contribution leaves a sum of Kshs 1,455,106.56, plus costs and interests.

55. Accordingly, the appeal succeeds to that extent.

56. Since the appellant has not succeeded in all aspects, each party shall bear own costs of this appeal.

57. It is so ordered.

Read, signed and delivered in open Court at Machakos this 27th day of April, 2020

G V ODUNGA

JUDGE

Delivered at 9.30 am in the absence of the parties having been notified through their known email addresses.

CA Josephine