REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 7 OF 2020

STANWEL HOLDINGS LIMITED

LUKA WACHIRA NGUCHE.....APPELLANTS

VERSUS

RACHEAL HALUKU EMANUEL

AND CHRISTINE HABELA BUYA

(Legal Representatives of the estate of

CHRISTIAN MAUNDU HIRIBAE (Deceased).....RESPONDENTS

(Appeal from the Judgment and Decree of the Senior Principal Magistrate Honorable R. K. Ondieki in PMCC No. 209 of 2017 Kilifi read by Honorable SPM J. Kituku on 22nd January 2020)

BETWEEN

Coram: Hon. Justice R. Nyakundi

Macmillan Jengo advocate for the AppellantsWambua Kilonzo advocate for the Respondents

JUDGMENT

The appeal before me, by the 2nd and 3rd defendants, hereinafter the 1st and 2nd appellants respectively, is against the award of damages by the trial court in the sum of Kshs. 2, 036,400/= for general and special damages after 10% contributory negligence. The judgment was delivered on 22.01.2020. Aggrieved by the judgment, the Appellant filed a memorandum of appeal on the 7.08.2020. The appeal is mainly on the Trial Court's finding on quantum. The grounds of appeal are that: -

1) The assessment and award of general damages for pain and suffering and loss of amenities is inordinately high as to represent an entirely erroneous estimate.

2) The Learned Trial Magistrate in assessing damages for loss of dependency failed to apply the correct principles hence arrived at an erroneous estimate of damages which the deceased suffered.

3) The Learned Trial Magistrate misapprehended the evidence and misapplied, misunderstood and or overlooked the correct legal principles and judicial precedent and the submissions by parties that he made an award for loss of dependency that was erroneous and inordinately high.

4) The Learned Trial Magistrate erred in Law in failing to apply the provisions of Section 2 of the Insurance (Motor Vehicle) Amendment Act 2013 in choosing the income of the deceased and in failing to apply the Minimum Wage.

5) The Learned Trial Magistrate erred in fact and in law in failing to appreciate that similar injuries should attract similar awards and in failing to apply the doctrine of Stare decis and take into account public interest. He thus made an award that was arbitrary, inordinately high and erroneous.

6) The Learned Trial Magistrate choice of dependency ratio, the multiplicand and multiplier is wrong and unreasonable.

Reasons whereof the appellant prays that the appeal be allowed and the following orders do issue:-

a. The assessment of general damages be set aside ad the awards be reduced downwards.

***b. The court do re-assess the* award for general damages.**

c. Costs of this appeal.

At the hearing of this appeal, directions were taken to have both counsel file their respective submissions. The duty of an appellate court is well set out in the case of **Ann Wambui Nderitu vs Joseph Kiprono Ropkoi & Another CA. No. 345 of 2000** where the court held:

"As a first appellate court we are not bound by the findings of fact made by the superior court and we are under a duty to re-evaluate such evidence and reach our own conclusions. We should however be slow to differ with the trial Judge and the caution is always appropriate as O'Connor P. stated in Peters v Sunday Post Ltd. [1958] EA 424, at Pg. 429:

"It is a strong thing for an appellate court to differ from the finding on a question of fact, of a Judge who tried the case and who has had the advantage of seeing and hearing the witness."

This court will however interfere where the finding is based on no evidence, or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did. See Ephantus Mwangi & Another vs Wambugu [1983] 2 KCA 100:" or in accordance with the principles and guidelines in **Robert Nsioki Kitavi v Coastal Bottlers Ltd [1982] – 198 IKAR 891 – 895**

"The appellate court will only interfere with a trial Judge's assessment for damages when the trial Judge has taken into account a factor he ought not to have been into account or failed to take into account or the award is so low that it amounts to erroneous estimate."

This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see **Selle & Another Vs Associated Motor Boat Company Ltd & Others [1968] EA 123**. The parties filed Written Submissions but did not find it necessary to orally highlight.

Consequently, guided by the above principles of law stated in the aforementioned case I shall proceed to review the facts and evidence presented in the Trial Court.

Brief Facts

The Respondents filed suit against the Appellants vide plaint dated the 27.06.2017 for general damages under the Law Reform Act and the Fatal Accident Act, burial expenses, special damages and costs of the suit and interest thereof arising from a road traffic accident which was alleged to have occurred on or about the 28.06.2016 while the deceased was walking as a pedestrian off the tarmac road along Mombasa-Kilifi road, at Oasis Medical Centre, when Motor Vehicle Registration Number KCC 039K lost control, veered off the tarmac road and hit the deceased from behind as result whereof the deceased sustained fatal injuries.

They alleged that the motor vehicle was in the authority, control and physical possession of the 1st Appellant at all material times while the 2nd Appellant was its authorized driver and or agent. The Respondents blamed the Appellants for the alleged accident and set out particulars of negligence. They sought damages under the Law Reform Act and the Fatal Accident Act, burial expenses, special damages and costs of the suit and interest thereof. They testified and produced exhibits in support of their cases and filed submissions dated 04.09.2018.

The Appellants/2nd and 3rd Defendants filed a defence dated 04.10.2017 together with two witness statements, denying any liability arising from the said accident. They did not call any witnesses and filed submissions dated 21.09.2018.

Judgment was entered against the 1st Defendant after having been duly served and failed to enter appearance and on application by the Plaintiffs' advocate.

The Evidence

PW1, Plaintiff, Racheal Haluku, stated that she lives in Maziwa in Tana River County and is a farmer. She stated that she knew the 2nd Plaintiff, who is her co-wife and that the deceased, was her husband. She wished to adopt her witness statement dated 27.06.2017. She stated that the deceased, who was 23 years old at the time and a gardener earning Kshs. 500.00 per day, died in a road accident on 28.06.2016 at Mtwapa, along Mombasa-Kilifi Road. She adopted her list of documents being, Police Abstract, Chief's letter, Death Certificate, Demand letter, Receipt for special damages, Motor vehicle Search and it's receipt, Letters of administration intestate, Receipt for advocate's costs of grant and receipt for court fees on grant as exhibit 1 to 9 respectively. She marked the Police Abstract as MFI-1.

On cross examination she reaffirmed that the deceased was her husband and that they had been married in church. She stated that she did not witness the accident and that she had nothing to prove how much the deceased used to earn. She further confirmed that the 2nd Respondent was her co-wife.

PW2, Makao Hiribae he stated that he worked at Umoja Rubber and had witnessed the accident on 28.06.2016 along Malindi-Mombasa

road at 8.30am. He also stated that he wished to adopt his witness statement.

On cross examination he reaffirmed that he had witnessed the accident at 8.30am. He stated that there were many motor cycles and some of them were roughly driven. He stated that the motor vehicle driver was on high speed and that both the motor vehicle and the motor cycle were on the same direction. He stated that when he arrived on the scene the accident had occurred. He stated that he was on his way to Mtwapa and the motor vehicle was from the opposite direction overtaking at high speed and that the accident occurred outside the tarmac. He stated that the driver was at high speed and lost control.

On Re-examination he stated that the motor vehicle was heading to Kilifi and that he saw the accident happen and the deceased being injured. He stated that when he drew near he saw the deceased and recognized him and then made a call to his wife. He stated that the motor vehicle had been overtaking a motor cycle as a result of which it overturned. He stated that the pedestrian had been hit outside the tarmac road. He stated that the accident happened about ten meters ahead of him.

At this juncture the consent on liability was recorded on 29.08.2018 at 10:90 against the plaintiffs and defendants respectively. The Police Abstract was also marked as Exhibit 1 and the plaintiffs closed their case. The defendants also closed their case and a mention date for submissions was given.

Submissions at trial

Mr. Wambua Kilonzo, advocate for the Plaintiffs**,** submitted that the suit was brought on behalf of the estate by the two plaintiffs who were wives of the deceased as legal representatives of the estate. They submitted that the issue of liability had been settled when the matter came up for further hearing of the police officer on 28.8.2019 as parties recorded a consent in favor of the plaintiffs against the defendants at 10:90.

They submitted that on quantum the deceased be compensated under the Fatal Accident Act (Cap 32) and the Law Reform Act having been survived by two widows and two children. They submitted that the deceased who was 23 years old at the time of his death as seen by the death certificate produced enjoyed good health and lived a good life. They submitted that the deceased had worked as a laborer (shamba boy) earning Kshs. 500 per day.

They submitted that under the head of damages for pain and suffering the deceased be awarded Kshs. 100,000. Guided by the case of **Alice O. Alukwe (Suing on behalf of the Estate of Maureen Alukwe (Deceased)-v-Akamba Public Road Services Ltd & 3 Others HCCC No. 26 of 2005** where the deceased had died on the spot and was awarded Kshs. 50,000.00 for pain and suffering. They urged that due to inflation Kshs. 100,000.00 was fair and reasonable.

On loss of expectation of life they submitted that the younger the deceased the higher the damages. As such as the deceased was a healthy 23 year old he had many more years to live and Kshs.200, 000.00 would be fair and just. They relied on the case of **Absons Motors & 2 Others-v-Sinema Kitsao & Chrispus Kitsao Kajefwa (Administrators of the estate of the late Kitaso Kajefwa Kitunga (Deceased) HCC No.39 of 2013**, where the deceased who was 85 years old at the time of his death was awarded Kshs.100, 000.000 under this head.

On loss of dependency they submitted that the deceased was a 23 year old shamba boy earning Kshs. 500.00 a day adding up to Kshs. 15,000.00 a month. They urged the court to use the multiplicand of 37 years assuming that he would have worked to 60 years and subject it to the ratio 2/3 since he had dependents. Consequently making it **2/3 x 30 x 12 x 15,000/- = Kshs. 3,600,000.00.**

On special damages they submitted that they had pleaded and proved Kshs. 36,300.00 as special damages, being payments for advocate's fees and court fees for grant.

On funeral and burial expenses, Counsel submitted that the court can take judicial notice that funeral expenses are incurred and need not be proven and as such should award a nominal amount as funerals are expensive in Africa as they involve, hearse, transport, coffin, mortuary fees, post mortem etc. Counsel suggested an award of Kshs. 100,000.00 as the deceased died in Mombasa and was buried in Tana River. He relied on the case of **Marion Njeri Kago-v-Kenya Railways Corporation HCCC No. 828 of 2003** where the judge stated that a court should be able to award a reasonable sum depending on the deceased's station in life and other factors without the confines of strict proof.

Mr. Macmillan Jengo, advocate for the Defendants**,** submitted that judgment on liability had been entered at 10% against the plaintiff and 90% against the Defendants and thus proceeded to submit on quantum.

Under the head of damages for pain and suffering counsel submitted that as the deceased had died on the spot an award of Kshs. 10,000 would be sufficient and relied on the case of **Jackson Magati Kiritu-v-Charles Cheruiyot Keter HCCC No. 437 of 1996 Nakuru** where an award of Kshs. 10,000.00 was awarded under this head.

On loss of expectation of life they submitted that the evidence before the court did not indicate the health condition and lifestyle of the deceased and urged the court to be guided by the case of **Victoria Ngendo-v-J.K. Njoroge HCC No.1438 of 1989**, where an award of Kshs.60, 000.000 was made under this head. They submitted that an award of Kshs. 70,000.00 for loss of expectation of life would be sufficient due to the intricacies of inflation.

On loss of dependency they submitted that in the absence of evidence on income and dependency the court should take the approach of a general/global sum and award Kshs.400, 000.00 as there was no evidence of earnings or indicating the deceased had children or that he was survived by the mother as no clinical cards of birth certificates of the minors were presented and the mother was never called as a witness. Counsel also submitted that it had not been properly ascertained how much the deceased earned and further PW1 had indicated that the deceased's job was erratic and therefore there was only speculation. He submitted that the court should be guided by the **Insurance (Motor Vehicle Third Party Risk) Amendment Act 2013 section 2** and use the minimum wage as per the **Regulation of Wages (Agricultural**

Industry) (Amendment) Order 2015 such that as a general worker in the agricultural sector minimum wage was Kshs. 5,436.90.

On the multiplier Counsel urged the court to use a multiplier of **15 years** as the deceased was in more physical work and would have worked for a shorter period, he also agreed that a two thirds dependency ratio will do as the deceased had a wife, children and a mother. Consequently, making it **2/3 x 15 x 12 x 5,436.90/- = Kshs.652,428.00.** He urged the court to be guided by the case of **Lawi Ouma Odera-v-John Juma Obungu & Another HCCC No. 369 of 2000 (Kisumu)**, **Victoria Ngendo-v-J.K. Njoroge HCC No.1438 of 1989** and **Daniel Wenwa Owana-v-Lake Tanners & Another HCCC No. 254 of 1989 Nairobi.**

Counsel also submitted that none of the decisions relied upon by the plaintiffs refer to a deceased who was 23 years old hence cannot assist the court.

On special damages they submitted that the same should be awarded as pleaded being Kshs. 36,300.00.

On funeral and burial expenses, Counsel submitted that the same was special damages and although documentation may not be necessary to prove a party should plead specifically and provide particulars for the court to make an award. As such they urged the court to ignore the claim and as it was only raised in submissions without evidence. Finally, on costs and interest Counsel submitted that the same may follow the event.

The Trial Court's judgment

Judgment was delivered by the trial court on 22.01.2020. The Learned trial Magistrate awarded general and special damages as follows;

A. General Damages

(1) Fatal Accidents Act

Loss of Dependency (a global sum) Kshs.2, 000, 000.00/=

B. Law Reform Act

(a) Pain and Suffering Kshs. 100,000.00/=

(b) Loss of Expectation of Life Kshs. 100,000.00/=

(c) Special Damages Kshs. 36,400.00/=

Total.....Kshs.2, 036, 400.00/=

The Learned Chief Magistrate also awarded costs of the suit and interest thereon at court rates.

The Appelant's Submissions

Counsel for the Appellant, **Mr. Macmillan Jengo,** in his submissions dated 25.06.2020, submitted that the appeal was against the award of damages and as such the court should be guided by the principles set out in the Court of Appeal in **Henry Hidaya Ilanga V Manyema Manyioka [1961] 1 Ea 705 (Cad)** while applying with approval the rule laid down by the **Privy Council in Nance V. British Columbia Electric Railway Company Ltd (4) (1951) A.C 601 at p.613**.

Counsel submitted that the trial court failed to apply the correct principles took into account extraneous unpleaded issues and filed to apply statutory law and guidance properly hence acted arbitrarily and exercised its discretion wrongly. Counsel further submitted that the award of Kshs. 2,000,000.00 was inordinately high and plucked from the blues and cannot be explained or justified as the trial court did not consider precedent and that it is trite that comparable injuries should receive comparable awards. He asked this court to rectify the anomaly by considering the circumstances of the case.

Counsel submitted that the court should have turned to the minimum wage of Kshs. 5, 436/- as the deceased was said to have worked I the farms, in light of the fact that there was lack of proof of income. Further counsel submitted that the multiplier of 30 years was on the higher side and if the court was to adopt the global award it must be near to a situation where the multiplier approach is used. They urged this court to set aside the assessment of damages of Kshs. 2,000,000.00 and replace it with a figure of between Kshs. 800,000.00 and 1,000,000.00. He asked the court to take into account the fact that some of the cases referred to were less than a month old hence the issue of inflation and passage of time don't apply. He also prayed for costs of the appeal.

For these submissions counsel relied on the cases of; **M'rarama M'ntheri V Luke Kiumbe Murithi (2015) eKLR, Jackson Chege Kamau & Another-v-James Theuri Wachira HCCC No.3 of 2016, John Wamae & 2 Others-v-Jane Kituku Nziva & Another (2017) eKLR**, **Ann Kanja Kithinji (suing as the legal representatives of the estate of Patrick Koome deceased) & 2 Others-v-Jacob Kirari & Another (2018)eKLR, John Migwi & Another-v-Mashua Hassan Msuka & Another C.A. No.96 of 2018, Amazon Energy Limited-v-Josephine Martha Musyoka & Another (2019) eKLR** and **Antony Muthamia Ngurwe & Another-v-Jane Nkatha Kathurima (2020) eKLR.**

The Respondents' Submissions

Counsel for the Respondents, **Mr. Wambua Kilonzo**, in his submissions dated 02.07.2020, submitted that the only issue for determination by this court was whether the trial court applied the wrong principles of law in assessing damages both under the Law Reform Act, Cap 26 Laws of Kenya and the Fatal Accidents Act Cap 32 Laws of Kenya and whether the amount was so inordinately high that it must be a wholly erroneous estimate of the damages. He submitted that the appellate court can only interfere where the trial court took into account an irrelevant factor or left out a relevant factor or where the ward was too high or too low as to amount to an erroneous estimate or that the assessment was based on no evidence.

Counsel submitted that the appellant had expressed dissatisfaction on the awards both under the Law Reform Act and the Fatal Accident Act but only submitted on the award on loss of dependency.

On pain and suffering Counsel submitted that it was not in dispute that the deceased sustained serious injuries and died on the spot and that it was not how long the deceased took to die but rather how much pain he endured even though it was for a short period of time. He further submitted that court should be concerned with each unit of pain and suffering endured before it can overturn the trial court's award. He submitted that the trial court's award of Kshs. 100,000.00 was not inordinately high as the Appellant's submissions at trial had relied on judicial authorities made in 1996 and 2005 more than 18 years ago therefore subject to inflation. He submitted that the trial court had indeed considered all authorities presented by both parties in their submissions and inflation hence its award was not excessive or erroneous to warrant this court to interfere with it.

On loss of expectation of life Counsel further submitted that the Appellants had not raised any issue with the award under that heading.

On the issue of loss of dependency **Mr. Kilonzo** reiterated that it was not disputed that the deceased had passed away at the age of 23 and was in good health. He further submitted that PW1 had testified that the deceased had married two wives both of whom had one child each and he had also been assisting the mother. He argued that Section 4 (1) of the Fatal Accidents Act recognizes wife, husband, parent and child of the deceased as dependents entitled to benefit from any suit under the Act. He further submitted that PW1 had tendered evidence before the lower court that the deceased used to do casual jobs and at the time of his death he was a gardener earning Kshs. 500.00 a day. He submitted that failure to provide evidence of income does not mean that there was no evidence of the deceased being a casual laborer and consequently the trial court had awarded a global sum. He submitted that minimum wage is set to ensure that laborers are not exploited by their employers and does not necessarily mean that they cannot be paid any amount above the minimum wage. Counsel submitted that most casual laborers are not offered these jobs accompanied by any documentation but from the evidence on record it is clear that the deceased had put food on the table for his family as well as provided for their basic needs.

Mr. Wambua submitted that there was no law that incriminates or disadvantages an individual considered to be unemployed. He submitted that a shamba boy did not necessarily mean unskilled labour as one needed a lot of knowledge to be able to deal with farm work hence the amount proposed by the Appellants was not correct under the Regulations of Wages (Agricultural Industry Amendment Order 2015) and thus being a resident of Kilifi County was entitled to Kshs. 296.20 a day. Consequently the same could be summed up as 2/3 x 30 x 12 x (296.20 x 30 days) = Kshs. 2,132,640.00.

Counsel submitted that the trial Magistrate had exercised his discretion within the limits and principals instructive on assessment of damages considering the age of the deceased. Consequently he urged this court to dismiss the appeal with costs.

For these submissions counsel relied on the cases of; **Kenya Power Ltd V James Matata & 2 Others (suing as the legal representatives of the estate of Nyange Masaga (Deceased) [2016] eKLR**, **Mashua Hassan Msuka (Suing as the administrator of the estate of the late Juma Mohamed Mapejo (Deceased)-v- John Migwi & Another**, **Moses Akumba & Another-v-Hellen Karisa Thoya [2017] eKLR** and **Catherine Mwendwa Mwirigi-v-Lucy Nkoyai Karwamba (suing as the legal administrator of the estate of Derrick Mugambi Mwimbi (Deceased) Civil Appeal No.128 of 2018 Meru.**

Issues For Determination

It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions see **Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424**. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

> ***i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***
>
> ***ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and***
>
> ***iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.***

There are very clear principles on the sums recoverable against the defendant who caused the fatal injuries which caused the death of the deceased under the **Law Reform Act Miscellenous Provisions (Section 2) and the Fatal Accident Act under Section 4 and 5 of the Act.** As provided for in the Fatal Accident Act the claim by the respondents against the appellants was brought as legal personal representative and on behalf of the estate of the deceased for the benefit of the dependents. It is general principle of law that when assessing damages recoverable on both the Law Reform Act and Fatal Accidents Act the amount recoverable under the Law Reform Act shall be taken into account but deducted in the final assessment of damages so as to avoid double payment to the same beneficiary. It is imperative to conceptualize the exercise of discretion in assessment of damages under the Law Reform Act and Fatal Accidents Act.

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter.

I will consequently put my mind to the following issue for determination by this court in my view:

1. Quantum

Quantum

I stand by the Court of Appeal for East Africa in ***Peters –vs- Sunday Post Limited [1958] EA 424*** where **Sir Kenneth O'Connor** stated as follows:-

> ***"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484. "My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their Evidence is given."***

Further in the case Of ***Millicent Atieno Vs. Ochuongo Vs. Kalota Richard [2015] eKLR And Fmm & Another Vs. Joseph Njuguna Kuria & Another [2016] eKLR*** Where The Court Relied On ***Ringera J. In Leonard Ekisat & Antoher Vs. Major Kibingen 2005 eKLR*** it was stated 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 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"***

For the issue of quantum I shall rely on the Court of Appeal's decision in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that –

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
>
> ***'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 he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."***

From my re-evaluation of the evidence, I find that the learned trial magistrate made reference to the relevant evidence on record. That said, it is for me to determine whether the award was consistent with comparable awards made. The Court of Appeal in **Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR** stated that ***"comparable injuries should attract comparable awards"***.

I have considered the parties' submissions on quantum of damages as well as the authorities cited by Counsel in their submissions for this appeal. It must be noted that injuries will never be fully comparable to other person's injuries. What a court is to consider is that as far as possible comparable" to the other person's injuries, and the after effects.

I am however not persuaded by the authorities cited by the appellants at trial on account of the fact that they were not the most recent precedents. I wish to reiterate that it is the responsibility of counsel to provide the court with precedence that is current and relevant as an advocate is an officer of the court and a beacon of justice.

The appellants' case is that the approach taken by the learned trial Magistrate was erroneous and against the well laid down principles on loss of dependency and that there is need to interfere with the Judgment on this point. I note that they have not fully submitted on any of the other issues as such I am persuaded that they do agree with the learned trial magistrate's awards under the other headings. Consequently, I find no reason to interfere with the trial court's finding under the other heads and as such shall focus on the issue of loss of dependency.

It is not in contention that the deceased was a 23 year old male adult, who worked as a shamba boy or gardener, within Kilifi County and that he had dependents; two wives, two children and a mother.

The determination of damages will involve the principles laid down in various judicial decisions such as in the case of **Yorkshire Electricity Board v Naylon 1968 AC 52G** where the court held that:

> ***"It is to be observed and remembered that the prospects to be considered and those which were being referred to by Viscount Simon L. C. in his speech were not the prospects of employment or of social status or of relative pecuniary affluence but the prospects of a 'positive measure of happiness' or of a 'predominantly happy life."***

I have considered the rival submissions on the quantum of damages, the authorities cited by the Appellants and Respondents in their submissions. Further, in dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5** where the court held that;

> ***"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 he misapprehended the evidence in some material respect, and so arrived at a Figure which was either inordinately high or low"***

In the case of **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR** the court stated as follows: -

> **"It is the law that the assessment of 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 simply because it would have awarded a different figure if it had tried the case at the first instance …"**

For this I shall rely on the Court of Appeal's decision in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, where the Court of Appeal held that –

> ***"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:***
>
> ***'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 he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."*** *(Emphasis my own).*

I concur with the Learned Judge in the case of **Civil Appeal Number 17 of 2015 & 18 of 2015 Malindi Moses Akumba & Another V Hellen Karisa Thoya [2017] eKLR** that:

> ***"…each life is important and equal and that there should be no distinction between a poor man and a rich one, no distinction between one who is working and an unemployed person".***

The deceased was a young 23 year old man who was also healthy. He was a gardener whether he was formally employed or not should not be a major issue here as this was a young man's life that had been cut short. That said, it is for me to determine whether the award was consistent with comparable awards made.

The Court of Appeal has reaffirmed the various variables to be taken into account on proof of income and employment when it comes to the question whether one has to produce bank statements, book of accounts, receipts, and testimonials as the safest way to determine the parameters that one was in active employment or his income earnings. That position has been made clear in the case of **Jacob Ayigo v Simon Obayo [2005] eKLR** where it was expressly stated as follows:

> ***"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 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."***

I consider the court's obitum in the case of In the case of **Wangai Thairu v Hon Burngetuny & Another supra** – the court on this powers

stated as follows:

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are 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 purchase.***
>
> ***In choosing the said figure usually called the multiplier the court must bear in mind the expectation if earning life of the deceased, the expectation of life and dependency of the defendants and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration 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"***

In the cases of **Board of Governors of Kangubiri Girls High School& Another v Jane Wanjiku court of appeal sitting at Nyeri in civil appeal no. 35 of 2014 eKLR** pronounced itself as follows:

> ***"The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason"***

In reference to the decision in the case of ***Kwanzia v Ngalah Rubia and another*** **Ringera J**. as he then was read as follows

> ***"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. Can and must be abandoned where facts do not facilitate its application. It is plain that it is useful and practical method where factors such as age of the deceased, the amount or annual or monthly independency and the expected length of the dependency are known 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"***

What amounts to proof on the above factors depends on the circumstances and character of each particular case. This is the position taken and articulated in the **case of *Charles Ouma & Another v. Bennard Odhiambo Ogeche 2014 eKLR*** where the court held:

> ***"I am of the considered view that the learned trial Magistrate fell into error in making awards under separate heads. As it were the future of the deceased who was aged 14 years old as at the time of the accident was uncertain. There was no knowing what he would have become had he lived his life to the full nor how much he would earn, nor was there any way knowing whether or not he would be able to support his brother, the respondent herein"***

I take judicial notice that from the latest World Bank data life expectancy in Kenya is between 64 and 69 years. I also take judicial notice that the minimum wage in Kenya is based on the region and occupation of various categories of workers. However, having said that I am inclined to concur with the learned trial magistrate that a global sum would be the best approach in the circumstances of this case.

The Appellants propose an award of the sum in the region of Kshs. 800,000.00 to 1, 000,000.00 while the Respondents argued that and an award of Kshs. 2,000,000.00 is not excessive or erroneous.

I should hasten to add that there is no golden rule in the assessment of damages, as what is beyond doubt is that irrespective of the age of the deceased and whether or not there is evidence of his pecuniary contribution damages are payable to the parents or dependents, as the heads, global or mixed approaches have been applied in superior courts as was seen in the Court of Appeal's decision in the case of **Kenya Breweries Limited –v- Saro [1999] KLR 408.**

Consequently, I find that the global sum would be sufficient in this case, however, from the foregoing I find that the learned trial magistrate's award was inordinately high while the amount proposed by the Appellants was too low. I therefore award a global sum of Kshs. 1,000,000.00 under this head.

Special Damages

The test to be applied in this award of damages is clearly articulated in the cases of **Mariam Maghema Ali v Jackson M. Nyambu T/A Sisera Store Civil Appeal No. 5 of 1990 and Idi Ayub Shaban v City Council of Nairobi 1982 – 1988 IKAR 681** which laid down the principle that special damages in addition to being pleaded must be strictly proved. Consequently, on special damages I find that the Respondent had clearly proven the amount pleaded as special damages and as such I find no reason to vary the Learned Magistrate's decision on that.

The award on Interest

It is important to note that the award on interest is discretional as such I find no basis for tempering with the trial court's decision on this.

I further wish to point out that *in assessing compensatory damages, the Law seeks at most to indemnify the victim for the loss suffered, not to mulct the tortfeasor for the injury he has caused see the case of* **Lim v Camden HA {1980} AC 174.**

In view of the foregoing, I am persuaded that the award made by the learned trial magistrate under the head of loss of dependency fell on the higher side in comparison to comparable awards, hence there is need for interference. However, I am not persuaded that the sum suggested by the Appellants is reasonable and fair in light of the circumstances of this case.

There is no legal requirement for the court to deduct the amount awarded under the Law Reform Act from the award made under the Fatal Accidents Act. For the above reasons, the appellants appeal partially succeeds and the following orders abide the decision of this court:

A. General Damages

(1) Fatal Accidents Act,

(Loss of Dependency) Global Sum Kshs. 1, 000, 000.00/=

B. Law Reform Act

(a) Pain and Suffering Kshs. 100,000.00/=

(b) Loss of Expectation of Life Kshs. 100,000.00/=

(c) Special Damages Kshs 36,400.00/=

Total..... **Kshs. 1, 236, 400.00/=**

Subject to the **10%** contributory negligence against the Respondents as consented by parties. Interest shall abide from the date of judgment until payment in full.

Each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF DECEMBER 2020

……

R. NYAKUNDI

JUDGE

NB: ***This Judgment is dispatched electronically to the respective emails of the advocates in the matter.***