REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 87 OF 2017

DANIEL KAHIGA.....1ST APPELLANT

SHADRACK SAKWA JUMA.....2ND APPELLANT

-VERSUS-

JANET JERUTO & MICHAEL CHEPKWONY

(suing as the legal representative of the estate of

MAUREEN JEPKOECH CHEPKWONY, Deceased).....RESPONDENTS

(Being an appeal from the Judgment and Decree in Eldoret CMCC No. 593 of 2016 delivered on 16 June 2014 by Hon. Obulutsa, CM)

JUDGMENT

[1] This appeal arises from the Judgment and Decree passed in **Eldoret Chief Magistrate's Civil Case No. 593 of 2016: Jeruto Janet Tolong & Michael Chepkwony (suing as the legal representatives of the estae of Maureen Jepkoech Chepkwony, Deceased) vs. Daniel Kahiga & Shadrack Sakwa Juma**. The Appellants were the Defendants in the lower court suit, wherein the cause of action was premised on negligence. It was alleged by the Respondents that, on or about **14 December 2015,** the Deceased, **Maureen Chepkoech Chepkwony**, was travelling as a lawful pillion passenger on motor cycle **Registration No. KMDK 553R** along Eldoret-Iten Road when the 2nd Appellant drove Motor Vehicle **Registration No. KAG 240Z** so negligently that it lost control, veered off the road and violently knocked down the deceased; and that as a result the deceased sustained fatal injuries.

[2] Accordingly, the Respondents sued the two Appellants on behalf of the estate of the deceased pursuant to **Sections 2 and 3** of the **Law Reform Act, Chapter 26 of the Laws of Kenya** and **Section 6** of the **Fatal Accidents Act, Chapter 32 of the Laws of Kenya,** claiming General and Special Damages for pain, suffering and loss of expectation of life. After hearing both sides of the disputation, the learned trial magistrate made an award in the sum of **Kshs. 11,870,289/=** together with interest and costs, in a Judgment delivered on **16 June 2017.**

[3] Being dissatisfied with the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal, raising the following grounds of appeal:

[a] That the Learned Trial Magistrate erred in law and fact in failing to dismiss the Respondent's suit in the lower court as they did not prove their case on a balance of probability.

[b] That the Learned Trial Magistrate erred in law and fact in holding the Appellants 100% liable for the alleged accident when there was no sufficient evidence to support that finding.

[c] That the Learned Trial Magistrate erred in law and fact in failing to hold the deceased wholly and/or substantially liable for the accident.

[d] That the Learned Trial Magistrate erred in law and fact in making an award in Special Damages of **Kshs. 76,289/=** that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the Respondent, and in the absence of proof of the said special damages.

[e] That the Learned Trial Magistrate erred in law and fact by awarding the Respondent a sum of **Kshs. 100,000/=** for pain and suffering while not considering that the deceased succumbed to her injuries on the spot and therefore amounting to an erroneous

estimate of the loss and damage suffered by the estate of the deceased.

[f] That the Learned Trial Magistrate erred in law and fact by awarding the estate of the deceased a sum of **Kshs. 150,000/=** for loss of expectation of life when it was not entitled to the same and/or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

[g] That the Learned Trial Magistrate erred in law and fact in failing to deduct the award for loss of expectation of life from the final award thus enabling the estate of the deceased to benefit twice.

[h] That the Learned Trial Magistrate erred in law and fact in adopting a multiplicand of **Kshs. 38,000/=** when the deceased was not earning any income at the time of her demise.

[i] That the Learned Trial Magistrate erred in law and fact in adopting a multiplier of 36 years without any legal basis and/or justification.

[j] That the Learned Trial Magistrate erred in law and fact in applying a dependency ratio of 2/3 in awarding damages without any legal basis and/or justification.

[k] That the Learned Trial Magistrate erred in law and fact in awarding the estate of the deceased a sum of **Kshs. 10,994,000/=** for loss of dependency/lost years that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

[l] That the Learned Trial Magistrate erred in law and fact in failing to adopt a global sum formula in awarding damages to the estate of the deceased.

[m] That the Learned Trial Magistrate erred in law and fact in only relying on the Respondent's evidence most of which was speculative in nature.

[n] That the Learned Trial Magistrate erred in law and fact in over-relying on the Respondent's submissions and authorities which were not relevant and without addressing his mind to the circumstances of the case.

[o] That the Learned Trial Magistrate erred in law and fact in failing to consider the Appellant's submissions and legal authorities relied on in support of the Defence.

[p] That the Learned Trial Magistrate's decision, albeit a discretionary one, was plainly wrong.

[4] In the premises, the Appellants prayed that the appeal be allowed, and the Judgment of the lower court be set aside and be substituted with a proper finding/Judgment of this Court; and that the Respondents be condemned to pay costs in the lower court and in this appeal.

[5] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **13 November 2018**. Thus, Counsel for the Appellants filed written submissions herein on **29 November 2018,** while the Respondent's written submissions were filed on **2 April 2019**. Counsel for the Appellant reduced the issues emerging from the 16 Grounds of Appeal to the following and argued the appeal on that basis:

[a] Whether the learned trial court erred in law and fact in holding the Appellants 100% liable;

[b] Whether the learned trial magistrate made an erroneous award under the **Law Reform Act;**

[c] Whether the learned trial magistrate erred in law and in fact in awarding special damages in his assessment of damages of **Kshs. 76,289/=;**

[d] Whether the learned trial magistrate erred in making an award under the **Fatal Accidents Act** that was excessive in the circumstances;

[e] Whether the learned trial magistrate erred in law and fact in failing to deduct the award for loss of expectation of life from the final award thus enabling the estate of the deceased to benefit twice;

[f] Whether the learned trial magistrate erred in law and fact in failing to adopt a global sum formula in awarding damages to the estate of the deceased;

[g] Whether the learned trial magistrate erred in law and fact in over-relying on the Respondent's submissions;

[h] Whether the decision of the lower court is plainly wrong.

[6] On liability, argued as **Issue No. 1** in the Appellant's written submissions, it was the submission of **Mr. Omwenga** that the trial magistrate proceeded to hold the Appellant's 100% liable to the Respondents without any justification other than that the Appellants did not attend court to testify. Counsel faulted the lower court for basing his conclusions on the mere fact that the 2nd Appellant was charged and did

not bear in mind that the matter was yet to be determined. He relied on **Ali Salim Karama vs. African Line Transport Co. Ltd Mombasa Civil Case No. 187 of 2006** wherein it was held that the mere fact that the driver was convicted for the offence of careless driving was not sufficient of itself to found 100% liability.

[7] On quantum, Counsel for the Appellants approached the issue from various angles and segmented his arguments into **Issues Nos 2 to 6** of his written submissions, noting that **Issue No. 4**, which was predicated on the Ground that the Special Damage award of **Kshs. 76,289/=** is excessive, was abandoned. Counsel also abandoned **Ground 12** in the Memorandum of Appeal along with **Issue No.6**. Thus, in support of the Appellants' contention that the trial magistrate made an erroneous award under the **Law Reform Act** by awarding **Kshs. 100,000/=** for pain and suffering and **Kshs. 150,000/=** for loss of expectation of life, Counsel took the view that, since the deceased succumbed some hours after the accident, an award of **Kshs. 10,000/=** would have sufficed for pain and suffering. He relied on **David Ngunje Mwangi vs. The Chairman of the Board of Governors of Njiiri High School [2001] eKLR** wherein **Kshs. 10,000/=** was awarded in a matter where the deceased person died soon after the accident.

[8] To augment his submissions, Counsel also relied on **Francis K. Nthiwa vs. Gregory K. Mwangangi & Another [2009] eKLR** wherein **Kshs. 100,000/=** was awarded for loss of expectation of life in respect of a deceased who was aged 19 years at the time of death; and urged the Court to find that no justification was given by the lower court for awarding **Kshs. 150,000/=** on that head.

[9] Mr. Omwenga impugned the trial magistrate's award under the **Fatal Accidents Act** in the manner set out in **Grounds 8, 9, 10 and 11** of the Memorandum of Appeal and under **Issue No. 4** in the Appellant's written submissions. According to him, the learned trial magistrate adopted a multiplier of 36 without taking into account the fact that the deceased was still a student and was yet to be employed; or the present vagaries of life, including the uncertainty that the deceased would have reached retirement age. On his part, he proposed a multiplier of 18 years on the authority of **Joseph Wachira Maina & Another vs. Mohammed Hassan [2006] eKLR,** in which a multiplier of 18 years was adopted.

[10] On the dependency ratio, Counsel for the Appellants urged the Court to note that the deceased was still a university student in her third-year studies; and that the Respondents did not demonstrate before the lower court how the deceased used to support the 1st Respondent and her (deceased's) siblings. It was therefore his argument that, in the absence of such evidence, a dependency ratio of 1/3 ought to have been applied, instead of 2/3. Likewise, Counsel took issue with the multiplicand of **Kshs. 38,000/=** that was adopted by the lower court, arguing that the pay slip that was exhibited by the Respondents amounted to nothing more than a guideline; and that the trial magistrate ought to have borne in mind that the deceased herein was yet to join the workforce as a teacher or otherwise.

[11] On their part, the Appellants urged the Court to adopt the sum of **Kshs. 5,844.20**, being the applicable minimum wage at the time, as the multiplicand. Counsel accordingly proposed that, on the basis of the foregoing, the amount due to the deceased's estate under the **Fatal Accidents Act** would be no more than **Kshs. 420,782.40 (Kshs. 5,844.20x12x18x1/3 = Kshs. 420,782.40)**. Further, it was the submission of Counsel that the award under the **Law Reform Act** for loss of expectation of life, ought to have been deducted by the trial magistrate from the award under the **Fatal Accidents Act**, but that this was not the case, given the summary of the awards at page 172 of the Record of Appeal. He relied on **Joseph Wachira Maina & Another** (supra) to buttress this argument.

[12] In respect of **Issues 7 and 8**, it was the submission of Counsel for the Appellants that, in reaching his conclusions and award, the trial magistrate over-relied on the Respondent's written submissions which appear at pages 69 to 124 of the Record of Appeal; and that he failed to pay any attention to the Appellants' written submissions at all; and that had he done so, he would have arrived at a fair and justified decision. He accordingly urged the Court to find that the decision of the trial magistrate is plainly wrong and to have the same set aside and replaced with a just and fair judgment of this Court.

[13] In response to the Appellants' submissions, Counsel for the Respondent, **Mr. Cheruiyot**, defended the decision of the lower court in terms of its conclusions both on liability and quantum. He submitted that all the allegations set out in the Plaint were proved by the Respondents; and in particular by the eye-witness account given by **PW4** and the fact that the 2nd Appellant was charged with the offence of causing death by dangerous driving contrary to **Section 46** of the **Traffic Act, Chapter 403** of the **Laws of Kenya**. He urged the Court to note that although the Appellants blamed the motor cyclist for the occurrence, they did not enjoin the owner thereof or even the rider of the motor cycle as a party to the lower court suit. Hence, his view was that the learned trial magistrate was right in holding the Appellants 100% liable for the accident and the ensuing loss, pain and suffering occasioned to the deceased's estate.

[14] In response to the Appellants' written submissions on quantum, Counsel for the Respondents relied on **Civil Appeal No. 256 of 2005: Gusii Deluxe Ltd & 2 Others vs. Janet Atieno** for the proposition that assessment of damages is an exercise of judicial discretion; and therefore that an appellate court such as this ought to be slow in disturbing the decision of the trial magistrate on the question of quantum unless satisfied that the trial court acted on a wrong principle of law, or that it misapprehended the facts or, for some reason, arrived at an erroneous estimate of the damage suffered. Counsel defended the sums awarded under the **Law Reform Act** for pain and suffering; and for loss of expectation of life. He similarly propounded the view that, in respect of claims under **Fatal Accidents Act**, double compensation would only arise when an award for lost years is made under the **Law Reform Act** and another award under the **Fatal Accidents Act** in respect of the same dependants. He relied on **Homa Bay Civil Appeal No. 1 & 2 of 2013: Simeon Kiplimo Murey & Another vs. Kenya Bus Services & 4 Others**, in urging the Court to dismiss this appeal with costs.

[15] This is a first appeal, and therefore it is the duty of the Court to review the evidence adduced before the lower court with a view of satisfying itself that the decision was well-founded; but bearing in mind that it did not have the advantage of seeing or hearing the witnesses. The holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** is instructive, namely:

"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

[16] The Respondents testified before the lower court and called two other witnesses, namely; **PC Cheserek Kiptoo (PW1)** and **Rasto Nyongesa Simiyu (PW4)**. In her evidence, the 1st Respondent, **Janet Jeruto (PW2)** told the lower court that the deceased was her first-born daughter; and that she was involved in a road traffic accident **on 14 December 2015** and thereby sustained injuries from which she died while undergoing treatment at **Moi Teaching and Referral Hospital.** She further testified that the deceased was a third-year student at the **University of Eldoret** in the Faculty of Education; and that she expected her to graduate, become a teacher and to support the family. She produced several documents to support her testimony, including the Certificate of Death and a letter from the area Chief.

[17] The 2nd Respondent, an uncle to the deceased, relied on his witness statement filed before the lower court and confirmed that the deceased died from injuries sustained in a road traffic accident; and that she was a third-year student at the University of Eldoret. He produced a pay slip to demonstrate to the lower court the income of a graduate teacher. The last witness, **PW4**, told the lower court that he was walking from Action towards Prison when the accident happened; and that he saw the lorry, **Registration No. KAG 240Z** swerve to the right, thereby knocking the motor cycle on which the deceased was a pillion passenger. It was further his evidence that the driver of the lorry immediately fled from the scene before the victim was rushed to hospital in an ambulance.

[18] On behalf of the Appellants, evidence was adduced by **Zakayo Luchombo Lusese (DW1)** on **12 April 2017.** He was, at the material time working for the 1st Appellant as a turnboy in the subject motor vehicle. He similarly adopted his witness statement filed before the lower court and confirmed that the lorry in issue was being driven by the 2nd Appellant at the time of the accident. He further confirmed that, on approaching the Prison junction, near Kipchoge Stadium, the driver gave a right-turn indication but the accident occurred before he fully joined the prison road because a motor cycle **Registration No. KMD 553R** from the opposite direction hit the lorry at the back-left wheel. Thus, according to **DW1**, the motor cyclist was to blame for the accident.

[19] Thus, having re-evaluated and reconsidered the entirety body of evidence adduced before the lower court, there is no dispute that an accident occurred on **14 December 2015** involving the 1st Appellant's lorry **Registration No. KAG 240Z** and a motor cycle **Registration No. KMDK 553R**; or that the said lorry was, at all material times, being driven by the 2nd Defendant. There is further no controversy that the deceased, **Maureen Jepkoech Chepkwony** was a pillion passenger on the motor cycle aforementioned or that she suffered injuries in the accident from which she died at Moi Teaching and Referral Hospital while undergoing treatment. Accordingly, the issues for re-consideration are two-fold, namely whether the lower court's decision on **liability** is defensible; and whether the assessment of **damages** by the learned trial magistrate was premised on sound principles.

[20] In proof of the allegations of negligence set out in the Plaint, the Respondents called four witnesses; including **Rasto Nyongesa Simiyu (PW4)** and **PC Cheserek (PW1). PW4,** an eye witness to the accident, was walking along the Eldoret-Iten Road at about 2.00 p.m. His evidence was that the motor cycle came from the direction of Iten heading towards Eldoret Town and was therefore on the left lane facing Eldoret direction; and that at the Prison junction, the lorry swerved to its right without any indication; thereby knocking the cyclist and his pillion passenger. He added that the lorry driver was over-speeding and therefore did not yield to the cyclist as was expected of him. In response to that evidence, the Appellants relied on the evidence of **DW1** who told the court that he heard a bang on the rear after the motor vehicle turned right at the junction. In my careful consideration, **PW4** was in a better position to witness the occurrence and therefore would be more credible, noting his evidence that he was walking towards Eldoret Town and was about 10 metres behind the motor cyclist. The accident happened ahead of him and at close range. That evidence attributes negligence to the lorry driver, for over speeding and failing to yield to the motor cyclist who had the right of way in the circumstances.

[21] In addition to the foregoing, it was also the evidence of **PW1** that following police investigations, the driver of the lorry, the 2nd Appellant herein, was charged with the offence of causing death by dangerous driving, but that he failed to attend court and a warrant of arrest was consequently issued for his apprehension. As at the time he testified before the lower court, the traffic case was still pending. Thus, whereas I agree with the submission by Counsel for the Appellants that the mere fact that the 2nd Respondent was charged with the offence of causing death by dangerous driving is, of itself, not sufficient to base a finding on liability, it is telling that the 2nd Respondent failed to attend court, granted the evidence of **PW4** that the he fled from the scene after the accident. In addition, **PW1** produced the Police Abstract in support of his evidence, adding that the point of impact was on the right side of the road facing Iten direction; a clear indication that the 2nd Appellant was the one at fault here.

[22] Secondly, and more importantly, is the fact that although the Appellants alleged negligence against the motor cyclist at paragraphs 6 and 7 of their Defence, no evidence was adduced in support thereof. Indeed, the averment in paragraph 7 that "… **The defendant shall in due course commence third party proceedings to enjoin the rider and/or owner of motor cycle Reg. No. KMDK 553R as a third party to this suit…"** was not followed through. Needless to say, that it is a cardinal principle that he who alleges must prove. Hence, in **Section 107(1)** of the **Evidence Act, Chapter 80** of the **Laws of Kenya,** it is stipulated that:

> **Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

[23] Likewise, in **Sections 109** and **112** of the **Evidence Act,** it is the law that:

> **109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.**
>
> **...**
>
> **112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.**

[24] It was upon the Appellants to prove the allegations made by them in their Defence and having failed to discharge that burden, the lower court cannot be faulted for holding the Appellants 100% liable. In this respect I would endorse the expressions of **Mabeya J.** in **Safarilink Aviation Limited vs. Trident Aviation Kenya Limited & Another [2015] eKLR,** that:

"...failure to rebut evidence tendered by one party leaves the court with no option but to draw an inference that the facts as presented are true..."

[25] On quantum, it is to be borne in mind that assessment of damages is a matter of discretion; and therefore, an appellate court will hardly disturb an award made by a subordinate court unless sufficient cause be shown to warrant such interference. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR** the Court of Appeal restated this principle as follows:

"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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 high that it must be a wholly erroneous estimate of the damages."

[26] The evidence placed before the lower court, which was entirely uncontroverted, was that the deceased was then a young adult aged 23 years. There was no dispute before the lower court that the deceased was a third-year student, pursuing a Bachelor of Education degree at the University of Eldoret. The evidence of her mother **(PW2),** which was similarly unchallenged, was that she was the first-born child and was the hope of the family, having been the only one to join university. She added that the deceased was planning to do her Masters Course after graduation and was also a music artist with great promise. **PW2** expected that, upon graduation, the deceased would earn **Kshs.40,000/=** to **Kshs. 50,000/=** which was then the monthly salary of a graduate teacher. She concluded her evidence by stating that she expected the deceased to support her and her siblings upon graduation and becoming a teacher.

[27] The evidence of **PW2** was corroborated by the evidence of her brother, **Michael Chepkwony (PW3),** who was able to see and speak to the deceased on the fateful day before she was taken to theatre. His evidence was that the deceased was "… **in so much pain and was profusely bleeding…"** He produced a pay slip of a graduate teacher **(Plaintiff's Exhibit No. 13),** showing a net salary of **Kshs. 38,021.60** for **December 2016**. He added that the deceased was expected to graduate in the year **2017** and would most likely have started working in **2018** for a salary higher than shown on **Exhibit 13**.

[28] It was in the light of the foregoing that the learned trial magistrate adopted a multiplicand of **Kshs. 38,000/=,** a multiplier of **36 years** and a dependency ratio of **2/3** to arrive at **Kshs. 10,944,000/=** as the quantum of damages due under the **Fatal Accidents Act**; in addition to **Kshs. 100,000/=** for pain and suffering and **Kshs. 150,000/=** for loss of expectation of life. Thus, the lower court's award was computed as hereunder:

[a] Pain and Suffering Kshs. 100,000/=

[b] Lost years Kshs. 10,944,000/=

Kshs. 11,944,000/=

[c] Less loss of expectation of life Kshs. 150,000/=

Kshs. 11,794,000/=

[29] In the premises, the issue that now falls for determination is the question whether the lower court adopted the correct approach in terms of **multiplicand; multiplier** and **dependency ratio.** In resolving this issue, I find instructive the approach adopted in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others [1957] EA 748**, wherein the Court of Appeal for East Africa restated the formula to be applied in the following terms:

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

On the Multiplier

[30] The deceased died at the age of 23 years, and as was pointed out by **PW2** and **PW3,** had good prospects of graduating and joining the teaching workforce as a graduate teacher. It was thus on the assumption that the deceased would have joined the workforce at the age of 24 years and worked up to the retirement age of 60 years that the lower court came up with the multiplier of 36 years. The Appellants disputed this conclusion, arguing that no attention was given to the present vagaries of life, and the fact that it was not known when the deceased would be employed and for what period she would have worked. Counsel relied on **Joseph Wachira Maina & Another vs. Mohammed Hassan [2006] eKLR** to support his proposal that a multiplier of 18 be employed instead.

[31] I have perused and considered the authority aforementioned and note that it was decided on **23 June 2006** before the retirement age was adjusted to 60 years and is therefore distinguishable from the facts of the instant case. It is however a valid point that, in determining the

multiplier, due consideration ought to be given to the vicissitudes and imponderables of life. Hence, while I agree that the deceased had good prospects of being employed, the correct approach would have been to give allowance of a few years between the expected date of employment and retirement. Thus, in **Machakos HCCC No. 112 of 2002: Mukiti Musili Moki vs. Lt. Col. Lucas Kairu**, a decision rendered on **10 February 2009**, a multiplier of 25 years was applied, with the Court acknowledging that:

"…it is always difficult to quantify general damages where the deceased person has no known means of earning an income. The deceased was a young graduate who had just completed her Bachelor of Commerce degree. She graduated posthumously with an upper second class (Honours) degree in marketing. She had good prospects of being employed…"

[32] In that case, the court proceeded on the assumption that the deceased would have worked until the age of 50 years, considering that the retirement age was then 55 years. In the premises, I would be of the considered view that a multiplier of 30 years would be the most appropriate, given the facts presented before the lower court; and I so find.

On the Dependency Ratio:

[33] The Appellants took issue with the 2/3 ratio adopted by the trial court, contending that it was inapplicable to the circumstances of the case. Their argument was that the deceased was still a university student and that it was not demonstrated by the Respondents how she used to support the 1st Respondent and the siblings. It was therefore their posturing that, granted that no evidence of support was availed, the lower court ought to have adopted the ratio of 1/3. It was, thus, on that basis that the Appellants urged the Court to adopt the ratio of 1/3 in reworking the quantum.

[34] Whereas it is trite that dependency is a matter of fact which has to be established by way of evidence, it is also recognized that, in the context of the Kenyan society, young ones are expected to, and do routinely assist their parents and siblings, irrespective of whether they are in formal employment or not. This reality was aptly expressed by the Court of Appeal in **Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] eKLR** (per **Nyarangi, JA)** thus:

"...in the context of Kenya, and that is the relevant context, parents of a deceased young man who would have been preparing himself for a career with a view to looking after his parents in their old age suffer real economic loss. The financial assistance relative to the ability of the deceased which is normally expected and readily provided is obliterated by the death. The cost of bringing up the deceased ... are extinguished. Now, almost all assistance of this kind would in the conditions of Kenya be almost wholly economic in substance. So much so that the loss caused by the death could never be adequately compensated in monetary terms. No question of a windfall to the parents can therefore reasonably arise."

[35] Likewise, in the case of **Kenya Breweries Ltd vs. Saro [1991] eKLR,** the Court of Appeal (differently constituted) restated its position on the matter in the following words:

"…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...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 no evidence of pecuniary contribution...we reject the 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...""

[36] In **Gachoki Gathuri (Suing as the Legal Representative of the Estate of James Kinyua Gachoki (Deceased) vs. John Ndiga Njagi Timothy & 2 Others [2015] eKLR**, wherein the deceased was a 29-year-old unmarried man, a dependency ratio of 2/3 was applied. Accordingly, I find no valid reason for disturbing the ratio of 2/3 adopted by the lower court; and this is notwithstanding that this court would have itself come to a different conclusion on that aspect; and in deference to the holding in **Peters vs. Sunday Post Limited [1958] EA 424** that:

"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..."

On the Multiplicand:

[37] As has been pointed out herein above, the deceased was poised for employment as a graduate teacher when she lost her life in the subject accident. Evidence was placed before the lower court that she would have earned a net salary of about Kshs. **38,000/=.** That evidence was not rebutted. Clearly, the lower court committed no error in adopting the net sum of **Kshs. 38,000/=** as the multiplicand. In the **Hellen Waruguru Waweru Case**, the Court of Appeal was explicit that:

"...the net income determines the multiplicand and it is only net of statutory deductions. In this case...the net salary after statutory deductions was Sh. 19,373, and indeed counsel for KSSL accepted that figure in his submissions. There is no reason why the High Court should have interfered with that figure..."

[38] In the premises, the proposal by the Appellants that the minimum wage be applied is clearly untenable herein, granted that there was credible and uncontroverted evidence to guide the lower court on the multiplicand**.**

On the Awards Under Law Reform Act

[39] For pain and suffering, the trial court awarded the deceased's estate **Kshs. 100,000/=,** which the Appellants took issue with, contending that it is excessive. The Appellants had proposed an award of **Kshs. 10,000/=** before the lower court on the authority of **David Ngunje Mwangi vs. the Chairman of the Board of Governors of Njiiri High School [2001] eKLR**, wherein **Kshs. 10,000/=** was awarded for pain and suffering. It is noteworthy however that in that case, it was unclear to the court whether the deceased died instantly or not; and the Plaintiff's position was that he may have died instantly. Hence, the facts are distinguishable from the facts at play in this appeal. The Respondents herein availed credible evidence to prove that the deceased's death was not instant; but that she was rushed to Moi Teaching and Referral Hospital and that **PW3** had occasion to talk to her and noted that she was in great pain. PW3 further told the lower court, and this evidence was unrebutted, that the deceased agonized over the prospect of her death before she was taken to the theatre. Additionally, the Certificate of Death exhibited before the lower court gave the date of her death as **15 December 2015**, a day after the accident. In the premises, I entertain no doubt at all that the award of **Kshs. 100,000/=** for pain and suffering was premises on sound basis.

[40] In respect of loss of expectation of life, the lower court awarded **Kshs. 150,000/=.** The Appellants had proposed an award of **Kshs. 100,000/=** on the authority of **Francis K. Nthiwa vs. Gregory K. Mwangangi [2009] eKLR** and urged the Court to approve the same. However, this is a non-issue in my view, the amount having been deducted from the award under **Fatal Accidents Act**. Besides, it was not demonstrated that the trial magistrate erred in principle in coming up with the figure of **Kshs. 150,000/=.**

[41] In the result, I would re-calculate the quantum of damages due to the estate of the deceased as follows:

Under the Law Reform Act:

Loss of Expectation of life - **Kshs. 100,000**

Pain and suffering - **Kshs. 150,000**

Under the Fatal Accidents Act

Loss of dependency Kshs. 38,000 x 2/3 x 30 x 12= **Kshs. 9,120,000**

Special damages - Kshs. 76,289

Total - Kshs. 9,446,289/=

Less loss of expectation of life - **Kshs. 150,000**

Kshs. 9,296,289/=

[42] Hence, the appeal is allowed to the extent aforestated. The Judgment and Decree of the lower court are hereby set aside and replaced with a Judgment of this Court in favour of the Respondents against the Appellants in the total sum of **Kshs. 9,296,289/=** together with interest and costs; the interest being payable from the date of the lower court Judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 29TH DAY OF JULY 2019

OLGA SEWE

JUDGE