



**Njoroge & another v Mohamed (Suing as the personal representative
of the Estate of Ibrahim Omar - Dcd) & 2 others (Civil Appeal
E001 of 2024) [2025] KEHC 2009 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 2009 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL APPEAL E001 OF 2024
WM MUSYOKA, J
FEBRUARY 21, 2025**

BETWEEN

SAMWEL MAINA NJOROGE 1ST APPELLANT

MANCO COMPANY 2ND APPELLANT

AND

**ISAAC MOHAMED (SUING AS THE PERSONAL REPRESENTATIVE OF THE
ESTATE OF IBRAHIM OMAR - DCD) 1ST RESPONDENT**

ALI ABDI ADAN 2ND RESPONDENT

ABIDINASIR ISAACK MOHAMED 3RD RESPONDENT

*(An appeal arising from the judgment of Hon. EA Nyaloti, Chief Magistrate,
CM, delivered on 19th December 2023, in Busia CMCCC No. E107 of 2023)*

JUDGMENT

1. The suit, at the primary court, was initiated by the respondents, against the appellants, for compensation, arising from a road traffic accident, which allegedly happened on 26th October 2022, which resulted in the death of the late Ibrahim Isaack Omar, hereafter referred to as the deceased. The deceased was a driver, of motor vehicle registration mark and number KBW 625X/ZE5005, according to the plaint, which he parked at the trailer park at Malaba, beside a perimeter wall, and then slept behind it. The case by the respondents was that while so sleeping the said motor vehicle, registration mark and number KBW 625X/ZE5005, owned by the 2nd respondent, was so recklessly or negligently reversed, by the 1st appellant, into the trailer parking lot, that it overrun the deceased, causing his death.



2. The appellants filed a joint defence, in which they denied everything pleaded in the plaint. They pleaded, in the alternative, that it was the deceased who was negligent, in either the way he had parked his motor vehicle, or by sleeping at a dangerous spot.
3. A trial was held. Liability was resolved through a consent, that was recorded on 21st November 2023. An oral hearing was conducted, for the purposes of assessment of quantum of damages, on the same day, 21st November 2023, and the 1st respondent testified as PW1. No other witness testified. Judgment was delivered on 19th December 2023. The court awarded Kshs. 2,200,000.00, for loss of dependency; Kshs. 50,000.00, for pain and suffering; Kshs.50,000.00, for funeral expenses; and Kshs. 15,000.00 for postmortem expenses.
4. The appellants were aggrieved, hence the instant appeal. The grounds of appeal, in the memorandum of appeal, dated 5th January 2024, revolve around the trial court adopting wrong principles in the assessment of damages; the court making an award under the *Fatal Accidents Act*, Cap 32, Laws of Kenya, when the same had neither been pleaded nor proved; the court adopting a multiplier of 15 years without taking into account the vagaries and vicissitudes of life; the court adopting a dependency ratio of 1/3, which had not been proved and when the deceased did not have any dependants; the court not considering submissions and authorities; and the court making an excessive award of damages for pain and suffering.
5. On 24th June 2024, the respondents evinced an intention to file a cross-appeal. They asked for 14 days. The matter was put off to 22nd July 2024, to allow them to do so. By 22nd July 2024, no cross-appeal had been filed, and directions were given on disposal of the appeal, by way of written submissions. Those written submissions were to be received on 23rd September 2024, when the matter was to be mentioned. The Judge did not sit on 23rd September 2024 and 18th November 2024. He sat on 18th December 2024, when a date was allocated for judgment.
6. I note from the record that the respondents filed a Motion on 7th November 2024, of even date, seeking that a draft memorandum of cross-appeal be deemed as duly filed. After that filing, the matter was mentioned before the Deputy registrar, on 18th November 2024. The respondents and their Advocate did not attend court, and, therefore, directions were not taken on the fate of that Motion. The matter was fixed for mention, on 18th December 2024. On that date, the matter was placed before me, the Advocates, who were present for both sides, confirmed filing submissions, and invited me to allocate a date for judgment, which I did. The issue of the Motion was not raised. I take it that the quest to file a cross-appeal was abandoned.
7. As indicated above, directions were given on 22nd July 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.
8. The appellants have collapsed their 7 grounds into 4: on whether their written submissions were considered; the award of Kshs. 50,000.00 for pain and suffering was excessive; damages were awardable under the *Fatal Accidents Act*, for pain and suffering, given that the same was not pleaded and proved; and subordinate courts are bound by pleadings filed by the parties.
9. On the written submissions not having been considered, the appellants state that the trial court had indicated that the parties had failed to file written submissions, yet both sides had in fact filed them. They submit that the trial court failed to consider the submissions filed by the parties, hence the erroneous decision on loss of dependency.
10. On the award on pain and suffering being excessive, the appellants argue that the deceased died on the spot, and a lower award ought to have been considered. They propose a figure between Kshs.



- 10,000.00 and Kshs. 20,000.00, citing *Rai Cement Limited vs. Stephen & another* (Suing as the legal administrator of the estate of Zablun Khaemba Wanyama (Deceased)) [2022] KEHC 13815 (KLR) (DK Kemei, J), where an award was made of Kshs. 10,000.00, for pain and suffering, where the deceased died immediately after the accident.
11. On the award made under the *Fatal Accidents Act* not having been pleaded and proved, the appellants submit that the claim by the respondents was founded on the *Law Reform Act*, Cap 26, Laws of Kenya, and sought damages for loss of earnings, pain and suffering, funeral expenses and postmortem expenses. It is submitted that the only damages recoverable under the *Law Reform Act* were for pain and suffering and loss of expectation of life. They cite *Rottger vs. Karisa & another* (suing on behalf of the estate of Said Thoya) [2023] KEHC 26981 (KLR)(Thande, J). They submit that, although the trial court did proceed to award damages for loss of dependency, there was no narrative on how the trial court arrived at that figure. They contend that the trial court stated that the deceased was aged 45 years old, and could have worked up to 60 years, and that the deceased was supporting his father, yet no evidence was presented that the deceased was survived by a father, to warrant the award under the *Fatal Accidents Act*. They submit that parties are bound by their pleadings, and the trial court ought not have determined matters that were not pleaded. They cite *Philmark Systems Co. Ltd vs. Andermore Enterprises* [2018] eKLR (Cherere, J), *David Sironga ole Tukai v Francis Muge & 2 others* [2014] eKLR (GBM Kariuki, M’Inoti & Mohammed, JJA) and *Ann Wairimu Wanjohi vs. James Wambiru Mukabi* [2021] eKLR (Karanja, Okwengu & Gatembu, JJA).
 12. The respondents, in their written submissions, largely support the findings, holdings and orders by the trial court. They cite *Melbrimo Investment Company Limited vs. Dinah Kemunto & Francis Sese* (suing as personal representatives of the estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR (Kamau, J) and *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa & Amid Nyongesa* (legal representatives of Alvin Nanjala (Deceased) [2020] eKLR (Muriithi, J).
 13. There is only 1 issue for determination: whether the appeal on quantum is merited.
 14. In the plaint, the respondents only pleaded damages under the *Law Reform Act*, broken down into claims for loss of monthly earnings, pain and suffering, funeral expenses, loss of earnings for 10 years and postmortem expenses. The trial court awarded damages for funeral expenses, postmortem, pain and suffering and loss of dependency. The memorandum of appeal turns largely on the awards made, that ought, ideally, to have been brought under the *Fatal Accidents Act*, mainly the loss of dependency.
 15. Under the *Law Reform Act*, the claim is brought on behalf of the estate, for the loss directly suffered by the estate. The damages payable here would include that for pain and suffering, for a cause of action would accrue in favour of the deceased, arising from a motor traffic accident, for recovery of compensation, in that regard. Section 82(a) of the *Law of Succession Act*, Cap 160, Laws of Kenya, talks about personal representatives of a dead person having power “to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.” Section 2 of the *Law Reform Act* provides for “all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.”
 16. An award was made under this head, pain and suffering, for Kshs. 50,000.00. The appellants have not directly raised issue with this award, in their memorandum of appeal. But in their written submissions I see that they argue that the same was excessive, as the deceased died instantly or on the spot, and, therefore, a lower award should have been considered. I doubt whether this award is up for consideration in the appeal, as it is not addressed in the memorandum of appeal, as the same dwells only on loss of dependency. Written submissions are not pleadings, but arguments based on the pleadings. Nothing should turn on the arguments made in the written submissions, for the said



written submissions are not founded on the pleadings. The decisions from the courts do not help either, for whereas as section takes the view that a lower award ought to be made where the death was instantaneous, for the deceased would have suffered no pain or suffered minimal pain, there is another that is reluctant to interfere with a higher award. There is no consensus, and the courts have absolute discretion on what to award.

17. Rai Cement Limited v Stephen & another (Suing as the legal administrator of the estate of Zablon Khaemba Wanyama (Deceased)) [2022] KEHC 13815 (KLR)(DK Kemei, J), which the appellants rely on, is in the cluster which holds the view that where there is instantaneous death, the award should be as low as Kshs. 10,000.00. In Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah [2015] KEHC 6612 (KLR) (Ougo, J) and Kenya Power & Lighting Co Ltd v Sophie Ngele Malemba & Wilhelim Maghanga Gabriel [2019] KEHC 10424 (KLR)(DK Kemei, J), belong to the other school, where awards of Kshs. 50,000.00, for pain and suffering were sustained, where the deceased persons had died either instantaneously or shortly after the accident. See also General Cargo (Transport) Limited v Ndeme (suing as administrator of the estate of Mwadingo Mkama Beja – Deceased) [2023] KEHC 27244 (KLR)(Magare, J). Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (suing as personal representative of the estate of Stephen Sinange alias Reuben Sinange (Deceased) [2022] eKLR (Kamau, J), which is cited by the respondents, would fall in that category.
18. My sympathies lie with the position that a low award should be made where death was instantaneous, for the deceased person would have suffered either no pain or minimal pain. These are meant to be awards for pain and suffering, so, where no pain or little pain was suffered, it would not do justice to impose an award other than the barest minimum. However, given the current state of affairs, where it would appear that there is absolute discretion for the court to award what it considers appropriate, I would rather let the award by the trial court stand.
19. Section 83 of the *Law of Succession Act* makes funeral costs an expense on the estate, and, at paragraph (a), imposes a duty on personal representatives “to provide and pay out of the estate of the deceased, the expenses of a reasonable funeral for him.” The expenses incurred at the interment or disposal of the remains of the deceased would be an expense on the estate, and the same are recoverable under the *Law Reform Act*. The trial court awarded an amount for the claim under that head, at Kshs. 50,000.00. I reiterate what I have stated above, that the appellants have not raised issue with that award, in their memorandum of appeal, for there is no specific ground of appeal on the award of damages for funeral expenses.
20. I would wish to state, with respect to funeral expenses, that the decision, in Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)(Omolo, Tunoi & Githinji, JJA), has come to be considered to have set the principle, that “a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses.” Awards are usually made, under this head, regardless of whether material evidence is presented. In Jacob Ayiga Maruja & another v Simeon Obayo [2005] KECA 202 (KLR)(Omolo, Tunoi & Githinji, JJA), the court settled on Kshs. 60,000.0, as reasonable and legitimate funeral expenses, being a reduction from the amount awarded by the trial court of Kshs. 117,325.00. In Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) v Dubai Superhardware [2021] KEHC 9017 (KLR)(Janet Mulwa, J), the trial court had awarded no damages for funeral expenses, but on appeal the High Court awarded Kshs. 50,000.00, as pleaded in the plaint. Rottger v Karisa & another (suing on behalf of the estate of Said Thoya) [2023] KEHC 26981 (KLR)(Thande, J), cited by the appellants, is of the same school.
21. The claim for recovery of postmortem expenses would fall under the same category. Expenses incurred for the purpose of an autopsy on the remains of the deceased is an expense on the estate. It is not,



- strictly speaking, a part of funeral expenses, for postmortem is not conducted as part of the process of the disposal of the body, but for the separate purpose of determining the cause of death. Disposal of the body is not dependent on autopsy or postmortem, and it can be interred, or otherwise disposed of, without any autopsy having been conducted. That expense, therefore, is separate from the funeral expenses. The appellants have not made the expenses on the autopsy an issue on appeal, as there is no ground of appeal founded on it, in their memorandum of appeal. There would be no foundation, in the circumstances, for me to interfere with the award made by the trial court on it.
22. Loss of expectation of life is the other head for which the court could make an award under the [Law Reform Act](#). It is an award to compensate the estate for the loss of prospective happiness due to a reduction in life expectancy. It can also be awarded under the [Fatal Accidents Act](#), hence the debate, as to whether, where it is awarded under the [Law Reform Act](#), the court ought to subtract it from the amount awarded under the [Fatal Accidents Act](#). What is usually awarded, under that head, currently, is Kshs. 100,000.00, and the courts have come to consider that figure to be conventional. See *Nzuki v Maithya & another* (Suing as the Legal Representatives of the Estate of Joseph Wambua - Deceased) [2024] KEHC 2752 (KLR) (Limo, J). Loss of expectation of life was not pleaded in the plaint, and the trial court did not make an award on it.
 23. The other claim allowable or damages awardable under the [Law Reform Act](#) is for lost years, awarded to the estate of a deceased person to compensate the estate for the loss in income it would have benefited from had the deceased lived. See *EA Growers Limited v Charles Ng'ang'a Ngugi* [2015] KEHC 5067 (KLR) (Ngaah, J). Claims under this head are rarely made in Kenya, but there is ample case law on them. *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KECA 42 (KLR) (Kneller, Hancox & Nyarangi, JJA) is, perhaps, the case classicus on this. But there are others, such as *EA Growers Limited v Charles Ng'ang'a Ngugi* [2015] KEHC 5067 (KLR) (Ngaah, J), *Janet Syokau Okoye* (The Legal Representative of the Estate of Julius Uvyu Mutune (Deceased) v James Ithau Mathendu [2016] KEHC 6080 (KLR) (Muriithi, J), *Emmanuel Wasike Wabukesa v Muneria Ndiwa Burman* [2019] KECA 524 (KLR) (Githinji, Okwengu & Mohammed, JJA) and *Amicabre Travel Services & another v DKY* (Suing as the Legal Representative of the Estate of VJK) [2023] KEHC 3787 (KLR) (Janet Mulwa, J).
 24. The claim would be for compensation for loss of earning capacity between the date of the death of the deceased and the date of his anticipated death from natural causes. The lost income would be in respect of what he would have spent on himself, rather than what he would have spent on others, meaning dependants. What he would have spent on himself would be a claim accruing to the estate, under the [Law Reform Act](#), while what he would spend on others would be a claim accruing to dependants, under the [Fatal Accidents Act](#). Where an award is made for lost years under the [Law Reform Act](#) and for loss of dependency under the [Fatal Accidents Act](#), both going to dependants, the principle would be that the award under the [Law Reform Act](#) be subtracted from that under the [Fatal Accidents Act](#). It is this principle that makes the claim quite rare, given that in fatal claims, suits would be brought under both statutes, and rather than make a claim whose award would subsequently be taken away, parties often choose not to claim for lost years, instead preferring to stick to loss of dependency.
 25. Claims under the [Fatal Accidents Act](#) are brought by or on behalf of the dependents or dependants of the deceased, that is individuals who were dependent on the deceased person during his lifetime. They would cover claims for loss of financial support, being compensation for the financial support that the dependants would have continued to receive had the deceased stayed alive. They would also cover loss of the services that the dependants were receiving from the deceased, say household chores, childcare, consortium, etc. See *EA Growers Limited vs. Charles Ng'ang'a Ngugi* [2015] KEHC 5067 (KLR) (Ngaah, J). They would also include bereavement damages, usually a fixed sum awarded for the



grief and emotional distress caused by the death, which would be concurrent to the loss of expectation of life, under the *Law Reform Act*. It would be in respect of claims under the *Fatal Accidents Act* that issues about the age, income or earnings of the deceased, employment or activities, multiplicand, multiplier, dependency ratio, dependants, etc, would arise.

26. The respondents did not premise their claims on the *Fatal Accidents Act*, instead their case was rested entirely on the *Law Reform Act*. Sometimes some parties are not clear on the boundaries between the claims to be made under the 2 statutes, and this appears to be one such case, for the disclosures about the earnings of the deceased were probably made with a view to recovery of loss of dependency. The respondents did not expressly plead loss of dependency, and they did not expressly base their claim on the *Fatal Accidents Act*, for that statute is not mentioned at all in the pleadings. That being the case, there was absolutely no foundation for the trial court to make an award for loss of dependency.
27. Awarding loss of dependency to the respondents amounted to dealing with matters that were not pleaded. Parties are bound by their pleadings, and the courts can only determine a matter based on what is pleaded and the evidence adduced, so long as it is aligned to the pleadings. Whatever evidence is unaligned to the pleadings, should be disregarded, however strong it may be. See *Daniel Otieno Migore v South Nyanza Sugar Company Limited* [2018] eKLR (Mrima, J), *Philmark Systems Co. Ltd v Andermore Enterprises* [2018] eKLR (Cherere, J), *David Sironga ole Tukai v Francis Muge & 2 others* [2014] eKLR (GBM Kariuki, M'Inoti & Mohammed, JJA) and *Ann Wairimu Wanjohi v James Wambiru Mukabi* [2021] eKLR (Karanja, Okwengu & Gatembu, JJA), cited by the appellants, are on point, on courts not deciding matters based on material that is not pleaded.
28. I have read and re-read the pleadings in the pleadings, relating to loss of monthly earnings and loss of earnings for 10 years, and I have failed, from the language of the pleadings, to find any suggestion that the respondents were making a claim that they suffered loss when the deceased died, because of the termination of income that was accruing from his employment. There is no pleading in the pleadings about who the dependants of the deceased were, who would have suffered loss of dependency on account of that death. Equally important is the lack of pleading on the relationship between the respondents and the deceased, and on whether they were dependent on him at all, to justify an award of compensation to them for loss of dependency. There was no proof, from the evidence adduced at trial, that they were his dependants. Even if such evidence was adduced, it would have been useless and needless, as there was no pleading in the pleadings on loss of dependency.
29. At paragraph 23 of this judgment, I have discussed the principle of lost years, and the awards available under it. Curiously, none of the parties hereto addressed me on it, yet it appears to be of relevance here. The pleadings, in the pleadings, are clear that the respondents had mounted their claim based exclusively on the *Law Reform Act*. The respondents had not brought the suit as dependants of the deceased, so that their claim could be brought under the *Fatal Accidents Act*. The 1st respondent is a legal representative of the deceased, for he holds a limited grant of letters of administration ad litem. He brought the suit on behalf of the estate, and that brought him within the purview of the *Law Reform Act*, where he could claim compensation on behalf of the deceased or his estate, for among other things, lost years.
30. His claim, in the pleadings, is for loss of earnings of 2/3 of the salary of the deceased per month and loss of earnings for 10 years, for the deceased was aged 45 years, and would have probably continued working up to age 55. That pleading would be the foundation for the claim by the 1st respondent for lost years. I am confining this to the 1st respondent, given that the grant of representation in this case is made in favour of the 1st respondent, and there is no evidence that the other respondents were ever appointed administrators of the estate of the deceased or made his personal representatives, whether fully or to a limited extent. This would be a pure claim for lost years. The pleading is not elegant, but there can



be no doubt that this was a claim for lost years, and the trial court should have dealt with it as such, instead of branding it a claim for loss of dependency, when no claim of that kind had been made. In the written submissions by the respondents, which the trial court did not have opportunity to consider, the respondents did allude to their claim being for the income the deceased lost through his death, but then they did not follow through with a coherent argument that it was a claim in the mould of lost years.

31. Most of the claims for lost years are in respect of children and adolescents, but the courts have had occasion also to handle claims in respect of adults. The principles for assessment of damages for lost years were laid out in *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KECA 42 (KLR)(Kneller, Hancox & Nyarangi, JJA), and have subsequently been followed in other cases thereafter, such as *EA Growers Limited v Charles Nganga Ngugi* [2015] KEHC 5067 (KLR) (Ngaah, J), *Janet Syokau Okoye (The Legal Representative of the Estate of Julius Uvyu Mutune (Deceased) v James Ithau Mathendu* [2016] KEHC 6080 (KLR)(Muriithi, J), *Emmanuel Wasike Wabukesa v Muneria Ndiwa Burman* [2019] KECA 524 (KLR)(Githinji, Okwengu & Mohammed, JJA) and *Amicabre Travel Services & another v DKY (Suing as the Legal Representative of the Estate of VJK)* [2023] KEHC 3787 (KLR)(Janet Mulwa, J).
32. The said principles are, as lifted from *Sheikh Mushtaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 others* [1986] KECA 42 (KLR)(Kneller, Hancox & Nyarangi, JJA):
 - “(i) the sum to be awarded is never a conventional one but compensation for a pecuniary loss,
 - (ii) it must be assessed justly and with moderation,
 - (iii) deduct the victims’ living expenses during the “lost Years” for they would not form part of the estate,
 - (iv) a young child’s present or future earnings in most cases would be nil,
 - (v) an adolescent would usually be real, assessable and small,
 - (vi) calculate the annual gross loss,
 - (vii) apply the multiplier (estimated number of “lost working years” accepted as reasonable in each case), and
 - (viii) Deduct the victim’s probable living expenses of a reasonably satisfying enjoyable life for him or her.”
33. In *Janet Syokau Okoye (The Legal Representative of the Estate of Julius Uvyu Mutune (Deceased) v James Ithau Mathendu* [2016] KEHC 6080 (KLR)(Muriithi, J), the deceased was a young man of 21 years, working as a pastor and a businessman managing a posho mill. The trial court calculated the lost years, by taking what he was likely to be spending on himself, and considering that he would have stopped working or retired at age 60. The other cases involved minors, and the courts adopted the global award approach.
34. In the instant case, it was pleaded that the deceased earned Kshs. 45,000.00 per month, out of which he spent 1/3 on his expenses, leaving him with 2/3 to spend on himself. It was also pleaded that he was 45 years old, and he would have continued to work until he attained age 55. That would suggest, going by *Janet Syokau Okoye (The Legal Representative of the Estate of Julius Uvyu Mutune (Deceased) v*



James Ithau Mathendu [2016] KEHC 6080 (KLR)(Muriithi, J), that the 2/3 available to him, said to be Kshs. 30,000.00 would be multiplied by 12 months and 10 years, making Kshs. 3,600,000.00.

35. Would there be justification for that calculation? I do not think so. No concrete evidence was adduced on how much the deceased earned from his endeavours. So, not much reliance should be placed on the figure of Kshs. 45,000.00, as no documents were produced to support it. In the absence of such proof, recourse must be to the Government regulations on the minimum wage for a truck driver as of 26th October 2022, when the accident happened, and the deceased died. The applicable Government paper should be the Regulation of Wages (General)(Amendment) Order, 2022, published through Legal Notice No. 125 of 1st July 2022. The minimum wage for a heavy commercial vehicle driver was fixed at Kshs. 34,302.75. Was the deceased a truck driver? I have looked at the papers filed by the appellants, and I have found, in there, admission of those facts, particularly in the witness statement by the 1st appellant.
36. The dependency ratio proposed by the respondents, of 2/3, is what a person would usually spend on his dependents. Their claim was not for loss of dependency, but for lost years. The ratio for that should be what he spent on himself, after taking away the expenses upon dependency and others. Of course, there was no evidence of dependency. No doubt, the deceased had expenses of one kind or other, and after expending 2/3 of his income on such he would be left with 1/3 thereof. Accordingly, what his estate lost, by his death, should have been calculated as follows, following *Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1986] KECA 42 (KLR)(Kneller, Hancox & Nyarangi, JJA) and *Janet Syokau Okoye (The Legal Representative of the Estate of Julius Uvyu Mutune (Deceased) v James Ithau Mathendu* [2016] KEHC 6080 (KLR)(Muriithi, J): $1/3 \times 12 \times 10 \times 34302 = 1,373,080$.
37. On written submissions not being considered, I would start by saying that that is not a substantial ground of appeal, for a judgment cannot be set aside merely on the ground that the trial court did not consider the submissions made by the parties. It would still be possible for a court to properly analyse the pleadings and the evidence, and arrive at the right and correct conclusions, after applying the applicable law to the evidence adduced. So, whether submissions were considered or not is neither here nor there.
38. The appellants argue that both sides had filed written submissions, and went on to mention the dates on those written submissions, and when they were filed. I have perused the physical trial record that has been placed before me, and I have not seen any written submissions. I suppose it was the same record that the trial court was working with when preparing the judgment. I have perused the record of appeal lodged by the appellants, and it does exhibit written submissions filed by the parties on 6th and 7th December 2023. I note that the matter was to be mentioned on 7th December 2023, to receive those submissions. That mention never happened, and the said written submissions did not find their way into the court file, perhaps because the said file had been retained by the trial magistrate, for the purpose of writing the judgment, and the magistrate, therefore, did not have access to them at the time of writing the judgment. It appears to me to be a matter of case management gone wrong, for which the parties were innocent.
39. On whether subordinate courts are bound by the pleadings of the parties, I do not think I should expend time and energy dealing with this, for I believe the appellants are just being cheeky or mischievous, for the law is clear on this. There are no exceptions, and I have fully dealt with the issue hereabove, at paragraphs 27 and 28 of this judgment.
40. In view of everything that I have said above, I find and hold that the appeal herein has merit, to the extent indicated. Consequently, I will set aside, as I hereby do, the award with respect to loss of dependency, and substitute it with an award for lost years, of Kshs. 1,373,080.00. The rest of the awards



shall remain intact. As the claim was founded on the *Law Reform Act*, the awards could only be in favour of the personal representative of the deceased and the administrator ad litem of his estate, the 1st respondent herein. The other 2 respondents would not be entitled to anything, for they had no authority to represent the estate. The appeal is allowed to that extent. Each party shall bear their own costs. It is so ordered.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 21ST DAY OF FEBRUARY 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Eva Adhiambo, Legal Researcher.

Advocates

Ms. Mweresa, instructed by Onyinkwa & Company, Advocates for the appellants.

Mr. Ashioya, instructed by Ashioya & Company, Advocates for the respondents.

