



**Kisii County Government v Momanyi & another (Suing as the Legal  
Representatives of the Estate of the Late Douglas Onsarigo Mageto) (Civil  
Appeal E146 of 2023) [2025] KEHC 3822 (KLR) (24 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3822 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E146 OF 2023  
DKN MAGARE, J  
MARCH 24, 2025**

**BETWEEN**

**KISII COUNTY GOVERNMENT ..... APPELLANT**

**AND**

**LINET OSEBE MOMANYI ..... 1<sup>ST</sup> RESPONDENT**

**CHARLES MAGETO OKONG'O ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE  
DOUGLAS ONSARIGO MAGETO**

*(Appeal from the Judgment and decree of Hon. P. K. Mutai, Senior Principal  
Magistrate, dated 20.11.2023 arising from Kisii CMCC No. 605 of 2018)*

**JUDGMENT**

1. This is an appeal from the Judgment and decree of Hon. P. K. Mutai, Senior Principal Magistrate, dated 20.11.2023 arising from Kisii CMCC No. 605 of 2018.
2. The Appellant was aggrieved and filed a Memorandum of Appeal dated 5.12.2023 raising the following grounds:
  - i. The learned magistrate erred in law and fact in not finding that the suit was time-barred under Section 17 of the [Work Injury Benefits Act](#), 2007.
  - ii. The learned magistrate erred in law and fact in apportioning liability at 70:30 for the Respondent.
  - iii. The learned magistrate erred in law and fact in applying a wrong multiplier to arrive at damages.



- iv. The learned magistrate erred in law and fact in awarding excessive damages for pain and suffering.
3. The Respondents had filed a Complaint, dated 17.9.2018, claiming damages for an accident that occurred on 27.7.2017, arising from a work injury accident. The deceased was in employment with the Appellant at Ikuruma Sub-county. He was submerged by heavy sand at the contract site as a result of which he sustained fatal injuries. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages and general damages under the Law Reform Act and Fatal Accidents Act.
4. The Appellant entered appearance and filed defence dated 13.11.2018 denying the particulars of negligence and injuries pleaded in the complaint. The Appellant also objected to jurisdiction. The matter was decided against the Respondent on 8 May 2020, where the trial magistrate dismissed the suit for lack of jurisdiction. The Respondent successfully appealed vide Kisumu Appeal No. 6 of 2020. The decision is reported as Linet Osebe Momanyi & another (suing as personal representatives & legal administrators of the estate of Douglas Onsario Mageto) v Kisii County Government [2021] KEELRC 1694 (KLR)
5. The matter was remitted to the lower court for hearing and final determination. The parties were heard in support of their respective cases. The court rendered its judgment as follows:
  - a. Liability 70:30 against the Appellant
  - b. Damages for pain and suffering Ksh. 30,000/=
  - c. Damages for loss of dependency Ksh. 7,0753,456/=
  - d. Loss of expectation of life Ksh. 100,000/=
  - e. Special damages Ksh. 80,000/=

### **Evidence**

6. During the hearing, PW1 was Linet Osebe. She relied on her witness statement filed in court and testified that the deceased was her husband working as a plant operator with the Appellant. He was 28 years old. They had two children. She produced documents in her list of documents dated 17.9.2018. On cross-examination, she testified that her husband was a plant operator. That she incurred the expenses adduced. He earned a basic salary of Ksh. 18,403/=.
7. DW1 for the Appellant was Richard Onduso. According to him, the deceased was a driver and operator. He found the deceased under the sand and rescued himself. He blamed the deceased. The basis of blame, however, was not laid.

### **Submissions**

8. The Appellant submitted that the deceased was equally negligent, and the award of 50:50 liability would have been proper. The Appellant also proposed a multiplier of 22 years, multiplicand of Ksh. 20,000/=, and award of Ksh. 5,000/= for pain and suffering and Ksh. 50,000/= for loss of expectation of life.
9. The Respondent filed submissions dated 17.12.2024. It was submitted that the suit could not be time-barred in light of the authority in Linet Osebe Momanyi v Kisii County Government (supra) that suits filed after 22.5.2008 could not be time-barred.



10. It was submitted on liability and quantum that the apportionment of liability of 70:30 for the Respondent was fair, and the award of damages was proper and not inordinately high. Reliance was placed inter alia on *Beatrice Njeri Maina v Augustine Maina Ngetia* (2015) eKLR to prove that the lower court's discretion was in accordance with the law.

### **Analysis**

11. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, has the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. This court's jurisdiction to review the evidence should be exercised with caution. In the case of *Peters v Sunday Post Limited* [1958] EA 424, the court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

12. This court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself, and draw its own conclusions. In *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...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...”

13. The Appellant urged me to find that the lower court erred in finding liability against the Appellant. They propose that the lower court's judgment be set aside and the suit dismissed. On the other hand, the Respondent's case is that the lower court's judgment was correct on both quantum and liability and should not be disturbed.

14. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities, that the Appellant was 70% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In *Anne Wambui Ndiritu –v- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



15. The burden of proof lies with a party positively asserting. The duty of proving contributory negligence is also on the party asserting it. The same may shift to the defendant, depending on the circumstances of the case. In *Evans Nyakwana –v- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Sections 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden, and as Section 108 of the *Evidence Act* provides, the burden lies in that person who would fail if no evidence at all were given as either side.”

16. The question of what amounts to proof on a balance of probabilities was addressed by Kimaru, J in *William Kabogo Gitau –v- George Thuo & 2 Others* [2010] 1 KLE 526 that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

17. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”

18. The standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In *Palace Investment Ltd –v- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller –v- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

19. The feeble attempt to challenge the suit on account of time limitation fails. Even though the Appellant did not raise those issues in the lower court, as submitted by the Respondent, the issue had been settled.



I do no more than reproduce the following findings of the court. In the case of *Omutiti v Orpower 4 Inc* (Employment and Labour Relations Appeal 12 of 2021) [2023] KEELRC 1974 (KLR) (31 July 2023) (Judgment), DN Nderitu, J, stated as follows:

21. The following dates are very important to this appeal and any other matter relating to the issues herein. The date of commencement of the WIBA is June 2, 2008 as per Legal Notice (LN) No 60 of May 23, 2008. The judgment of the High Court was delivered on March 4, 2009 and that of the Court of Appeal was delivered on November 17, 2017. The judgment of the Supreme Court was delivered on December 3, 2019.
  22. The case in the lower court by the Appellant in this appeal was filed on September 27, 2017. There are two very important aspects of this date. The first one is that the case by the Appellant was filed after the WIBA had commenced operation. Secondly, the High Court had declared various sections of the Act unconstitutional, as alluded to above, before the case was filed. The third angle is that the Court of Appeal and the Supreme Court had not dealt with the respective appeals filed therein as alluded to above as at the date of filing of the case.
  23. What has probably caused the confusion that has been witnessed in matters raising the same or similar issues as raised in this appeal is that the Court of Appeal and the Supreme Court did not comment on or give directions on cases that were filed between the decision of the High Court and the decision of the Court of Appeal. The two superior courts directed on matters that had been filed prior to coming into operation of WIBA on June 2, 2008 and directed that such matters should proceed on merits to logical conclusion based on the doctrine of legitimate expectation.
  24. This court takes the considered view that a declaration by a court of law on the constitutionality or otherwise of a law is simply a declaration with the effect that upon exhaustion of the appeal process, as it happened in the matter between the Law Society of Kenya V Attorney General above, the Supreme Court declared that the various sections of the WIBA were constitutional, except those mentioned, and they were so ab initio.
20. There was ensuing confusion on the state of the law. The Chief Justice gave practice directions on the WIBA matters via the Kenya Gazette of 28th April 2023 and provided the following:

Claims that were filed after the commencement of WIBA but before the Supreme Court decision.

Taking into account that the High Court vide its judgment dated 4th March 2009 in *Law Society of Kenya v. Attorney General & Another* (2009) eKLR declared some of the provisions in WIBA, including Sections 16, 23(1) and 52, which prescribe the procedure for lodging claims under the Act unconstitutional.

Consequently, the said declaration of nullity created a legitimate expectation that claimants could directly lodge claims for compensation for work related injuries and diseases in court. As such, litigants cannot be penalized for relying on the declaration of nullity, as appreciated by the Supreme Court in *Attorney-General and 2 Others v Ndi and 79 Others; Prof. Rosalind Dixon and 7 Others (Amicus Curiae)* (Petition 12, 11 and 13 of 2021(Consolidated)) [2022] KESC 8 (KLR) to lodge their claims in court. Therefore, all claims for compensation for work-related injuries and diseases filed after the commencement of WIBA and before the Supreme Court decision at the Employment and Labour Relations Courts or the Magistrates' Courts shall proceed until conclusion before the said courts.



21. The court was seized with the requisite jurisdiction, and Section 17 of the *Work Injury Benefits Act* 2007 was not applicable to this case. The question of limitation and jurisdiction was dealt with earlier in the life of this matter, wherein in an appeal from an earlier decision against the Respondent, the court, Radido Stephen, MCI Arb, in the decision now reported as Linet Osebe Momanyi & another (suing as personal representatives & legal administrators of the estate of Douglas Onserio Mageto) v Kisii County Government [supra] made the following orders:
- (i) The appeal is allowed.
  - (ii) The judgment of the Magistrates Court delivered on 8 May 2020 is set aside.
  - (iii) The suit before the Magistrates Court be heard afresh to a logical conclusion.
  - (iv) Each party to bear its own costs of the appeal.
22. The said decision is not quoted for precedent value. It is a decision in the same matter herein. That decision is binding on the parties inter se. The Appellant did appeal to the Court of Appeal. The issues determined therein have thus crystallized. The said decision was concerning the same matter. Having not appealed, it is not open for the court to deal with the same issues between the same parties. This is prohibited by Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya, which states as follows:
- “No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”
23. On the question of the Supreme Court decision, the learned Judge made the following decision:
17. The Appellants herein lodged their suit in the Magistrates Court on 20 September 2018. As of that date, the subsisting law was the order of the High Court, staying the operation of section 16 of the *Work Injury Benefits Act*. The High Court order was not stayed by the Court of Appeal, and it only ceased to subsist upon the determination by the Supreme Court on 3 December 2019.
  18. The Magistrate, therefore, fell into error of both law and fact in declining jurisdiction.
24. The *Civil Procedure Act* also provides explanations with respect to the application of the res judicata rule. In re Estate of Riungu Nkuuri (Deceased) [2021] eKLR, the court stated as follows:
- The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017]eKLR, the Supreme Court, while considering the said provision, held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- (a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That former suit was between the same parties or parties under whom they or any of them claim.
  - (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.



- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
25. The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. In the case of Attorney General & another ET v (2012) eKLR it was held that;
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v NBK & Others (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”. In that case the court quoted Kuloba J, (as he then was) in the case of Njanju v Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated:
- If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....”
26. In essence, therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of Henderson v Henderson (1843-60) All E.R 378, observed thus:
- “...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”
27. The question of jurisdiction and time bar were dealt with. This court cannot set aside the same or handle them in any way without offending a decision of this very court in the same case, CC No. 605 of 2018. This court is not an appellate court for Justice Radido's decision. This rests on ground 1 of the memorandum of appeal.
28. On re-evaluating the evidence on merits, the Appellant alleged that the Respondent contributed to the accident. The court found that the deceased, too, had not taken precautions and awarded 70:30 against the Appellant. I find no material on which to interfere with the court's discretion. There is no appeal on the part of the Respondent. The evidence of DW1 did not attribute any negligence on the part of the deceased. Indeed, there were no pleadings to that effect. This was contrary to Order 2, rule 10 which provides as follows in regard to the need to give particulars of various elements as hereunder:



- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing —
  - (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
  - (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
- (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
- (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—
  - (a) where he alleges knowledge, particulars of the facts on which he relies; and
  - (b) where he alleges notice, particulars of the notice.
- (4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reasons.

29. This is also echoed in Order 2 rule 4 of the Civil Procedure Rules as follows:

- (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
  - (a) which he alleges makes any claim or defence of the opposite party not maintainable;
  - (b) which, if not specifically pleaded, might take the opposite party by surprise; or
  - (c) which raises issues of fact not arising out of the preceding pleading.
- (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

30. The Appellants ought to have pleaded that defence in their amended defence if they intended to raise it at the trial. In the case of *Cube Movers Ltd & another v Victor Ayiecha Okero & another* (suing as the legal representative of the Estate of Vincent Maiko Okero (Deceased) [2015] eKLR, the court stated as doth regarding pleading over contributory negligence:

27. Significantly, in this case the amended defence does not contain any pleading against the deceased for contributory negligence. The Applicants ought to have pleaded that defence in their amended defence if it was intended to raise it at the trial. That is the essence of Order



2 Rule 4 of the Civil Procedure Rules: all material facts must be pleaded. In *Fernandes –V- People Newspaper Limited* (1972) EA 63 the court observed:

“A civil case is decided on issues arising out of the pleadings. No allegation of negligence against the Appellant has ever been made, and it was not open to the court find negligence on his part.” See also *Gandy –V- Caspain* (1965) EACA 139.

31. The Appellant also failed to offer a plausible explanation to prove contributory negligence by the deceased to 50:50 equal blame. In a courtroom situation, we deal with empirical evidence on what is more probable than the other. In the case of *Embu Road Services vs Riimi* (1968) EA 22, the courts held inter alia as doth; -

“Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence”. See also *Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D)*.

32. The Respondent proved the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage, and foreseeability of the particular type of damage caused against the deceased. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* {1988} RTR 298 the determinants of negligence were stated as follows:

“The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused.”

In *Caparo* case (supra) the Court stated:

“What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case.”

33. The court finds no basis for interfering with the liability at 70:30 against the Appellant. The same is dismissed.
34. On the damages, the Appellant submitted that Ksh. 5,000/= would be an adequate award under pain and suffering. The lower court awarded Ksh. 30,000/= under this head. For pain and suffering, in Civil



Appeal No. 42 of 2018 Joseph Kivati Wambua v SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

“The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal.” (emphasis mine).

35. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased die later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital prior to his death.
36. The question therefore is whether the award of Ksh. 30,000/= for pain and suffering was excessive. On the award for pain and suffering, in Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v. Elijah Oketch Adellah [2015] eKLR, the Court awarded Ksh. 50,000/= on 6<sup>th</sup> February 2015 for pain and suffering where the deceased died shortly after the accident.
37. In Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another v. Hellen Karisa Thoya [2017] eKLR the court upheld an award of Ksh 50,000/= on 4<sup>th</sup> October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain.
38. Similarly, in Machakos High Court Civil Appeal No 50 of 2016 - Kenya Power and Lighting Co Ltd v. Sophie Ngele Malemba & Another [2019] eKLR, the deceased who had died on the spot was awarded Ksh. 50,000/= for pain and suffering by the trial court which award was upheld on appeal.
39. The appellant proposed Ksh. 5,000/= under this head while the Respondent submitted that the award of Ksh. 30,000/= was proper. Based on the above case law, I am persuaded that the award of Ksh. 30,000/= was proper.
40. The damages for pain and suffering were awarded at 30,000/=-, after some hours of excruciating pain. In the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W. Musyoka stated as doth; -

13. In Sukari Industries Limited v. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Ksh. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

“[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages



will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Ksh 10,000 to Ksh 100,000 over the last 20 years hence I cannot say that that the sum of Ksh 50,000 awarded under this head is unreasonable.”

41. On loss of expectation of life, the Appellant did not submit how this award was excessive. I find that the award of Ksh. 100,000/- under loss of expectation of life was not excessive and is hereby upheld. It is not in dispute that the deceased died at the scene of the accident at 28 years old and was in good health before his death. The deceased did also not die after suffering elongated pain for some hours. In *Mercy Muriuki & Another v. Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

“The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/= while for pain and suffering the award range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

42. In order to interfere with the lower court's finding on loss of dependency, there has to be a basis. The appellant did not challenge that the deceased was a driver and plant operator. He was employed by the Appellant on a definite salary. This was indicated in the pleadings to be 31,403/=. A pay slip issued by the Appellant was produced. The gross earnings were 31,403/=:, including a leave allowance of Ksh 4,000/=:, leaving a sum of 27,403/=:. Statutory deductions were:

- a. Provident fund 2,808.35/=
  - b. Payee Ksh. 3,061.75/=
  - c. NHIF Ksh. 900/=
- Subtotal – Kshs. 6,770.10/=

43. This leaves a net earning of Ksh. 20,632.90/=:. The deductions for loans and welfare are voluntary deductions for the benefit of the deceased and his dependents. They form part of the income. The lower court, however, applied a sum of Ksh. 27,442/=:. This was erroneous as leave allowance is not part of the earnings. A proper sum was Ksh. 20,632.90/=:, being the gross pay net of one-off items and statutory deductions.

44. The court recalled that the principles applicable to assessing damages under the *Fatal Accidents Act* have been fairly settled. In the case of *Beatrice Wangui Thairu –v- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988* (unreported), Ringera J, as he then was, held at page 248 that:

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



45. The court thus erred in applying Ksh. 27,403/=, which was the gross pay. A sum of Ksh. 20,632.90/= was a proper multiplier. The court had this to say regarding loans in the case of Joshua Mulinge Itumo (suing for and on behalf of the Estate of Damaris Nduku Musyimi (Deceased) v Bash Hauliers Limited & another [2021] eKLR93:

In my view, where the deceased had taken some temporary advance or loan, the same ought to be taken into account for the period covered by the facility and not for the entire period which the Court finds as regards the reasonable figure representing so many years purchases, otherwise known as the multiplier. I, therefore, agree with the Appellant that the learned trial magistrate erred in applying the amount stated in the payslip for the whole period of the multiplier. I agree that the prudent thing to do would have been to apply the net salary (gross salary less only statutory deductions) to get the total dependency sum, then deduct the total sum of the loan balances being the 3 SACCO loans with balances of Ksh. 50,000, Ksh. 657,325/- and Ksh. 251,650/-, a total of Ksh. 958,975/-. If that is done the amount due under the head of loss of dependency would Ksh. 7,011,840/- less total of the loan balances amounting to Ksh. 958,975/- leaving the net balance as Ksh. 6,052,865/-. The appeal therefore succeeds on that ground to that extent.

46. In using gross pay, the court fell foul of the postulations by the Court of Appeal in Nyeri Civil Appeal Number 22 of 2014 - Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v. Kiarie Shoe Stores Limited [2015] eKLR, as hereunder:

“In this case, there was no complicated record of evidence to evaluate. Only Hellen testified and produced documentary evidence. On the issue of the salary, the deceased’s last pay-slip was produced and it showed clearly his gross earnings of Sh. 39,683. That is followed by no less than 13 deductions ranging from statutory deductions to loan deductions leaving a balance of Sh. 16,036. The trial court used the gross earnings as the multiplicand while the High Court used the net figure. With respect, both courts were in error. In the case of Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, the Court of Appeal stated the law on assessment of damages under the *Fatal Accidents Act* which we cite in part as follows:

“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.

As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. In this case, Hellen testified, and it is apparent from the pay slip that 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.”



47. In addressing the other deductions other than statutory deductions, the Court of Appeal, in Number 48 of 2016 - Mary Osano (Personal Representative of the estate Charles Otworu Ogechi - Deceased) v. Simon Kimutai [2020] eKLR, stated as follows:

“Counsel for the appellant submitted that the deceased’s net pay, as evidenced by a copy of his payslip, was Ksh 53,550 per month, with a house allowance of Ksh 45,000 per month, which totals to Ksh 98,550. The statutory deductions as contained in the payslip are; P.A.Y.E at Ksh 23,947; NHIF at Ksh 320 and NSSF at Ksh 3748 which totals to Ksh 28,015. The rest do not amount to statutory deductions as the learned Judge erroneously held. In our assessment, the rest of the deductions were either in the form of savings or payment of loans, none of which are to be factored in when determining a multiplicand.”

48. Therefore, the applicable value for the loss of dependency in the circumstances of this case was the net salary and not the gross salary. The deceased had two children both minors. He left a widow. I find no basis to interfere with the 2/3 as applied in the lower court. He was also 28 years old, and the court applied for 32 years. This failed to consider the vagaries of life, vicissitudes of life and the retirement age of 60 years. The Appellant proposed 22 years. I find that 24 years would be appropriate. I am fortified by the reasoning of the court in the case of *China Civil Engineering & another v Mwanyoha Kazungu Mweni & another* [2019] eKLR as follows;

On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Ksh.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

49. I find no wrong principles that the lower court applied except for the multiplier, which I reduced to 24 years. In *Jane Chelagat Bor v. Andrew Otieno Onduu* [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

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

50. The applicable loss of dependency is thus as follows:

$$\text{Ksh. } 20,632.90 \times 24 \times 12 \times 2/3 = \text{Ksh. } 3,961,517/=.$$

51. The net effect is that I set aside judgment on the quantum of the loss of dependency. In lieu thereof, I enter judgment for a sum of Ksh. 3,961,517/=. Appeal on other limbs and liability is dismissed in limine.
52. There was no appeal against the award on special damages. The lower court awarded Ksh.80,000/- for special damages as pleaded and proved. I will not disturb this finding.



53. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:
- (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
  - (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

54. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

55. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

56. The proper order is that each party shall bear their own costs.

### **Determination**

57. In the upshot, I make the following orders: -
- a. The appeal against liability is dismissed.
  - b. The appeal against the award on pain and suffering is dismissed.



- c. The appeal against loss of expectation of life of Ksh. 100,000/= is dismissed.
- d. The award of Ksh. 7,285,456/= in respect of loss of dependency is set aside and substituted thereof with an award of Ksh. 3,961,517/=.
- e. Each party is to bear their own costs.
- f. Right of appeal 14 days.
- g. Stay of execution for 30 days.
- h. Certificate of judgment against government do issue forthwith.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24<sup>TH</sup> DAY OF MARCH, 2025.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**KIZITO MAGARE**

**JUDGE**

In the presence of: -

Ms. Bonareri for the Appellant

Ms. Chepkorir for the Respondent

Court Assistant – Michael

