Mwangi v Kimaiyo & another (Suing as the legal representative of the Estate of Nicodemus Kipkorir Kimutai - Deceased) (Civil Appeal E168 of 2024) [2025] KEHC 2618 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2618 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E168 OF 2024

E OMINDE, J

MARCH 12, 2025

BETWEEN

HEZRON MWANGI ..... APPELLANT

AND

FLOMENA TIRIKI KIMAIYO AND THYLINE JEPKOSGEI KORIR (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NICODEMUS KIPKORIR KIMUTAI - DECEASED) ..... RESPONDENT

(Being an appeal from the judgment of Hon. B. K. Kiptoo (PM) delivered on 26/07/2024 in Eldoret CMCC No. 889 of 2019)

JUDGMENT

1. The appeal herein in on both liability and quantum. By a Plaint dated 11/10/2019, the Respondents sued the Appellant in the trial seeking General Damages under the *Law Reform Act* and the *Fatal Accidents Act*, Special Damages, costs of the suit and interest at court rates for fatal injuries sustained in a road traffic accident that occurred on 26/08/2018, along the Eldoret -Kapsabet road at Mutwot Area.

2. It is alleged that the Appellant his agent and or servant negligently drove, managed and control motor vehicle registration number KBM 927X causing the aforesaid motor vehicle to collide with motor vehicle registration number KBQ 150 J in which the deceased was travelling and as result the deceased sustained fatal injuries.

3. The Appellant filed a Statement of Defence dated 6/11/2019, in which he denied the occurrence of the accident. In the alternative he pleaded contributory negligence on the part of the Appellant.

4. In its determination, the learned trial Magistrate entered judgment in favour of the Respondents in the following terms:

a. Liability 90% :10%

b. Loss of expectation of life Kshs. 100,000/=

c. Pain and Suffering Kshs. 50,000/=

d. Special damages Kshs. 66,250/=

e. Damages under the *Fatal Accidents Act* Kshs. 7,200,000/=

f. Total Kshs. 7,416,250/=

g. Less 10% Liability Kshs. 741,625/=

h. TOTAL Kshs. 6,674,625/=

5. The Appellant is aggrieved by the decision of the trial Magistrate and has preferred the present appeal on (8) grounds: -

1. The learned trial Magistrate erred in law and fact in holding the Appellant liable contrary to the evidence on record.

2. The learned trial Magistrate erred in law and fact in failing to find that the Respondents had not proved their case on a balance of probabilities.

3. The learned trial Magistrate erred in law and fact in failing to dismiss the Respondents case.

4. The learned trial Magistrate erred in law and fact in failing to consider the Appellant's evidence on record.

5 . The learned trial Magistrate was biased.

6. The learned trial Magistrate erred in law and fact in awarding damages that were inordinately excessive

7. The learned trial Magistrate erred in law and fact in using wrong principles

8. The learned trial Magistrate erred in law and fact in failing to consider the Appellant's submissions.

6. The appeal was canvassed by way of written submissions. The Appellant filed their submissions on 15/01/2025 while the Respondents filed on 23/01/2025.

The Appellant's Submissions

7. On liability, Counsel for the Appellant submitted that in civil cases a Plaintiff is required to prove their claim against the Defendant on a balance of probabilities as was clearly stated in the case of Kirugi & Another v Kabiya & 3 Others [1987] eKLR as cited in the case of Eastern Produce (K) Ltd Chemoni Tea Estate V Bonfas Shoya [2018] eKLR. Counsel also relied on the proviso of Section 107 of the *Evidence Act*.

8. Counsel submitted that the 90% liability against the appellant was without basis and was contrary to the evidence on record. That whereas PW2 testified that despite witnessing the accident, he never recorded a statement with the police, it was evident that PW2 recorded his statement on 30/1/2021, more than two years after the accident occurred. That due to the long period preceding his recording of his statement, the veracity of his testimony is questionable. That further, he was also not listed as part of the respondent's witnesses at the filing of the Respondents case in October of 2019. That his inclusion as part of the Respondents witnesses was therefore an afterthought. Counsel added that he was also not listed as a witness in the Police Abstract

9. Counsel further submitted that despite PW2 testifying that he witnessed the accident, upon the cross examination of PW3, he testified that there was no eye witness to the accident, a position also confirmed by DW2 who too testified that he was not aware of any eye witnesses. Counsel added that from the testimony of PW2, he averred that the accident occurred at around 6.30 pm which was contrary to the testimony of PW3, who testified that the accident occurred at around 1630 hrs.

10. Counsel therefore submitted that the testimony of PW2 is marred with a lot of inconsistencies and as such, he is not a credible witness. Counsel urged that his evidence should therefore not be used as a basis of apportioning liability to the Appellant.

11. Counsel further submitted that PW3 testified that he was not the investigating officer, he did not visit the scene of the accident, he did not have the police file, and/or did not produce sketch maps to show where the point of impact was. That the trial magistrate failed to consider this in the judgment because if he had, he ought to have found that the Respondents had failed to prove their case against the Appellant on a balance of probabilities as required by the law.

12. Counsel argued that without the Sketch Map the trial court could not determine how the accident occurred or the point of impact. That the failure of the police officer to produce a sketch plan or to prove where the point of impact of the accident was lends credence to the Appellant's case that it is the Respondent who drove in zig zag manner and abruptly encroached into the lane of motor vehicle registration number KBM 927X and hit the said motor vehicle thereby causing the accident. Counsel relied on the case of Postal Corporation of Kenya & another vs. Dickens Munayi [2014] eKLR where it was held that:

> " In my view, it is only a sketch plan of the scene that could clearly map out how the accident occurred and particularly where the point of impact was. The lack of this crucial piece of evidence leads me to doubt the entire testimony of PW2 and PW3. It also casts benefit of the defence case that probably it could as well be the Respondent who pulled to this lane."

13. Counsel further submitted that whereas the trial Magistrate in his judgment relied on the Police Abstract in attributing blame to the Appellant for causing the accident, he maintained that a police abstract does not prove negligence on the part of a Defendant nor does it prove the occurrence of the accident. Counsel submitted that a police abstract only proves the fact that following an accident, the occurrence thereof was 'reported' at a particular police station. He relied on the holding in the case of Peter Kanithi v Aden Guyo Itaro (2014) eKLR and Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karenge [2021] eKLR where Justice Odunga opined that:

> " 36. A police abstract is merely evidence that a report of an accident has been made to the police. Unless it contains information regarding the investigations and their outcome, such evidence cannot without more be evidence of negligence. The Police Abstract Report which was produced before the trial court did not contain any other information apart from the date, of the accident, the particulars of the vehicle involved, its ownership, the insurance company that covered the vehicle, the victim and the name of the investigating officer. There was no information regarding the outcome of the investigations which was indicated to have been still pending. That document could not therefore be the basis of finding liability on the part of the Respondents."

14. Counsel reiterated that a police abstract is prepared based on preliminary investigations and statements, which may not reflect the true circumstances of the accident and in the absence of an investigation

report, police file, sketch map or evidence from the Investigating Officer explaining the basis of the findings, the contents of a police abstract should not have been used as the sole basis of attributing blame to the Appellants. Counsel urged that the reliance of the police abstract to attribute blame by the trial Magistrate was flawed and unsupported by the evidence on record.

15. Counsel further submitted that DW1 testified that the deceased driver of motor vehicle registration number KBQ 150J was driving at a very high speed and in a zig zag manner and failed to keep to his lane resulting in the accident, she averred that the deceased was to blame for the accident since he acted negligently while driving his motor vehicle and that this information was recorded in the Occurrence Book which she read to the court. That DW2's testimony also was that the deceased driver failed to keep to his lane and consequently encroached into DW2's lane and hit his vehicle on the driver's side.

16. Counsel argued that it is evident from the testimony of DW1 and DW2 that the accident was solely caused by the deceased who encroached into the lane of DW2 and therefore, the deceased should have been held solely liable for causing the accident. That further, no evidence was brought against the Appellant's driver proving that he caused the accident. Counsel urged that in these circumstances, the trial Magistrate ought to have found the deceased 100% liable.

17. Counsel cited Section 78 of the *Civil Procedure Act* which defines the role of a first Appellate Court and he also cited the Court of Appeal in Peter M. Kariuki v Attorney General [2014] eKLR where it was held that:

> " We have also, as we are duty bound to do as a first appellate court, to reconsider the evidence adduced before the trial court and revaluate it to draw our own independent conclusions and to satisfy that the conclusions reached by the trial judge are consistent with the evidence."

18. In view of the facts, evidence and the authorities hereinabove, Counsel urged that the Respondents failed to prove liability against the appellant on a balance of probabilities as required by law and it is therefore their submission that the learned trial magistrate erred in law and fact in holding the Appellant 90% liable while relying on the testimonies of the Respondents witnesses and police abstract which was contrary to the evidence on record.

19. In regard to the damages awarded, Counsel submitted that this Court has power to interfere with an award of the lower Court as was held the case of Jane Chelagat Bor v Andrew Otieno Onduu (1988-1992) 2 KAR 288 and Kemfro Africa Ltd t/a Meru Express service & Gathogo Kanini v AM Lubia & another (1982 - 1988) 1 KAR 777 where it was held that:

> " The court must be satisfied that either the trial Magistrate in assessing damages took into account an irrelevant factor and left out relevant factors, or the amount is so inordinately low or so inordinately high that it is a wholly erroneous estimate of the damage."

20. On pain and suffering, Counsel submitted that the law is that damages for pain and suffering in fatal accident claims are designed to compensate the deceased's estate for the pain and suffering the deceased endured before death. That from the evidence on record, the deceased having died on spot did not experience much pain and suffering. Counsel relied on the case of Moses Koome Mithika & another v Doreen Gatwiri & another (Suing as the legal representative and Administrator of the Estate of Phineas Murithi (deceased) [2020] eKLR whereby the court awarded Kshs. 10,000/= for pain and suffering for a victim who died on the spot. Counsel therefore submitted that Kshs. 10,000/= would be sufficient compensation for the deceased under this heading.

21. On loss of expectation of life, Counsel submitted that Respondents pleaded that the deceased died aged 30 years and in good health, however, no documents were produced to prove that the deceased was in good health. Counsel contended that based on the people listed as the beneficiaries of the deceased, these beneficiaries are the same in the *Law Reform Act* and *Fatal Accidents Act* and that the award therefore ought not to be given.

22. Counsel urged that the Court be guided by the case of Kemfro T/A Meru Express Services and another v Lubia and another (1987) eKLR, in making a similar finding. That therein, the court of appeal held that in awarding damages for both loss of expectation of life and loss of dependency, duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same as the damages will go to the same person. He also cited Section 2 (5) of the *Law Reform Act*.

23. On loss of dependency, Counsel submitted that PW1 testified that the deceased died aged 30 years, was married and had three children, she further testified that the deceased was driver earning Kshs. 35,000 per month. However, on cross-examination, she stated that she has nothing to prove her allegations that the deceased was married or that the monthly salary was as she alleged.

24. With regard to the dependency ratio, Counsel argued that dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as follows:

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

25. Counsel further argued that PW1 failed to prove that the deceased was married as she did not produce a marriage certificate or any other proof to show that the alleged Thyline Jepkosgei was the deceased's wife. Counsel relied on the holding in the case of James Mukolo Elisha & Another v Thomas Martin Kibisu [2014] eKLR where this court stated:

> " The respondent did not adduce any documentary evidence to show that any of the persons listed under paragraph 6 of the Plaint were actually dependants of the deceased. In the result, we allow the appeal and set aside the judgment of the trial court dated 29th November, 2001, as far as the award for general damages under the *Law Reform Act* and *Fatal Accidents Act* is concerned."

26. In light of the above, Counsel submitted that the Respondents failed to prove dependency and thus a dependency ratio of 1/3 would be sufficient.

27. On the multiplicand, Counsel submitted that PW1 did not adduce any proof to show that the deceased was a driver or that he was earning the alleged sum Kshs. 35,000 per month. Counsel maintained that it is trite law that in the absence of proof of income the court has to resort to the minimum wage prevailing at the time of the deceased's death. Counsel relied on the holding in of Gachoki Gathuri (Suing as Legal Rep. of The Estate of James Kinyua Gachoki (Deceased) V John Ndiga Njagi Timothy & 2 Others [2015] eKLR where the court held that; -

    It is trite law that where there is no proof of income, the court will adopt the minimum wage provided in the Regulations of Wages (General Amendment) Order.

28. It light of the above, Counsel submitted that since the Respondents failed to prove that the deceased was a driver, the Court should therefore adopt the applicable minimum wage of Kshs. 8,109.90/= as the multiplicand.

29. Regarding the multiplier, Counsel submitted that as per the death Certificate, the deceased died aged 30 years. Counsel relied on the case of Franco Mwirigi v Patrick Musyoki Munywoki &Duncan Mbole Munyoki (suing on behalf of the estate of Maurice Wambua-Deceased [2018] KEHC 2141 (KLR), the court in making its decision reduced the multiplier of 30 years which had been adopted by the lower court and substituted with a multiplier of 20 years for a person who died aged 30 years. The court went further and stated as follows:

> " It was the duty of the trial court to weigh the evidence and the submissions of both sides and reach a just decision. In light of the averment in the plaint that the deceased was a "strong, brilliant, healthy, talented young man" aged 30 years with "an extended life expectancy" and the persuasive submissions, the trial court had reason to ratchet up the multiplier for lost years as proposed by the respondents. It cannot indeed be doubted that all things being equal, the deceased had a long life ahead of him. However, life is not predictable. The unpredictability of life should be taken into account in picking a multiplier. Taking the vagaries of life into account, I find that a multiplier of 30 years was on the higher side. It is not stated in the judgement of the trial court why 30 years and not 18 years was picked as the multiplier."

30. Counsel also relied on the holding in the case of FMM & Another v Joseph Njuguna & Another [2016]eKLR in which the court adopted a multiplier of twenty three (23) years where the deceased was aged twenty six (26) years at the time of death. In view of the foregoing, Counsel proposed a multiplier of 20 years.

31. With regard to special damages, Counsel submitted that the Respondents pleaded special damages as follows; transport of body and mourners Kshs. 120,000/=, funeral expenses Kshs. 500,000/= and Letters of Administration Kshs. 66,250/= That these items were not entirely proved contrary to the basic principle in Special Damages that they must be specifically pleaded and proven. He quoted from the decision of the Court of Appeal in Hahn v Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P 717 and 721 where the Learned Judges of Appeal-Kneller, Nyarangi JJA, and Chesoni Ag. J.A.-held:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

32. Counsel contended that the Respondents pleaded Kshs. 686,250, the Respondents however produced a receipt for Kshs. 66,250/= for legal fees for obtaining grant ad litem that the other receipts amounting to Kshs. 620,000/= were pleaded but not proved. Counsel therefore submitted that it is only the amount of Kshs. 66,250/= that ought to have been awarded.

The Respondents' Submissions

33. On liability, Counsel for the Respondents submitted that the learned trial Magistrate was right and applied sound principles based on the evidence adduced by the Respondents in apportioning liability and held the Appellant 90% liable. Counsel added that the Respondents in the plaint dated 11/10/2019 sought damages arising from a road traffic accident that had occurred on 26/08/2018

where Nicodemus Kipkorir Kimutai who was driving motor vehicle registration number KBQ 150J died as a result of the injuries sustained motor vehicle registration number KBM 927X driven by the Appellantg;s servant agent et al collided with deceased's motor vehicle. That in that plaint, the respondent laid out grounds upon which they attributed negligence to the Appellant as follows; driving at a speed that was excessive., failing to keep or look out for other road users, overtaking when it was not safe to do so and failing to stop, to slow down swerve or in any other manner manage or control his vehicle so as to avoid the accident.

34. Counsel further submitted that the Respondents called 3 witnesses being herself, an eye witness and a traffic police officer. That the Respondent in her evidence in chief blamed the driver of motor vehicle KBM 927 X for the accident by driving into the path of motor vehicle KBQ 150 J which resulted into the collision. That the Respondent also called one Alfred Kibiwott Kimutai who happened to have been at the scene of the accident and witnessed the same occur. That the said eye witness adopted his witness statement and in his testimony told the court that the driver of appellant's motor vehicle that was heading to Kapsabet from Eldoret and while trying to avoid a motorcyclist swerved into the opposite lane and into the path of KBQ 150 J and thus blamed the appellant's drive for failing to swerve back into his lane in time to avert the accident, that the Respondent also called a traffic police officer who produced police abstract to confirm the details and occurrence of the offence.

35. Counsel submitted that the Appellant on his part called a Base Commander who on her part blamed driver of KBQ 150 J for failing to keep on his lane and on cross-examination she confirmed that she did not produced sketch plans in court and also confirmed that she was not the investigating officer and the matter was still under investigation. That she testified that the police abstract does not show that driver of KBQ 150 J was to blame. That this witness also confirmed that the investigating officer did a shoddy job and that the information relied on in the OB was as given by Dennis Barasa, the Appellant's driver. Counsel therefore urged that because the Base Commander's testimony is based on information as narrated by the appellant's driver's as to how the accident occurred ought to be treated with caution because as is to be expected, such a person's testimony could be tilted with a view of absolving himself from blame.

36. Counsel maintained that based on evidence adduced and specifically the evidence of the eye witness which was neither rebutted nor controverted, the learned magistrate was right to apportion liability at the ratio of 90:10%. He therefore urges the court not to interfere with findings of the learned magistrate.

37. On the issue of quantum, Counsel submitted that it is settled law that an appellate court will not interfere with an award of general damages by a trial Court unless:-(a) the trial court acted under a mistake of law; or (b) where the trial court acted in disregard of principles; or (c) where the trial court took into account irrelevant matters or failed to take into account relevant matters: or (d) where the trial court acted under a misapprehension of facts; or (e) where an injustice would result if the appellate court does not interfere; or (f) where the amount awarded is either ridiculously low or ridiculously high that it must have been erroneous estimate of the damage as already herein summarised vide the submissions of the appellant. Counsel relied on the case of Kivati v Coastal Bottlers Ltd the Court of Appeal stated: See Dumez (Nig) Ltd v Ogboli {1972}3 S.C. Page 196," Per BADA, J.C.A (P. 28, paras. C-G) -Civil Appeal No.69 of 1984, and the holding Ken Odondi & two others y James Okoth Omburah ta Okoth Omburah & Company Advocates.

38. Counsel submitted that the trial Court applied the right principles in arriving at the quantum of damages and the court ought not interfere with the same.

39. Regarding the multiplicand, Counsel submitted that the learned Magistrate invoked the right principles by applying Kshs. 30,000/= as multiplier which are the deceased's expected earnings. Counsel submitted that it is a fact that the deceased was a truck driver at the time of accident and it is also a fact that the Respondent did not produce a payslip to prove deceased's earnings and the learned magistrate had to resort on minimum wage of a driver which according to 2018 Basic Minimum wage of a driver at the time was Kshs. 30,627. Counsel urged the Court to be guided by the court of appeal decision in the case of Jacob Ayiga Maruja & Anor Vs Simeon Obayo Ca Civil Appeal No.167of 2002(2005) eKLR where the court observed that absence of proof of the deceased's earnings in form of receipts cannot be construed to mean he was not working for gain, the court observed;

> "…..We do not subscribe to the view that the only way to prove one's profession must be by way of production of certificates and that the only way of proving earnings is equally production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihoods in various ways. If documentary evidence is available, that Is well and good. But we reject any contention that only documentary evidence can prove these things".

40. Counsel submitted that the learned trial Magistrate applied a multiplier of 30 years, that evidence was tendered that the deceased was at the time of death was aged 30 years old as per the Respondent's testimony and the death certificate produced, that the learned Magistrate observed that the deceased was expected to have had had an active live a head of him until attaining the age of 60 Years and thus urge you not to disturb the findings of the learned magistrate on the issue of the Multiplier.

41. Regarding the dependency ratio, Counsel submitted that learned Magistrate applied a two third (2/3) ratio in so far as dependency ratio is concerned. Counsel further submitted that evidence was adduced in the form of birth certificates to confirm that the deceased had dependants and urged the court to so find and hold that the learned magistrate applied right principles on this frontier.

42. On loss of expectation of life and pain and suffering, Counsel submitted that award of damages is normally conventional and it is his submission that the award of Kshs. 100,000/= and Kshs. 50,000/ = was not excessive in the circumstances.

43. In the end, Counsel urged the Court to uphold learned Magistrate's decision on both liability and quantum and thus proceed to dismiss the appeal with costs to the Respondent.

Determination

44. Being a first appeal the court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & others [1968] 1EA 123:

> "…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. In particular, this court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

Liability

45. Liability was apportioned at the ratio of 90% - 10%against the Appellant. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In Khambi & Another vs Mahithi & Another [1968] EA 70 it was held that: -

    It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

46. In this case, it is common ground that an accident indeed occurred on 26/08/2018 involving motor vehicle registration No. KBM 927X belonging to the Appellant and motor vehicle registration No. KBQ 150J driven by the deceased in which the deceased sustained fatal injuries. On the one hand, the Appellant blames the Respondents for the accident, whilst on the other hand, the Respondents blame the Appellant. In this instance to determine where liability lies, the Court will draw upon the evidence at the trial Court.

47. In light of the fact that the submissions of both counsel dwelt majorly on the evidence as adduced by the various witnesses, I will not rehash the same in its entirety but only where necessary. On the issue of liability, I have perused the lower court proceedings and considered the evidence of the witness in a bid to evaluate the same and reach my own informed conclusions on how the accident occurred.

48. PW2 is the witness who testified that he was at the scene when the accident occurred. Even as the credibility of the said witness has been brought to question by Counsel for the appellant in his submissions for the reasons already summarised, the court notes from the record of proceedings that his testimony was that he was at the scene of the accident when it occurred was not challenged. Also his testimony on how the accident occurred was not subjected to any cross examination that sufficiently rebutted challenged and/or controverted the same on its material particulars. Because his testimony is key, it is important that the court restates it on the salient points on how the accident occurred.

49. The witness testified that on the material date he was waiting for a matatu along the Eldoret- Kapsabet road. That at around 6:30pm he was on the said road awaiting a matatu to travel back to Eldoret when he witnessed an accident involving two motor vehicles, a canter that was carrying tea to the factory which was heading to Eldoret, and a lorry which was heading to Kapsabet. That he later learnt that the canter was registration number KBQ 150J and the lorry was registration number KBM 927X. He further stated that the accident occurred about 20 metres from where he was standing when the driver of motor vehicle registration number KBM 927X which was headed to Kapsabet from Eldoret while trying to avoid a motor cyclist swerved into the opposite lane and onto the path of motor vehicle registration number KBQ 150J. That the driver of motor vehicle registration number KBM 927 X was not able to swerve back into his lane in time and as a result the said vehicle hit the driver's side of motor vehicle KBQ 150J. He blamed the driver of motor vehicle registration number KBM 927X for causing the accident.

50. Because it is trite law that submissions are not evidence, the appellant's having failed to dent the credibility of this witness at the trial and also having failed to challenge, controvert and or contradict the testimony of this witness in any significant manner during cross examination, it follows then that seeking to do so in submissions does not help the appellants case in any way. Further, the court notes that the driver of the appellant who testified as DW1 testified that the plaintiff hit the driver's side of his car. This in fact corroborates the PW2's testimony that he got onto the path of the deceased motor vehicle in seeking to avoid hitting the motor cyclist. As the record shows, the evidence of the Police

Officers were not helpful at all in assisting the court reach a determination on causation. For the above reasons, I am satisfied with the Hon Magistrates finding on liability and the same is upheld.

Quantum

51. For reasons that assessment of damages is at the discretion of the trial Court, this Court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another where the Court held as follows: -

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

52. In its assessment of damages under the *Fatal Accidents Act*, the trial Court, based on the evidence presented, awarded Kshs.50,000/- for pain and suffering and awarded a sum of Kshs.100,000/- for Loss of Expectation of Life under the *Law Reform Act* and the Court.

53. In the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows as regards damages awardable under these two heads;

> " As regards damages awarded under the *Law Reform Act*, the principle is that 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.... 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 Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

54. On loss of expectation of life, the court in the case of Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR 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 Kshs. 100,000/- while pain and suffering the awards range from Kshs.10,000/- with higher damages being awarded if the pain and suffering was prolonged before death."

55. Given the above two authorities, I do not find the awards given by the trial court under the two heads to be inordinate and both are accordingly upheld.

56. The Trial Court in assessing loss of dependency based its award on the multiplicand approach. The application of this approach was explained in detail by Justice A. Ringera (as he then was) In the case of

Ezekiel Barng'entuny –vs-Beatrice Thairu HCC No. 1638 of 1988 where Justice Ringera (as he then was) as follows

> " 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 purchase. 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 dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."

57. There are instances where the courts have relied on the minimum wage where the income of the deceased is not clear or was unascertainable. In the case of Nyamai Petronila & another Vs Monica Usyoki & another [2020] eKLR:

> " In this appeal, the appellant contends on the loss of dependency that though the certificate of death shows that the deceased was aged 49 years old and was a plumber, there were no records to show previously his monthly earnings. On multiplicand, it was submitted that the court erred as it used a multiplicand of Kshs. 10,000/- since there was no evidence of the deceased's earnings and there was no evidence of the deceased's employment. The court was urged to use the Multiplier approach in assessing damages which is a useful and practical method where factors such as age of the deceased, amount of annual monthly dependency are known. The Court was urged to assess the deceased income using the minimum wage of Kshs. 4,854/- which was the applicable minimum wage at the time of his death as published under Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013. In this regard, the Appellant relied on HCCA No. 108 of 2008 – Machakos Philip Mutua vs. Veronicah Mule Mutiso [2013] eKLR where it was noted that "... in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate is usually like a wage of an unskilled employee."

58. On this very same issue, the Court of Appeal in Civil Appeal No. 167 of 2002 Ayiga Maruja & Another -vs- Simeone Obayo (2005) eKLR the Court observed;

> .... We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and that earn their livelihood in various ways. If documentary evidence is available that it well and good. But we reject any contention that only documentary evidence can prove these things.

59. In this case the evidence of PW1 who testified that she is the deceased mother was that the deceased was employed by one Anderson Koech as a driver of a lorry which was transporting tea at a salary of Ks. 30,000/= per month. PW2 too in his uncontroverted evidence did testify that on the material date the deceased was driving a canter with tea which he was taking to the factory. This testimony that the deceased was a driver was not challenged in any meaningful way. However, no documents were availed to support the salary of Ks. 30,000/= which the court notes is the amount that the trial magistrate used as a multiplicand.

60. Even as I agree with above decision of Ayiga Maruja above on the issue of court's sometimes over emphasis on the availability of documentation, in situations where guidance on how the court can proceed in circumstances where documents cannot be availed for one reason or another exists, then the court ought to go by that guide. This is of particular relevance and significance in this case because I note that in his judgement the trial court did not at all dwell on the fact that there was no documentation availed to support the salary of Ks. 30,000/= as alleged.

61. Further, the trial court also did not indicate the reasons for which it was basing the multiplicand of Kshs. 30,000/- on notwithstanding the absence of documentation in support of the same. In circumstances such as these, the relevant guide that the court can rely on and ought to have resorted to does exist. The same is quite appropriate to the circumstances of this case and it is The Regulation of Wages (Agricultural Industry) (Amendment) Order 2015 which is the regulation that was applicable at the time of the deceased death in 2018.

62. In the said regulation the salary of a lorry or car driver is given at Ks. 7966.80 and this is what the court ought to have and which this court will use as the multiplicand. On the multiplier, given that it is not controverted that the deceased was aged 30 years, was in good health and was a driver, then having been an employed person during his lifetime, the court shall use the normal retirement age of 60 years to determine the multiplicand.

63. Further, the Counsel for the appellant urged the Court to replace the dependency ratio of 2/3 with one of 1/3 for the reasons given as summarised. As was held in the case of Dickson Taabu Ogutu (suing as the legal representative of the estate of Wilberforce Ouma Wanyama v Festus Akolo & Another (2020) eKLR, dependency is a matter of fact. The deceased mother testified that the deceased was married to one Thylyne Jepkosgei Korir and they had three children who have been named in the plaint. This evidence was not at all challenged rebutted and/or controverted.

64. The Birth Certificates of the children were produced as PExh 5(a)-(c). Again, this evidence was not at all challenged at the trial in cross examination. The court in noting that these were minor children, takes cognisance of the fact it is to be expected that the children would dependant on their parents to a large extent and the parent herein includes the father. Coupled with the mother and the wife as dependants, I am satisfied that the dependency ratio of 2/3 as awarded by the Hon Magistrate is quite appropriate and I see no plausible reason to upset the same.

65. I make this decision quite conscious of the award as given on Loss of Expectation of life which the Court is required to consider so as to avoid the issue of double compensation as submitted by Counsel for the appellant. As for the issue of double compensation. In this regard then, the award under Loss of Dependency shall be 7966.80 x 12 x 30 x 2/3 which comes to Kshs. 1,912,032/=

66. Special damages are those damages which are ascertainable and quantifiable at the date of the action. They must be specifically pleaded and proved. I this case the trial Magistrate found that an amount of Ks. 66,250/- as pleaded under particulars of Special Damages was proved by way of the production of receipts. Counsel for the appellant argued that no receipts were produced to support the award for funeral expenses under this head and that the same is therefore not warranted. On this submission on funeral expenses, several decisions of the courts as hereunder are relevant and I wholly associate myself with them.

67. The case of Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs. Dubai Superhardware [2021] eKLR wherein the High Court (J. N. Mulwa) took judicial notice on the issue of funeral expenses and held as follows:

This expense is a special damage. It is trite that special damages must not only be pleaded but also strictly proved. A sum of Kshs. 50,000/= was pleaded in the plaint as funeral expenses. There is a long list of authorities to that effect. 22. However, with hardships and difficulties faced by deceased's mourning families, it has now become necessary and trite to allow, without strict prove, reasonable funeral expenses.

68. The Court of Appeal decision in the case of Jacob Ayiga Maruja & another vs. Simeon Obayo [2005] eKLR (Supra) where the court rendered itself thus:

We agreed and the Courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses" and proceeded to allow an expense of Sh.60, 000/= towards funeral expenses in the case.

69. Lastly the case of Premier Dairy Limited vs. Amrit Singh Sago & Another C.A No. 312/2009 where the Court of Appeal took judicial notice of the fact that:

It would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved. 24. Guided by the above pronouncements, I set aside the trial Court's Nil award on funeral expenses, and substitute the same with an award of Kshs. 50,000/= as funeral expenses.

70. Going by the above authorities, I am satisfied that notwithstanding the non-availability of receipts, the trial Magistrate correctly rendered himself in making an award for funeral expenses. Further, in light of the awards in the said decisions, I do not find the Hon magistrate's award of Ks. 100,000/= for funeral expenses to be high. I also note that even as the same was awarded, the court omitted to factor it in under Special Damages and the judgement only reflects the Kshs. 66,250/= that he found to be proved. This court in factoring this amount then shall award Special damages at Kshs 166,250/=. The upshot of my findings as herein above on the appellant's Appeal then is as follows;

i. The Appeal against liability as awarded at 90%-10% against the defendant is now hereby dismissed and the award on liability is upheld

ii. The Appeal against the award of Ks. 50,000/= for Pain and Suffering in favour of the plaintiff is now hereby dismissed and the said award is upheld

iii. The Appeal against the award of Ks. 100,000/= for Loss of Expectation of Life is now hereby dismissed and the said award is upheld

iv. The Appeal against the award of Ks. 6,674,625/= for loss of dependency is now hereby allowed. The said amount is set aside and substituted with an award of Ks. 1,912,032/=

v. The Appeal against the award for Special damages is now hereby dismissed and the Special damages awarded by the trial court are now hereby enhanced from Ks. 66, 250/= to Ks. 166, 250

vi. TOTAL Ks. 2, 228, 282/=

vii. Less 10% Liability Ks. 2,005,453.80

viii. Costs of the suit and interest at court rates.

READ DATED AND SIGNED AT ELDORET ON 12TH MARCH 2025

E. OMINDE

JUDGE