New Kenya Co-operative Creameries Ltd v Sechero (Suing as the personal representative of the Villance Libosho Lukhabi - Deceased) (Civil Appeal 41 of 2020) [2024] KEHC 16943 (KLR) (7 February 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 41 OF 2020

F WANGARI, J

FEBRUARY 7, 2024

BETWEEN

NEW KENYA CO-OPERATIVE CREAMERIES LTD ..... APPELLANT

AND

NELSON LIHAABI SECHERO (SUING AS THE PERSONAL REPRESENTATIVE OF THE VILLANCE LIBOSHO LUKHABI - DECEASED) ..... RESPONDENT

(Being an Appeal from the Judgement and Decree of the Chief Magistrate's Court at Mombasa of Honourable Albert Lesootia (PM) dated the 21st February, 2020 in Mombasa CMCC Civil Case No. 1859 of 2015)

JUDGMENT

1. This is an appeal from the judgement of the Learned Principal Magistrate Hon. Albert Lesootia in Mombasa CMCC No. 1859 of 2015 given on 21st February, 2020.

2. The Appellant preferred eight (8) grounds of appeal which were well set out in the memorandum of appeal dated 5th March, 2020 and filed on 16th March, 2020. They are as follows: -

    a. That the Learned Honourable Magistrate erred in both law and fact in finding and holding the Defendant (Appellant) 100% liable or otherwise for causing the accident despite the fact that the Plaintiff (Respondent) failed to discharge his legal burden of proof in that he failed to call/tender evidence from an eye witness to give an account on the issue of liability thus the question of liability was not proved at all as per the law required;

    b. That the Learned Honourable Magistrate erred both in law and fact in finding and holding that the deceased was legitimately expected to be at the scene of the accident despite the

overwhelming evidence adduced by DW1 and DW2 of a duty roaster that showed where the deceased had been assigned duties for that day;

c. That the Learned Honourable Magistrate erred both in law and fact in failing to consider the overwhelming evidence of DW1 who indeed witnessed the accident and gave a true account that the deceased was on her earphones thus she breached the factory rules of engaging in harmful conduct while in the factory and thereby failed to exercise reasonable precaution over her own safety while in the factory;

d. That the Learned Honourable Magistrate erred in both law and fact in shifting the burden of proof on liability on the Defendant (Appellant) yet the Plaintiff (Respondent) had not discharged his burden of proof that the accident occurred as a result of the Defendant's (Appellant's) negligence and/or breach of duty of care;

e. That the Learned Honourable Magistrate erred in both law and fact in awarding damages that were unjustified, manifestly excessive including applying a multiplicand of Kshs. 119,000/= yet the deceased herein was a university student who had not graduated and had not started earning and as such due to the vagaries of life, it was erroneous for the trial court to have presumed that the deceased would have graduated to earn as much;

f. That the Learned Honourable Magistrate erred in both law and fact in failing to consider the Defendant's submissions and contending that the same had not been filed yet the same were already on record thus reaching an unjust decision;

g. That the Learned Honourable Magistrate erred in both law and fact in arriving at the decision he did on both liability and quantum;

h. That the Learned Honourable Magistrate erred in both law and fact in coming up with his own theories and conclusions not backed by any evidence presented before him on how the accident occurred.

3. I have considered each of the grounds upon which the Trial Court's judgement is being impeached and I shall give due regard in the court's determination of the appeal one way or the other. The Appellant thus prayed that appeal be allowed and that this court proceed to set aside the judgement of the Trial Court delivered on 21st February, 2020 and the same be dismissed with costs. It was lastly prayed that the Appellant be awarded costs of the appeal and in the court below.

4. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

5. This was aptly stated in the cases of Selle v Associated Motor Boat Company Ltd [1968] EA 123 and Peters v Sunday Post Limited [1985] EA 424 where in the latter case, 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..."

6. In Livestock Research Organization v Okoko & another (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR) (29 June 2022) (Ruling), Justice R. E. Aburili, J. held as follows;

> In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyse and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal stated that:
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> > "An appeal to this Court from a trial by the High 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 allowances in this respect"

7. I shall not reproduce the parties' pleadings as they already form part of the record suffice to summarize the genesis of the claim. As per the plaint dated 1st November, 2012 and filed on 15th November, 2012, the deceased, a fourth year engineering student at Moi University is said to have been an intern at the Appellant's Miritini Factor. On 4th June, 2010 while the deceased was at the Appellant's factory undergoing her industrial attachment, a pasteurizer machine which was being moved slipped and fell on her thereby occasioning her to suffer fatal injuries. The Respondent blamed the Appellant for the accident and subsequent loss.

8. The claim was strenuously opposed and instead, the Appellant shifted the blame to the deceased through a statement of defence dated 6th September, 2013 and filed on 9th September, 2013. The matter proceeded to full trial and judgement was entered in favour of the Respondent against the Appellant. General damages was assessed at Kshs. 11,819,400/= but due to pecuniary limits of the Trial Court, this sum was capped at Kshs. 10,000,000/= while special damages was assessed at Kshs. 88,400/=. The award was to attract costs of the suit and interest at court rates from the date of filing suit. It is this decision that precipitated the present appeal.

Summary of the Respondent's case

9. Nelson Likhabi Sechero testified as PW1. The deceased was her first born daughter who was at the time of death a Mechanical Engineering Student at Moi University doing her attachment. He stated that the deceased was involved in an accident at the Appellant's Miritini factory when a machine crashed her head. He stated that he travelled to Mombasa Coast General Hospital Mortuary and witnessed the post mortem.

10. He confirmed incurring expenses towards funeral arrangements. He enumerated the expenses incurred such as hiring a hearse. He blamed the Appellant for the accident for subjecting the deceased to danger. He confirmed that the deceased had a mobile phone but she used to leave it at home and that she could not have been the cause of the accident as according to him, she was a responsible girl. He stated that they received Kshs. 50,000/= from Moi University to cater for the funeral expenses. He produced all the documents as exhibits. He thus prayed for damages and costs of the suit.

11. On cross examination, he confirmed that the deceased had been to another attachment while in second year. He stated that he was informed of the incident by an officer from the Appellant. He had not visited the deceased at Mombasa. He confirmed that the deceased applied for attachment and the application was accepted by the Appellant. It was his testimony that the deceased had a group accident cover and that he had not lodged any claim at Moi University.

12. He denied knowing the machine the deceased was using and that he confirmed that he did not witness the accident. He did not know the deceased's duty at the factory. Referred to several agreements which he had filed in support of specials, PW1 stated that he did not get receipts for the services. Questioned on the phone, he stated that the deceased had a phone but they found it at her house. She confirmed that the deceased was 23 years at the time of death.

13. On re-examination, he stated that he got information that the deceased was crushed by a pasteurizer machine. He went to the deceased house and found her phone. He confirmed that the Kshs. 50,000/ = he got from Moi University was funeral expenses.

14. PW2, Felistus Mmbali adopted her witness statement as her evidence in chief. On cross examination, she confirmed that she witnessed the post-mortem. She neither witnessed the accident nor visited the Appellant's factory. That marked the close of the Respondent's case.

Summary of the Appellants' Case

15. DW1, Joseph Kenga, a mechanical filler at the Appellant's company adopted his witness statement as his testimony. He was supervising the engineering personnel in filling. He confirmed that he was the deceased's supervisor on the fateful day. He stated that they train students on safety when they come for attachment. He equally referred to safety rules which were part of his documents. He was the one planning duty roasters and he produced the duty roaster for June, 2010. On the said day, the deceased was to repair the ladies' lavatory.

16. He stated that he was removing a pasteurizer machine with six (6) others. Before moving the machine, he ensured the area was clear. The deceased appeared on the machine's way and she had earphones on. He shouted at the deceased but she could not hear. The machine injured the deceased occasioning her fatal injuries. She confirmed that the deceased had been provided with safety boots and a helmet. He blamed the deceased for the accident for among others, she was not supposed to be in the area the machine was being moved and that she was on her phone thus could not hear the warning.

17. On cross examination, he confirmed that the deceased had been oriented on safety and that the lavatory she was working on was within the factory. He stated that the machine tilted but he did not take any caution to avoid the machine from falling. He confirmed that there was no provision that the deceased was not allowed to move out of her work station and equally that nothing prevented her from leaving her work station. He stated that the deceased was on her course of duty though on her phone at the time of the incident. An incident report was prepared though he did not have it in court. He denied that the Appellant failed to ensure the deceased's safety.

18. On re-examination, the witness confirmed that he had ensure that the area was clear and that the machines were protected. He reiterated his position that the deceased had no role at the scene where the accident occurred. He described the positioning of the machine before the accident occurred. According to him, the wooden plunks which the machine rested on titled causing the machine to fall crushing the deceased. Two of his colleagues were on each side of the machine and that the deceased was not near him. He was the in charge of safety but the accident was sudden. He stated that the accident was the first at the Appellant's premises. He reiterated his earlier testimony that he took all the necessary safety measures but the deceased contravened safety movement rules and that she failed to wear appropriate safety gear.

19. DW2, Michael Mukopi, the Appellant's Industrial Relationship Manager adopted his witness statement as his testimony. He produced the documentary evidence relied by the Appellant among them the insurance cover from Corporative Insurance Company Limited. He affirmed that

the Appellant's policy is that accidents at the Appellant's premises shall not be the company's responsibility. For their employees, they had workmen compensation. He poured cold water on the Respondent's claim. He alluded to a duty roaster prepared for both staff and students and that the deceased had been inducted on safety. He confirmed that there were several machines at the Appellant's premises.

20. The witness indicated that the deceased had been allocated duty to repair a system of the ladies' toilet and that the accident occurred about ten (10) metres away from the deceased's work station. As such, the deceased was not expected at the accident scene. No one else was injured. He got a report from the manager that the deceased was an attaché. He confirmed that the supervisor had ensured that there was sufficient safety thus he blamed the deceased for the accident. He directed the family to pursue insurance for compensation.

21. On cross examination, he confirmed that he did not witness the accident and that he had no evidence that the insurance company had made any payment. He equally confirmed that it was the Appellant's duty to provide a safe working environment. However, as a company, they took no responsibility for injuries to interns. He alluded to an incident report but that he did not have it.

22. On re-examination, he confirmed that he was informed of the accident by the person who witnessed it since it was his duty to know. The report he received was that the deceased was on her phone. He confirmed that DW1 was the deceased's supervisor. On insurance cover, the witness stated that it was the deceased's university that took the cover thus not the Appellant's duty to ensure the insurance paid the compensation to the deceased's family. He reiterated that the Appellant was not liable for the death. That marked the close of the defence case. The Trial Court having considered the pleadings, evidence, parties' submissions and the law, it found the Appellant 100% liable and entered judgement for the Respondent which is now the subject of this appeal.

23. When the appeal came before this court, directions were taken that the same be canvassed by way of written submissions. Both parties duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Appellant's initial submissions are dated 22nd October, 2022 and filed on 4th November, 2022 while the Respondent's submissions are dated 23rd September, 2022 and filed on 26th September, 2022. The Appellant filed further submissions dated 17th January, 2023.

24. When this court became seized over this matter and being alive to the Supreme Court's decision in Law Society of Kenya v Attorney General & Another [2019] eKLR, it directed parties to file further submissions addressing the question of jurisdiction and specifically whether the claim herein was grounded upon Work Injuries Benefits Act, 2007 or the *Occupiers' Liability Act*, Chapter 34 Laws of Kenya. Parties duly complied with the further directions. The Appellant's submissions on jurisdiction are dated 2nd June, 2023 while the Respondent's submissions on the same are dated 7th August, 2023.

Appellants' Submissions

25. The Appellant condensed its grounds to three (3) and the first ground addressed itself to liability. It was submitted that the burden of proof was on the Respondent to show that the Appellant was culpable for the accident and the ensuing damage. According to the Appellant, this could only have been proved by someone who witnessed the accident or an expert who ought to have displaced the Appellant's narration of events. Pouring cold water on the two witnesses who testified for the Respondent, the Appellant submitted that none of the said witnesses led any evidence on liability as their testimony was majorly on what they did after learning of the accident.

26. In the Appellant's view, even if it had opted not to tender evidence, the Respondent's case ought to have been dismissed. However, out of abundance of caution, it called two (2) witnesses whose evidence has been summarized elsewhere in this judgement. The Appellant submitted at the close of the Respondent's case before the Trial Court, the burden of prove had not been discharge. The Appellant made reference to the duty roaster showing where the deceased had been assigned to work, the nature of training given and that the deceased had her headphones on which prevented her from hearing the shouting and warning by fellow employees. On all the above, the Appellant opined that the Trial Court ignored such evidence.

27. The Appellant poured cold water on the Trial Court's judgement first on the issue of liability as according to it, the court instead of relying on evidence by the Appellant's witnesses, it went on a fishing expedition advancing its own theory on how the accident occurred and who caused it. Citing sections 107, 108 and 109 of the *Evidence Act*, it was the Appellant's submissions that the burden of proof of a fact was on the person who wished the court to believe in the existence of such fact.

28. Accordingly, the Appellant submitted that it was the Respondent's duty to prove liability on a balance of probability and not for the Trial Court to come up in Kenya's adversarial system of dispute settlement with theories on how the accident occurred in the absence of evidence incriminating the Appellant. Accordingly, the Appellant submitted that the Trial Court had no evidence before it to show that the Appellant was negligent or in breach of its statutory duty of care.

29. The Appellant placed reliance on Halsbury's Laws of England, 4th Edition, Volume 17 at pages 13 and 14 for the proposition that the legal burden is the burden of proof which remains constant throughout trial. If at the conclusion of the trial, if the party with the onus to prove failed to establish it to the appropriate standard, the party will lose. The case of Haley v London Electricity Board [1965] AC 778 was cited for the proposition that negligence requires that fault be proved against the Defendant. Proof cannot be implied by the fact that an accident occurred. The same position was reiterated in Mount Elgon Hardware v United Millers Ltd, *CA No. 19 of 1996* (UR).

30. While highlighting the testimony of DW1, the Appellant placing reliance on the case of Oriental Construction Co. Ltd v Peter Kariuki Mburu, ELRCA 14 of 2018, the Appellant contended that the employee must demonstrate that he was not negligent in the performance of his duties. Further, the Appellant submitted that not all industrial accidents taking place at the work place result from the negligence of the employer unless there is sufficient evidence demonstrating there was failure, breach and the negligence of the employer. The case of Timsales Ltd v Stephen Gachie [2005] eKLR was cited in support of the above proposition.

31. The Appellant thus urged the court to hold that liability was not proved and proceed to set aside the Trial Court's holding on liability and substitute the same with an order dismissing the suit with costs to the Appellant.

32. On quantum, the Appellant submitted that even if the court was to dismiss the suit due to the Respondent's failure to prove negligence, it behoves the court to assess probable quantum of damages it would have awarded had the claim succeeded. It took issue with Trial Court's award which it considered inordinately high as to represent an erroneous estimation. Its main contest was under the head of lost years/loss of dependency. The Trial Court used a multiplier of 25 years and a monthly income of Kshs. 119,000/= and a dependency ratio of 1/3 arriving at a figure of Kshs. 11,781,000/= which according to the Appellant, exceeded to Trial Court's pecuniary limit.

33. Placing reliance on the cases of Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR and Kemfro Africa Limited t/a Meru Express Service v AM Lubia & Another [1982 - 1988] 1 KAR 727,

the Appellant urged the court to exercise its power to disturb the award once it finds out that the judge considered an irrelevant factor or left out a relevant factor or that the amount is inordinately low or inordinately high that it must be a wholly erroneous estimate of the damage. It was submitted that the deceased was a 4th year Engineering student who had not started working and that her monthly income was unknown. Equally, no evidence was led on her probable monthly salary had she successfully completed her degree course.

34. The Appellant further submitted that the Trial Court's reliance on the case of Ismael Nyasimi & Another v David Onchangu Orioki [2018] eKLR was an error in principle for among others, the said decision was distinguishable to the case before it. It was also submitted that neither the current reality nor judicial notice was taken of the fact that jobs in Kenya even for graduates are nowadays scarce and even getting a job after graduating and attaining a salary of Kshs. 119,000/= was not a guarantee. The case of Fredrick Mwangi Wamwea v Mutuma Munene Meja [2021] eKLR was cited in support.

35. Submitting further on the case of Ismael Nyasimi relied on by the Trial Court, the Appellant stated that in Nyasimi case, the deceased was already a qualified engineer unlike the present case and further, the Plaintiff had led some evidence on the probable salary issue unlike the case at hand. The case of Godwin Mbaka Njagi (Suing as Personal Representative of Harrison Mbaka v Caren Mati & Another [2020] eKLR which cited several other cases was adopted as the guiding case on the issue of loss of dependency.

36. In conclusion, the Appellant urged the court to hold that the Respondent did not prove negligence or breach of duty as against the Appellant and therefore set aside the Trial Court's judgement on liability and dismiss the suit but nevertheless award at least Kshs. 30,000/= as the probable salary that the deceased could have probably earned or alternatively award a global figure. It also prayed for costs of both the Trial Court and this appeal.

Respondent's Submissions

37. The Respondent having set out the factual background leading to the appeal proposed four (4) issues for consideration which he set out as follows: -

    a) Did the Trial Magistrate err in law and fact in finding that the Appellant was wholly liable for the fatal injuries sustained by the deceased on 4/6/2010?

    b) Did the Trial Magistrate err in law and fact in awarding the Respondent damages that were unjustified and manifestly excessive including a multiplicand of Kshs. 119,000/=?

    c) Did the Trial Magistrate err in coming up with his own theories and conclusions not backed up by any evidence presented before him on how the accident occurred?

    d) Who bears the cost of this appeal?

38. Addressing the first issue, the Respondent commenced with a restatement of the role of an appellate court. He thereafter referred the court to a certain passage in the Trial Court's judgement addressing the issue of liability. The Respondent summarized the Appellant's misgivings with the Trial Court's judgement and went on to make reference to sections 107 to 109 of the *Evidence Act*. The Supreme Court's decision in Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2028] eKLR was cited for the elements necessary to establish a negligence claim.

39. The Respondent submitted that in evaluating the evidence before him, the Trial Magistrate had noted that it was not in dispute that on the material day, the deceased succumbed to her injuries while undergoing industrial attachment at the Appellant's factory. Thus by virtue of this attachment, the

deceased and the Appellant fell under the guidelines of sections 3 (1), 6 (1), (2), (2) (b) and (3) of the Occupational Health and Safety Act, Chapter 514, Laws of Kenya, which compels occupiers (employers) to ensure the safety, health and welfare at work place of all persons working in their workplace irrespective of whether their work is temporary or permanent.

40. The Appellant submitted that it is on the above background that the Trial Magistrate was satisfied that as the deceased was pushing the heavy milk pasteurizer with others, the Appellant owed her a statutory and common law duty of care which required the Appellant to take necessary precautions to prevent harm on those pushing the machine causing the same to tilt and fall crushing the deceased's head thus resulting in her death. It was the Respondent's position that the Appellant breached its statutory and common law duty of care when its officers failed to secure the pasteurizer machine properly.

41. It was thus the Respondent's position that the Trial Magistrate properly addressed himself to what caused the accident and who was to blame. The Trial Court was not persuaded that the Appellant took any reasonable steps to prevent the machine from tilting and falling on the deceased. The case of Statpack Industries v James Mbithi Munyao [2005] eKLR was cited on how causation can be ascertained. The Respondent submitted that though an eyewitness is important, failure to call one is not fatal to a case of negligence as all one is required is to establish the four elements on a balance of probability.

42. On the duty roaster of 4/6/2010, the Respondent submitted that even if the deceased was allocated duties at the lavatories on the material day, DW1 confirmed that there was no company policy that prevented the deceased from moving from her work station. Her duty post thus could not absolve the Appellant from the liability for the deceased fatal injuries. Similarly, on the deceased putting herself on harm's way, the Respondent submitted that no incident report was availed by the company detailing the version of events that occurred.

43. On the second issue, the Respondent submitted that it was not borne by the Appellant's pleadings that the deceased failed to observe basic precautionary measure while pushing the machine. The Respondent made reference to the Appellant's statement of defence under the head of particulars of contributory negligence. It was submitted that it was not possible that one was glued to a phone and at the same time pushing the machine. Thus, the Respondent contended that the issue of phone was an afterthought since if it was not, it ought to have been pleaded in the statement of defence. The Respondent concluded this line of submissions by stating that the Trial Magistrate correctly failed to find any persuasive value on the defence that the deceased had her earphones and thus could not hear DW1's warnings.

44. On the third issue, the Respondent while citing the case of Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 88] KAR 5, restated the general principles upon which an appellate court can interfere with an award of damages. The Respondent urged this court not to disturb the awards on pain and suffering and loss of expectation of life as according to him, the Trial Magistrate considered relevant factors in making the award. On damages for lost years/loss of dependency, he submitted that it is settled law that assessment of dependency ratio under the Fatal Accident's Act is a question of fact which must be proved by evidence.

45. The deceased was survived by two (2) dependants, his father and mother. Placing reliance on Ishmael Nyasimi case (above), it was the Respondent's view that in the Trial Court's view, the deceased could have had her own needs and for this reason, it adopted a dependency ratio of 1/3 towards her dependants. Therefore, the dependency ratio was not unreasonable or excessive. On multiplicand, the Court of Appeal decision in Roger Dainty v Mwinyi Omar Haji & Another [2004] eKLR was cited on the principles necessary to ascertain reasonable multiplier or multiplicand.

46. The Respondent submitted that the approach in assessing damages for lost years is to take the income the deceased would have earned less the living expenses, assuming that one lived and worked up to the age of retirement. Placing reliance on Ishmael Nyasimi case, the Respondent submitted that the Trial Court cannot be faulted for adopting a multiplicand of Kshs. 119,000/= per month based on the prospective income the deceased would have earned as an entry level engineer. It was also submitted for the Respondent that the Trial Court's approach was in consonance with the Court of Appeal decision in Rosemary Mwasya v Steve Tito Mwasya & Another [2018] eKLR.

47. On multiplier of 25 years, the Respondent submitted that the deceased was 23 years at the time of her death and had a bright future as mechanical and production engineer. Even though she could have worked to the age of 60 years, the Respondent concurred with the Trial Court's holding and thus urged this court to uphold the same. This was the same argument on special damages.

48. On the issue of whether the Trial Court came up with own theories and conclusions not backed by evidence, the Respondent submitted that the Trial Court had to make a decision whether the he had made a case for negligence against the Appellant and apportion liability if so before awarding damages. The Trial Court was satisfied that the Respondent had discharged his burden and apportioned 100% liability and capped its award at Kshs. 10,000,000/=. It was thus the Respondent's view that the Trial Court applied the correct legal principles on the facts to reach the conclusion it did.

49. The Respondent thus prayed for the appeal to be dismissed with costs. Upon being served with the Respondent's submissions, the Appellant opted to file further submissions.

Appellant's Further Submissions

50. Its first salvo was the Trial Court's pecuniary jurisdiction. On this, the Appellant relied on the Court of Appeal decision in Pelezia Bakari Salim v Somoire Keen & 2 Others [2020] eKLR. Based on this decision, the Appellant thus urged that the award by the Trial Court was without jurisdiction and thus was a nullity.

51. The second issue was on double jeopardy. According to the Appellant, the Respondent having received a sum of Kshs. 50,000/= which according to it was compensation from the insurance company, it was wrong for the Respondent to now once again sue the Appellant for the fatal injuries yet the deceased's family had been compensated. The Appellant sought to distinguish between employment and internship placement.

52. According to the Appellant, the later does not create an employer – employee relationship. Thus if an intern is injured during the internship, the Appellant is not obligated to compensate for the injury as it would its employees. This was because before one is placed for attachment/internship, the university of origin must provide a cover for the student and in the case at hand, the cover was provided by CIC Insurance.

53. It was further submitted that having received Kshs. 50,000/= from CIC Insurance any other claim ought to have been sought from Moi University and not the Appellant. The Respondent's act was deemed to be double jeopardy. In response to the Respondent's submissions, the Appellant submitted that it was not liable since the deceased had been assigned specific duties to wit working in the ladies' lavatory. She was therefore not expected at the scene. The Appellant concluded that the deceased was an author of her misfortune. The case of Lochab Brothers Ltd & Another v Johana Kipkosgei Yegon [2017] eKLR and Twin River 1 Estate v Teresia Mutheu Nzui [2018] eKLR were cited in support.

54. As for special damages, the Appellant submitted that the Trial Court erred in awarding a sum of Kshs. 88,400/= yet what was relied upon were contracts for hire, invoices and petty cash vouchers. According to the Appellant, the same did not pass muster and thus they ought to have been dismissed.

Parties Further Submissions

55. On the question of jurisdiction, the Appellant submitted that the deceased was an intern and not an employee as per the definition in the Work Injuries Benefits Act (WIBA) and particularly, section 16 thereof. Therefore, WIBA did not apply to the deceased and as such, this court's jurisdiction was not divested. However, the Appellant submitted that the claim was based on occupiers' liability. The *Occupational Safety and Health Act*, 2007 was cited to support the Appellant's line of submissions. Particularly, sections 6 and 13 of the said Act were cited in extenso.

56. The Appellant submitted that under the *Occupational Safety and Health Act*, the employee also bears a duty of care to himself or herself and in such a claim, liability needs to be proved. Paragraph 662 at page 476 of Halbury's Laws of England, 4th Edition was cited in support of burden of proof in an action for damages for negligence. Hence whereas the court has jurisdiction, the Respondent still bore the burden to prove negligence which according to the Appellant, it was not done.

57. Lastly on pecuniary jurisdiction, the Appellant contended that though the Trial Court had the statutory and territorial jurisdiction to handle the matter, it could not award any amount over and above Kshs. 10,000,000/=. The court was referred to the decree which indicated that a figure of Kshs. 11,705,530/= was made by the Trial Court. The Appellant concluded by praying for the appeal to be allowed with costs.

58. On the Respondent's part, the court was referred to WIBA's preamble and according to the Respondent, the clear intention of the Act was to provide for compensation to employees who get injured in the course of their employment. The definition of accident and employee as used under sections 2 and 4 of the Act was further relied upon to fortify the position that in the absence of employer – employee relationship, the Act did not apply to the accident that occurred on 4/6/2010 leading to the deceased's fatal injuries.

59. The Respondent further submitted that none of the parties made any reference to an employee in their respective pleadings and since parties are bound by their pleadings, a different cause of action other than that which was set up cannot be taken at this stage. It was reiterated that the deceased was at the Appellant's premises not as an employee but as an intern undertaking her industrial attachment. There was no contractual relationship between the deceased and the Appellant and that she was not in its payroll thus received no benefit other than exposure to work undertaken. Thus based on the facts of the case, WIBA had no application. The case of William Wachira Waruige v Kago Mukunya & Associates [2020] eKLR was cited.

60. The court was thus urged to make a specific finding that WIBA did not apply to the material facts relating to the accident of 4/6/2010. Accordingly, it was the Respondent's view that the claim fell under the Common Law duty of care, *Fatal Accidents Act* and the *Law Reform Act* and that the Trial Court had the requisite jurisdiction to hear and determine the matter as it did. Just as the Trial Court, it was submitted that this court has the requisite jurisdiction to deal with the matter.

61. Submitting on the *Occupational Safety and Health Act*, the Respondent reproduced the preamble to the Act and contended that though it makes reference to "all persons present in a workplace", a consideration of sections 2, 3 and 6 of the Act gave a different scenario. It was contended that though section 3 makes reference to anybody whether with a contract of service with an employer or not,

section 13 gave a different angle. It was the Respondent's view that the Act did not confer any duty or responsibility on a person at a workplace other than an employee.

62. Accordingly, it was the Respondent's position that this Act did not apply to the facts of the case involving the accident in which the deceased lost her life. The case of Transmara Sugar Co. Ltd, HCCA No. 4 of 2019 was referred to. It was submitted that even if this Act were to apply, it would not have precluded the Trial Court from making the award it made since failure to comply with any section of the Act leads to criminal sanctions and not necessarily compensation. Thus, according to the Respondent, the Appellant would derive from the application of this Act that would affect the damages awarded.

63. On pecuniary jurisdiction, it was the Respondent's view that no award was made in his favour in the sum of Kshs. 11,485,336/=. His view was that the Trial Court was alive to its jurisdiction and thus the capping of the award to Kshs. 10,000,000/=. Therefore, it was contended that the Appellant was misleading the court. Making reference to his pleadings, the Respondent pointed out that other than special damages which were liquidated in nature, the other reliefs were subject to discretionary assessment of the court. The Respondent submitted that at the time he lodged the claim on 15/12/2012, the High Court had unlimited original jurisdiction in criminal and civil matters. Therefore, save for geographical location of the cause of action, the High Court at Kakamega was properly seized of the matter.

64. On the transfer of the suit to the Chief Magistrate Court at Mombasa, the applicable law then, the Statute Law (Miscellaneous Amendment) Act, 2012 conferred the Chief Magistrates' court with pecuniary jurisdiction sufficient to adequately compensate the Respondent in terms of the reliefs sought. Thus based on the sequence of events, the court in which the original claim was filed and the one in which it was transferred to for hearing and determination had the requisite jurisdiction ab initio to try and determine the issues involved. It was thus stated that it was wrong for the Appellant to argue that the suit was first filed in a court bereft of pecuniary jurisdiction. The case of Pelezia Bakari Salim was distinguished with the facts of the present case.

65. On double jeopardy, it was submitted that there was no privity of contract between the Appellant and CIC Insurance Company Limited or that the Appellant shared with Moi University in payment of the premium for the cover extended to students on internship. It was submitted that the Appellant did not contribute for the cover provided by CIC to justify its claim to want to own the Kshs. 50,000/= given to the Respondent by CIC and thus double jeopardy does not arise. The case of Jeremiah Gitau Kiereini v Capital Markets Authority & Another [2013] eKLR was referred to. The court was thus urged to dismiss the appeal.

Analysis and Determination

66. I have considered the appeal lodged, the submissions filed both for and against which I have summarized as above, the authorities cited as well as the law. In this appeal, the Appellant has challenged both liability and quantum of damages awarded by the Trial Court. This court suo moto directed parties to make submissions on the issue of jurisdiction. The issues for determination will therefore be as follows: -

    a. Whether the court has jurisdiction to hear this appeal;

    b. If the answer to (a) above is in the affirmative, whether the appeal is merited; and

    c. What is the order as to costs?

67. On the first issue, it is now old hat that jurisdiction is everything and the locus classicus on this aspect is the case of Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR. In Republic v Magistrates Court, Mombasa; Absin Synegy Limited (Interested Party) (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022) (Judgment), jurisdiction was defined as follows: -

> "...Jurisdiction may be defined to be the power of the court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Jurisdiction means the power conferred by law upon the court to try and hear the cases and give appropriate judgements..."

68. Based on the Supreme Court's decision in Law Society of Kenya (above) and having considered the nature of appeal, parties were directed to file submissions on whether the claim was one under WIBA or Occupiers Liability Act. However, though parties fully addressed themselves to WIBA, they submitted on Occupational Health and Safety Act instead of Occupiers Liability Act. Be that as it may, this is a mere infraction that cannot handcuff this court from rendering itself on the issue. This is because if the court finds that the claim falls under WIBA, a consideration of the other Act would be an academic exercise.

69. Beginning on WIBA, a consideration of the parties' pleadings would unravel where the claim falls. Paragraphs 3 and 4 of the plaint dated 1st November, 2012 is the first point of call. It leaves no doubt that the Appellant was described as the owner in charge of and occupier of Miritini Factory and that the deceased was allowed, invited and or permitted to enter and use the Appellant's premises. Similarly, the statement of defence dated 6th September, 2013 makes no reference of any other relationship between the Appellant and the deceased other than the fact that the deceased was at the Appellant's premises.

70. The preamble of WIBA provides as follows: -

> "An Act of Parliament to provide for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes" (Emphasis added)

71. It is incumbent to define who an employee is. The Act at section 5 gives the definition. Salient features in the definition adopted by the Act gives certain salient features that enables one to point out who an employee is. For one to be considered an employee, he or she must be engaged (employed) for wages or salary. There must be a contract of service between the employee and the person or entity engaging it (employer) as defined under section 4 of the Act. The Act does not define a contract of service but its meaning is given under section 2 of the *Employment Act*, Chapter 226, Laws of Kenya as follows: -

> "Contract of service means an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership."

72. A consideration of the term apprentice would almost certainly bring an intern into a position that he or she could be considered an employee. However, section 9 of the *Employment Act* resolves the doubt. There is no dispute that the deceased was to be at the Appellant's premises for a period of three (3) months. As such, section 9 of the *Employment Act* required that a contract of service in writing ought to have been executed between the deceased and the Appellant if that was the parties' intention.

73. Secondly, for the period the deceased was with the Appellant, there was no consideration in form of payment of a salary or wage. This alone resolves the issue and since both parties are in agreement that

indeed, there was no employer – employee relationship, this court returns a finding that the claim was not based on the *Work Injury Benefits Act* and thus it is vested with jurisdiction to consider the appeal.

74. Having found as above, it is imperative to make a definitive finding whether the claim was founded on the ordinary Common Law duty of care or under the Occupiers' Liability. The answer to this issue lies at paragraphs 3 and 4 of the plaint dated 1st November, 2012. The paragraphs clearly confirm the relationship between the Appellant and the deceased. The preamble of the *Occupiers' Liability Act*, Chapter 34, Laws of Kenya provides thus: -

> " An Act to amend the law as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or things done or omitted to be done there."

75. This clearly fits what the Respondent pleaded as his cause of action. Section 3 of the Act prescribes the extent of an occupier's duty of care. Section 3 (1) and (2) therefore decree thus: -

1. An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

2. For the purposes of this Act, "the common duty of care" is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

3. ....

76. Having found as above, it is now incumbent to consider whether the Appellant exercised duty of care towards the deceased and this requires a consideration of the facts leading to the deceased's fatal injuries. The fact that an accident occurred that claimed the deceased's life does not ipso facto render the Appellant automatically liable. In Jamal Ramadhan Yusuf & Another v Ruth Achieng Onditi & Another [2010] eKLR, Makhandia, J (as he then was) held as follows: -

> " ...It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence ipso facto must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence, as he who asserts must prove..."

77. It is trite that the legal burden of proof lies with the person who alleges. The Plaintiff(s) bear the legal burden of proof to prove the claim against the Defendant(s). Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows: -

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

78. Once the Plaintiff(s) discharges the legal burden of proof, the burden is then shifted to the Defendant(s) to adduce evidence against the Plaintiff(s) claims. This burden is well captured under Sections 109 and 112 of the same Act as follows:

Section 109

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

79. The above legal provisions are well captured in Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334 and Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR. It therefore follows that since the Respondent's case was founded upon negligence that was attributed to the Appellant, the Respondent had the burden of proof to demonstrate that the Appellant was negligent and that the accident in issue caused the death of his daughter.

Liability

80. It is not in dispute that an accident occurred on 4/6/2010 at the Appellant's premises and which claimed the deceased's life. What is in dispute was who was to blame. In support of his case, the Respondent fronted two (2) witnesses. For the Appellant, two (2) witnesses testified.

81. As held in various authorities, this court will now embark on its duty as an appellate court to re-evaluate, re-assess and re-analyze the evidence before the Trial Court's with a view to satisfy itself on its correctness. The Appellant asserts that the Trial Court should have dismissed the suit since no eye witness testified as to who was to blame for the accident. The Respondent support the 100% liability apportioned as against the Appellant.

82. As stated elsewhere in this judgement, the claim was founded upon an occupiers' liability. This being the case, parties were bound to satisfy the rules of evidence before liability could be apportioned for or against. This is so because claims founded upon occupiers' liability are not claims of strict liability where a party such as the Appellant herein could be held liable whether it was negligent or not. The court in Catherine Wangeci Wariahe v Meridian Hotel Limited [2016] eKLR, the court while addressing Occupiers Liability Act noted as follows: -

> " ...As is the case with any tort, the party advancing the claim, bears the burden of proof the standard of which, is on a balance of probability. Section 3 aforesaid, does not create a presumption of negligence against the occupier of the premises whenever a person is injured on the premises. A Plaintiff who invokes that Section must still be able to point to some act or omission on the part of the occupier which caused the injury complained of, before liability can attach..."

83. It is not in doubt that both the Respondent and his witness were not present when the incident happened. To this extent therefore, the Respondent did not adduce evidence of the alleged negligence attributable to the Appellant. Therefore, if the Respondent's claim was founded only upon the Appellant's alleged negligence, the claim should have been dismissed because the Respondent did not prove any negligence on the Appellant's part. However, the Respondent did also assert that the Appellant breached its common law duty of care (paragraph 7 of the plaint).

84. In Catherine Wangeci Wariahe (above), the court quoting Githinji JA (as he then was) sentiments in Suma Properties Case held as follows: -

> " ...it is clear from Section 3(2) of the Act that from the definition, the common duty imposed by the Act is to take reasonable care in all the circumstances of the case to see that the visitor is reasonably safe. The Act neither imposes on the occupier, an absolute Common Duty of Care, nor guarantees a visitor absolute safety but the standard or degree of care depends on the facts of each case..."

85. A review of the evidence on record reveals that the deceased, a fourth year engineering student was a female adult of sound mind. She was 23 years at the time of the accident. There is equally evidence that she had been inducted on safety and was aware of the Appellant's factory rules and regulations. Similarly, there is uncontroverted evidence that the deceased had been assigned duties elsewhere and not the accident scene. Section 3 (2) of the *Occupiers' Liability Act* provides as follows: -

> (3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—
>
> a) an occupier must be prepared for children to be less careful than adults; and
>
> b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so. (Emphasis added)

86. The deceased not being a child could not be covered under section 3 (3) (a) as was the case in Jumuia Hotel v SN & JCO (Suing as the Legal Representatives in the Estate of CAN – Deceased) & another [2021] eKLR. However, being a intern engineering student, she came within the provisions of section 3 (3) (b) of the Act and it was properly expected by the Appellant that the deceased would appreciate and guard against any special risks ordinarily incident in such a factory as the Appellant's.

87. Be that as it may, the duty of care owed to the deceased is imposed by statute. Once the deceased was allowed to do her internship at the Appellant's premises, she was entitled to common duty of care. The evidential burden shifted to the Appellant to show that it had discharged the obligation to see that the deceased who was a permitted visitor was reasonably safe in using the premises. Though evidence was led by DW1 that the deceased was not supposed to be at the scene of the accident, on cross examination, he stated that there was nothing that forbade the deceased from leaving her work station and that she was on her course of duty.

88. Similarly, DW1 gave the dimensions plus the weight of the pasteurizer that was being moved. It is common ground that one (1) ton of weight is not a mean feat and as a factory, they ought to have employed enough machinery to avoid such humongous equipment being moved mechanically. Had the Appellant exercised caution by ensuring that such equipment is moved by machines, perhaps the accident could have been averted.

89. However, am unable to agree with the Trial Court's holding that the deceased was legitimately expected to be there as she had not been warned of the exercise of that day. That holding is neither pleaded nor evidence led on the same. There is evidence showing that the deceased had been assigned duty elsewhere albeit not far away from the accident scene but that does not of itself absolve the deceased from contributory negligence. The Appellant did what it could to avert the accident but as observed above, perhaps more care ought to have been employed.

90. I have come to the inescapable conclusion that the Trial Court erred in finding liability wholly as against the Appellant. In the circumstances, I proceed to disturb the holding on liability and in its place, I find that both parties were equally to blame.

91. In conclusion thus, I set aside the finding on liability at 100% against the Appellant and in its place, I substitute it with an order finding both the deceased and the Appellant each to blame at 50%.

Quantum

92. The Trial Court made various awards in favour of the Respondent under the several heads and in total, it came to Kshs. 11,819,400/=. Being alive to its jurisdiction, the amount was capped at Kshs. 10,000,000/=. The Court of Appeal in Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) KAR set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

> " ...An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."

93. Later in Power & Lighting Company Limited & Another v Zakayo Saitoti Naingola & Another [2008] eKLR, the court held as follows: -

> " ...On quantum, the court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages (1) Damages should not be inordinately too high or too low; (2) They are meant to compensate a party, for the loss suffered but not to enrich a party, and a such they should be commensurate to the injuries suffered; (3) Where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts; (4) Where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment ..."

94. On the award of general damages for pain and suffering and loss of expectation of life, the Trial Court made an award of Kshs. 50,000/= and Kshs. 100,000/= respectively. In Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, it was held as follows: -

> " ...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..."

95. Taking into account the rate of inflation and passage of time, I see no error in the Trial Court's award on the two (2) heads and the awards are upheld.

96. On lost years/loss of dependency, the Trial Court adopted 25 years as the multiplier, Kshs. 119,000/= as the multiplicand and 1/3 as the dependency ratio. The court relied on the case of Ishmael Nyasimi & Another (above). From the judgement, the Trial Court appears to have applied the said decision

without factoring whether the circumstances were similar to the case it was handling. It has been held that no two (2) cases are the same and that each one has to be decided on their own peculiar facts. Similarly, an authority is what it decides. It is not one size fits all.

97. Though the deceased herein was a fourth year engineering student and that she was expected to graduate and get a job, it is nowadays not automatic that one graduates and gets a job. It is common knowledge that there are PhD holders who have no jobs despite their stellar qualifications. Similarly, a salary of Kshs. 119,000/= is not something to easily get by. In Ishmael Nyasimi case, evidence was led as to what the deceased would have earned had he lived. However, in the present case, no such evidence was led other than in submissions. It is trite that submissions cannot take the place of evidence.

98. Accordingly, the multiplier approach was not the best approach since it involved a lot of speculation. In Marko Mwenda v Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993, Ringera, J (as he then was) held as follows: -

> " ...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case..."

99. Having noted as above, the Trial Court's award under the head of lost years/loss of dependency is hereby set aside and in its place, a global award of Kshs. 6,000,000/= is hereby entered.

100. On special damages, the Respondent had pleaded a sum of Kshs. 129,200 but was awarded Kshs. 88,400/=. Special Damages must be both pleaded and proved before they can be awarded by the court. Suffice it to quote 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..."

101. A natural corollary of this has been that the Courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide pro forma invoices sent to the party by a third party. In this regard, our Courts have held that an invoice is not proof of payment and that only a receipt meets the test. (See Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] eKLR).

102. A review of the evidence presented in support of the specials reveal that some are proforma invoices, agreements and what would pass as receipts are issued in favour of third parties and as such, the court finds that the specials were not proved. The award of Kshs. 88,400/= as special damages is hereby set aside in its entirety.

103. Lastly before considering the issue of costs, there is the issue of whether the Trial Court had jurisdiction to enter judgement over and above Kshs. 10,000,000/=. It is not disputed that the Trial Court

was manned by a Principal Magistrate whose pecuniary jurisdiction is fixed at Kshs. 10,000,000/=. Having reviewed the judgement and the Court of Appeal decision cited by the Appellant, there is no judgement entered by the Trial Court for a sum exceeding Kshs. 10,000,000/=. As such, I find no merit on this ground. The Trial Court was properly guided and the capping is in consonance with the Court of Appeal decision.

Costs of the suit

104. On the issue of costs, a careful reading of Section 27 of the *Civil Procedure Act* indicates that it is trite law that they follow the cause or event as described by Sir Dinshah Fardunji Mulla in his book The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540. It is that costs must follow the event unless the court, for some good reasons, orders otherwise. The import is that a successful party is entitled to costs unless he or she is guilty of any misconduct or there exist some other good reasons and or cause for not awarding costs to the successful party.

105. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. The Halsbury's Laws of England, 4th Edition (Re-issue), [2010], Vol.10. para 16, notes as follows: -

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice"

106. Any departure from this trite law can only be for good reasons which the Supreme Court in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR the court noted as follows:

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Costs follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

107. I have said enough to show that award of costs is intertwined with the court's exercise of discretion. In the absence of any evidence that the same was not exercised judiciously or in the converse, exercised capriciously, I see no reason to interfere with the Trial Court's exercise on its discretion on award of costs. It is obvious that costs can be determined from the award and I see no dispute on this aspect.

108. On this appeal, the appeal as partially succeeded but exercising my discretion, I order each party to bear own costs.

109. Flowing from the above discourse, I proceed to make the following orders: -

a. The appeal herein partially succeeds on the following terms: -

i. The Trial Court's order finding the Appellant 100% liable is hereby set aside and in its place, substituted with an order finding both the deceased and the Appellant equally to blame and thus liability shall be borne at 50% each;

ii. The Trial Court's award on pain and suffering and loss of expectation of life is hereby upheld;

iii. The Trial Court's award of lost years/loss of dependency based on multiplier approach is hereby set aside and substituted with an award of a global sum of Kshs. 6,000,000/=;

iv. The Trial Court's award of special damages at a sum of Kshs. 88,400/= is wholly set aside and substituted with an order dismissing the award.

v. The award on general damages shall attract interest from the date of this judgement.

b. Each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA, THIS 7TH DAY OF FEBRUARY, 2024.

.....

F. WANGARI

JUDGE

In the presence of:

M/S Wambua Advocate for the Appellant

Mulama Advocate for the Respondent

Barille, Court Assistant