Kiende & another v Mugala (Civil Appeal E383 of 2020)
[2024] KEHC 2505 (KLR) (Civ) (8 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2505 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E383 OF 2020

CW MEOLI, J

MARCH 8, 2024

BETWEEN

JOHN KINYANJUI KIENDE .... 1ST APPELLANT

EVANS NJOGU KARANJA .... 2ND APPELLANT

AND

MOSES LUGAYE MUGALA .... RESPONDENT

(Being an appeal from the judgment of D.A. Ocharo (Mr.) (PM) delivered on 26th June, 2020 in Nairobi Milimani CMCC No. 8683 of 2017)

JUDGMENT

1. This appeal emanates from the judgment delivered on 26.06.2020 in Nairobi Milimani CMCC No. 8683 of 2017 (hereafter the lower court suit). The suit was instituted via a plaint on 07.12.2017 by Moses Lugaye Mugala, the plaintiff in the lower court (hereinafter the Respondent), in his capacity as the legal representative of the estate of the late Philip Omega Lugale (hereafter the Deceased). He named John Kinyanjui Kiende and Evans Njogu Karanja as defendants (hereafter the 1st and 2nd Appellant/Appellants). The Respondent's claim for damages was founded on negligence and arose from an accident that occurred on 05.09.2016.

2. It was averred that the at all material times to the suit the 1st Appellant was the registered owner of motor vehicle registration number KBH 679Q (hereafter suit motor vehicle) while the 2nd Appellant was the 1st Appellant's authorized driver, servant and or agent or owner in possession and or beneficial owner of the suit motor vehicle. That on the date in question, the Deceased was a passenger aboard the suit motor vehicle along Red Hill Road when the same was so negligently driven, controlled and or managed that as the Deceased was disembarking it caused him to fall off, after which the rear wheel

of the suit motor vehicle ran over the Deceased occasioning him fatal injuries. It was further averred that the accident was caused by the gross negligence of the 2nd Appellant for which the 1st Appellant was vicariously liable.

3. The Appellants filed a statement of defence on 15.03.2018 denying the key averments in the plaint and liability. They particularly averred without prejudice to the denials in the statement of defence that any such occurrence of the accident as the Respondent may prove was caused solely and or substantially by the negligence of the Respondent. The suit proceeded to hearing during which only the Respondent adduced evidence.

4. In its judgment, the trial court found the Appellants 100% severally and jointly liable for the accident. The court thereafter awarded damages in favour of the Respondent as hereunder: -

   Pain and Suffering – Kshs. 50,000.00/-

   Loss of Expectation of Life - Kshs. 100,000.00/-

   Loss of Dependency - Kshs. 1,500,000.00/-

   Special Damages – Kshs. 33,975.00/-

   Total Kshs.1,733,975.00/-

5. Aggrieved with the outcome, the Appellants preferred this appeal challenging the whole judgment based on the following grounds; -

   1. The learned magistrate erred in law and misdirected himself when he failed to consider the Appellant's submissions on both points of law and facts.

   2. That the learned magistrate's decision was unjust against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

   3. That the learned magistrate erred in law and misdirected himself when she failed to consider the provisions set out in the The Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013 CAP 405.

   4. The learned magistrate erred in law and fact in finding the Appellants 100% liable in view of the evidence produced before the trial court and in particular the following; -

      a. That the Respondent failed to prove his case on liability against the Appellants

   5. The learned magistrate erred in law and fact in awarding the estate of the Deceased a sum of Kshs. 50,000/= (fifty thousand) for pain and suffering while not considering the deceased passed on the same day.

   6. The learned magistrate erred in law and fact by awarding the estate of the deceased a sum of Kshs. 150,000/= (one fifty thousand) for loss of expectation of life when they were not entitled to the same and or the same was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

   7. The learned magistrate erred in law and fact in awarding the estate of the deceased a sum of Kshs. 1,500,000/= (one million five hundred thousand) for the loss of dependency that was so excessive as to amount to an erroneous estimate of loss or damage suffered by the estate of the deceased.

8. The learned magistrate erred in fact and in law in failing to consider the Appellant's submissions on quantum, liability and legal authorities relied upon in support thereof.

9. The learned magistrate erred in law and fact by overly relying on the Respondent's submissions which were not relevant without addressing his mind to the circumstance of the case.

10. The learned magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature.

6. The appeal was canvassed by way of written submissions which on the Appellants part were riveted on both liability and quantum of damages. Addressing the issue of liability, counsel cited the decisions in Karugi & Another v Kabiya & 3 Others [1983] eKLR as quoted in Benter Atieno Obonyo v Anne Nganga & Another [2021] eKLR to summarily submit that, during cross examination the Respondent confirmed to having not witnessed the accident. And therefore submitted that in the absence of proof of liability, the trial court erred in finding the Appellants 100% liable for the accident.

7. Concerning quantum of damages, counsel submitting on the award on loss of dependency, counsel called to aid the decision in Nairobi HCCC No. 4580 of 1987 Christine Shoi & Another v East African Cemenet Ltd & Another as quoted in Leonard Wanganga Ngara & 2 Others v Joyce Warurii Ndung'u & 2 Others [2020] eKLR to contend that the Deceased was 20 years old, unmarried and worked as a casual labourer therefore the trial court erred in assessing an inflated award under by way of a global sum.

8. It was further submitted that the trial court erred by failing to deduct the award under the *Law Reform Act* from award made under Fatal Accident Act as the two awards cannot issue in respect of a fatal claim. That there ought to have been a deduction between the two awards to obviate double compensation. The Appellants relied on a raft of decisions among them being Seremo Korir & Another v SS (suing as the legal representative of the estate of MS) [2019] eKLR, Patrick Barasa v Serah Wambui Karumba (suing as the legal representative of the estate of the late Albert Chebaya) [2019] eKLR, Francis Wainaina Kirungu (suing as the legal representative of the estate of John Karanja Wainaina v Elijah Oketch Adellah [2015] eKLR and Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Menja) v Kiarie Shoe Stores Limited [2015] eKLR as quoted in Dismas Muhami Wainaina v Supon Kasirimo Marata (suing as administrator and personal representative of the estate of Partinini Supon) [2021] eKLR in that regard.

9. Equally, counsel argued that the Respondent did not prove dependency, which is a matter of fact. The decisions in Dismas Muhami Wainarua (supra) and Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as quoted in Samuel Mutitu Nderitu (suing on his own behalf and as legal representative of the Estate of Gladys Muringi Nderitu) v Erastus Mutahi Mugambi [2021] eKLR were called to aid. Counsel went on to urge the court to re-evaluate the awards and the Appellants' proposal in the lower court for a global award of Kshs. 300,000/- for lost dependency. In conclusion, the court was urged to allow the appeal with costs to the Appellants.

10. The Respondent naturally defended the trial court's decision. Counsel for the Respondent equally addressed the twin issues of liability and quantum. Regarding liability, counsel relied on the decision in Kennedy Macharia Njeru v Packson Githongo Njau & Another [2019] eKLR to submit that the Respondent's evidence was corroborated by the police abstract which was not contested by the Appellants at trial. Further citing the decision in Trust Bank Limited v Paramount Universal Bank Limited & 2 Others Nairobi (HCS No.1243 of 2001) he contended that the Appellants did not controvert the Respondent's evidence and therefore the trial magistrate's finding on liability was well founded, the Respondent having proved his case on a balance of probabilities.

11. Concerning damages, particularly under the head of pain and suffering, counsel argued that from the evidence presented at the trial the Deceased died four (4) days after the accident while undergoing treatment at Kenyatta National Hospital. Therefore, the trial court's award of Kshs. 50,000/- under the said head was justified and ought to be upheld. On loss of expectation of life, counsel relied on the decision in Hyder Nthenya Muli & Another v China Wu Yi Limited & Another [2017] eKLR to submit that the sum of Kshs. 100,000/- was the conventional award and should be upheld.

12. On the question on lost dependency, counsel attacked the Appellants' submissions on double compensation by citing the Court of Appeal decisions in Hellen Waruguru Waweru (supra) and South Sioux Farms Ltd & 2 Others v Selina Robi Mwita (suing as legal representative of the Estate of the Late Julius Bonare Chacha) [2021] eKLR. He argued that the issue of double compensation is settled and is without basis here.

13. Concerning the award itself, counsel submitted that the trial court did not err because in instances where the deceased's earnings could not be ascertained, the court can either rely on the minimum wage or a make global award. That while the Respondent had proposed the minimum wage approach in its submissions, the trial court opted to adopt the global award approach. He defended the global award of Kshs 1,500,000/- by the trial court as judicious considering the settled principles on when a court can interfere with an award on damages by the trial court. The decisions in Geoffrey Obiero & Another v Kenya Power & Lighting Corporation Limited & Another [2019] eKLR and Shabani v City Council of Nairobi [1985] eKLR were called to aid. In summation, counsel reiterated that the Respondent's evidence was uncontroverted and urged the court to dismiss the appeal with costs.

14. The court has considered the record of appeal, the pleadings and original record of the proceedings as well as the parties' respective submissions. This is a first appeal. The Court of Appeal for East Africa spelt out the duty of the first appellate court in Selle –Vs- Associated Motor Boat Co. [1968] EA 123 in the following terms: -

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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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 allowance in this respect.
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> 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

15. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See:- Ephantus Mwangi & Another vs Duncan Mwangi Wambugu [1982 – 1988] 1 KAR 278. Upon a review of the memorandum of appeal and submissions by the respective parties it is evident that the appeal turns on the twin issues of liability and quantum of damages. The court will determine whether the trial court's findings thereon were well founded.

16. In Wareham t/a A.F. Wareham & 2 Others v Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in the foregoing regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail." (Emphasis added).

17. Here, it may be apposite to quote in extenso the relevant facets of the decision of the lower court. Upon restating the evidence tendered before it, the trial court proceeded to state as follows concerning liability; -

> "The Defendants, despite entering appearance and filing their statement of defence, did not tender evidence to rebut the Plaintiff's evidence.............In light of the above, I find the Defendants 100% jointly and severally liable for the accident." (sic)

18. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the [*Evidence Act*](). See Court of Appeal in Mumbi M'Nabea v David M. Wachira [2016] eKLR. The duty of proving the averments contained in the plaint lay squarely on the Respondent. In Karugi (supra) the Court of Appeal stated that:

> "[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof. We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendants' failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant...--. The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

19. This means in this case that it was the duty of Respondent herein to prove the averments in his plaint and that the burden was not lessened by the fact that the Appellants failed to call evidence. It is also settled the legal burden always rests with the Plaintiff to discharge his burden of proof on balance of probabilities. The occurrence of the accident on 05.09.2016 is not in dispute. As I understand it, the Appellants' bone of contention is that the Respondent failed to adduce evidence demonstrating the negligence alleged against the driver of the suit motor vehicle could have been responsible for the accident.

20. Superior courts have often stated that the mere occurrence of an accident, without more, cannot be proof of negligence. As the Court of Appeal stated in Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] eKLR, the onus of proof lies upon him who alleges and where negligence is alleged, some

form of negligence must be proved against the defendant. The court in that case cited the famous decision of Kiema Mutuku v Kenya Cargo Hauling Services Ltd [1991] 2KAR 258 where the Court of Appeal, reiterating the foregoing stated that:

> "There is, as yet no liability without fault in the legal system in Kenya and a plaintiff must prove some negligence against the defendant where the claim is based on negligence."

21. The particulars of negligence against the 2nd Appellant were set out in detail and or itemized at paragraph 6 of the Respondent's plaint. At the trial, the Respondent testified as PW1. The gist of his evidence was that the Deceased who was his son was involved in a road traffic accident on 05.09.2016 and passed on 09.09.2016 as a result of the injuries sustained in the accident. Adopting his witness statement, he went on to state that the accident occurred as the Deceased was alighting from the suit motor vehicle, and that the driver sped off before he could fully alight and as a result the vehicle ran over the Deceased. That the accident occurred at a bus stage and that he learned this from the Deceased before he died.

22. PW1 asserted that the Deceased was not liable for the accident and blamed the driver of the suit motor vehicle. He produced the Letter of Administration as PExh.1, the Burial Permit as PExh.2, the Death Certificate as PExh.3, the Treatment Note and Case Summary from Kenyatta National Hospital (KNH) as PExh.4, the Police Abstract as PExh.5, a Bundle of Receipts from KNH as PExh.6(a), a Bundle of three invoices from KNH as PExh.6(b), the Post Mortem as PExh.7, a Letter from the Chief as PExh.8, Copy of Records & Receipt as PExh.9(a) & (b) and a Demand Letter as PExh.10.

23. Under cross-examination, PW1 stated that he did not witness the accident and did not have an eye witness in respect of the accident. On re-examination he reiterated that the Deceased narrated to him how the accident occurred before he passed on.

24. The trial court in its finding on the question of liability relied on decision in Autar Singh Bahra & Anor v Raju Govindji HCCC No. 548 of 1998 as cited in Motex Knitwear Limited v Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 to the extent that the Respondent's evidence was uncontroverted hence the Appellants were 100% liable. The trial court did not intensively interrogate the evidence by PW1 and the fact that he did not witness the accident or call a witness to the accident in question. His alleged provenance to the particulars of negligence as against the 2nd Appellant was that the Deceased informed him of the circumstance leading to the accident prior to his demise.

25. That said, PW1's evidence as to circumstances of the accident was based on evidence of a witness who could not be called as a witness given his demise. The question arising being whether PW1's evidence was admissible and sufficient to establish on a balance of probabilities the itemized particulars of negligence against the 2nd Appellant and vicariously as against the 1st Appellant. Section 33(a) of the *Evidence Act* provides that; -

> "Statements, written or oral, of admissible facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence or whose attendance cannot be procured, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are themselves admissible in the following cases—
>
> (a) relating to cause of death
>
> when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements

are admissible whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question;"

26. The Respondent in his evidence categorically stated that the accident occurred on 05.09.2016 and that the Deceased succumbed to his injuries on 09.09.2016 per PExh.1 and corroborated by PExh.3, PExh.4, PExh.7 & PExh.8. According to the Respondent's evidence soon after the accident his son was first treated at Kihara District Hospital, then Kiambu County Hospital and latter KNH. A perusal PExh.4 reveals that the Deceased was admitted on 08.09.2016 at KNH and that his "condition changed and attempts to resuscitate were unsuccessful". Based on the medical reports it may be reasonably deduced that the Deceased was in a reasonably stable condition to narrate the circumstances leading to the accident prior to his untimely demise. The standard of proof in civil cases is on a balance of probabilities and in the court's view, the evidence of PW1 taken in its entirety appears credible enough to call for an answer from the Appellants.

27. However, the Appellants did not offer any alternative set of facts in relation to the circumstances leading to the accident, or seriously challenge the version proffered by the Respondent. Therefore, while the trial court did not address itself to the applicable legal provisions or circumstances in which the Deceased's statements were made, it did not err in finding that the Respondent had discharged his burden of proof of negligence on a balance of probabilities. Consequently, the trial court's finding that the Appellants were wholly liable was well founded.

28. Turning now to the issue of quantum, the applicable principles are well settled. The appellate court will only disturb an award of damages where such award is so inordinately high or low as to represent an entirely erroneous estimate. This court is guided by the principles enunciated by the Court of Appeal in the case of Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini v A.M Lubia and Olive Lubia (1987) KLR 30. It was held in that case that:

> " The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that , short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages."
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> See also; Butt v Khan (1981) KLR 349 and Lukenya Ranching and Farming Co-operative Society Limited v Kavoloto (1979) EA 414; Catholic Diocese of Kisumu v Sophia Achieng Tete Kisumu Civil Appeal No. 284 of 2001, [2004]eKLR; Mbogo V. Shah (1968) EA 93.

29. In Bashir Ahmed Butt v Uwais Ahmed Khan [1982 – 1988] I KAR 5 the court observed that:

> " An appellate court will not disturb an award of 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".

30. While the Appellants' memorandum of appeal, challenges the entirety of the trial court's findings on quantum, the Appellants did not file any submissions before the trial court on the issue. Thus, the lower court did not have the benefit of the submissions and authorities now urged before this court on appeal. This is unacceptable as an appeal is essentially intended as a re-evaluation of the proceedings of the court appealed from. See Ochieng J's judgment in Silas Tiren & Another V. Simon Ombati Omiambo [2014] eKLR.

31. That said, the Respondent's claim against the Appellants was for general damages for lost dependency, pain and suffering and loss of expectation of life under the *Fatal Accidents Act* and the *Law Reform Act*. The plaint named the persons whose benefit the claim was brought as the Respondent being the Deceased's father and Lynett Ajema, the Deceased's mother. It was further pleaded that the Deceased was aged 21 years at the time of his untimely demise, enjoyed good health, was a casual worker at a restaurant in Village Market earning Kshs. 1,800/- per week or Kshs. 7,200 per month, and providing for his dependents. And that as a result of the accident his expectation of a healthy and happy life was considerably shortened occasioning loss to his estate.

32. PW1 supported the averments in his pleadings by his oral testimony and documentary evidence being PExh.1 to PExh.10. On pain and suffering, it was PW1's evidence that the Deceased passed on some four (4) days after occurrence of the accident. In his submissions before the trial court in urging an award of Kshs. 200,000/-, his counsel relied on the decision in Alice Alukwe v Akamba Public Road Services & 3 Others [2013] eKLR where the claimant died on the spot and was awarded Kshs. 50,000/-. The trial court upon considering the Respondent's evidence in turn relied on the decision in Kimunya Abednego Munyao v Zipporah S. Musyoka & Another [2019] eKLR in awarding Kshs. 50,000/- under the said head. The decision relied on by the Respondent before this court relating to the said head was not placed before the trial court, and in that respect, the court reiterates the dicta in Silas Tiren (supra). From my own review of the material presented before the trial court and comparable authorities cited, the award for pain and suffering appears reasonable in the circumstance and the court does not feel justified to interfere therewith.

33. On loss of expectation of life counsel for the Respondent in submissions before the trial court urged an award of Kshs. 150,000/-. Citing the decision in Stella Kanini Jackson & Anor v Kenya Power & Lighting Co. Ltd [2012] eKLR where the court awarded Kshs. 150,000/- in respect of a claimant who died on the spot. The trial court on considering the Respondent's evidence did not cite any superior court decision in awarding Kshs. 100,000/- under the said head while correctly observing that there was no indication that the Deceased was not in good health. This award was within conventional limits for awards under this head and there appears to be no reason to make this an exceptional case in which the Court is justified to interfere.

34. Concerning lost dependency, reviewing the evidence and submissions before the trial court and applying the applicable principles this court does not agree that with the Appellants that the Respondent did not prove how dependency on the Deceased. The Respondent being the father of the Deceased alongside his mother were proper dependents pursuant to Section 4 of the *Fatal Accidents Act* and Section 2(5) of the *Law Reform Act* thus entitled to damages for lost dependency. See Kenya Breweries v Saro (1991) eKLR.

35. The trial court was justified, despite the dearth of evidence on the deceased's income, to do its best in arriving at an award. The Court of Appeal in Civil Appeal No. 203 of 2001 Kimatu Mbuvi v Augustine Munyao Kioko [2001] eKLR stated inter alia that :

> " But there is dicta in decided cases that a victim does not lose his remedy in damages because its quantification is difficult ... 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 earnings 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 yet earn their livelihood 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."

36. In Wambua v Patel [1986] KLR 336 cited in Kimatu's case, the Court grappled with the quantification of loss of earnings of a cattle trader who had sustained injuries in a road traffic accident. Even though the Court found the Plaintiff's earnings to be rather low, and that he kept no records, the court, Apaloo J (as he then was) stated:

> " Nevertheless. I am satisfied that he was in the cattle trade and earned his livelihood from that business, a wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop a more sophisticated business method ... But a victim does not lose his remedy in damages because the quantification is difficult."

37. The Respondents' evidence that the Deceased was casual worker at a restaurant in Village Market earning Kshs. 1,800/- per week or Kshs. 7,200/- per month, was not controverted. In any event, a casual worker's earnings though not ascertainable through formal evidence given the typical mode of remuneration, would somehow support and care for the worker's family, in this case the Respondent's parents, the Deceased being a bachelor. The Respondent in urging an award of Kshs. 1,621,192/- rooted for a multiplier approach calculated as Kshs. 10,954x12x7x1/3.

38. In the court's view, given the dearth of pertinent material, this was proper case for a global award. However, the trial Court ought to have relied on a more comparable authority in respect of a deceased person in the same age bracket and or circumstances as the Deceased. As opposed to the case of David Mbuba & Another v Victoria Mwongeli Kimwatu & Another [2018] eKLR which involved a deceased who was survived by a wife and children. Despite this, the trial court's award of Kshs. 1,500,000/- under the said head, cannot be said to be so inordinately high as to represent an erroneous estimate. This court finds no merit in the Appellants' challenge in that regard.

39. Lastly, as concerns the Appellants submissions that the trial court erred by failing to deduct the awards under the *Law Reform Act* from those under *Fatal Accidents Act*, it is settled that all that is required is for the court to consider awards under the former while assessing the latter, rather than mathematical deductions of one award sum from the other. That is the gist of the dicta in Hellen Waruguru (supra). Besides, this issue was neither listed in the grounds of appeal nor canvassed before the trial court. Appeals are determined on the basis of issues or grounds raised in the memorandum of appeal. It was not open to the Appellants, having eschewed to include the challenge concerning the alleged double award in their grounds of appeal, to surreptitiously canvass them through submissions. See North Kisii Central Farmers Limited v Jeremiah Mayaka Ombui & 4 others [2014] eKLR..

40. In the result, the court is of the considered view that the appeal herein is without merit. The appeal is dismissed in its entirety, with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 8TH DAY OF MARCH 2024.

C.MEOLI

JUDGE

In the presence of

For the Appellants: N/A

For the Respondent: Ms. Bwire

C/A: Carol