



Owuor & another (Suing as the legal representative and administrators in the Estate of Benard Onyango Ogungo – Deceased) v Aftah Petroleum (K) Ltd (Civil Appeal E074 of 2023) [2024] KEHC 4484 (KLR) (3 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E074 OF 2023
RE ABURILI, J
APRIL 3, 2024**

BETWEEN

**LEUNIDA ATIENO OWUOR & REMJUICE ONYANGO
OGUNYO APPELLANT**

**SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATORS IN THE
ESTATE OF BENARD ONYANGO OGUNYO – DECEASED**

AND

AFTAH PETROLEUM (K) LTD RESPONDENT

*(An appeal arising out of the Judgement of the Honourable S. Temu
in the Senior Principal Magistrate’s Court at Nyando delivered
on the 25th April 2023 in Nyando SPMCC No. E036 of 2020)*

JUDGMENT

Introduction

1. The appellants herein sued the respondent Company for general damages under the *Law Reform Act* and the *Fatal Accidents Act*, loss of consortium on the part of the widow as well as costs of the suit following a road traffic accident that occurred on the 15.5.2020 involving the respondent’s motor vehicle registration no. KBC 265G, a Mitsubishi lorry that knocked down the deceased herein Bernard Onyango Ogungo who was a motorcycle rider riding motorcycle registration No. KMEU 335R, TVS make, at Ahero junction.
2. The respondent filed a statement of defence dated 22nd July 2021 denying all the appellants’ averments while pleading negligence on the part of the deceased.



3. The trial magistrate in the impugned judgement found the respondent liable in negligence in the ratio of 80:20 in favour of the deceased on the ground that the deceased had also acted in a manner that was wanting. The trial magistrate awarded the appellants herein who are joint claimants damages as follows:
 - Pain & Suffering.....Kshs. 50,000
 - Loss of expectation of LifeKshs. 100,000
 - Loss of dependencyKshs.935,040
4. Aggrieved by the said judgment and decree, the appellants filed this appeal vide a memorandum of appeal dated 5th May 2020 raising the following grounds of appeal:
 1. The learned trial magistrate erred in law and in fact by disregarding the appellants’ submissions on the issue of liability and quantum hence occasioning a miscarriage of justice by arriving at an erroneous conclusion.
 2. The learned trial magistrate erred in law and in fact by finding that the deceased was 20% liable for the accident when there was clear evidence that the defendant’s motor vehicle which was being driven in excessive speed had lost control and had collided with another motor vehicle before colliding with the deceased’s motorcycle.
 3. The magistrate erred in law and in fact when he held the deceased 20% liable for the suit accident despite lack of rebuttal evidence/testimony from the defendant.
 4. The learned magistrate erred in law and in fact when he made a grossly low and erroneous award on loss of dependency which award was not in tandem with the underpinning principles informing an award under that head thus occasioning a miscarriage of justice.
5. The parties filed written submissions to canvass the appeal.

The Appellant’s Submissions

6. The appellants submitted that they did not file a certified copy of the decree as required by Order 42 Rule 2 of the Civil Procedure Rules but instead they filed the certified copy of the judgment delivered on the 25th April 2023 but that notwithstanding they sought reliance on section 2 of the *Civil Procedure Act* that provides inter alia that judgement shall be appealable notwithstanding the fact that a formal decree in pursuance of a judgement may not have been drawn up or may not be capable of being drawn up. The appellants further relied on the court’s holding in the case of *Ndwiga & Another v Mukimba* [2022] eKLR where the court reiterated the provision of section 2 of the *Civil Procedure Act*.
7. It was submitted that given the circumstances as brought out in the plaintiff’s testimony, the deceased having been a motorcycle rider, there was nothing more he could have done to avoid the accident. Reliance was placed on the cases of *Kenya Bus Services Ltd v Humphrey* [2003] eKLR where it was held inter alia that when buses are properly maintained, serviced and driven by its driver, they do not just run over bridges and plunge into rivers without explanation and that of *Margaret Wangari Kiambuthi v Jan Njeriu Ngugi & Another* [2018] eKLR where it was held that the appellant motor vehicle was more lethal than the bicycle the deceased was cycling.
8. The appellants submitted that the unavailability of the qualifications of the deceased rider was not a reason for the court to hold the deceased liable for the accident. Reliance was placed on the cases of *Joash M. Nyabicha v Kenya Tea Development Authority & 2 Others* [2013] eKLR and *Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR where the court in both instances



inter alia that the fact of a criminal infraction does not in itself imply that the person is negligent but that the infraction must be the cause or contributed to the occurrence of the accident.

9. It was further submitted that the respondent failed to avail a witness to controvert the evidence by the appellants' and in so failing, the allegations against him ought to have been deemed true and hence the lower court should have held the respondent/ defendant 100% liable for the accident.
10. The appellants thus urged this court to set aside the award on liability of 20% against the deceased and proceed to hold the respondent 100% liable for the accident.
11. On quantum it was submitted that the trial magistrate used the wrong minimum wage as multiplier as he used that for 2015 instead of that for 2020. The appellants further submitted that though no evidence of earnings was supplied, the deceased having been a motorcycle rider in Ahero and a watchman, the minimum wage as at the time of the deceased's demise would have come in handy which was Kshs. 13,572.90.
12. On the multiplicand, it was submitted that the court used the retirement age of 50 years which was erroneous since the requisite retirement age was 60 since 2005 hence a multiplicand of 31 years would suffice. Reliance was placed on the cases of Kisii HCCA No. 78 of 2016; Gilbert Nyangau Oyugi v Charles Ondgo Onduso & Another where the court used a multiplier of 30 years where the deceased was 25 years old, Nairobi HCCA No. 831 of 2007 Lucy Kanini Irungu v Chege Wahome & 2 Others where the court used a multiplier of 32 years where the deceased was 25 years old and the case of Crown Bus Services Ltd & 2 Others v Jamilla Nyongesa & Amida Nyongesa [2020] eKLR where a multiplier of 35 years was applied for a deceased who was 21 years at the time of her death.
13. The appellants thus submitted that the final computation would be $31 \times 13,572.90 \times 12 \times \frac{2}{3} = 3,365,856$.

The Respondent's Submissions

14. It was submitted that the said accident was as a result of contributory negligence by the Victim who failed to keep a safe distance from the probox that was ahead of him, which safe distance could have given him room for judgment since there was an emergency in front of him. The respondent thus submitted that the trial court was right to hold the deceased partly to blame for the accident.
15. The respondent submitted that the deceased's contributory negligence was manifest as the deceased's experience in motor cycle driving was unknown since he had no motor rider/ driver license.
16. In response to the appellant's submissions that it did not call any witness to controvert their evidence, it was submitted that the respondent relied on the statements of Moulid Mohamud Issa dated 22nd July 2021.
17. The respondent submitted that an award of Kshs. 868,913.99 would have been sufficient as general damages under the *Law Reform Act* and the Fatal Accident's Act which amount was arrived at by calculating $12 \times \frac{1}{3} \times 7240.95 \times 30$.
18. It was submitted that it did not contest the heads awarded on pain and suffering and loss of expectation of life.

Analysis and Determination

19. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. This is a principle espoused in section 78 of the *Civil Procedure Act*. The Court must, however, bear in mind that this Court, unlike the trial Court, had no advantage of observing the



demeanour of the witnesses and hearing their evidence first hand and therefore give an allowance for that. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. In addition, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubv v Nyamuro* [1983] LLR at 403, where *Kneller JA & Hancox Ag JJA* held that-

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”

21. Having considered the Appellant’s Grounds of Appeal and the parties’ Written Submissions, I find the issues for determination to be:

Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.

Whether or not the quantum of damages awarded was unjustified in the circumstances of this case so as to warrant interference by this court.

Liability

22. On liability, In *Khambi and Another v Mahithi and Another* [1968] EA 70, it was held that:

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

23. That was the same position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a judicial discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

24. The law is clear that he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi*. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to *Phipson on the Law of Evidence*, the term ‘burden of proof’ has two distinct meanings:

1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction



or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.

2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.
25. Section 107 of *Evidence Act* defines Burden of Proof as– of essence the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
26. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence. Whoever has the obligation to persuade the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.
27. The question therefore is whether the appellants herein discharged the burden of proof that the respondent was wholly liable in negligence for the occurrence of the accident leading to the deceased's sustaining fatal injuries.
28. PW2 testified that he witnessed the accident and saw the respondent's motor vehicle hit the deceased's motorcycle and that further, the said motor vehicle was being driven at a high speed. He testified that the deceased was clad in a reflective jacket and helmet.
29. PW3 the investigating officer of the material accident testified that she visited the scene immediately after the accident and established that the respondent's motor vehicle was overtaking when it collided with an oncoming pro-box before proceeding to collide head on with the deceased motorcyclist. She testified that the speed limit at the scene was 50km/hr and further that there was a continuous yellow line at the place because the road approached the junction. It was her testimony that they charged the respondent's driver as he was careless and that the said driver was convicted.
30. The respondent did not call any witness in support of its defence. Further, none of the documents attached to the statement of defence were ever produced as exhibits. Although it was submitted that the respondent relied on the filed statement, a statement of a witness to be, filed in court, is not evidence until that witness testifies and is tested on cross examination. Such statement even if filed remains just that, a statement not admitted in evidence as an exhibit. the same situation applies to the documents filed in court unless produced by consent or by a witness, they remain just documents and not exhibits of evidence capable of being relied on by the party and neither can the court rely on such evidence to make a decision.
31. As earlier stated, the burden of proof lies on he who alleges. In this case, the appellants called an eye witness to the accident involving the deceased and the respondent's motor vehicle. The witness vividly stated how the accident occurred and in that testimony which was not controverted, nowhere does this court find any scintilla of contributory negligence.
32. A public road is a road meant to be used by all road users and each road user is expected to be careful and to ensure their own safety and the safety of other road users. However, where a road user driving on the road fails to drive with due care and attention and causes an accident involving other road users, there is no reason why the court should apportion liability to a road user who is simply found to be using the road carefully, just because he was found to be on the said road.



33. It is also not lost to this court that the respondent's driver was charged with the offence of careless driving and was convicted of the offence as charged. The respondent did not adduce any evidence in support of its defence or to controvert the appellants' evidence on how the accident occurred, according to the eye witness' account.
34. It is trite that where a plaintiff gives evidence in support of his case but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J.* citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:
- “In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.
35. Nonetheless, the fact that a defence is held to be mere allegations in no way lessens the burden on the plaintiff to prove his case on a balance of probabilities. In the case of *Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR* it was stated:
- “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.
- (See *Kirugi and Another v Kabiya and Others [1983] e KLR*).
36. Thus, in the instant case, the appellants, despite the absence of evidence from the respondent were obligated to prove their case on a balance of probabilities. Even assuming that the statement of Moulid Mohamud Issa as filed formed part of the documents in support of the respondent's case, which it was not, as a statement not made on oath is no evidence at all, it was necessary to call the maker to verify the information in that document and to be subjected to cross examination. production of such statement can only be with leave of court as stipulated in section 33 of the *Evidence Act*, where there is evidence to the effect that the maker was dead or could not be found.
37. This court is thus faced with the question; what weight should be placed on a statement or document not produced as an exhibit? The Court of Appeal in *Kenneth Nyaga Mwige v Austin Kiguta & 2 Others [2015] eKLR* addressed itself to this issue by stating as follows:
- “The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind



to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.
 20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.
 21. In *Des Raj Sharma -v- Reginam* (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of *Michael Hausa -v- The State* (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
 22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”
38. In addition, it bears repeating that the witness was not called to testify in court and his statement was not tested. That being the case, such statement carries very little probative value if at all.
 39. Guided by the above position, which this court is bound by, it is clear that the documents attached to the respondent’s defence, having not been admitted as evidence, they had no evidential value. Coupled with the respondent’s failure to bring any witness to testify in support of its defence, it follows that the allegations of contributory negligence levelled against the deceased remained just that. It is also not lost to this court that the respondent’s driver was charged with the offence of careless driving and he was convicted of the offence.



40. Accordingly, having found that the respondent failed to discharge the burden of proof that the deceased contributed to the accident that led to his demise, in the premises, I find and hold that the trial court erred in apportioning liability in the ratio of 80:20 between the respondent and the deceased since the appellants' case remained uncontroverted and the respondent failed to adduce any evidence to show that the deceased contributed to the accident or at all.
41. In the circumstances, I find this appeal merited. I hereby set aside the trial court's apportioning of liability and substitute it with an order that the respondent was 100% liable for the accident.

Quantum

42. Regarding the circumstances under which an appellate court will disturb a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows:

“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 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.”

43. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal outlined the principles to be considered before disturbing an award of damages as follows:

“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 is 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 high that it must be wholly erroneous estimate of the damages.”

44. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

45. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

“The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i. e his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. (Emphasis added)”



46. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji Nku Hcca* No.15 of 2003 [2007] eKLR, the court observed thus:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a 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 amount of annual or monthly dependency and the expected length of the dependency are known 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.”

47. In the same breath, the court in *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, held as follows:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

48. In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the court was dealing with a similar issue, it stated:

(23). In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.

[24]. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

49. From the above, it is clear, therefore, that the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case.

50. In the instant case, PW1 testified that the deceased who was his brother, worked as a watchman though he did not have any letter to that effect and further that the deceased had a wife and child. PW4, the Chief of Wawidhi Location testified that he knew the deceased who hailed from Ayweyo sub-location which was within his jurisdiction. He testified that the deceased had a wife and a child.

51. Taking the aforementioned into consideration, that there was no evidence of how much the deceased was earning at the time of his demise, I am satisfied that this is a case which was for the trial court to adopt the global award approach and I therefore proceed to do so.

52. In the case of *Maingi Celina v John Mithika M’itabari* suing as the administrator of the estate of Erastus Kirimi Mithika (Deceased) [2018] eKLR the court awarded Kshs. 1,000,000 where it was proved that the deceased at the time of death was an 18-year-old.



53. In the case of *Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago* [2020] eKLR the court reduced an award of Kshs. 2,000,000 to 1,500,000 where the deceased was 28 years old.
54. In the circumstances of this case, I find that a global sum of Kshs. 1,200,000 would be sufficient compensation for loss of dependency. I set aside the award made by the trial court based on the multiplier formula and substitute it with a global award of kshs 1,200,000.
55. As the awards on pain and suffering and loss of expectation of life were not contested, the same remain undisturbed.
56. Regarding loss of consortium, this court notes that this suit is governed by the *Fatal Accidents Act* and the *Law Reform Act*. Having read both statutes, the court finds that the statutes do not provide for recovery of damages under this head.
57. Furthermore, a claim for loss of consortium as a general damage can only be sustained in an action instituted by a spouse of a survivor of an accident in which it is claimed that owing to the serious injuries sustained in the accident in question, the spouse who must have been a party to the suit as a plaintiff as well, was incapable of enjoying consortium with his/her surviving spouse and that his or her quality of life had, as a result been diminished.
58. Thus, loss of consortium cannot thus be maintained as a claim on its own and in a fatal accident claim. See the case of *Innocent Keti Makaya Denge v Peter Kipkore Cheserek & another* [2015] eKLR and that of *Wasilwa Saul & another v Daniel Waswa Simiyu & Gladys Nelima Misiko*(Both suing as the legal representatives of the estate of Paul Wafula Simiyu) [2022] eKLR
59. The upshot of the above is that the appeal herein only succeeds as follows:
 Liability is apportioned 100% against the respondent
 Loss of dependency Kshs. 1,200,000
 Pain and Suffering Kshs. 50,000
 Loss of expectation of life.... Kshs. 100,000
 Total general Damages.....1,350,0000
60. Interest on General damages shall accrue from date of judgment in the lower court at court rates until payment in full.
61. As the appeal was occasioned by the wrong exercise of discretion by the trial court, and as the appeal is only partially successful, I order that each party shall bear their own costs of the appeal.
62. This file is closed.
63. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF APRIL, 2024

R.E. ABURILI

JUDGE

