



Kamonde v Mulonzya & another (As Administrators of the Estate of Paul Vinzi - Deceased) (Civil Case E213 of 2022) [2024] KEHC 5648 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5648 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E213 OF 2022
DKN MAGARE, J
MAY 9, 2024**

BETWEEN

ALLAN MWITI KAMONDE APPELLANT

AND

SUSAN KAVATA MULONZYA 1ST RESPONDENT

STEPHEN SAFARI VINZI 2ND RESPONDENT

AS ADMINISTRATORS OF THE ESTATE OF PAUL VINZI - DECEASED

JUDGMENT

1. This is an Appeal from the decision of Hon. G. Kiage, RM in Mombasa CMCC E611 of 2021 given on 16/11/2022. The Appellant was the Defendant in the lower court.
2. The Appellant filed a 10 paragraph Memorandum of Appeal. The Memorandum is general in nature. Grounds 1, 9 and 10 are on quantum. Ground 3 is on liability. The rest are general. THE GROUNDS are humongous and unseemly contrary to Order 42 Rule 1 that requires that the Memorandum of Appeal be concise. The same provides as doth: -
 1. Every Appeal to the High Court shall be in the form of a Memorandum of Appeal signed in the same manner as a pleading.
 2. The Memorandum of Appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order Appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.”



3. The Court of Appeal had this to say in regard to rule 86 (which is *pari materia* with order 42 Rule 1) in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR: -

“We are yet again confronted with an Appeal founded on a Memorandum of Appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a Memorandum of Appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of Appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of Appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of Appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of Appeal in strict compliance with the rules of the Court. (See *Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others* [2013] eKLR) and *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR. In the latter case, this Court lamented:

“We must reiterate that counsel must strive to make drafting of grounds of Appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of Appeal do not in anyway enhance the chances of success of an Appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of Appeal presented by the Appellant, *Robinson Kiplagat Tuwei* against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

4. Further in *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the Court of Appeal observed that: -

“Our first observation is that the Memorandum of Appeal in this matter sets out repetitive grounds of Appeal. The singular issue in this Appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of Appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others*, Civil Appeal No. 223 of 2013, this Court stated:

“The Memorandum of Appeal contains some thirty-two grounds of Appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of Appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”

Pleadings

5. By a plaint dated 29/3/21 the Appellant was sued for General damages arising from an accident on 10/5/2021. The suit was filed on 22/4/2021. The Appellant sought damages for a road traffic accident on the said date.
6. They also sought special damages of 64,600. The deceased was said to be a man aged 50 years with income of Ksh. 20,000/= who left behind 4 children and a widow. It turned out that the accident was on 10/5/2019.



7. Letters of Administration were obtained on 2/6/2020. The suit was filed on 22/4/2021, a period of 10 months and 2 days later. The defendant filed defence in September., 2021. The plaint was amended on 16/9/2021 to change the deceased was a pedestrian.

Evidence

8. The Respondent's witnesses testified. On 7/12/2021 Sgt. John Kamau of Makupa Police Station testified on the accident of 10/5/2019. He stated that Emanuel Nyale was driving Motor Vehicle Registration No. KCS 116L, when at Buxton Junction the accident occurred. Motor vehicles from Nyali had been allowed while those from the opposite direction and from Coast Provincial General Hospital had been stopped.
9. The Driver knocked down a pedestrian. He postulated that on investigations the driver was blamed. This was a time when happy hour had not been introduced. Happy hour, is a phenomenal in Mombasa during rush hours where, vehicles from one side are stopped for almost 30 minutes while vehicles from the opposite heavy traffic direction are allowed to use both sides of the road.
10. The driver is said to have attempted to swerve in vain. The 2nd witness testified that she did not witness. She produced documents 1 – 8 in evidence. The third witness also was the administrator.
11. The Appellant's driver testified that he was driving from Malindi at 40Kph. Suddenly at the pedestrian jumped onto the road and the accident occurred. It was his case that he was not charged. He blamed the pedestrian for cross carelessly.
12. Upon hearing the case, the court delivered its judgment as follows: -
- a. Liability 90:10
 - b. Pain and suffering 50,000/= . Law reform
 - c. Loss of expectation 100,000/=
 - d. Pain and suffering 50,000/=
 - e. Loss of dependency 1,200,000/=
 - f. Special damages 30,000/=
 - g. Funeral expenses 34,000/=
 - h. Total 1,414,000
 - i. Less 10% contribution
 - j. Total due 1,272,6000
13. The Appellant Appealed and set forth the following grounds of Appeal: -
- a. That the learned trial magistrate reached a decision that was against *the constitution*, the common law, the *Law reform act*, the *fatal Accidents Act*, the *Evidence act*, the *Civil Procedure act* and the Civil Procedure Rules 2010 and all applicable laws.
 - b. That the learned trial magistrate improperly exercised his discretion and or duty by taking into account matters which he ought not to have taken into account and failing to take into account matters he should have taken into account.



- c. That the learned trial magistrate erred in law and fact in apportioning liability for the accident, the subject matter of the primary suit, at 10 % against the deceased and 90 % against the Appellant.
- d. That the learned trial magistrate erred in failing to consider and play all the evidence tendered before him by and on behalf of the opposing parties before him.
- e. The learned trial magistrate erred in failing to consider the totality of the evidence given by Appellant and other Respondent.
- f. That the learned trial magistrate erred in not apportioning the higher and or highest blame for the accident upon the deceased as opposed to the Appellant.
- g. That the learned trial magistrate erred in failing to take into the court binding authorities on legal principles pronounced in the case of law submitted by the Appellant.
- h. That the learned trial magistrate erred in failing to consider, apply and distinguish the written submission and legal authorities cited and relied upon by the parties.
- i. That the learned trial magistrate erred in making an excessive and very outrageously high award of damages.
- j. That the learned trial magistrate erred in not following the legal principles applicable in assessment of damages or personal injuries.

Submissions

- 14. The Appellant filed submissions dated 10/1/2024. They submitted that Sergeant John Kamau was not at the scene. He submitted that the Sergeant John Kamau confirmed that the driver tried to swerve. He stated that Emanuel Nyange said confirmed how the accident occurred.
- 15. They blame the court for giving 90:10 when the Appellant was crossing at a non-designated crossing. They rely on the case of William Kiprono Towett and 1597 Others -vs- Farmilad Aviation and 2 Others (2015) eKLR, on the duty of the court. They submitted that the burden of proof was shifted. They prayed that liability be set aside. They conceded 10% liability.
- 16. On damages, they stated that a multiplier should be 6 – 11 years. They relied on the case of Monica Njeri Kamau v Peter Monari Onkoba [2019] eKLR, where Justice Rachel Ngetich applied a multiplier of 11 for a 39 year old.
- 17. Further, the appellant relied on the cases of Mombasa CA No. 317 of 2003 Checkers Trading Ltd & Another v Fatuma Kimanthi & another and Christine Chamaiyek V Unister Transporters Ltd [2007] eKLR. In the later case that case, the court applied a multiplier of 6 years. The last case turned on its own facts and is not binding on the court as the factors considered were out of line with factors advised in binding decisions of the court of Appeal referred herein after.
- 18. The appellant relied on the case of Janet Chonge Walumbe & 2 others v Julius Mwaniki & another [2019] eKLR, where a multiplier of 10 years was applied for a 50 year old.
- 19. There was no submission on other grounds of Appeal hence they are deemed abandoned.
- 20. The Respondent filed submissions. They blamed the Appellant's driver for failure to exercise due care and skill. They relied on the case of Susan Kanini Mwangangi & another vs Patrick Mbithi Kavita



[2019] eKLR with reference to the East Africa Court of Appeal’s decision in Embu Public Road Services Limited vs Riimi [1968] EA 22 held that:

“The doctrine of *res ipsa loquitur* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident... Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show “that there was a probable cause of the accident which does not connote negligence” or “that the explanation for the accident was consistent only with an absence of negligence.”

21. On damages they stated that the multiplier of 15 years is not inordinate.

Analysis

22. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses’ testimonies.

23. In the case of *Selle & Another vs. Associated Motor Board Company Ltd.* [1968] EA 123, the Court stated as follows:

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An Appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

24. In the case of *Mbogo and Another vs. Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to



take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

25. The duty of the first appellate was stated by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law looks in their usual gusto, held by as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An Appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

26. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

27. In the case of *Peters vs Sunday Post Limited* [1958] EA 424, 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...”

28. The burden of proof is on the party wishing the court to give it a judgment. This is in line with 107-109 of the *Evidence Act*: -

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

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 that fact shall lie on any particular person

29. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

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

30. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case.



31. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:
- “As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The Appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”
32. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:
- “In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
33. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;
- “The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”
34. Furthermore, in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:
- “Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
35. In my reevaluation, crossing of the Road at a non-designated place, means that if arrested the DPP knows what to do. However, in this case, the records show that there was no designated place. Something had to give. The Appellants witness maintained that he was driving at 40 Kph. That cannot be true since the impact was instant. The court takes judicial notice that instant brakes and a very short stopping distance are possible. By swerving, it denotes that the Appellants driver was at high speed.



36. The deceased was also not blameless. The vehicles had just been allowed at a junction. The pedestrian had no regard to his own safety. Balancing between the 2 parties the Respondent bears less responsibility. The Appellant could not speed at such a point and expect not to see pedestrian, I do hold that *res ipsa Loquitur*, the Driver was speeding excessively hence the inability to stop.
37. However, the court was plainly wrong in giving a nominal liability of 10% for the deceased. 70:30 is closer to what happened. The deceased did not have regard to his own safety despite the negligence by the Appellant's driver. I set aside the award of 90:10 and substitute the same with 70:30 in favour of the Respondent.
38. In the circumstances I allow the Appeal on liability, set aside award of 90:10 and substitute with 70% against the Appellant and 30 % against the Respondent.
39. I proceed to determine whether the court erred in the award on quantum. The principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of Damages in discretionary.
40. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR* as follows:
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 damage.”
41. Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, *Nance v British Columbia Electric Co Ltd*, in the decision of Henry Hilanga v Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -
- ‘The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance.: -
- “We find the words of Lord Denning in the *West (H) & Son Ltd (1964) A.C. 326* at page 341 on excessive awards on damages important to replicate herein thus:
- “I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.”
42. The words of Lord Denning were reiterated by Nyarangi, JA. in *Kigaragari v Aya [1985] eKLR* thus:
- “I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also



to be within what Kenya can afford. That must bear heavily upon the court. The largest application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees.”

43. In the case of *Kilda Osbourne v George Bamed and Metropolitan Management Transport Holdings Ltd & another* Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in *H. West & Sons Ltd v Shephard* {1963} 2 ALL ER 625 Sykes J stated as follows:

“The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant.”

44. It is common understanding that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of *H. West and Son Ltd v. Shepherd* [1964] AC.326, where it was stated that:

“... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ...”

45. With the above guide, if the Award is inordinately high, then I will have to set it aside. However, if it is just high but not inordinately high, I will not do so. For the Appellate Court to interfere with the Award, it is not enough to show that the Award is high or had I handled the case in the Subordinate Court I would have awarded a different figure.

46. I note that the court used a minimum wage of Ksh. 10,000/=. The minimum was even higher at the time of the accident. However, there is no cross Appeal.

47. On the multiplier, the court considers several factors including the remainder of life of the deceased and the current dependants. *Beatrice Wangui Thairu V Hon. Ezekiel Barngetuny & Another*, Nairobi HCCC No. 1638 of 1988 where Ringera J (as he then was) stated:

“The principles applicable to an assessment of damages under the Fatal Accidents Acts are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow



the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

48. The deceased could have reached a prime old age of 70 years. 15 years is therefore not inordinate for a 50 year old. 15 years is within the range. A person does not drop dead on turning 60 years. They could have more useful life after that. It is only vagaries of life are taken into consideration in discounting the multiplier. The age of the dependents is taken into consideration, especially the young wife aged 45 and the youngest daughter aged 12 years.

42. It should be remembered that the method of arriving at damages is not scientific but a practical way of getting approximate. In *Mwanzia Ngalali Mutua Vs Kenya Bus services (Msa) Ltd & Another*, the Court held as follows: -

“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 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.”

49. *China Henan International Co-operation Ltd v China Henan International Co-operation Ltd & another* [2021] eKLR, Justice R E Ougo stated as hereunder: -

16. I now turn to consider the multiplier adopted by the trial magistrate. The appellants submitted that the trial court was at fault for noting that the deceased was 50 years old as at the time of death and proceeding to award a multiplier of 15 years. According to the appellant, a multiplier of 8 years was more appropriate. In the *Isaack Kimani Kanyagi* case (*supra*) the court of appeal held that:

“...the deceased was a self-employed person and the government retirement age was irrelevant to her business. Her ability to continue in business depended on her good health and there was no evidence that she had any health problems that could have made it impossible for her to continue with her business well beyond the age of 60 years. We find that a multiplier of 15 years would have been fair and reasonable taking into account the deceased’s age and the vagaries and uncertainty of life.”

17. The deceased being a business man and in good health could well carry with his business beyond the retirement age. In the circumstance, I am counterstained to agree with the finding of the trial magistrate on the 15 years multiplier.”

50. In the case of *Techard Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR, Justice ODUNGA stated that-

“78. As the deceased was 50 years old, it is my view that a multiplicand of 10 would have been reasonable in those circumstances.”

51. It is clear therefore that the court can exercise discretion and apply a continuum of figures from 10 to 15 for a 50 year old. The court cannot substitute the award simply because, had I been sitting in the lower court, I would have awarded a different figure. In *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989* where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings



but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."

52. An Appeal on the ground of multiplier and loss of dependency is accordingly dismissed.

Determination

53. In the circumstances the Appeal is partly allowed as follows: -

- a. Judgment of liability is set aside in lieu thereto I enter judgment at 70:30 in favour of the Respondent as the Appellant was largely to blame.
- b. The Appeal on general damages for loss of dependence is dismissed and the award of Ksh. 1,200,000/- upheld.
- c. Appeal on law reform is dismissed.
- d. Special damages and Funeral expenses remain the same, that is Ksh. 64,000/=
- e. This works out as doth: -
 - a. Liability 70:30
 - b. Pain and suffering Ksh. 50,000/=.
 - c. Loss of expectation Ksh. 100,000/=.
 - d. Loss of dependency Ksh. 1,200,000/=
 - e. Total Ksh. 1,414,000
 - f. Less 30% contribution Ksh 420,000?=-
 - g. Sub-total Ksh. 980,000/=
 - h. Add Special Damages
 - i. Special damages Ksh. 30,000/=.
 - ii. Funeral expenses Ksh. 34,000/=.
 - i. Grand Total Ksh 1,044,000/=.
- f. Each party shall bear their own cost for the Appeal.
- g. The Respondent to have costs in the lower court.
- h. The file is closed.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA ON THIS 9TH DAY OF MAY, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Onyango for the Appellant

No appearance for the Respondent

Court Assistant - Brian

