**Commodity House Limited v Nyapara & another (Civil Appeal E243 of 2023) [2024] KEHC 7079 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEHC 7079 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E243 OF 2023**

**DKN MAGARE, J**

**JUNE 11, 2024**

**BETWEEN**

**THE COMMODITY HOUSE LIMITED ..... APPELLANT**

**AND**

**MARY KERUBO NYAPARA ..... 1ST RESPONDENT**

**JAMES OSUSU NYAPARA ..... 2ND RESPONDENT**

***(Being an appeal from the Judgment of the Hon. G. Sogomo (PM) in Mombasa CMCC No. E448 of 2020 delivered on 25th August, 2023)***

## JUDGMENT

1. This is an appeal from the judgment and decree of the Honorable G. Sogomo given on 25.8.2023 in Mombasa CMCC E448 of 2020. The Appellant was the Defendant.

2. The Appellant filed a behemoth of 17 paragraphed Memorandum of Appeal. It is a classic study on how not to write a Memorandum of Appeal. It is gross repetitive, augmentative and verbose ad nauseum. The same repeats the question of liability in all paragraphs except 5, 15, 16 and 17. The rest of the grounds raise only one question liability. The 4 mentions grounds raise issues of General and Special damages. A Memorandum of Appeal should be concise in terms of Order 42 Rule 1. Order 42 Rule 1 of the Civil Procedure Rules provides are 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 about compliance with Rule 86 of the Court of Appeal Rules (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) 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. In the case of 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:
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> "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."

5. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

**Duty of the first Appellate court**

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

7. 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 is 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."

8. The duty of the first appellate Court was settled long ago 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."

9. 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.

10. 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..."

11. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019)eKLR , Justice D.S Majanja held as doth:

> "General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

13. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph *8*.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

16. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs 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..."

17. Therefore, for me 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.

18. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

19. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

20. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite

apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

21. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

**Pleadings**

22. The Appellant filed suit claiming damages for a fatal accident on behalf of the

mother and 3 siblings. There was no claim for a child or widow. This is in respect of the accident involving Motor Vehicle Registration No. KAX 963U/ZD3322 and the Deceased rider of Motor Cycle Registration Number KMCZ 139S on 5.2.2020. The suit was filed on 17.12.2020 under Law Reform and Fatal Accident Act. The deceased was said to be a businessman aged 37 years with a normal life expectancy.

23. The Respondent filed defence dated 10.2.2020. They attributed particulars of negligence to the deceased.

**Evidence**

24. Mary Kerubo Nyapara testified that the deceased was his son and produced 7

documents excluding the funeral expenses receipt and police abstract. Police Officer is to be called, the defence can always call them. The matter continued before Hon. D.W. Mburu on 6.12.2022 where a new PW2 testified. This is PC. Philip Yator of Changamwe Police Station. He stated that he went to the scene and found the Motor Vehicle Registration No. KAX 963G ZD3322 Mercedes Benz Actros and a Motor Cycle Registration KMCZ 1395, Yamaha with a dead body trapped. On cross examination she stated that there were receipts for accommodation for October 2020. The deceased was buried in February 2020. She stated that they paid Kshs. 100,000/= at Janam Funeral Services.

25. PW2 was PC. Keah Rashid. He was sworn in but stood down due to an objection from Mr. Shikely. This was erroneous as it is never the defendant who dictates the Plaintiff's interests if a more evaluated underneath the tyres. Help was requested for and the body was taken to the mortuary. He stated that Motor Cycle Registration No. KMCZ 139S was dragged for a distance. The Motor Cycle was trapped under the rear axle while the deceased's body was on 2nd axle.

26. He concluded that the driver failed to keep distance. He charged the driver for causing death by dangerous driving in Mombasa TR. 537 of 2020 which was still in court. He stated that the owner of the bike was the Appellant while the driver was Clement Mbole. On cross examination the witness stated that the truck ended up in the ditch.

27. PW3 James Osusu Nyapara testified on documents dated 6.11.2020 which he adopted as exhibits. He stated that receipts for accommodation were 8 months after burial. The Appellant's witness testified on 22.6.2023 before Hon. Sogomo. The witness adopted his stated and produced Exhibit 2, 3 and 4.

28. He stated that he was driving the subject vehicle for his employer Commodity House Ltd. who had employed him for 9 years. He stated that the motor cycle was moving slowly therefore he decided to overtake it. He stated that the Rider suddenly swerved to the right. The driver swerved and found the rider at the rear of the tyres. He reported to Pipeline Police and was released on Kshs. 100,000/= bond. On cross examination, he stated that it is the cyclist who rammed from the rear. His case was pending. He closed the case at this point.

**Submissions**

29. Parties filed submissions which I shall subsume in the judgment to avoid repetition. The Appellant filed single space submissions which are not PDF readable. The court has endevoured to read but cannot summarize the plethora of decisions referred to due to the same referring to one point only - burden of proof.

30. The appellant relied on proceedings in a traffic case that did not form part of the trial proceedings. Despite the Appellant being on both quantum and liability, the Appellant quoted decisions on the aforesaid area only.

31. On the other hand the Respondent filed particularly ineligible submissions. They stated that the court did not consider extraneous issues or misdirected itself. It was their case that the Appellant rammed into the rear of the Deceased, hence should be wholly held liable. They relied on the case of Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR.

**Analysis**

32. The driver confirmed one thing, the cyclist was driving slowly. This aspect of his speed was thus established. It is the Appellant driver who decide, whether unlikely, to overtake carelessly at a construction part of the road. He was unable to complete the venture.

33. He appears to have dangerously maneuvered the vehicle, effectively killing the deceased. The defence evidence confirmed without much more that 100% liability was proper.

34. I dismiss the allegations raised in the submission in the lower court on the acquittal. This is for 2 reasons. The first one being that no such evidence was tendered. Raising evidence in submissions is otiose. Submissions are not evidence. In Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, Odunga J, as he then was, stated as doth: -

> " Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:
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> "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided."
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> 19. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:
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> "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."
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> 20. Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

1. "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do

prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

21. As stated by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

35. Secondly acquittal is not a license to freedom in the Civil world. It is simply that the offence charged was not proofed beyond reasonable doubt. What is required of Civil is proof on a balance of probability. This standard cannot be used in criminal cases. The court may find that an accused is guilty on a balance of probability and cannot commit until the evidence rises to the standard of beyond reasonable doubt. This means In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

36. There is no presumption of innocence in civil cases. An acquittal does not mean that civil liability cannot attach. It means that the criminal standard, which is higher was not met. That is why the reverse is not true. A conviction raises the bar of the convicted tortfeasor.

37. The test in civil cases is simple. On a balance of probabilities. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J, as he was then, in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " 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."

38. 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; -
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> "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 the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a 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 loose, because the requisite standard will not have been attained."

39. The Appellant's driver was at the scene. His evidence clearly points that the deceased was lawfully cycling at a slow speed when the driver decided to drive dangerously. I find that the finding of 100% liability is proper. The appeal on liability is consequently dismissed.

40. The court awarded the following in terms of damages

    a. Damages for loss of dependency – Kshs. 1,248,246.50

    b. Special Damages Kshs. 249,650

    c. Loss of Expectation of life Kshs. 100,000/=

    d. Pain and suffering Kshs. 10,000/=

41. Only two aspects were challenged

    i. Special Damages

    ii. Use of minimum wage

**Special Damages**

42. Special damages are required to be specifically pleaded and proved In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the

head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

43. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as then he was, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

44. In this a sum of Kshs. 249,680 was pleaded and awarded. This amount was challenged. However, when it comes to funeral expenses, courts have relaxed the rule as it is known that burial takes place and expenses are incurred. Reasonable amount ought to be awarded. The Court of Appeal, in Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR, stated that:

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/ = was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

45. The Appellant raised issue that the court did not interrogate the figures. That aspect is correct. The court relied on the decision of Herbert Hahn v Amrik Singh [1985] eKLR. This was a decision by Kneller, Nyarangi JJA & Chesoni Ag JA, as then they were. The said decision did not find funeral expenses in the current jurisprudential leanings.

46. It is important to interrogate the expenses and rule out expenses not related to interment of the body. Expenses incurred long after burial are of no use. The same applies to the expenses incurred before death. The expenses must also relate to the deceased not auxiliary parties. Where receipts are not available, reasonable expenses are to be awarded. Where receipts are available they should relate to the interment of the remains. Any extra ceremonies like anniversaries of unveiling of the cross are not part of funeral expenses.

47. The burial permit was given on 7.2.2020 there is no evidence that burial was delayed for any reason. As at 24.2.2020 parties had started the succession process by getting the chief's letter. It is noted that Janam Funeral Services were paid for the executive coffin and Hearse to Kisii.

48. The Hire Contract was to expire after burial on 21.2.2020. A sum of Kshs. 85,000/= was also paid to hire a bus for moaners from Abagusii Welfare Association. The rest of the receipts are after the burial and are not useful.

49. There must have been other reasonable expenses of Kshs. 35,000/=. The total proved was Kshs. 220,000/=. I set aside the award of Kshs. 249,680 and substitute with a sum of Kshs. 220,000/=. I note that the change is marginal. However, the court must interrogate figures not just accept figures thrown to the court.

50. On General damages a minimum wage was proposed by the court. The Appellant stated that proof was not done. It is only the deceased who could truthfully tell us his income. In his absence, the court cannot insist on proof. Even witnesses will Hazard a guess on the possible income. This is why the court uses a multiplier where the same can be established or a lump sum. There is no specific way to measure both.

> In the case of Kenya Wildlife Services vs. Geoffrey Gichuru Mwaura [2018] eKLR the court relied on the Ezekiel Barngetuny case where Ringera J had stated:
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> "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the 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."

51. The Court of Appeal in Mariga vs Musila, Civil Appeals Nos. 66 of 1982 and 88 of 1983 (1984) KLR as follows: -

> " The assessment of damages is more like an exercise of discretion and an appellate court is slow to reverse a lower court on the amount of damages unless it is satisfied that the judge acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. The question is not what the appellate court would award but whether the lower court judge acted on wrong principles."

52. Ringera J in Mwanzia v. Ngalali Mutua v Kenya Bus Services (Msa) Ltd & Another stated as hereunder:-

> 'The multiplier approach is just a method of assessing damages. It is not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as 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".

53. Whether a lump sum is used or multiplier damages due to the deceased dependents range between 1,200,000 and 1,500,00. The court awarded 1,248,246.30 using the multiplier. There is nothing in the

exercise of discretion that was wrong with use of a minimum wage. The minimum wage appears to be for the lowest of the low. The deceased herein could have had more robust lifestyle and living. However, there is no cross appeal on quantum. I shall not consider the same. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held as hereunder:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

54. The upshot is this the Appeal on quantum of General damages is baseless and lacks merit, it is accordingly dismissed.

55. Consequently, except the reduction of special damages from Kshs. 249,680 to Kshs. 220,000/=. The appeal is dismissed with costs of Kshs. 135,000/=

**Determination**

56. In the circumstances I make the following orders: -

    a. The appeal on liability is dismissed.

    b. Appeal on general damages is dismissed

    c. On special a sum of Kshs. 249,680 is set aside and substituted with a sum of Kshs. 220,000/=

    d. The appeal is largely unsuccessful, the Respondent shall have costs of Kshs. 135,000/=

    e. Stay of 30 days.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.**

Judgment delivered through Microsoft Teams Online Platform.

**KIZITO MAGARE**

**JUDGE**

In the presence of:

Mr. Shikely for the Appellant

No appearance for the Respondent

Court Assistant - Jedidah