Muthiga v Kipkongoi & another (Suing as the Legal Representatives and Administrators of the Estate of Joseph Kipkoech – Deceased) (Civil Appeal E158 of 2021) [2024] KEHC 14814 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEHC 14814 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E158 OF 2021

JRA WANANDA, J

OCTOBER 4, 2024

BETWEEN

SOLOMON MURITHI MUTHIGA ..... APPELLANT

AND

SUSAN WANGOI KIPKONGOI ..... 1ST RESPONDENT

PATRICK KIPSANG NGETICH ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF JOSEPH KIPKOECH – DECEASED

JUDGMENT

1. This Appeal is against a finding on liability and also the quantum of damages awarded to the Respondents in Eldoret Chief Magistrate's Civil Case No. 106 of 2020 as compensation for the death of a 68 years old adult male that occurred as a result of a fatal road accident. In the trial Court, the Appellant was the Defendant while the Respondents were the Plaintiffs. The Appellant now seeks a review of the finding on liability and also reduction of the amount of compensation awarded claiming that the same was manifestly excessive.

2. The background of the case is that by the Plaint filed on 4/02/2020 through Messrs A.K. Chepkonga & Co. Advocates, the Respondents sued the Appellant seeking general damages under the *Fatal Accidents Act* and the *Law Reform Act* and for loss of consortium, special damages at Kshs 291,250/-, costs of the suit and interest.

3. The Respondents pleaded that the Defendant was, at all material times, the owner of the motor vehicle registration number KCC xxxP (hereinafter referred to as "the Van"), that on 28/3/2019, the deceased, Joseph Kipkogei, was lawfully travelling aboard the motor vehicle registration number KAW xxxY 799P (hereinafter referred to as "the tractor"), when along the Eldoret-Nakuru road at Choma Zone

area, the Appellant's said van was so negligently, carelessly and/or recklessly driven, managed and/or controlled that it rammed into the van in which the deceased was a passenger thereby occasioning the deceased fatal injuries. It was pleaded further that the deceased was 68 years old, working as a driver, and earning a sum of Kshs 10,000/-, that he was in good and robust health and had prospects of working for several years and that as result of his death, his estate has suffered loss.

4. The Defendant filed its Defence on 8/05/2020 through Messrs Onyinkwa & Co. denying the claim and the particulars alleged.

5. After the close of pleadings, the suit proceeded to trial.

6. By consent of the parties, the evidence of one Edwin Kibitok in Eldoret CMCC No. 105 of 2020, presumably a related suit, was adopted to apply. Strangely, however, neither of the parties has supplied this Court with a copy of those proceedings in which the said witness testified.

7. PW2 was the 1st Respondent herein, Susan Wangui Kipkongoi who stated that the deceased was her husband. She then adopted her Witness Statement and produced exhibits. Under cross-examination by Mr. Wesonga, Advocate for the Appellant, she stated that she was born in 1964 and had 9 children, 3 of whom have casual jobs, that the deceased died at about 65 years and that he was a tractor driver. She testified that she depended fully on the deceased although she conceded that they still have the parcel of land where they have been farming. She also stated that the deceased used to bring about Kshs 10,000/- per month although she conceded that she had not produced any document as proof. She then stated that she has not remarried. In re-examination, she stated that the deceased used to take odd jobs so as to feed his family.

8. By a further consent of the parties, the evidence of DW1 in the said Eldoret CMCC No. 105 of 2020 was also adopted to apply in the suit. As aforesaid, this Court has not been not been supplied with a copy of the proceedings in which the said witnesses testified.

9. By its Judgment delivered on 5/11/2021, the trial Court entered Judgment in favour of the Respondents as follows:

a)	Liability at 100%	
b)	Pain & suffering	Kshs 75,000.00
c)	Loss of expectation of life	Kshs 100,000.00
d)	Loss of dependency (global award)	Kshs 500,000.60
e)	Special damages	Kshs 136,000.00
	Total	Kshs *811,810.00*
f)	Costs and interest	

10. Dissatisfied with the Judgment, the Appellant filed this Appeal on 8/12/2021. In the Memorandum of Appeal, the following 8 grounds were preferred:

    i. That the trial Magistrate erred in law and fact in holding the Appellant 100% liable without taking into account the evidence on record.

ii. That the trial Magistrate erred in law and fact by failing to take into account the evidence on record on the issue of liability thereby arriving at an erroneous decision

iii. That the trial Magistrate erred in law and fact that the Respondents failed to prove their case against the Appellant as required by law and ought to have dismissed their case.

iv. That the trial Magistrate erred in law and fact by failing to consider the Appellant's submissions on both liability and quantum.

v. That the trial Magistrate erred in law and fact by adopting the wrong principles in assessment of damages payable to the Respondent thereby arriving at an erroneous decision.

vi. That the trial Magistrate erred in law and fact in awarding Kshs.75,000/= for pain and suffering which was manifestly excessive in the circumstances.

vii. That the trial Magistrate erred in law and fact in awarding damages for loss of dependency when the same not proved.

viii. That the trial Magistrate erred in law and fact in awarding damages which were excessive in the circumstances in view of the evidence adduced

Hearing of the Appeal

11. It was then directed that this Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed his Submissions on 24/8/2023 while the Respondents filed theirs on 6/11/2023.

Appellant's Submissions

12. Regarding liability, Counsel submitted that neither the testimonies or the evidence adduced pointed towards the blameworthiness of the Appellant and pointed out that the trial Magistrate having established that the Respondents did not witness the accident and did not explain the circumstances surrounding it, invoked the doctrine of Res Ipsa Loquitor to determine the issue of liability. He then cited the case Susan Kanini Mwangangi & another v Patrick Mbithi Kavita [2019] eKLR and submitted that once the doctrine of Res ipsa Loquitor is pleaded as was by the Respondents herein, the Defendant can only escape liability if he demonstrates that there was either no negligence on his part, or that there was contributory negligence, that it is not disputed that the statement of defence did not specifically state that the deceased's motor vehicle suddenly joined the Respondent's tractor's lane causing the accident, that although the Appellant pleaded particulars of negligence against the Respondent, a defence is not meant to adduce evidence and that the particulars of negligence pleaded by the Appellant were established by the testimony of the Appellant's witness. He urged that according to the Defendant's Witness statement, the tractor driven by the deceased was off the road and suddenly joined the road without any indication, that it had no lights and that this contributed to the occurrence of the accident or caused it. Counsel also urged that the Appellant witnessed the accident and that he gave a clear account of how it occurred as opposed to the Respondents who were not eye-witnesses. According to him therefore, the Appellant sufficiently demonstrated that the deceased caused the accident, that the Appellant had the right of way and that the deceased ought to have waited for the road to clear before joining.

13. He submitted that the trial Magistrate did not consider the Appellant's witness statement on the issue of liability but relied heavily on the contents of the Plaint to hold the Appellant 100% liable. He further submitted that "he who alleges must prove" as per the purport of Section 107 (1) of the *Evidence Act*, that the Respondents alleged that the Defendant's motor vehicle was defective but did not produce

any inspection report to prove so, and that the Respondents had the burden of proof in this case and failed to discharge the same. He wondered what evidence the Respondents availed to prove that the Appellant's van was faulty to require rebuttal evidence and argued further that the trial Magistrate erred by holding that the Appellant had the burden of proving that his van was not defective by producing an inspection report. He submitted that this Court is therefore entitled to interfere and analyze the evidence afresh as was held by the Court of Appeal in Kneller & Hancox Ag JJA in Mkube Vs Nyamuro [1983] KLR.

14. On his "without prejudice" submissions on quantum, Counsel urged the Court to be guided by the principles enunciated by the Court of Appeal in the case of Barnabas v Ombati (Civil Appeal E43 of 2021). He contended that the trial Magistrate adopted the wrong principles and left out relevant factors while making a determination on the damages awardable to the Respondents under the *Law Reform Act* thereby arriving at an excessive amount.

15. Regarding "pain and suffering", Counsel submitted that the deceased died on the spot and that "pain and suffering" was therefore not prolonged before he succumbed, that the trial Magistrate, while relying on the case of Premier Dairy Limited vs Amarjit Singh Sagoo &Another [2013] eKLR, did not mention whether the deceased in that case died on the spot and also that the award made for "pain and suffering" was not appealed against. He further submitted that it is a generally accepted principle that very nominal damages will be awarded for "pain and suffering" if death followed immediately after the accident and cited the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR. He argued further that trial Magistrate erred by awarding Kshs75,000/- which is on the higher side. According to him, an award of Kshs 10,000/- would have been sufficient.

16. On "loss of expectation of life", Counsel submitted that the deceased died at the age of 68 years, that he was an old man who had already lived his life to an advanced age and that additionally, he died on the spot. He faulted the trial Magistrate for awarding Kshs 100,000/- and urged that an award of Kshs50,000/- would have been adequate. He cited the case of West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [20191eKLR

17. On "loss of dependency", he submitted that "dependency" is a question of fact which must be proved and cited the case of Chania Shuttle vs Mary Mumbi (Suing on behalf of the estate of Francis Mungai Karanja (deceased) (2017) eKLR. He submitted further that although the Respondents averred that the deceased was married, no documentary evidence was produced in support thereof, no birth certificates were produced to show that the 9 children alleged to belong to the deceased actually existed and depended on him and that therefore, the Respondents failed to prove dependency. According to him, there was also no proof of the income earned by the deceased and . He then cited the case of Voi Pleasant View School Limited v Rose Mutheu & another [2017] eKLR and submitted that the trial Magistrate erred by awarding damages for loss of dependency which was not justified as it was not based on any evidence and that it is possible that the deceased was himself a dependant and/or had no children depending on him.

Respondents' Submissions

18. On the issue of liability, Counsel for the Respondents cited the case of Re H and Others (Minors) [1996] AC 563 and the case of Miller vs. Minister of Pensions (1947) 2 ALL ER 372 and averred that the Respondents proved their case on a balance of probabilities. He submitted that the evidence of PW1 was to the effect that both motor vehicles were headed towards the same direction when the van rammed into the rear part of the tractor causing it to overturn and land on a ditch and that it was also his evidence that the driver of the van was charged with causing death in Eldoret Traffic Case

Number 386 of 2020. According to him, this evidence strongly pointed to negligence on the part of the Appellant's driver, that such negligence speaks for itself and can be inferred from the Police Abstract, the Occurrence Book (OB) Report and the evidence by PW1 that the van rammed into the "rear part of the tractor", and that under the doctrine of Res Ipsa Loquitor, the Appellant's driver was responsible for the death of the deceased. He cited the case of Emmanuel Wawole Mochawa v Harun Kariuki Kamande [2020] eKLR. Counsel contended further that the Learned Magistrate acted within the parameters of the law when she disregarded the Appellant's allegations that the driver of the tractor suddenly joined the lane of the van on grounds that the same had not been pleaded in the Defence, that it is trite law that parties are bound by their pleadings, that the Appellant dedicated a whole paragraph to outline the particulars of negligence in the Defence but made no mention on the allegation that the tractor suddenly joined the van's lane. He cited the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR. He also submitted that in the absence of any explanation by the Appellant refuting the Respondents' evidence, the trial Court was right to infer that the accident was caused solely by the negligence of the Appellant's driver.

19. On quantum, regarding the limits for an Appellate Court to interfere with an award of damages, Counsel cited the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited]2015] eKLR. On "pain and suffering", Counsel denied that the award of Kshs 75,000/- for was excessive in the and cited, as a comparable award, the case of Premier Dairy Limited vs. Amarjit Singh Sagoo & Another [2013] eKLR. On "loss of expectation of life", he also denied that the award of Kshs 100,000/- was excessive and submitted that it is the generally accepted figure. He cited the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR.

20. On "loss of dependency", Counsel cited Section 4(1) of the *Fatal Accidents Act* to the effect that "dependants" of the deceased are entitled to compensation. He submitted that during the trial, the 2nd Respondent (PW2) who is the wife of the deceased testified in proof of such dependency and stated that they have 9 children, that the deceased was the sole breadwinner of the family and that as a result of his sudden death, the family had suffered immense loss and also that the deceased supported some of the children who were still school-going by paying for their school fees and basic necessities and that the Respondents produced a letter from the Chief which proved the above matters. According to him therefore, "dependency" was proved. Counsel further submitted that the 2nd Respondent (PW2) also testified that the deceased used to drive tractors and would be paid for doing so, that the nature of such employment was informal and thus difficult to prove income thereof through production of receipts or pay-slips, but that this does not curtail the Court from awarding damages He cited the case of Sivaram Enterprises & Another -Vs-Samuel Nyachani [2015] eKLR and also the case of Jacob Aviga Maruja & Another -Vs-Simeane Obavo, Civil Appeal No. 107 of 2002. He also cited the case of John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR, in which, he submitted, the Court adopted the global sum method in arriving at the amount of damages payable to the estate of a deceased who died at the age of 61 years, thus past the age of employment. He therefore maintained that the award of Kshs 500,000/- was reasonable and just.

Determination

21. Being a first appeal, the Court is guided by principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " ... this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily

to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.

22. I find the issues that arise for determination herein to be the following;

    i. Whether the finding of liability at 100% against the Appellant was justified.

    ii. Whether the awards for "loss of dependency", "pain and suffering", "loss of expectation of life", and "special damages" were proper and/or justified.

23. I now proceed to analyse and answer the issues.

i. Whether the finding of liability at 100% against the Appellant was justified

24. That the accident alleged herein as involving the Appellant's van and the tractor driven by the deceased occurred on 28/3/2019 is not in dispute. Similarly, that the death of the deceased occurred on the same date and resulted from the said accident is also not disputed. The question is who was to blame for the accident. In Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663 Lord Reid reasoned that:

> " To determine what cause an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law, this question must be decided as a properly instructed and reasonable jury would decide it ..... The question must be determined by applying common sense to the fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."

25. The Appellant has faulted the trial Magistrate for applying the doctrine of res ipsa loquitor. Regarding the applicability of the doctrine, in the case of Catherine Wangechi Wariah (Suing as the administrators of the estate of late James Mwambiriro Njeri) versus Meridian Hotel Ltd [2016] eKLR, the Court held as follows:

> " The effect of properly invoking the maxim of res ipsa loquitor shifts the burden of proof to the Defendant to show that the accident did not occur due to its negligence. In law, the court can infer negligence from the circumstances of the case in which the accident occurred ... In the book of Winfield and Jolowiz on tort 17th Edition the learned author wrote;
>
> > " This had traditionally been described by the phrase Res Ipsa Loquitor the thing speaks for itself...its nature was admirably put by Morris L.J when he said that it;
> >
> > Possesses no magic qualities, nor has it any virtue, order than that of brevity, merely because it is oppressed in latin. When used on behalf of a plaintiff, it is generally a short way of saying;
> >
> > I submit that the facts and circumstances which I have proved establish a prima facie case of negligence against the Defendant ... there are certain happenings that

do not normally occur in the absence of negligence and upon proof of these a court will probably hold that there is a case to answer ...."

" There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in absence of explanation by the Defendants that the accident arose from want of care..."

26. Similarly, in Nandwa v. Kenya Kazi Ltd (1988) KLR, 488, the Court of Appeal stated that:

" In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."

27. Further, in the case of Virginia Njeri & another v Joseph Njenga [2020] eKLR, Ngugi (Prof) J (as he then was) held as follows:

" 16. It is important to recall that the doctrine of Res ipsa loquitur is a legal rule that lets plaintiffs avoid proving specific negligence when they can show that the type of accident speaks of the defendant's negligence. It assesses liability in the absence of clear evidence of what went wrong. The Courts allow Plaintiffs this facility out of realization that some accidents are usually caused by negligence. Consequently, when the Plaintiff brings his case within the doctrine, the Court infers negligence from the accident's very occurrence.

17. However, for the doctrine to apply, two conditions must be satisfied. First, it must be shown that the accident is one that ordinarily would not occur in the absence of negligence. This is what allows the plausibility of the inference: if the inference is far-fetched, then the doctrine does not apply. Second, the doctrine does not apply unless it can be demonstrated that the Defendant was in exclusive control of the agency that caused the injury. This refers to the extent to which the Defendant participated at the scene of the accident. If the Defendant had exclusive agency that caused the accident, and the accident is one that ordinarily would not occur in the absence of negligence, then by operation of the doctrine of res ipsa loquitur, the Defendant would be liable for the accident unless he offered an explanation other than negligence."

28. As aforesaid, by consent of the parties, the testimonies of witnesses in Eldoret CMCC No. 105 of 2020 were adopted to apply in the suit the subject hereof but strangely, neither of the parties supplied this Court with a copy of the proceedings in which those other witnesses testified. This Court is therefore denied the full material to enable it to make an accurate assessment on the issue of liability. However, upon reading the pleadings, submissions by the parties and the Judgment of the trial Court, it is clear that the undisputed evidence was that both the motor vehicles were headed towards the Eldoret direction when the Appellant's van rammed into the rear of the tractor driven by the deceased causing the tractor to overturn and then land in a ditch. There was an allegation that the Appellant's driver was charged in Eldoret Traffic Case No. 336 of 2020 for causing the accident and which case was still pending determination.

29. It is also evident that the counter-testimony of the Appellant's driver was that on 28/3/2019 at around 8:40 pm, he was lawfully driving the said van along the Nairobi- Eldoret Road when at Choma zone area, the tractor driven by the deceased suddenly joined the road. I deduce that his testimony was that he was moving at a speed of 50 km/hr and that the tractor, which was off the road on the left side suddenly joined the road without any warning and also that it had no lights. His further version was that he tried to avoid the accident by swerving onto his right side but that unfortunately, his van hit the tractor on the right tyre as it was too close. He also testified that his motor vehicle was inspected and found to have no defects and he also denied that he was charged with offence of causing the accident.

30. From the said testimonies, it is my considered view that there were reasonable grounds to blame the Appellant's driver. As much as the Appellant's driver blamed the deceased for suddenly joining the road without any indication and also alleging that the tractor had no lights, that piece of testimony fell afoul of the rule that parties are bound by their pleadings. This is because I note that these allegations were never at all pleaded in the Defence. Further, no evidence whatsoever was tendered before the trial Court to support the assertions. Unless clear and convincing evidence is tendered, a driver who rams into another vehicle from the rear would prima facie be the one to blame. Further, although the Appellant's driver alleged that he was driving at the speed of 50 km/h, that allegation sounds untrue. The evidence is that the impact of the tractor being hit from the rear by the van violently and with substantial force threw the deceased out of the tractor causing him to land on the ground. Considering the extent of the injuries suffered by the deceased as captured in the post-mortem Report, it is obvious that the van could not have been moving at such low speed of 50 km/h to cause such impact. In the circumstances, I find no grounds to fault the Learned Magistrate's findings on liability, including the reliance on the Res Ipsa loquitur doctrine.

ii. Whether the awards for "loss of dependency", "pain and suffering", "loss of expectation of life" and "special damages" were proper and/or justified

31. It has long been held that, except in the limited instances permitted, an appellate Court should not easily interfere with exercise of discretion by a trial Court in its award of damages.. In Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.m. Lubia and Olive Lubia [1985] Kneller. J.A, stated:

> " 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 ....."

32. The question therefore is whether, in this case, this Court should interfere with the damages awarded by the trial Court. As stated above, the discretion in assessing general damages payable will only be disturbed if it is found that the trial Court erred in the manner set out above.

33. Regarding "pain and suffering", the awards are usually nominal but each case must be determined on its own merits. In the persuasive case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the Court observed as follows:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The

conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

34. In this case, the deceased died on the same date of the accident and presumably, on the spot. Before the trial Court, the Respondents proposed a sum of Kshs 10,000/- while the Appellant proposed Kshs 100,000/-. My review of awards for "pain and suffering" in instances where the deceased dies on the spot reveals that majority of the awards by the Courts range in the region of about Kshs 20,000/- to 50,000/-. This is in consideration of the fact that there would be no prolonged distress or torture on the part of the deceased before death. Although therefore the amount of Kshs 75,000/- awarded appears slightly on the higher side, it cannot be described as manifestly excessive or inordinately too high to the extent that it would merit a review by this Court. I therefore decline to interfere with it.

35. On the award of "loss of expectation of life" at the sum of Kshs 100,000/-, Counsel for the Appellant faulted the trial Magistrate for failing to take into account that the deceased was an old man who had fully lived his life. I note while the Respondents had, before the trial Court, proposed an award Kshs 100,000/-, the Appellant proposed a figure of Kshs 50,000. From my own review of comparable and recent authorities, I find that majority of the awards by the Courts range in the region of about Kshs 80,000/- to Kshs 150,000/-. The trial Magistrate having awarded Kshs 100,000/-, I do not find that amount to be manifestly excessive and in turn, I find no fault on his part in awarding that amount.

36. On "loss of dependency", the Appellant has faulted the trial Magistrate for making an award under this head because, according to him, "dependency" was not proved and further, that there was no proof of the income earned by the deceased. Section 4(1) of the Fatal Accident Act, recognizes a "dependant" as "wife, husband, parent and child" of the deceased. I note that PW2 testified that the deceased was her husband with whom they had 9 children, that the deceased was the sole bread winner of the family and that he supported their children by catering for their school fees and basic necessities. There was also in evidence, the letter dated 4/10/2019 from the Assistant Chief, Tulwet Sub-location confirming the above matters. All the said matters were never controverted in any way. I therefore do not agree with the Appellant's argument that it was not proved that the deceased had dependants.

37. Regarding proof of the income earned by the deceased, PW2 testified that the deceased was a driver which fact was also corroborated by the death certificate. The Courts have taken the position that proof of earnings is not limited to production of documents and certificates. As was held in the case of Jacob Ayiga Vs Simon Obayo (Suing as personal representatives of the Estate of Thomas Ndaya Obayo) (2005) eKLR, to hold otherwise would do injustice to a lot of Kenyans who are illiterate and a big number whose employers have never issued them with any employment records.

38. It is however also true that in this case, the amount of the earnings made by the deceased was never ascertained and for this reason, the trial Court adopted the "global sum" approach as opposed to the "multiplier" method. On this issue, in the case of Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR, the Court 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."

39. Similarly, Mabeya J in the case of Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR, stated as follows:

> "(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."

40. It is therefore evident that the principle advanced in the said cases and in many others, which I have not necessarily also cited, is that the "multiplier" approach should only be adopted in cases where there is satisfactory proof of the monthly income earned by a deceased person. The income earned by the deceased not being ascertainable therefore, the trial Magistrate properly adopted the "global sum" approach in this case. In any event, neither of the parties has taken issue with the trial Magistrate's said choice.

41. Regarding global awards for "loss of dependency" made in comparable authorities by different Courts, I take notice of the following decisions:

    a. In Shalom Transporters v Omare & another (Suing as the legal representatives of the Estate of Martha Moraa); Nyamo Investment & another (Third party) (Civil Appeal 4 of 2020) [2023] KEHC 27267 (KLR) (27 November 2023) (Judgment, Gikonyo J, in an Appeal, upheld a global award of Kshs 800,000/- where the deceased was 60 years.

    b. In John Wamae & 2 others v Jane Kituku Nziva & another [2017] eKLR, L. Njuguna J, in an appeal, awarded a global sum of Kshs 400,000/- where the deceased was aged 61 years.

    c. In Dora Mwawandu Samuel (Suing on her behalf and on the behalf of the Estate of Samuel Muweliani Jumamosi (Deceased) vs Shabir M. Hassan [2021] eKLR, Njoki Mwangi J, in an appeal, upheld a global sum of Kshs 400,000/- where the deceased was aged 59 years.

42. Considering that in this matter the deceased was aged 68 years at the time of his death, in view of the foregoing authorities, it is clear that the global award of Kshs 400,000/- made by the trial Magistrate was well within the margins awarded in comparable cases and cannot at all be termed manifestly excessive or inordinately high.

43. The award for "special damages" at Kshs 136,000/- was not challenged and as such, I will not disturb the same.

Final Orders

d. The upshot of the above is that this Appeal lacks merit and is dismissed in its entirety with costs to the Respondents

DELIVERED, DATED AND SIGNED AT ELDORET THIS 4TH DAY OF OCTOBER 2024.

.....

WANANDA J.R. ANURO

JUDGE

Delivered in the presence of:

Ms Nyabuto for Appellant

Ms Lugwe for Respondent

Court Assistant: Brian Kimathi