Mwanzia & another (Suing on their behalf and on behalf of the Estate of the Late Sammy Mwanzia) v Agility Logistics & another (Civil Appeal E037 of 2020) [2023] KEHC 2 (KLR) (4 January 2023) (Judgment)

Neutral citation: [2023] KEHC 2 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E037 OF 2020

OA SEWE, J

JANUARY 4, 2023

BETWEEN

JENNIFER NZILANI MWANZIA ..... 1ST APPELLANT

JULIUS MUTINDA ..... 2ND APPELLANT

SUING ON THEIR BEHALF AND ON BEHALF OF THE ESTATE OF THE LATE SAMMY MWANZIA

AND

AGILITY LOGISTICS ..... 1ST RESPONDENT

EDITH KIGEN JEPKOSGEI ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. Muchoki, RM, delivered on 8th December 2020 in Mombasa CMCC No. 1602 of 2017)

JUDGMENT

1. The two appellants, Jennifer Nzilani Mwanzia and Julius Mutiso Mutinda, sued the two respondents, Agility Logistics and Edith Kigen Jepkosgei, in Mombasa CMCC No. 1602 of 2017, seeking general and special damages under the *Law Reform Act*, chapter 26 of the Laws of Kenya, and the *Fatal Accidents Act*, chapter 32 of the Laws of Kenya. They also prayed for interest and costs of the suit. The 1st appellant is the widow of the deceased. Jointly with the 2nd appellant, they brought the suit as the administrators of the estate of Sammy Mwanzia (the deceased).

2. Their cause of action was that, on or about the December 10, 2015, the respondents, through their authorized drivers, servants and/or agents, so negligently managed, controlled and/or drove Motor Vehicles Registration Numbers KBH 896V/ZC0614 and KBR 758A/ZD8025, respectively, such that

they rammed into Motor Vehicle Registration No. KBR 909J, which was then being driven by the deceased, Sammy Mwanzia.

3. Particulars of negligence were supplied by the appellants at paragraph 4 of their Plaint dated February 20, 2017. Likewise, particulars pursuant to the requirements of the applicable statutes were furnished at paragraph 5 of the Plaint. Those particulars are to the effect that the appellants brought the action, not only on their own behalf, but also on behalf of the dependants of the deceased; the majority of whom were minors at the time. And, at paragraph 6 of the Plaint, the appellants averred that, at the time of his demise, the deceased was aged 43 years, and that he was healthy and energetic, with bright prospects in life. Thus, they asserted that, by reason of his death, the appellants and the other dependants of the deceased suffered loss, for which they sought recompense in damages.

4. The record of the lower court shows that the 1st respondent resisted the claim and filed a defence on January 8, 2018. At paragraph 3 thereof, the 1st respondent averred that the appellants had no cause of action due to the fact that the accident was occasioned by the deceased's own negligence, in that he veered off his lane and rammed into the 1st respondent's motor vehicle; which collision then involved the 2nd respondent's motor vehicle, which was behind the 1st respondent's motor vehicle. Accordingly, the 1st respondent denied the allegations of negligence levelled against it by the appellants and posited that the deceased was the author of his own misfortune.

5. The record further shows that the 2nd respondent opted not to defend the suit. Hence, at the instance of the appellants, interlocutory judgment was entered against her on November 8, 2018. On the basis of the evidence presented before it by the parties, the lower court found that negligence had not been proved against the respondents; and that the deceased was to blame for the accident. He accordingly dismissed the appellant's suit, with costs to the 1st respondent.

6. Being aggrieved by the decision of the lower court, the appellants filed this appeal on December 21, 2020 on the following grounds:

    (a) That the learned magistrate misdirected himself in law and principle by dismissing the appellants' suit on the grounds that the appellant did not prove the claim on a balance of probabilities and in so doing failed to consider that:

        (i) the investigations by the police officers were marred with incurable irregularities and hence the finding that Motor Vehicle Registration No. KBR 909J driven by the deceased was 100% to blame for the accident was not supported by credible facts;

        (ii) The investigations by the private investigator hired by the insurance company were marred with incurable irregularities having interviewed witnesses who never recalled the events of the accident and hence the finding that Motor Vehicle Registration No. KBR 909J driven by the deceased was 100% to blame was not supported by credible facts;

        (iii) The fact that the accident involved three drivers who had equal responsibility to avoid the accident and hence the deceased as the driver of Motor Vehicle Registration No. KBR 909J could not be held 100% liable for the accident;

        (iv) The contradicting contents of the private investigator's report as pointed out during the trial and submissions which were never considered in the judgment.

    (b) That the learned magistrate erred in law and in fact by failing to make any orders in respect of the 2nd respondent despite having entered interim judgment against the 2nd respondent.

(c) That the learned magistrate erred in law and in fact by failing to address the issue of quantum payable to the appellants.

7. Thus, the appellants prayed for orders that their appeal be allowed and that the judgment and decree of the lower court dated December 8, 2020 be set aside; and that judgment be entered for them and liability apportioned accordingly. They also prayed that the quantum of damages payable be determined by the Court; and that the costs of the appeal be borne by the respondents.

8. The appeal was urged by way of written submissions, pursuant to the directions given herein on February 8, 2021. Consequently, the appellants' written submissions were filed on March 29, 2022. Mr. Kariuki for the appellants thereby proposed two issues for consideration, namely:

(a) Whether Motor Vehicle Registration No. KBR 909J was wholly to blame for the accident;

(b) whether the learned magistrate erred in principle in failing to assess the quantum of damages payable.

9. According to Mr. Kariuki the investigations leading to the conclusion that the deceased was solely responsible for the accident were marred with incurable irregularities and therefore misleading. He urged the Court to note that the 1st appellant was not at the scene at the time of the accident and that the police officer who testified as PW2 before the lower court was not the investigating officer. He further pointed out that no sketch plan of the scene was ever taken or produced to assist the lower court in making a fair determination in the matter before him, especially as to the point of impact. In this regard, Mr. Kariuki relied on *Equator Distributors v Joel Muriu & 3 others* [2018] eKLR to augment his argument that sketch plans, though prepared after the even, have some probative value.

10. While pointing out that the only survivor of the accident and probably the only eye witness was the turn-boy in Motor Vehicle Registration No. KBR 909J, counsel for the appellants expressed concern that no efforts were made by the investigating officer to record his statement before he died. In his view, the turn-boy could have been interviewed and his statement recorded in time had the investigating officer exercised due diligence in his investigations.

11. Further to the foregoing, Mr. Kariuki faulted the decision of the lower court by pointing out that it admitted the investigations report prepared and signed by one Mike Munywoki without calling the maker; and that even then, the people who were interviewed by Mr. Munywoki could not recall what happened at the time of the accident. Counsel thought it was significant that the 1st respondent's driver was served with a Notice of Intended Prosecution. He therefore posited that, in those circumstances, liability ought to have been apportioned. Thus, it was the submission of Mr. Kariuki that the conclusion of the investigating officer fixing blame for the accident on the deceased was flawed, in that key witnesses were not involved. He relied on *Hussein Omar Farah v Lento Agencies* [2006] eKLR; *Isaac Onyango Okumu v James Ayere & another* [2019] eKLR and *Equator Distributors v Joel Muriu & 3 others* (*supra*) for the proposition that, if there is no concrete evidence to determine who is to blame between two drivers then both should be equally to blame, and urged the Court to so find.

12. Mr. Kariuki also impugned the decision of the lower for failing to apportion liability to the 2nd respondent, in respect of whom interlocutory judgment had been entered. He pointed out that, although the 2nd respondent entered appearance before the lower court, she failed to file a Defence. He therefore took the view that it was a misdirection for the lower court to dismiss the appellants' case against the 2nd respondent without setting aside the interlocutory judgment.

13. On quantum, Mr. Kariuki submitted that the lower court erred in failing to assess the quantum that would have been payable to the estate of the deceased, had he found in favour of the appellants. He then proceeded to make submissions for consideration under the heads of pain and suffering, loss of expectation of life, and loss of dependency. In addition, Mr. Kariuki proposed an award, under special damages for funeral expenses in the sum of Kshs. 80,000/=. Thus, counsel prayed for an award in the total sum of Kshs. 2,476,400/= and left it to the Court to apportion liability amongst the three drivers.

14. On her part, Ms. Vanani for the 1st respondent relied on her written submissions filed on 12th April 2022. She defended the decision of the learned magistrate contending that the appellants utterly failed to prove negligence against the respondents. She pointed out that, from the evidence of the police officer, called by the appellants themselves as their PW2, it was plain that the deceased was to blame for the accident and therefore the author of his own misfortune.

15. Counsel made reference to various precedents to buttress her arguments on liability and urged the Court to find that no basis has been laid to support the assertion by counsel for the appellants that the investigations were marred with incurable irregularities. Similarly, Ms. Vanani submitted that there was no basis upon which liability could be founded as against the 2nd respondent; and therefore that it was immaterial, in the circumstances that interlocutory judgment had been entered against her.

16. In respect of ground 3 of the appellant's grounds of appeal, Ms. Vanani conceded that the lower court ought to have assessed the damages payable but omitted to do so. She pointed out that in their submissions before the learned magistrate, they addressed the issue of quantum substantively and pointed out that the lower court was expected to assess damages even when the ultimate decision was to dismiss the suit. She therefore reiterated their submissions in that regard and invited this Court to proceed and assess the damages. In her view, an award of Kshs. 800,000/= would suffice as general damages. She relied on HCCC No. 4708 of 1989: *Grace Kanini Muthini v KBS Limited & another* for the applicable principles, which I will revert to shortly.

17. This being a first appeal, it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions in respect of the disputation; while giving due consideration for the fact that it did not have the advantage of seeing or hearing the witnesses. This is in line with *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 wherein it was held that:

> ...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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

18. A similar approach was adopted by the Court of Appeal in *Wambaira & 17 others v Kiogora* [2004] eKLR and *Mwanasokoni v Kenya Bus Services* [1985] eKLR which counsel for the 1st respondent brought to the Court's attention. Thus, I have perused the proceedings of the lower court and noted that the 1st appellant testified on October 28, 2019 as PW1. She told the lower court that the deceased, Sammy Mwanzia, was her husband and that he was 43 years old when he died in a road traffic accident on December 10, 2016.

19. The 1st appellant conceded that she did not know how much the deceased was earning per month and added that she was left with 5 children to take care of. The 1st appellant produced Certificates of Birth in respect of her children, among other documents, in proof her claim. In cross-examination, the 1st

appellant explained that the deceased was employed by Midland Tyres in Nairobi as a driver and that he would pay house rent for the family.

20. The appellant's second witness was Cpl. Everlyne Oturi (PW2), a police officer based at Changamwe Police Station at the time. She attended court on behalf of her colleague Cpl. Dida, who was the investigating officer in the traffic matter, and explained that Cpl. Dida had since been transferred to Bamburi Police Station. She testified on the basis of the information gleaned from the documents on the police file and told the lower court that the investigating officer's conclusion was that the deceased was to blame for the accident since he carelessly overtook other motor vehicles at high speed. She produced the Police Abstract as the Plaintiff's Exhibit 8 before the lower court.

21. On behalf of the 1st respondent, Alex Muiruri Mzerobi (DW1) testified on 5th October 2020. He too attended court on behalf of a colleague and produced an accident investigation report compiled by Risko Surveyors & Assessors as the Defendant's Exhibit No. before the lower court. He explained that the author of that report, Mike Munyoki, had since died. The report was accordingly admitted pursuant to section 35 of the *Evidence Act*.

22. In the light of the foregoing summary of evidence, there is no dispute that a road traffic accident occurred on December 10, 2015 at Raffia Bags Area on the Nairobi-Mombasa Highway. The accident involved three motor vehicles, namely, Motor Vehicle Registration No. KBR 909J then driven by the deceased, Sammy Mwanzia; Motor Vehicle Registration No. KBH 896V/ZC0614 belonging to the 1st respondent and Motor Vehicle Registration No. KBR 758A/ZD 8025 belonging to the 2nd respondent. It is common ground that deceased died on the spot while his turn-boy died some time thereafter. The accident was reported to Changamwe Traffic Base and investigations undertaken under the charge of Cpl. Dida as the investigating officer.

23. From the testimony of PW2, the conclusion reached by the investigating officer, and which the lower court accepted as true, was that the deceased was responsible for the accident. The appellants have vehemently refuted that conclusion; and therefore the issues for determination in this appeal are:

    (a) Whether the deceased, as the driver of Motor Vehicle Registration No. KBR 909J, was wholly to blame for the accident; and,

    (b) Whether the learned magistrate erred in principle in failing to assess the quantum of damages payable.

[a] Whether the deceased, as the driver of Motor Vehicle Registration No. KBR 909J, was wholly to blame for the accident:

24. Needless to say that it is not sufficient that an accident occurred involving the three motor vehicles aforementioned in which the deceased died. The appellants, as the plaintiffs before the lower court, were obliged to prove a link between that accident and the allegations of negligence made by them at paragraph 4 of their Plaint. As was observed by the Court of Appeal in *Kiema Mutuku v Kenya Cargo Hauling Services Ltd* [1991] 2KAR 258:-

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

25. The same position was reiterated in *Statpack Industries v James Mbithi Munyao* [2005] eKLR thus:

> It is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which on a balance of probability, a connection between the two may be

drawn. Not every injury is necessarily as a result of someone's negligence. An injury per se is not sufficient to hold someone liable."

26. In this regard, PW2, a police officer who was one of the appellant's witnesses, testified that:

> ...on the particular day and time the driver to KBR 909J was driving from Nairobi headed to Mombasa and on reaching the location of the accident, he tried to overtake a motor vehicle ahead of him and in the process hit motor vehicle KBH 896V which was heading to the opposite direction on the axle tyres.
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> He lost control and swerved to the left side and before returning to his lane he collided head on collisions with motor vehicle registration KBR 750A/ZD 802J which was also heading to the opposite direction. As a result of the impact the driver of KBR 909J Sammy Mwanzia succumbed to the injuries on the spot."

27. Considering that PW1 was not at the scene and therefore could not prove any of the particulars of negligence set out at paragraph 4 of the Plaint, it is plain that there was no basis upon which the lower court could find the respondents liable or apportion liability to them. Indeed, in *Stapley v Gypsum Mines Ltd* (2) [1953] A.C. 663 at p. 681, Lord Reid had the following to say, which has been quoted with approval by the Court of Appeal in *Michael Hubert Kloss & another v David Seroney & 5 others* [2009] eKLR

> To determine what caused 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 facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one 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 caused the accident. I doubt whether any test can be applied generally."

28. It was therefore imperative, in a case such as the instant one where negligence was alleged, for credible evidence to be availed in proof thereof. In the absence of such proof as was the case herein, it is my finding that the decision arrived at by the trial magistrate on liability is justified in the circumstances and is hereby upheld. Indeed, as was observed by Sir *Kenneth O'Connor in Peters v Sunday Post Limited* [1958] EA 424:

> It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."

29. Counsel for the appellants made heavy weather of the fact that although interlocutory judgment was entered herein against the 2nd respondent it did not count for anything. He therefore questioned why lower court did not apportion liability to the 2nd respondent on the basis of the interlocutory judgment.

First and foremost, "interlocutory judgment" is defined by *Black's Law Dictionary*, 11th Edition at page 1008 as: -

> An intermediate judgment that determines a preliminary or subordinate point or plea but does not finally decide the case.
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> • A judgment or order given on a provisional or accessory claim or contention is generally interlocutory..."

30. Hence, order 10 rule 6 of the *Civil Procedure Rules*, provides:

> Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and any defendant fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the court of the damages or the value of the goods and damages as the case may be.

31. Likewise, order 10 rule 7 of the *Civil Procedure Rules* states:

> Where the plaint is drawn as mentioned in rule 6 and there are several defendants of whom one or more appear and any other fails to appear, the court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against the defendant failing to appear, and the damages or the value of the goods and the damages, as the case may be, shall be assessed at the same time as the hearing of the suit against the other defendants, unless the court otherwise orders.

32. Rule 10 of Order 10 makes it clear that the provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence. Hence, whereas the 1st respondent entered appearance and filed a defence, the 2nd respondent only filed a Memorandum of Appearance dated 3rd January 2018. She had 14 days to file her Defence but opted not to. Accordingly, by dint of Rule 7 aforementioned, the matter had to proceed to hearing and assessment of damages done at the same time as the hearing of the suit against the 1st defendant. As no such orders were made by the learned magistrate, the case against the 2nd defendant was rightly determined in a final sense at in the same judgment as that of the 1st respondent.

33. I find succour in this conclusion in the case of *Josphat Muthuri Kinyua & 5 others v Fabiano Kamanga M'etirikia* [2021] eKLR in which it was held: -

> ...When there is some other aspect of the claim besides the claim for pecuniary damages, as a claim for negligence, the Court will have to consider such a claim on the merit and satisfy itself that the same has been proven through 'formal proof' proceedings before proceeding to assess damages. This is the course adopted in Mwatsahu vs Maro, Civil Case No. 74 of 1996 (1967) EA 42, a case of pecuniary damages for breach of warranty of title which the Court (Harris J) found the registrar could not enter judgment in default of the defence.
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> 20. The Court does not therefore find that the entry of interlocutory judgement absolved the Appellants from proving liability by way of hearing in Court. This Court thus finds that despite omission by the Respondent to file a defence in the matter, the Court was still required to have the matter heard with respect to liability, in addition to the question of assessment of damages..."

34. Similarly, in *Samson S. Maitai & another v African Safari Club Ltd & another* [2010] eKLR, Emukule J observed: -

> ...I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meaning - refers to being "methodical" according to rules (of evidence). On the other hand, according to *Halsbury's Laws of England*, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."

35. Accordingly, in *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court held: -

> In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.

36. The Court of Appeal took the same posturing in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR thus:

> ...The fact that the respondent admitted liability *ab initio* does not in any way shift the burden of proof from the appellants. It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side. see Mwangi Muriithi (*supra*) and *Mumbi M'Nabea v David Wachira* Civil Appeal No 299 of 2012.
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> In *Romauld James v AGT* [2010] UKPC Lord Kerr at paragraph 13 cited a passage from the judgment of Kangaloo JA in the same case. It has some bearing both on the present issue and the next, to which we will turn directly. Kangaloo JA said:
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> [28]. In my view, it does not lie in the mouth of the appellant to say that he is not obliged to place evidence of damage suffered before the constitutional court before liability is determined. I say so because it must first be shown that there has been damage suffered as a result of the breach of the constitutional right before the court can exercise its discretion to award damages in the nature of compensatory damages to be assessed. If there is no damage shown, the second stage of the award is not available as a matter of course. It is only if some damage has been shown that the court can exercise its discretion whether or not to award compensatory damages. The practice has developed in constitutional matters in this jurisdiction of having a separate hearing for the assessment of the damages, but it cannot be overemphasized that this is after there is evidence of the damage. In the instant case there

is no evidence of damage suffered as a result of the breaches for which the appellant can be compensated...."

37. It is plain therefore that the submission by Mr. Kariuki, that the 2nd respondent ought to have been held liable on the basis of the interlocutory judgment is misguided. The lower court was correct in proceeding with the hearing of the matter and determining the same on the basis of the evidence presented before him. In the end, he arrived at the conclusion, and correctly so in my view, that the appellant had not proved their case against the respondents.

[b] Whether the learned magistrate erred in principle in failing to assess the quantum of damages payable:

38. On quantum, it is evident that the lower court failed to assess the quantum of damages he would have otherwise awarded, had he found for the appellants. Counsel for the 1st respondent conceded that this was a misdirection. The obligation by a court of first instance to assess damages that would have otherwise been payable, even where liability is not established, cannot be overemphasized. This obligation was restated by the Court of Appeal in *Andrew Mwori Kasaya v Kenya Bus Service* [2016] eKLR thus:

> ...the rationale or otherwise of assessing damages even where they are withheld by the trial court was succinctly set out by the court in *Mordekai Mwangi Nandwa v Ms Bhogals Garage Ltd* Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:
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> > "The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"
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> This principle has religiously been followed by the courts below..."

39. In the premises, I reiterate the expressions of Hon. Mabeya, J. in *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, that:

> It has been held time and again by the Court of Appeal that the court of first instance must assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

40. I have therefore given careful consideration to the submissions made by counsel for the parties. I note that, on pain and suffering, the appellants' counsel proposed an award of Kshs. 50,000/=. There appears to be no proposal under this head in the respondent's written submissions filed by Ms. Vanani. It is nevertheless settled that the guiding factor is the time that elapsed from the time of the accident

to the time of death. I agree therefore with the position taken by Hon. Majanja, J. in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR that:

> ... it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years..."

41. Similarly, in *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 that:

> 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."

42. Accordingly, my view is that an award of Kshs. 20,000/= for pain and suffering and Kshs. 100,000/= would have sufficed in this instance.

43. On loss of dependency, the approach taken in Chunibhai J. *Patel and another v P.F. Hayes and others* [1957] EA 748, by the Court of Appeal for East Africa, and which I find useful, was that:

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

44. The same principle was applied in *Grace Kanini Muthini v Kenya Bus Service Ltd* (*supra*) thus:

> The court must find out as a fact what the annual loss of dependency is, 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 fraction to be applied. Each case must depend on its facts. When a court adopts any fraction, that must be taken as its finding of fact in the particular case... The annual loss of dependency must be multiplied by a figure representing a suitable number of years of purchase. In considering that reasonable figure, commonly known as a multiplier, regard must be had to the personal circumstances of both the deceased and the dependants such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependants expectation of dependency. The chances of the life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand of 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 wisely invested, good returns can be expected."

45. There appears to be no dispute that the deceased was 43 years old. The 1st appellant produced a Certificate of Death before the lower court, which confirms this fact. She however did not know how much the deceased used to earn as a driver. Mr. Kariuki proposed that the minimum wage for a driver

in Mombasa of Kshs. 18,595/= be adopted as the multiplicand, along with a multiplier of 15 years and a dependency ratio of 2/3. He further urged the Court to take into consideration that the deceased was employed as a driver in the private sector and therefore could have worked beyond 60 years of age.

46. Where, as in this case, there was no proof of the deceased's monthly income, the best course would be for the lower court to award a global sum. In this regard, the decision of Hon. Ringera, J. in Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & another, (as quoted by Koome J., (as she then was) in *Albert Odawa v Gichimu Gichenji* [2007] eKLR), is instructive. The learned Judge took the view, with which I agree entirely, that:

> The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do."

47. Nevertheless, it is also the case that the minimum wage is often applied as a useful guide in such instances. The words of the Court of Appeal in Hellen Waruguru Waweru (*supra*) are apt in this connection:

> This Court has had occasion to contextualize the society in which we live in relation to the requirement for strict proof of damages. In the case of *Jacob Ayiga Maruja & another v Simeone Obayo* CA Civil Appeal No 167 of 2002 [2005] eKLR the Court observed:-
>
> > 'We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

48. On that account, I am prepared to hold, which I hereby do, that a multiplicand of Kshs. 18,595/=, being the minimum wage for a driver in Kenya would be reasonable. A multiplier of 15 years takes into account the vicissitudes of life and is therefore a better approach than the 10 years proposed by Ms. Vanani. It takes into consideration the possibility that a driver in the private section is more likely than not to work beyond the age of 60 years. It is further my finding that a dependency ratio of 2/3 would be justified, given the evidence of the 1st appellant that theirs was a young family that wholly depended on the deceased. I would accordingly work out the loss of dependency as at Kshs. 2,231,400/= made up as follows: Kshs. 18,595/= x 12 x 2/3 x 15.

49. As for special damages, the appellants claimed an amount of Kshs. 15,000/= but offered no proof thereof. It is trite that special damages must be specifically pleaded and proved. There being no proof of the special damage item, I would have awarded none, had the appellants succeeded in this appeal. There is also the claim for Kshs. 80,000/= as funeral expenses. The guidance given by the Court of Appeal in *Premier Dairy Limited v Amarjit Singh Ssagoo & another* [2013] eKLR is as hereunder:

> We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the 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."

50. Accordingly, a claim for funeral expenses ought to be allowed without specific proof. It is noteworthy however that the aforementioned amount of Kshs. 80,000/= was never specifically pleaded by the appellants, and therefore there would have no basis for awarding the same.

51. In the result therefore, the total amount due to the estate and dependants of the deceased, Sammy Mwanzia, would have been:

    Under the *Law Reform Act*:Pain and suffering - Kshs. 20,000/=Loss of expectation of life - Kshs. 100,000/=

    Under the *Fatal Accidents Act*Loss of dependency - Kshs. 2,231,400/=

    Total - Kshs. 2,351,400/=

52. In the result, having found that subordinate court committed no error to warrant the setting aside of its judgment, this appeal fails and is hereby dismissed. Given the plight of the 1st appellant, it is hereby ordered that each party shall bear own costs of both the appeal and of the lower court's proceedings.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 4TH DAY OF JANUARY 2023.

OLGA SEWE

JUDGE