



Bash Hauliers Limited v Wathuu & another (Suing on behalf of the Estate of Isaac Wahaba Gichuki - Deceased) & 2 others (Sued in their Capacity as the Administrators of the Estate of Willy Maingi Karaya - Deceased) (Civil Appeal E061, E062, E063 & E064 of 2021 (Consolidated)) [2023] KEHC 2386 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2386 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E061, E062, E063 & E064 OF 2021 (CONSOLIDATED)**

MW MUIGAI, J

MARCH 16, 2023

BETWEEN

BASH HAULIERS LIMITED APPELLANT

AND

RICHARD WAHABA WATHUU & PETER THUO WAHABA (SUING ON BEHALF OF THE ESTATE OF ISAAC WAHABA GICHUKI - DECEASED) 1ST RESPONDENT

FRANCIS KARAYA MAINGI 2ND RESPONDENT

LYDIA WAMBUA MAINGI 3RD RESPONDENT

SUED IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE OF WILLY MAINGI KARAYA - DECEASED

AS CONSOLIDATED WITH

CIVIL APPEAL E062 OF 2021

BETWEEN

BASH HAULIERS LIMITED APPELLANT

AND

RICHARD WAHABA WATHUU & PETER THUO WAHABA (SUING ON BEHALF OF THE ESTATE OF JAMES MWANGI WAHABA - DECEASED) 1ST RESPONDENT

FRANCIS KARAYA MAINGI 2ND RESPONDENT



LYDIA WAMBUA MAINGI 3RD RESPONDENT
SUED IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE OF
WILLY MAINGI KARAYA - DECEASED

AS CONSOLIDATED WITH
CIVIL APPEAL E063 OF 2021

BETWEEN

BASH HAULIERS LIMITED APPELLANT

AND

RICHARD WAHABA WATHUU & PETER THUO WAHABA (SUING
ON BEHALF OF THE ESTATE OF MONICA NJOKI WAHABA -
DECEASED) 1ST RESPONDENT
FRANCIS KARAYA MAINGI 2ND RESPONDENT
LYDIA WAMBUA MAINGI 3RD RESPONDENT
SUED IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE OF
WILLY MAINGI KARAYA - DECEASED

AS CONSOLIDATED WITH
CIVIL APPEAL E064 OF 2021

BETWEEN

BASH HAULIERS LIMITED APPELLANT

AND

RICHARD WAHABA WATHUU & PETER THUO WAHABA (SUING
ON BEHALF OF THE ESTATE OF FAITH MUKONYO MUTIO -
DECEASED) 1ST RESPONDENT
FRANCIS KARAYA MAINGI 2ND RESPONDENT
LYDIA WAMBUA MAINGI 3RD RESPONDENT
SUED IN THEIR CAPACITY AS THE ADMINISTRATORS OF THE ESTATE OF
WILLY MAINGI KARAYA - DECEASED

JUDGMENT

1. On August 28, 2008 around 2am, a road traffic accident occurred at Manyani along Nairobi-Mombasa road involving Motor Vehicle KBB 581P Toyota Corolla and Motor Vehicle KAW 755 M/ZC 6565 Mercedes Benz Semi trailer. The Motor Vehicle KBB 581P had six (6) occupants, five (5) adults and 1-year-old infant. They were James Mwangi Wakaba, Isaac Gichuki Wakaba, Monica Njoki Wakaba, Faith Mukonyo Mutio, Willy Maingu Karaya and Richard Wakaba Mwangi respectively.



- Unfortunately, all the five (5) adults died on the spot and leaving the infant as the only survivor, Richard Wakaba Mwangi.
2. As a result of this tragic road accident, the estate of the four deceased passengers' who are from one family, sued the Defendants' herein seeking similar orders;
 - i. General damages under the Fatal Accidents Act and the Law Reform Act
 - ii. Special Damages of Kshs.96,150
 - iii. Costs of the suit
 - iv. Interest thereon at court rates.
 3. Richard Wahaba Wathuu and Peter Thuo Wahaba are the Administrators in the estate of four of the deceased ; James Mwangi Wahaba, Isaac Gichuki Wahaba, Monica Njoki Wahaba and Faith Mukonyo Mutio, who are the Plaintiff's in the cases herein and the 1st and 2nd defendants are the administrators of the estate of Willy Maingi Karaya (deceased) while the 3rd defendant was the driver of the Trailer and the 4th defendant the owner of the Trailer
 4. The suits were initially filed at the Machakos High Court as HCCA 361, 362,363 and 364 of 2009 however pursuant to an order dated 3.10.2017, they were transferred to the Chief Magistrates court in Machakos and were allocated new case numbers being Machakos CMCC636,637,638 and 639 all of 2017.
 5. Subsequently, CMCC 639 of 2017 was selected as the test suit for determination of liability with the orders in the said case applying to the rest of the series being Machakos CMCC 636, 637 and 638 all of 2017.
 6. During the hearing, the witnesses testified in the test suit and the testimony was used to determine all the other suits.
 7. This appeal was filed by Bash Hauliers Limited who was the 4th Defendant in the Trial court.
 8. For purposes of appeal, noting that the matters arose out of one accident, the parties are the same, each record depending on the other, especially the test suit or evidence, testimonies, proceedings, submissions, the Appeals have been consolidated for ease of determination.

Trial Court Record

HCCA E061 of 2021

(Arising Out Of Machakos Cmcc 636 Of 2017)

Further Amended Plaint Dated October 19, 2017

9. The cause of action arose on August 28, 2008 when the deceased, a lawful passenger in Motor Vehicle KBB 581P when the 3rd defendant who is the 4th defendant's authorized driver, agent or servant so negligently drove, managed and controlled motor vehicle KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer causing it to violently collide with the 1st and 2nd defendant's motor vehicle KBB 518P at Manyani along Nairobi- Mombasa road.
10. It was averred that Willy Maingi (deceased) was the driver of motor vehicle registration number KBB 518P and the 3rd defendant was the registered owner of KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer.



11. The negligence of the 1st and 2nd defendant, their driver, agent, servant and assignee was particularized as follows;
 - i. Their authorized driver, agent, servant or assignee so negligently and recklessly drove motor vehicle KBB 581P thereby causing it to collide with the trailer hence occasioning fatal injuries to the deceased.
 - ii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to keep any proper look out and/or have sufficient regard for other road users.
 - iii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to observe highway code.
 - iv. Their authorized driver, agent, servant and assignee so negligently and recklessly failed stop, swerve, slow down or in any other way so to control and manage motor vehicle KBB 581 so as to avoid the said collision.
12. The negligence of the 3rd and 4th defendant were particularized as follows;
 - i. Failing to keep any or any proper look out or any sufficient regard to other road users particularly the deceased.
 - ii. Failing to control the said motor vehicle in time sufficient enough to keep the same from colliding with the 1st Defendant's motor vehicle
 - iii. Failing to exercise or maintain any or proper or effective control of the said motor vehicle
 - iv. Driving at an excessive speed.
 - v. Failing to observe highway code
 - vi. Failing to stop, swerve, slow down or in any other way so to control and manage motor vehicle KAW 755M/ZC 6565 so as to avoid the collision.
13. It was averred that as a result, Isaac Wahaba Gichuki sustained fatal injuries and died on the spot.
14. It was contended that at the time of his death, the deceased was 18 years old and full of life, he enjoyed good health, had vigorous and happy life with bright future prospects.
15. The Plaintiff's prayed for judgment to be entered as follows;
 - i. General damages under the Fatal Accidents Act and the Law Reform Act
 - ii. Special Damages of Kshs.96,150
 - iii. Costs of the suit
 - iv. Interest thereon at court rates

Statement Of Defence

16. The 1st & 2nd Defendant's amended Defense dated February 25, 2020 in which the 1st and 2nd Defendant denied the contents of the Plaint and averred that if the accident occurred, it was entirely the fault of the 4th Defendant authorized driver or servant or agent, Vincent Kariuki who was negligent in how he drove. They also indicated that they would rely on the doctrine of Res Ipsa Loquitor.
17. The negligence of the 4th defendant was particularized as follows;



- i. Failing to keep any proper look out.
 - ii. Failing to pay attention or take heed of the presence of motor vehicle registration number KBB 581 P on the said road.
 - iii. Driving at an excessive speed in the circumstances.
 - iv. Failing to stop, slow down and /or swerve to avoid the accident.
 - v. Failing to appreciate the proximity of motor vehicle KBB 581P on the said road.
18. The 3rd defendant filed a defense statement on January 13, 2010 essentially denying the contents of the Plaintiff and seeking to have it dismissed.
19. The 4th Defendant did not file a defense.

Trial Court Judgment

20. The court relied on the testimony of the witnesses in Machakos CMCC 639 of 2017 where the Plaintiff called one witness while the 1st and 2nd Defendants called the 1st Defendant as their witness.
21. Liability was found to be 25%/75 % for the 1st and 2nd Defendants as against the 3rd and 4th Defendants
22. On Quantum, in particular pain and suffering, the court found that the deceased died on the spot and awarded Kshs 30,000.
23. On loss of expectation of life, the Trial court awarded Kshs 150,000.
24. The deceased died at the age of 18 years old. The Trial court awarded a global award of Kshs 1,200,000 while relying on the case of J.N.K (Suing as the legal representative of the estate of MMM (deceased) vs Chairman Board of Governors ... Boys High School (2008) eKLR where a global award of Kshs 1,000,000 was given for a deceased minor aged 16 years old.
25. Special damages of Kshs. 96,150 was found to have been pleaded and proved.
26. The court awarded as follows;
- i. Pain and suffering Kshs 30,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 1,200,000
 - iv. Special Damages Kshs. 96,150
 - v. Costs
 - vi. Interest
- Total Kshs 1,476,150

Memorandum Of Appeal

27. Dissatisfied by this judgment, the Appellant filed this Appeal seeking the following orders;
- i. Spent



- ii. The Judgment and Decree of the Hon. Chief Magistrate Hon A.G. Kibiru delivered on 7th April 2021 with regard to the findings on liability and quantum (pain and suffering, loss of expectation of life, loss of dependency and special damages) be set aside in its entirety.
 - iii. The Respondents pay the costs of this appeal
 - iv. Such further or consequential orders as this Hon. Court deems fit.
28. The appeal is founded on the following grounds;
- i. That the learned magistrate erred in fact and law in failing to find that the 1st Respondents did not discharge their evidential burden of proof of their allegations as required under Section 107 of the Evidence Act thus arriving at an erroneous finding that the appellant was to blame for the accident.
 - ii. That the learned magistrate erred and misdirected himself in law and misapplied the Court of Appeal decision in the case of David Ochangu Orioki vs Ismael Nyasiemo & Charles Michieka Nyoungu (2019) e KLR thereby arriving at a wrong finding on liability between the Appellant and the 2nd & 3rd Respondents.
 - iii. That the learned magistrate erred in law by completely disregarding and/ or completely failing to consider the appellants submissions on apportionment of liability hence coming to an erroneous finding on liability of 25% as against the 2nd and 3rd respondents and 75% as against the appellant and in effect breaching the appellant's constitutional rights of access to justice and fair hearing.
 - iv. That the learned trial Magistrate erred in fact and law by failing to provide a basis for his award of Kshs 1,200,000 for loss of dependency in the circumstances.
 - v. That the Learned Trial Magistrate erred in awarding a sum in respect of damages which are punitive, excessive and/or inordinately high in the circumstances thus occasioning a miscarriage of justice.
 - vi. That the learned trial magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions of the Appellant which are binding upon the court vide the principle of judicial precedents and the doctrine of stare decisis
 - vii. That the Learned Trial Magistrate erred in fact and law by failing to consider all the averments made in the Appellant's pleadings in response to the plaint thereby reaching wrong conclusions of law and fact.
 - viii. That the Learned Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the 1st Respondents if ant and failed to apply precedents and tenets of law and fact.
 - ix. That the Learned Magistrate erred in fact and law in failing to consider conventional awards made in cases of similar nature.
29. The Appeal was canvassed by way of written submissions.



Appellant's Written Submissions

30. The Appellant filed submissions on October 17, 2022 in which it was submitted on five grounds which can be broken down to quantum and liability. On liability, the court was urged to use submissions on Machakos Appeal No. E063 of 2021, an appeal it was indicated flowed from the test suit. Therein it was contended that both drivers were to blame for the accident.
31. The second issue of quantum was broken down into various headings. On pain and suffering, it was submitted that the award was rather excessive as the deceased died on the spot as confirmed by the death certificate.
32. On loss of expectation of life, it was submitted that a figure of Kshs 80,00 however in view of inflation Kshs 100,000 would be reasonable given the fact that the deceased is alleged to have been 20 years old at the time of death. Reliance was placed on the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR and Duncan Mugo Miano vs Fred Mburu Ng'ang'a [2015] e KLR
33. On loss of dependency, it was submitted that the deceased died aged 18 as per the death certificate and was a student at Banita Secondary School as per a letter form the school. it was submitted that a figure of Kshs 80,000 however in view of inflation Kshs 100,000 would be reasonable given the fact that the deceased is alleged to have been 18 years old at the time of death. Reliance was placed on the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR and Duncan Mugo Miano vs Fred Mburu Ng'ang'a [2015] e KLR
34. On loss of dependency, it was submitted that the matter was not fit for multiplier approach as the future prospects of the deceased could not be ascertained. The court was urged to substitute the award with an award of Kshs 800,000. Reliance was placed on the case of Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 others [2014] eKLR and Put Sarajevo Gen. Eng. Co. Ltd vs Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the estate of Sylvester Muhia Gucha (deceased) & 2 others [2014] eKLR
35. While relying on the case of Peter Omolo vs Match Masters Limited [2017] eKLR and Cecilia Mwangi & Another vs Ruth W. Mwangi (1997) eKLR, it was submitted that the Trial court judgment as ripe for interference and this court had a duty to re- evaluate the evidence on both points of law and facts and come up with its findings and conclusions.
36. Lastly, it was submitted that the award made in the Trial court was inordinately high and based on the wrong principles given the circumstances and ought to be revised.

Respondent Submissions

37. The 1st Respondent filed submissions on November 14, 2022 in which it was submitted on five grounds which can be broken down to quantum and liability. On liability, Respondent submitted that the Appellant failed to produce any evidence to rebut the 1st Respondent's claim and therefore the apportionment of liability was sound, fair and proper for there being lack of evidence to prove otherwise. Reliance was placed on the case of Kerau Ghanshyam vs James Wambua Muendo [2021] eKLR.
38. The second issue of quantum was broken down into various headings. On pain and suffering, it was submitted that the award was rather excessive as the deceased died on the spot. It was contended that it is a generally accepted principle that nominal damages will be awarded under this limb where death occurs immediately and where it is prolonged, higher damages will be awarded depending on the length of time before death.



39. While relying on the case of Samuel Mutitu Nderitu (Suing on his own behalf as the legal representative of the estate of Gladys Muringi Nderitu (deceased) vs Erastus Mutai Mugambi [2021] eKLR where the court revised an award of pain and suffering from Kshs 10,000 to Kshs 50,000.
40. On loss of expectation of life, it was submitted that the deceased was 18 years and the figure of Kshs 150,000 was fair as he was fairly young. The Appellant cited the case of Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 others [2015] e KLR
41. On loss of dependency, while relying on the case of Zachary Abusa Magoma vs Julius Asiago Ogentoto & Jane Kerubo Asiago [2020] e KLR , it was submitted that the deceased was student and the award of Kshs 1,200,000 was fair.
42. In conclusion, it was submitted that the Trial Court judgment took into consideration the evidence tendered before the court , submissions , case-law and prevailing rate of inflation. Reliance was placed on the cases of Kridha Limited vs Peter Salai Kituri [2020] eKLR and Jane Wanja Mwangi vs Anestar Secondary School [2020] eKLR.
43. It was submitted that the Trial court judgment was sound and the appeal should be dismissed with costs to the 1st Respondent.

HCCA E062 OF 2021

Machakos Cmcc 638 Of 2017

Further Amended Complaint Dated October 19, 2017

44. The cause of action arose on August 28, 2008 when the deceased, a lawful passenger in Motor Vehicle KBB 581P when the 1st Defendant's authorized driver, agent or servant WILLY MAINGI (deceased) so negligently drove, managed and controlled motor vehicle KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer causing it to violently collide with 3rd Defendant's motor vehicle KBB 518P AT Manyani along Nairobi- Mombasa road.
45. The negligence was particularized as follows;
 - i. Driving at a speed that was too fast in the circumstances.
 - ii. Failing to keep any proper look out.
 - iii. Failure to have any sufficient regard for other road users.
 - iv. Failure to observe highway code.

Failing to stop, swerve , slow down or in any other way so to control and manage motor vehicle KBB 581 P so as to avoid the collision.
46. The negligence of the 3rd Defendant was particularized as follows;
 - i. Driving at an excessive speed.
 - ii. Failing to keep proper look out.
 - iii. Failing to observe highway code
 - iv. Failing to apply brakes, swerve and or avoid the accident
 - v. Failing to stop, swerve, slow down or in any other way so to control and manage motor vehicle KAW 755M/ZC 6565 so as to avoid the collision.



47. It was averred that as a result, James Mwangi Wahaba sustained fatal injuries and died on the spot. The dependents of the deceased are;
- i. Richard Wahaba Wahuu Father in law 70 years
 - ii. Teresia Mumbi Wahaba Mother in law 61 years
 - iii. Peter Thuo Wahaba Brother 32 years
 - iv. John Gachuhi Wahaba Brother 27 years
 - v. Phoebe Mwikali Isaac Mother 56 years
48. It was contended that at the time of his death, the deceased was 30 years old and full of life, enjoyed good health, had vigorous and happy life with bright future prospects.
49. The Plaintiff's prayed for judgment to be entered as follows;
- xv. General damages under the Fatal Accidents Act and the Law Reform Act
 - xvi. Special Damages of Kshs. 96,150
 - xvii. Costs of the suit
 - xviii. Interest thereon at court rates

statement of defence

50. The 1st & 2nd defendant's defense dated February 25, 2020 in which the 1st and 2nd defendant denied the contents of the Plaint and averred that of the accident occurred to was entirely the fault of the 3rd defendant's authorized driver or servant or agent. It was contended that the 4th defendant was liable for the acts and omissions of its driver. They also indicated that they would rely on the doctrine of Res Ipsa Loquitor.
51. The negligence of the 4th defendant was particularized as follows;
- i. Failing to keep any proper look out.
 - ii. Failing to pay attention or take heed of the presence of motor vehicle registration number KBB 581 P on the said road.
 - iii. Driving at an excessive speed in the circumstances.
 - iv. Failing to stop, slow down and /or swerve to avoid the accident.
 - v. Failing to appreciate the proximity of motor vehicle KBB 581P on the said road.
52. The 3rd defendant filed a defense statement on January 13, 2010 essentially denying the contents of the Plaint and seeking to have it dismissed.
53. The 4th defendant did not file a defense.

Trial Court Judgment

54. The court relied on the testimony of the witnesses in Machakos CMCC 639 of 2017 where the Plaintiff called one witness while the 1st and 2nd Defendants called the 1st Defendant as their witness.
55. Liability was found to be 25% / 75 % for the 1st and 2nd Defendants as against the 3rd and 4th Defendant.



56. On Quantum, in particular pain and suffering, the court found that the deceased died on the spot and awarded Kshs 30,000.
57. On loss of expectation of life, the Trial court awarded Kshs 150,000.
58. As regards loss of dependency, the Trial court found the deceased died aged 30 years old. At the time of death he was said to have been a mechanic working with Saberna Supply and Contractors in Mombasa earning a monthly salary of kshs.25,000/-. Counsel for the plaintiff proposed multiplier of 30 years on ground that the deceased would have worked up to the age of 60 years. Counsel for the 1st and 2nd defendants proposed a multiplier of 15 years. Reliance was made in the case of Kenya Power & Lighting Co. Ltd –vs- Bernard Kilonzo [2012] eKLR and the case of Wambua –vs- Patel & Anor [1980] 336. The Trial Court found a multiplier of 25 years appropriate. On the multiplicand the deceased is said to have been making a monthly income of Kshs. 25,000/-. The same was proved/confirmed by a letter from Sarbena Supply & Contractor hence there was sufficient prove of income. The deceased also supported his parents. The court found a dependency ratio of 2/3 appropriate. In the end an award of Kshs 5,000,000 was given.
59. Special damages of Kshs. 96,150 was found to have been pleaded and proven.
60. The court awarded as follows;
 - vi. Pain and suffering Kshs 30,000
 - vii. Loss of expectation of life Kshs 150,000
 - viii. Loss of dependency Kshs 5,000,000
 - ix. Special Damages Kshs. 96,150
 - x. Costs
 - xi. Interest

Total Kshs 3,957,113

The Appeal

61. Dissatisfied by this judgment, the Appellant filed this Appeal seeking the following orders;
 - i. Spent
 - ii. The Judgment and Decree of the Hon Chief Magistrate Hon A.G. Kibiru delivered on 7th April 2021 with regard to the findings on liability and quantum (pain and suffering, loss of expectation of life, loss of dependency and special damages) be set aside in its entirety.
 - iii. The Respondents pay the costs of this appeal
 - iv. Such further or consequential orders as this Hon. Court deems fit.
62. The Appeal is founded on the following grounds;
 - i. That the Learned Magistrate erred in fact and law in failing to find that the 1st Respondents did not discharge their evidential burden of proof of their allegations as required under Section 107 of the Evidence Act thus arriving at an erroneous finding that the Appellant was to blame for the accident.



- ii. That the Learned Magistrate erred and misdirected himself in law and misapplied the Court of Appeal decision in the case of David Ochangu Orioki vs Ismael Nyasiemo & Charles Michieka Nyoungu (2019) e KLR thereby arriving at a wrong finding on liability between the Appellant and the 2nd & 3rd respondents.
- iii. That the Learned Magistrate erred in law by completely disregarding and/ or completely failing to consider the Appellants submissions on proof of negligence hence coming to the erroneous finding on liability of 25% as against the 2nd and 3rd Respondents and 75% as against the Appellant and in effect breaching the Appellant's constitutional rights of access to justice and fair hearing.
- iv. That the Learned Magistrate erred in fact and law by erroneously applying a multiplier method in the circumstances where monthly income of the deceased was uncertain and unproved hence coming to the wrong assessment of damages.
- v. That the Learned Trial Magistrate erred in failing to consider the situations that warrant the use of the global sum approach as opposed to the multiplier approach.
- vi. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for his award of Kshs 5,000,000 for loss of dependency in the circumstances.
- vii. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for the multiplier, multiplicand and dependency ratio used when adopting the multiplier method in assessing damages for loss of dependency in the circumstances.
- viii. That the Learned Trial Magistrate erred in awarding a sum in respect of damages which are punitive, excessive and/or inordinately high in the circumstances thus occasioning a miscarriage of justice.
- ix. That the Learned Trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions of the Appellant which are binding upon the court vide the principle of judicial precedents and the doctrine of stare decisis
- x. That the Learned Trial Magistrate erred in fact and law by failing to consider all the averments made in the Appellant's pleadings in response to the plaint thereby reaching wrong conclusions of law and fact.
- xi. That the Learned Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the 1st Respondents if ant and failed to apply precedents and tenets of law and fact.
- xiii. That the Learned Magistrate erred in fact and law in failing to consider conventional awards made in cases of similar nature.

63. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

64. The Appellant filed submissions on October 17, 2022 in which it was submitted on five grounds which can be broken down to quantum and liability. On liability, the court was urged to use submissions on Machakos Appeal No. E063 of 2021, an appeal it was indicated flowed from the test suit. Therein it was contended that both drivers were to blame for the accident.



65. The second issue of quantum was broken down into various headings. On pain and suffering, it was submitted that the award was rather excessive as the deceased died on the spot. It was contended that it is a generally accepted principle that nominal damages will be awarded under this limb where death occurs immediately and where it is prolonged, higher damages will be awarded depending on the length of time before death. The court was urged to award Kshs 10,000. Reliance was placed on the case of Put Sarajevo Gen. Eng. Co. Ltd vs Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the estate of Sylvester Muhia Gucha (deceased) & 2 others [2014] eKLR.
66. On loss of expectation of life, it was submitted that a figure of Kshs 80,00 however in view of inflation Kshs 100,000 would be reasonable given the fact that the deceased is alleged to have been 20 years old at the time of death. Reliance was placed on the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR and Duncan Mugo Miano vs Fred Mburu Ng'ang'a [2015] e KLR
67. On loss of dependency, while relying on the case of Adetoun Oadeji (NIG) VS Nigeria Breweries PLC SC 91/2002 it was submitted that it was not pleaded in the amended Plaintiff that the deceased had any known occupation or what his earnings were and parties are bound by their pleadings. It was submitted that use the letter from Serbena Supply and contractor was misplaced and could not suffice as proof of earnings for reason that the said company is based in Nakuru while the deceased is said to have been working in Mombasa and given the distance, his salary must have been submitted through bank but no payment slip, bank statements or tax returns were produced to prove the said employment and earnings. Secondly, the maker of the letter was not availed to confirm correctness of the averments therein leaving the court speculate as to the authenticity of the documents as it could have been authored by anyone.
68. The deceased dependents were not proved; no birth certificate for the alleged child was produced. It was contended that the multiplier approach was erroneous and purely speculative and the court was urged to adopt a global sum approach and where facts for not support application of the Multiplier approach, the court has to abandon it.
69. The Appellant proposed Kshs 1,200,000 and in the alternative if the court were to use the multiplier approach, then it should use adopt a multiplier of 15 years a multiplicand of 5,185 and a dependency ratio of 1/3 amounting to Kshs 311,100. Reliance was placed on the cases of Benard Kirui Kiptoo & Another vs Esther Nyambura Mwangi (Suing as the legal representative of the estate of Paul Kiratu-Deceased) & Another [2020] eKLR, Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 others [2014] eKLR, Oyugi Juma Joseph vs Grace Omwanda Ogolla & another [2020] eKLR and Mumbi Ngumbi Kasamu (Suing as the legal Representative of the estate of Boniface Mulinge Mbithe (deceased) vs Mutua Mulaa & Another [2019] e KLR
70. While relying on the case of Peter Omolo vs Match Masters Limited [2017] eKLR and Cecilia Mwangi & Another vs Ruth W. Mwangi (1997) eKLR, The Appellant submitted that the Trial court judgment as ripe for interference and this court had a duty to re- evaluate the evidence on both points of law and facts and come up with its findings and conclusions.
71. Lastly, it was submitted that the award made in the Trial court was inordinately high and based on the wrong principles given the circumstances and ought to be revised.

Respondent Submissions

72. The 1st respondent filed submissions dated November 10, 2022 in which he submitted on five issues. The first issue was who was to blame for the accident and to what extent. It was submitted that the appellant failed to produce any evidence to rebut the 1st respondent's claim and therefore the



apportionment of liability was sound, fair and proper for there being lack of evidence to prove otherwise. Reliance was placed on the case of *Kerau Ghanshyam vs James Wambua Muendo* [2021] eKLR.

73. On the second issue of whether the learned trial magistrate considered all the evidence and submissions tendered in reaching his final determination, the Respondent was submitted in the affirmative. It was contended that the Appellant has relied on relatively old case law that failed to factor in the current rate of inflation. The court was invited to look at the case of *Samuel Mutitu Nderitu (Suing on his own behalf and as legal representative of the estate of Gladys Muringi Nderitu – Deceased) vs Erastus Mutahi Mugambi* [2021] eKLR where the court revised and award of pain and suffering for a person who had died on the spot from Kshs 10,000 to Kshs 50,000 taking into consideration the issue of inflation.
74. On the loss of expectation of life, it was submitted that the awarded of Kshs 150,000 was fair considering the deceased was fairly young and healthy and head prospects of living up to his prime years. In addition, the Appellant had failed to produce any plausible evidence why the award should be revised to Kshs 100,000. Reliance was placed on the case of *Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 others*.
75. Under loss of dependency, the Respondent submitted that the deceased was earning Kshs 25,000 as a mechanic. The Respondent further contended that the Appellant had an opportunity to cross examine the witness who produced the letter from Serbena Supply and Contractor during trial which they did and the letter was adopted as evidence by the 1st Respondent and the Appellant cannot choose to challenge it during appeal as stated in the case of *Crown Bus Services Limited & 2 others vs Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (deceased))* [2020] e KLR.
76. It was submitted that the award of Kshs 5,000,000 was reasonable and adequate
77. The 1st respondent submitted that this court should not interfere with the award save for the income of the deceased which could be revised upwards and if it should interfere, then care and utmost consideration should be taken bearing in mind that it is supposed to re evaluate the evidence and did not see and hear the witnesses. Further that the award should not disturbed unless it was inordinately high or low as to represent and entirely erroneous estimate. Reliance was placed on the cases of *Kridha Limited vs Peter Salai Kituri* [2020] eKLR and *Jane Wanja Mwangi vs Anestar Secondary School* [2020] eKLR.
78. Fourthly, it was submitted that the award of the Trial Court considered conventional awards for comparable claims.
79. Lastly, it was reiterated that the award of the Trial Court was sound and within the ambits of the law and should be upheld and the appeal dismissed with costs to the 1st Respondent.

HCCA E063 OF 2021

(Machakos CMCC 639 OF 2017- test suit)

Further Amended Plaint Dated February 5, 2020

80. The cause of action arose on August 28, 2008 when the deceased, a lawful passenger in Motor Vehicle KBB 581P when the 3rd Defendant who is the 4th Defendant's authorized driver, agent or servant so negligently drove, managed and controlled motor vehicle KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer causing it to violently collide with the 1st and 2nd Defendant's motor vehicle KBB 518P AT Manyani along Nairobi- Mombasa road.



81. It was averred that Willy Maingi (deceased) was the driver of motor vehicle registration number KBB 518P and the 3rd Defendant was the registered owner of KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer.
82. The negligence of the 1st and 2nd defendant, their driver, agent, servant and assignee was particularized as follows;
- i. Their authorized driver, agent, servant or assignee so negligently and recklessly drove motor vehicle KBB 581P thereby causing it to collide with the trailer hence occasioning fatal injuries to the deceased.
 - ii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to keep any proper look out and/or have sufficient regard for other road users.
 - iii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to observe highway code.
 - iv. Their authorized driver, agent, servant and assignee so negligently and recklessly failed stop, swerve, slow down or in any other way so to control and manage motor vehicle KBB 581 so as to avoid the said collision.
83. The negligence of the 3rd and 4th Defendant were particularized as follows;
- i. Failing to keep any or any proper look out or any sufficient regard to other road users particularly the deceased.
 - ii. Failing to control the said motor vehicle in time sufficient enough to keep the same from colliding with the 1st Defendant's motor vehicle
 - iii. Failing to exercise or maintain any or proper or effective control of the said motor vehicle
 - iv. Driving at an excessive speed.
 - v. Failing to observe highway code.
 - vi. Failing to stop, swerve, slow down or in any other way so to control and manage motor vehicle KAW 755M/ZC 6565 so as to avoid the collision.
84. It was averred that as a result, Monica Njoki Wahaba sustained fatal injuries and died on the spot. The dependents of the deceased are;
- i. Richard Wahaba Wahuu Father in law 70 years
 - ii. Teresia Mumbi Wahaba Mother in law 61 years
 - iii. Peter Thuo Wahaba Brother 42 years
 - iv. John Gachuhi Wahaba Brother 37 years
85. It was contended that at the time of her death, the deceased was 20 years old and full of life, she enjoyed good health, had vigorous and happy life with bright future prospects.
86. The Plaintiff's prayed for judgment to be entered as follows;
- i. General damages under the Fatal Accidents Act and the Law Reform Act
 - ii. Special Damages of Kshs.96,150



- iii. Costs of the suit
- iv. Interest thereon at court rates

Statement Of Defence

87. The 1st & 2nd Defendant's amended Defence is dated February 25, 2020 in which the 1st and 2nd Defendant denied the contents of the Plaint and averred that if the accident occurred, it was entirely the fault of the 4th Defendant authorized driver or servant or agent who was negligent in how he drove. They also indicated that they would rely on the doctrine of Res Ipsa Loquitor.
88. The negligence of the 4th defendant was particularized as follows;
- v. Failing to keep any proper look out.
 - vi. Failing to pay attention or take heed of the presence of motor vehicle registration number KBB 581 P on the said road.
 - vii. Driving at an excessive speed in the circumstances.
 - viii. Failing to stop, slow down and /or swerve to avoid the accident.
 - ix. Failing to appreciate the proximity of motor vehicle KBB 581P on the said road.
89. It was further stated that if the accident occurred, then it was an inevitable accident.
90. The 3rd defendant filed a Defence statement on January 13, 2010 essentially denying the contents of the Plaint and seeking to have it dismissed.
91. The 3rd defendant filed a statement of Defence dated 12.01 2020 in which he essentially denied all the contents of the Plaint and asked the court to dismiss the suit with costs

Hearing

Plaintiff's Case

92. On November 29, 2017, the Trial court upon application of the parties directed that the suit herein be a test suit on liability.
93. The Plaintiff case had two witnesses. PW1, Richard Wahaba Wathuo stated that he had adopted his witness statement and supplementary witness statement dated October 27, 2015 and October 19, 2017 and the list of documents and supplementary affidavit.
94. He stated that on August 27, 2008 his wife Teresiah Mumbi Wahaba, a family friend Mrs Marine and his children James Mwangi Wahaba, Isaac Gichuki Wahaba, Monica Njoki Wahaba, his grandson Richard Wahaba Mwangi and his daughter -in-law Faith Mukonyo Mutio attended a dowry ceremony of his son James Mwangi Mukonyo at Faith Mukonyo Mutios parents' home in Mimaba Village in Mtito Andei
95. After the ceremony, his children James Mwangi Wahaba, Isaac Gichuki Wahaba, Monica Njoki Wahaba , his grandson Richard Wahaba Mwangi and his daughter in law Faith Mukonyo Mutio decided to visit the home of his son James Mwangi Wahaba who lived in Mombasa. They boarded Motor Vehicle KBB 581P Toyota Corolla which was being driven by Willy Maingi Karaya (deceased). At 8.00pm he called James Maingi Wahaba to check on the progress of the journey and they were fine.



- A few hours later he could not reach them as their phones were off and those that went through, were unanswered.
96. On August 28, 2008, he decided to walk around the guest house he was staying in because he was feeling restless and the lady who owned the guest house told him that a radio station had reported that there was an accident at Manyani along Mombasa- Nairobi road and that all the victims died. He went to the room, woke his wife up and they rushed to Voi police station to confirm whether it was their children involved in the accident.
 97. On reaching the police station, the first thing they saw were wreckages of Motor Vehicle KBB 581 P Toyota Corolla. Upon inquiry, the police told them that the accident involved Motor Vehicle KBB 581P Toyota Corolla Station and Motor Vehicle KAW 755 M/ZC 6565 Mercedes Benz Semi trailer at Manyani along Mombasa Nairobi road and save for a minor who had been taken to hospital by good Samaritans, all other occupants of Motor Vehicle KBB 581P died.
 98. At the police station they were joined by Mr and Mrs Karaya and Mr. Waweru who are the father, mother and brother to Willy Karaya (deceased). They headed to the mortuary where the bodies had been taken while his wife and Mrs. Marine went to Voi Hospital to check on the minor.
 99. At Wundanyi Mortuary, he and Mr Waweru confirmed after viewing victims' bodies, that those who had perished were James Mwangi Wahaba, Isaac Gichuki Wahaba, Monica Njoki Wahaba , Willy Maingi Karaya and Faith Mukonyo Mutio. They arranged for the bodies to be taken to Voi Hospital for post mortem. They headed back to Voi Police station where abstracts were prepared in his presence.
 100. On the same day, August 29, 2009 after the post mortem had been completed, they arranged for the bodies to be transported to Nakuru where they were to be buried. He said the bodies of James Mwangi Wahaba, Isaac Gichuki Wahaba, Monica Njoki Wahaba and Faith Mukonyo Mutio were buried the same day.
 101. He said Monica Njoki Wahaba was a business woman operating retail shops in Nairobi who enjoyed good health and had a bright future but her life was cut short at only 25years old. She supported the family financially that was no longer there.
 102. Upon cross –examination by Atonga Advocate, he stated that he was not at the scene of the accident and had no eye witness to the accident. He said the accident was at around 2am along Nairobi-Mombasa. He said motor vehicle KBB was owned by Francis Maina. They had gone to pay dowry for his son Isaac, who died on the spot. He was 18 years old and a student. He provided for him. He said the receipts produced did not add up to Kshs 60,000 and had no revenue stamp. He said the driver of KBB was not blamed.
 103. Upon Cross examination by Adila for 3rd Party, he said he had not sued 3rd party and was claiming against Multiple Hauliers. He indicated that he had not filed a death certificate for his late son.
 104. In re- Examination, he stated that Motor Vehicle KBB is owned by Maingi Francis and he produced a receipt of Kshs 60,000 for funeral expenses. He had bought 4 coffins at 15,000 each, transport of Kshs 10,000 from Nakuru to Solai, Kshs 20,000 for food, tents, Kshs 30,000 transport from Voi to Nakuru, Kshs 100 for police abstract , Kshs 50 for death certificate and Kshs 6,000 for letters of administration totaling to Kshs 96,150.
 105. When PW1 was recalled, he stated that he is also the Plaintiff in Civil Case No 637/17, 638/17 and 639/17. In 637/17, the deceased Faith Mukonyo Mutie was his daughter in law. He produced the documents filed therein on October 27, 2017 as exhibit 12 -19 and support list October 19, 2017 copy of transport expenses. These are;



- i. Copy of death certificate no 373020
 - ii. Funeral expenses receipts
 - iii. Copy of grant ad litem dated March 10, 2009
 - iv. Copy of records dated November 11, 2009 for motor vehicle registration number KAW 755M/ ZC 6565 Mercedes Benz trailer
 - v. Copy of records dated November 11, 2009 for motor vehicle registration number KBB 581P Toyota Corolla
 - vi. Statutory notice to Co-operative Company limited dated September 25, 2009
 - vii. Statutory notice to Fidelity Shield Insurance Company limited
 - viii. Copy of demand letter to Francis Karaya Maingi
 - ix. Police Abstract
106. He further stated that in 637/ 17 which he represents the estate of James Mwangi Wahaba was his son, he produced the documents date 27/1015 as P. Exhibit 21-32 and the receipts for transport as P exhibit 33. These are;
- i. Police Abstract
 - ii. Copy of death certificate no 373019
 - iii. Funeral expenses receipts copies
 - iv. Medical expenses receipts for Richard Wahaba Mwangi
 - v. Copy of leaver's document from Nakuru Youth Polytechnic
 - vi. A copy of letter from Seberna Supply and contractor dated November 25, 2008
 - vii. Copy of birth certificate of Richard Wahaba Mwangi
 - viii. Copy of grant ad litem dated January 26, 2009
 - ix. Copy of records dated November 11, 2009 for motor vehicle registration number KAW 755M/ ZC 6565 Mercedes Benz trailer
 - x. Copy of records dated November 11, 2009 for motor vehicle registration number KBB 581P Toyota Corolla
 - xi. Statutory notice to co-operative Company limited dated September 25, 2009
 - xii. Statutory notice to Fidelity Shield Insurance Company limited
 - xiii. Copy of demand letter to Francis Karaya Maingi
 - xiv. Amended abstract
 - xv. A copy of body transport expense receipt
107. He contended that in 639/17 which he represents the estate of Monicah Njoki Wahaba was his daughter. He produced documents as per list of documents dated October 27, 2015 as exhibit 34 to 46 and the receipt support list as exhibit 47. These were;



- i. Copy of death certificate
 - ii. Copy of internal examination certificate from Kenya industrial Training Institute (KITI)
 - iii. Funeral expenses receipts
 - iv. Copy of grant ad litem dated January 26, 2009
 - v. Copy of records dated November 11, 2009 for motor vehicle registration number KAW 755M/ ZC 6565 Mercedes Benz trailer
 - vi. Copy of records dated November 11, 2009 for motor vehicle registration number KBB 581P Toyota Corolla
 - vii. Statutory notice to Co-operative Company limited dated September 25, 2009
 - viii. Statutory notice to Fidelity Shield Insurance Company limited
 - ix. Copy of demand letter to Francis Karaya Maingi
 - x. Police Abstract
108. Upon further cross examination, he stated that Faith Mukonyo was his daughter in law, she was a housewife and motor vehicle KBB was not to blame. She died on the spot, the driver of the trailer disappeared. He contended that they had a copy of record for the lorry. He said he did not have a receipt for Kshs 6,000. In Civil Case 638/17 the deceased was working in Mombasa, he was married with one child. In Civil Case 639/17, the deceased was operating a shop, she died on the spot. The 1st Defendant also lost his son in the accident, Willy Maingi Karaya, driver of motor vehicle KBB. Monicah was not married he said.
109. Upon further cross examination by Adila Advocate, he stated that he had not filed copies of birth certificate of his children, that he was not an eye witness and relied on what the police told him. The copy of record of prime mover is availed.
110. Upon further Re-examination by Baragu Advocate, he stated that the original receipts had revenue stamps. In Civil Case 637/17 the deceased left a son and he had annexed a birth certificate. Deceased in Civil Case 638/2017 was married to the deceased in Civil Case 637/17. James was working as per letter number 6 in Civil Case 638/ 17. He said Willy Maingi was not to blame because the other driver disappeared. He said they produced a copy of records of the lorry.
111. The 3rd Defendant, Multiple Hauliers was discharged and Bash Hauliers Limited joined as the 4th Defendant and Vincent Kariuki the 3rd Defendant.
112. PW2 was PC Bernard Mwangi based at Voi Police Station performing traffic duties. He stated he was there to produce the Police Abstract of the accident which occurred on August 28, 2008 at Manyani area along Nairobi Mombasa road involving motor vehicle KBE 581 E Toyota Corolla and motor vehicle registration number KAW 755M/ ZC 6565 Mercedes Benz. He said that after the accident, the passengers in motor vehicle KBE 581 E died on the spot. They were Monicah Njoki Wahaba, Mukonyo Mutio, James Mwangi Wahaba and Isaac Gichuki Wahaba.
113. It was his testimony that according to the records, motor vehicle KBE 581 belonged to Francis Mwangi while motor vehicle registration number KAW 755M Bash Hauliers. He produced the P3 forms and stated that according to the OB records, the driver of Motor Vehicle KAW escaped.



114. Upon cross- examination, he stated that according to the OB Investigation done, the case was still pending investigations and nobody as charged with traffic offence. He was not aware if driver of KAW was charged. According to the officers who visited the scene, motor vehicle KAW was to blame.
115. In Re -examination, he stated that the driver of Motor vehicle KAW disappeared and was to blame for the accident.

Defence Case (1st & 2nd Defendant)

116. DW1 was Francis Karaya Maingi. He said that Willy Maingi was his son and he recalled that on July 28, 2008 he had gone to Mtito Andei from Mombasa and on the way home, 5km from Manyani, they were involved in an accident with trailer KAW 755M/ ZC 6565. After the accident, he went to the scene the next day and found his son's motor vehicle had been towed but the lorry was still at the scene. He indicated that they found members of the public at the scene, the information they got was that the lorry was going downhill and lost control at a corner and hit his son's motor vehicle. He went to the police station and was informed that the driver and the turnboy had ran away from the scene. He adopted his statement into evidence.
117. Upon Cross examination, he stated that motor vehicle KBB was his but he had given it to his late son whom he said was a competent driver. He said he suspected the lorry driver was on the wrong side and that is why he ran away.
118. In re examination he said he was informed by the police that the driver of the lorry was on the wrong and had ran away.
119. the 1st and 2nd Defendant closed their case.
120. The 3rd & 4th Defendant case was closed for non-attendance.

Trial Court Judgment

121. The court relied on the testimony of the witnesses in Machakos CMCC 639 of 2017 where the Plaintiff called one witness while the 1st and 2nd Defendants called the 1st Defendant as their witness.
122. On Liability, the Trial Court found that the two motor vehicles had a head on collision and since all the occupants of KAW 655M perished in the accident, the only person who could have narrated to the court what transpired was the driver of KAW 655M. His escape after the accident can only be interpreted to mean that he was to blame. It was found that, the failure of the 4th Defendant to avail the driver to explain what transpired can only be construed to mean that the driver was substantially to blame. In the end, liability was found to be 25 to 75 % for the 1st and 2nd Defendants as against the 3rd and 4th Defendant.
123. On Quantum, in particular pain and suffering, the court found that the deceased died on the spot and awarded Kshs 30,000 under this head.
124. On loss of expectation of life, the Trial court awarded Kshs 150,000.
125. As regards loss of dependency, the Trial court found the deceased died aged 25 years old. Counsel for the plaintiffs proposed a multiplier of 35 years, on ground that the deceased would have worked to the age of 60 years. Learned counsel for the 1st and 2nd defendants proposed a multiplier of 15 years. Learned counsel for the 4th defendant proposed the application of a global award in this matter, on the basis that there was no evidence of income. Reliance was made in the case of Wambua V. Patel & Another (1980) KLR 336 and upheld in the case of Moruju & Anor vs Simeon Abayo CA No.167 of 2002.



The Trial court found a multiplier of 30 years appropriate in the present case. On the multiplicand, the deceased was said to have been making a monthly income of kshs.30,000/-. No record evidence of her income was produced neither was any evidence produced to prove that the deceased was doing any business. The Trial Court applied a minimum income of Kshs.15,000/- per month. The deceased was not married and is/was said to have been supporting her parents. The Court found the dependency ratio of 1/3 appropriate. In the end an award of Kshs 1,800,000 was given.

126. Special damages of Kshs. 96,150 was found to have been pleaded and proved.

127. The court awarded as follows;

- i. Pain and suffering Kshs 30,000
- ii. Loss of expectation of life Kshs 150,000
- iii. Loss of dependency Kshs 1,800,000
- iv. Special Damages Kshs. 96,150
- v. Costs
- vi. Interest

Total Kshs 2,076,150

The Appeal

128. Dissatisfied by this judgment, the Appellant filed this Appeal seeking the following orders;

- vii. Spent
- viii. The Judgment and Decree of the Hon. Chief Magistrate Hon A.G. Kibiru delivered on April 7, 2021 with regard to the findings on liability and quantum (pain and suffering, loss of expectation of life, loss of dependency and special damages) be set aside in its entirety.
- ix. The Respondents pay the costs of this appeal
- x. Such further or consequential orders as this Honourable Court deems fit.

129. The appeal is founded on the following grounds;

- i. That The Learned Magistrate erred in fact and law in failing to find that the 1st Respondents did not discharge their evidential burden of proof of their allegations as required under section 107 of the Evidence Act thus arriving at an erroneous finding that the Appellant was to blame for the accident.
- ii. That the Learned Magistrate erred and misdirected himself in law and misapplied the Court of Appeal decision in the case of David Ochangu Orioki vs Ismael Nyasiemo & Charles Michieka Nyounggo (2019) eklr thereby arriving at a wrong finding on liability between the Appellant and the 2nd & 3rd respondents.
- iii. That the Learned Magistrate erred in law by completely disregarding and/ or completely failing to consider the Appellants submissions on proof of negligence hence coming to the erroneous finding on liability of 25% as against the 2nd and 3rd Respondents and 75% as against the Appellant and in effect breaching the Appellant's constitutional rights of access to justice and fair hearing.



- iv. That the Learned Magistrate erred in fact and law by erroneously applying a multiplier method in the circumstances where monthly income of the deceased was uncertain and unproved hence coming to the wrong assessment of damages.
 - v. That the Learned Trial Magistrate erred in failing to consider the situations that warrant the use of the global sum approach as opposed to the multiplier method.
 - vi. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for his award of Kshs 1,636,320 for loss of dependency in the circumstances.
 - vii. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for the multiplier, multiplicand and dependency ratio used when adopting the multiplier method in assessing damages for loss of dependency in the circumstances.
 - viii. That the Learned Trial Magistrate erred in awarding a sum in respect of damages which are punitive, excessive and/or inordinately high in the circumstances thus occasioning a miscarriage of justice.
 - ix. That the Learned Trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions of the Appellant which are binding upon the court vide the principle of judicial precedents and the doctrine of stare decisis.
 - x. That the Learned Trial Magistrate erred in fact and law by failing to consider all the averments made in the Appellant's pleadings in response to the plaint thereby reaching wrong conclusions of law and fact.
 - xi. That the Learned Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the 1st Respondents if any and failed to apply precedents and tenets of law and fact.
 - xii. That the Learned Magistrate erred in fact and law in failing to consider conventional awards made in cases of similar nature.
130. The appeal was canvassed by way of written submissions however the appellant had not filed submissions at the time of writing this judgment.

Respondent Submissions

131. The 1st respondent filed submissions dated November 10, 2022 in which he submitted on five issues. The first issue was who was to blame for the accident and to what extent. It was submitted that the Appellant failed to produce any evidence to rebut the 1st Respondent's claim and therefore the apportionment of liability was sound, fair and proper for there being lack of evidence to prove otherwise. Reliance was placed on the case of *Kerau Ghanshyam vs James Wambua Muendo* [2021] eKLR.
132. On the second issue of whether the learned Trial Magistrate considered all the evidence and submissions tendered in reaching his final determination, it was submitted in the affirmative. It was contended that the Appellant has relied on relatively old case law that failed to factor in the current rate of inflation. The court was invited to look at the case of *Samuel Mutitu Nderitu (Suing on his own behalf and as legal representative of the estate of Gladys Muringi Nderitu – Deceased) vs Erastus Mutahi Mugambi* [2021] eKLR where the court revised and award of pain and suffering for a person who had died on the spot from Kshs 10,000 to Kshs 50,000 taking into consideration the issue of inflation.



133. On the loss of expectation of life, it was submitted that the awarded of Kshs 150,000 was fair considering the deceased was fairly young and healthy and had prospects of living up to her prime years. In addition, the Appellant had failed to produce any plausible evidence why the award should be revised to Kshs 100,000. Reliance was placed on the case of Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 others.
134. Under loss of dependency, it was submitted that where no proof of income is tendered, the courts are justified and allowed to invoke the prevailing minimum wage which in this case the Trial Court adopted Kshs 15,000 which falls within the minimum wage range. It was also submitted that the deceased died at the age of 25 years and had a promising and fulfilling life way past the age of retirement. A multiplier of 30 years adopted by the court was reasonable and had taken into account all the vicissitudes of life. Reliance was placed on the case of Justo Mungathia Mwithalie & another vs Joseph Maore Angacia & Another (Suing as the legal representative of the estate of EKM (Deceased) [2022] e KLR.
135. The 1st Respondent submitted that this court should not interfere with the award save for the income of the deceased which could be revised upwards and if it should interfere, then care and utmost consideration should be taken bearing in mind that it is supposed to re-evaluate the evidence and did not see and hear the witnesses. Further that the award should not be disturbed unless it was inordinately high or low as to represent an entirely erroneous estimate. Reliance was placed on the cases of Kridha Limited vs Peter Salai Kituri [2020] eKLR and Jane Wanja Mwangi vs Anestar Secondary School [2020] eKLR.
136. Fourthly, it was submitted that the award of the Trial Court considered conventional awards for comparable claims.
137. Lastly, it was reiterated that the award of the Trial Court was sound and within the ambit of the law and should be upheld and the appeal dismissed with costs to the 1st Respondent.

HCCA E064 OF 2021

(Machakos CMCC 637 OF 2017)

Further Amended Plaintiff Dated February 5, 2020

138. The cause of action arose on August 28, 2008 when the deceased, a lawful passenger in Motor Vehicle KBB 581P when the 3rd Defendant who is the 4th Defendant's authorized driver, agent or servant so negligently drove, managed and controlled motor vehicle KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer causing it to violently collide with the 1st and 2nd Defendant's motor vehicle KBB 518P AT Manyani along Nairobi- Mombasa road.
139. It was averred that Willy Maingi (deceased) was the driver of motor vehicle registration number KBB 518P and the 3rd defendant was the registered owner of KAW 755 M/ ZC 6565 Mercedes Benz Semi trailer.
140. The negligence of the 1st and 2nd Defendant, their driver, agent, servant and assignee was particularized as follows;
 - i. Their authorized driver, agent, servant or assignee so negligently and recklessly drove motor vehicle KBB 581P thereby causing it to collide with the trailer hence occasioning fatal injuries to the deceased
 - ii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to keep any proper look out and/or have sufficient regard for other road users



- iii. Their authorized driver, agent, servant and assignee so negligently and recklessly failed to observe the Highway Code.
 - iv. Their authorized driver, agent, servant and assignee so negligently and recklessly failed stop, swerve, slow down or in any other way so to control and manage motor vehicle KBB 581 so as to avoid the said collision.
141. The negligence of the 3rd and 4th Defendant were particularized as follows;
- i. Failing to keep any or any proper look out or any sufficient regard to other road users particularly the deceased.
 - ii. Failing to control the said motor vehicle in time sufficient enough to keep the same from colliding with the 1st Defendant's motor vehicle
 - iii. Failing to exercise or maintain any or proper or effective control of the said motor vehicle
 - iv. Driving at an excessive speed.
 - v. Failing to observe highway code
 - vi. Failing to stop, swerve, slow down or in any other way so to control and manage motor vehicle KAW 755M/ZC 6565 so as to avoid the collision.
142. It was averred that as a result, Faith Mukonyo Mutio sustained fatal injuries and died on the spot. The dependents of the deceased are;
- i. Richard Wahaba Mwangi son 10 years
 - ii. Richard Wahaba Wahuu Father in law 70 years
 - iii. Teresia Mumbi Wahaba Mother in law 61 years
 - iv. Isaac Reuben Mutiso Father 63 years
 - v. Phoebe Mwikali Isaac Mother 56 years
143. It was contended that at the time of her death, the deceased was 20 years old and full of life, she enjoyed good health, had vigorous and happy life with bright future prospects.
144. The Plaintiff's prayed for judgment to be entered as follows;
- i. General damages under the Fatal Accidents Act and the Law Reform Act
 - ii. Special Damages of Kshs.96,150
 - iii. Costs of the suit
 - iv. Interest thereon at court rates

Statement Of Defence

145. The 1st & 2nd Defendant's amended Defence is dated February 25, 2020 in which the 1st and 2nd Defendant denied the contents of the Plaint and averred that if the accident occurred, it was entirely the fault of the 4th Defendant authorized driver or servant or agent who was negligent in how he drove. They also indicated that they would rely on the doctrine of Res Ipsa Loquitor.
146. The negligence of the 4th Defendant was particularized as follows;



- i. Failing to keep any proper look out.
 - ii. Failing to pay attention or take heed of the presence of motor vehicle registration number KBB 581 P on the said road.
 - iii. Driving at an excessive speed in the circumstances.
 - iv. Failing to stop, slow down and /or swerve to avoid the accident.
 - v. Failing to appreciate the proximity of motor vehicle KBB 581P on the said road.
147. The 3rd Defendant filed a Defense statement on January 13, 2010 essentially denying the contents of the Plaintiff and seeking to have it dismissed.
148. The 4th Defendant filed a 3rd Party Defense on April 3, 2017 in which he opined that The 4th Defendant filed a Defense dated February 21, 2020 in which he denied the contents of the Amended Plaintiff and averred that the accident was caused by the negligence of the plaintiff or driver, servant or agent driving motor vehicle registration number KBB 581P. The negligence of the driver was particularized as follows;
- i. Driving at an excessive speed in the circumstances
 - ii. Ramming into motor vehicle registration number KAW 755M/ ZC 6565
 - iii. Driving without keeping a proper look out especially for motor vehicle registration number KAW 755M/ ZC 6565
 - iv. Driving without due care and attention.
 - v. Swerving on to the lane of motor vehicle registration number KAW 755M/ ZC 6565
 - vi. Failing to swerve or otherwise failing to control motor vehicle registration number KAW 755M/ ZC 6565 so as to avoid the accident.
 - vii. Failing to give way to motor vehicle registration number KAW 755M/ ZC 6565
 - viii. Driving a defective motor vehicle
 - ix. Failing to notice motor vehicle registration number KAW 755M/ ZC 6565 in time or at all so as to avoid the accident
 - x. Causing the accident.
149. The 4th Defendant alleged that the fatal injury was caused by the negligence of the deceased and particulars were outlined as follows;
- i. Failing to make use of the safety belt provided
 - ii. Failing to exercise the necessary precautions to ensure that she did not sustain bodily harm.
 - iii. Failing to exercise reasonable foresight as would have been expected of a reasonable person in his position.
 - iv. Failing to take any or adequate measures for her protection to ensure that she as not unduly or exceptionally exposed to danger.
 - v. Failing to exercise all or any reasonable care while aboard the said motor vehicle.
 - vi. Conducting herself in such manner as to expose herself to danger.



- vii. Panicking.

Trial Court Judgment

- 150. The court relied on the testimony of the witnesses in Machakos CMCC 639 of 2017 where the Plaintiff called one witness while the 1st and 2nd Defendants called the 1st Defendant as their witness.
- 151. Liability was found to be 25%/ 75 % for the 1st and 2nd Defendants as against the 3rd and 4th Defendant.
- 152. On Quantum, in particular pain and suffering, the court found that the deceased died on the spot and awarded Kshs 50,000 under this head.
- 153. On loss of expectation of life, the Trial Court awarded Kshs 150,000.
- 154. As regards loss of dependency, the Trial court found the multiplier approach appropriate in the circumstances and while relying on the case of Wambua V. Patel & Another (1980) KLR 336 used a multiplier of 35 years. It was found that the deceased was a housewife taking care of her one year old child. The court used a multiplicand of Kshs 5,844 as minimum monthly income. The deceased was not married and was said to have been supporting her one year old child and her parents. The Court found the dependency ratio of 2/3 appropriate. In the end an award of Kshs 1,636,320 was given.
- 155. Special damages of Kshs. 96,150 was found to have been pleaded and proven.
- 156. The court awarded as follows;
 - i. Pain and suffering Kshs 50,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 1,636,320
 - iv. Special Damages Kshs. 96150
 - v. Costs
 - vi. Interest
- 157. Dissatisfied by this judgment, the Appellant filed this Appeal seeking the following orders;
 - i. Spent
 - ii. The Judgment and Decree of the Hon. Chief Magistrate Hon A.G. Kibiru delivered on April 7, 2021 with regard to the findings on liability and quantum (pain and suffering, loss of expectation of life, loss of dependency and special damages) be set aside in its entirety.
 - iii. The Respondents pay the costs of this appeal
 - iv. Such further or consequential orders as this Hon. Court deems fit.
- 158. The Appeal is founded on the following grounds;
 - i. That the Learned Magistrate erred in fact and law in failing to find that the 1st Respondents did not discharge their evidential burden of proof of their allegations as required under Section 107 of the Evidence Act thus arriving at an erroneous finding that the Appellant was to blame for the accident.
 - ii. That the Learned Magistrate erred and misdirected himself in law and misapplied the Court of Appeal decision in the case of David Ochangu Orioki vs Ismael Nyasiemo & Charles Michieka



Nyounggo (2019) eKLR thereby arriving at a wrong finding on liability between the Appellant and the 2nd & 3rd respondents.

- iii. That the Learned Magistrate erred in law by completely disregarding and/ or completely failing to consider the Appellants submissions on proof of negligence hence coming to the erroneous finding on liability of 25% as against the 2nd and 3rd Respondents and 75% as against the Appellant and in effect breaching the Appellant's constitutional rights of access to justice and fair hearing.
- iv. That the Learned Magistrate erred in fact and law by erroneously applying a multiplier method in the circumstances where monthly income of the deceased was uncertain and unproved hence coming to the wrong assessment of damages.
- v. That the Learned Trial Magistrate erred in failing to consider the situations that warrant the use of the global sum approach as opposed to the multiplier approach.
- vi. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for his award of Kshs 1,636,320 for loss of dependency in the circumstances.
- vii. That the Learned Trial Magistrate erred in fact and law by failing to provide a basis for the multiplier, multiplicand and dependency ratio used when adopting the multiplier method in assessing damages for loss of dependency in the circumstances.
- viii. That the Learned Trial Magistrate erred in awarding a sum in respect of damages which are punitive, excessive and/or inordinately high in the circumstances thus occasioning a miscarriage of justice.
- ix. That the Learned Trial Magistrate grossly misdirected himself in ignoring the principles applicable and relevant authorities on quantum cited in the written submissions of the Appellant which are binding upon the court vide the principle of judicial precedents and the doctrine of stare decisis
- x. That the Learned Trial Magistrate erred in fact and law by failing to consider all the averments made in the Appellant's pleadings in response to the plaint thereby reaching wrong conclusions of law and fact.
- xi. That the Learned Trial Magistrate proceeded on wrong principles when assessing damages to be awarded to the 1st Respondents if ant and failed to apply precedents and tenets of law and fact.
- xii. That the Learned Magistrate erred in fact and law in failing to consider conventional awards made in cases of similar nature.

159. The Appeal was canvassed by way of written submissions.

Appellant's Written Submissions

160. The Appellant filed submissions on October 17, 2022 in which it was submitted on five grounds which can be broken down to quantum and liability. On liability, the court was urged to use submissions on Machakos Appeal No. E063 of 2021, an appeal it was indicated flowed from the test suit. Therein it was contended that both drivers were to blame for the accident.

161. The second issue of quantum was broken down into various headings. On pain and suffering, it was submitted that the award was rather excessive as the deceased died on the spot. It was contended that



it is a generally accepted principle that nominal damages will be awarded under this limb where death occurs immediately and where it is prolonged, higher damages will be awarded depending on the length of time before death. The court was urged to award Kshs 10,000. Reliance was placed on the case of Put Sarajevo Gen. Eng. Co. Ltd vs Esther W. Njeri & Johnson Mwangi Gucha (Suing as the Legal Representative of the estate of Sylvester Muhia Gucha (deceased) & 2 others [2014] eKLR.

162. On loss of expectation of life, it was submitted that a figure of Kshs 80,000 however in view of inflation Kshs 100,000 would be reasonable given the fact that the deceased is alleged to have been 20 years old at the time of death. Reliance was placed on the case of Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR and Duncan Mugo Miano vs Fred Mburu Ng'ang'a [2015] eKLR
163. On loss of dependency, it was submitted that the earnings of the deceased were not proved nor were the deceased dependents proven, in particular, no birth certificate of her alleged child were produced in evidence. The multiplicand was also not proved as the said order giving the wages was not produced in court or attached to the respondent's submissions.
164. It was contended that the multiplier approach was erroneous and purely speculative and the court was urged to adopt a global sum approach and award the deceased a lump sum award of Kshs 850,000. Further, that if the court were to use the multiplier approach, then it should use adopt a multiplier of 25 years, a multiplicand of 5,185 and a dependency ratio of 1/3 amounting to Kshs 518,500. Reliance was placed on the cases of Benard Kirui Kiptoo & Another vs Esther Nyambura Mwangi (Suing as the legal representative of the estate of Paul Kiratu- Deceased) & Another [2020] eKLR, Oyugi Judith & Another vs Fredrick Odhiambo Ongong & 3 others [2014] eKLR, Oyugi Juma Joseph vs Grace Omwanda Ogolla & another [2020] eKLR and Mumbi Ngumbi Kasamu (Suing as the legal Representative of the estate of Boniface Mulinge Mbithe (deceased) vs Mutua Mulaa & Another [2019] eKLR
165. While relying on the case of Peter Omolo vs Match Masters Limited [2017] eKLR and Cecilia Mwangi & Another vs Ruth W. Mwangi (1997) eKLR, it was submitted that the Trial court judgment as ripe for interference and this court had a duty to re- evaluate the evidence on both points of law and facts and come up with its findings and conclusions.
166. Lastly, it was submitted that the award made in the Trial court was inordinately high and based on the wrong principles given the circumstances and ought to be revised downwards.

Respondent Submissions

167. The 1st Respondent filed submissions dated November 10, 2022 in which he submitted on five issues. The first issue was who was to blame for the accident and to what extent. It was submitted that the Appellant failed to produce any evidence to rebut the 1st Respondent's claim and therefore the apportionment of liability was sound, fair and proper for there being lack of evidence to prove otherwise. Reliance was placed on the case of Keruu Ghanshyam vs James Wambua Muendo [2021] eKLR.
168. On the second issue of whether the learned Trial Magistrate considered all the evidence and submissions tendered in reaching his final determination, it was submitted in the affirmative. It was contended that the Appellant has relied on relatively old case law that failed to factor in the current rate of inflation. The court was invited to look at the case of Samuel Mutitu Nderitu (Suing on his own behalf and as legal representative of the estate of Gladys Muringi Nderitu – Deceased) vs Erastus Mutahi Mugambi [2021] eKLR where the court revised and award of pain and suffering for a person who had died on the spot from Kshs 10,000 to Kshs 50,000 taking into consideration the issue of inflation.



169. On the loss of expectation of life, it was submitted that the awarded of Kshs 150,000 was fair considering the deceased was fairly young and healthy and had prospects of living up to her prime years. In addition, the Appellant had failed to produce any plausible evidence why the award should be revised to Kshs 100,000. Reliance was placed on the case of Joseph Gatone Karanja vs Michael Ouma Okutoyi & 2 others.
170. Under loss of dependency, It was submitted that where no proof of income is tendered, the courts are justified and allowed to invoke the prevailing minimum wage which in this case the trial magistrate adopted Kshs 5,844 which it was contended fell below the minimum wage range. It was admitted that the same has not been appealed against but this court is at liberty to revise the award upwards. It was also submitted that the multiplier of 25 years was reasonable and had considered all the vicissitudes of life. Reliance was placed on the case of Justo Mungathia Mwithalie & another vs Joseph Maore Angacia & Another (Suing as the legal representative of the estate of EKM (Deceased) [2022] eKLR.
171. The 1st Respondent submitted that this court should not interfere with the award save for the income of the deceased which could be revised upwards and if it should interfere, then care and utmost consideration should be taken bearing in mind that it is supposed to re-evaluate the evidence and did not see and hear the witnesses. Further that the award should not be disturbed unless it was inordinately high or low as to represent an entirely erroneous estimate. Reliance was placed on the cases of Kridha Limited vs Peter Salai Kituri [2020] eKLR and Jane Wanja Mwangi vs Anestar Secondary School [2020] eKLR.
172. Fourthly, it was submitted that the award of the Trial Court considered conventional awards for comparable claims.
173. Lastly, it was reiterated that the award of the Trial Court was sound and within the ambit of the law and should be upheld and the appeal dismissed with costs to the 1st Respondent.

Determination

174. This Court considered the Trial court records, the Records of Appeal, the Memoranda of Appeal and Written Submissions of the parties through respective Counsel.
175. This being the first Appeal, the case of Court of Appeal for East Africa in Peters –vs- Sunday Post Limited [1958] EA 424 is applicable where Sir Kenneth O’Connor stated as follows:-
- “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. “
176. Hon. J.B Ojwang, J (as he then was) in Haile Selassie Avenue Development Co. Limited v Josephat Muriithi & 10 others [2004] eKLR held that:
- “The rules of procedure which regulate the trial process are intended to serve the constructive purpose of expediting trials, and facilitating judicial decision-making with finality. These rules cannot be said to be oppressive to parties, or that they necessarily wreak injustice. On the facts of this particular case, the Defendants ought to have complied with these rules of procedure.”



Liability

177. On the issue of Liability, in *Lakhamshi v Attorney General*, (1971) E A 118, 120 the Court observed;

“It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.’

178. The Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR had this to say;

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows: “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...”

179. The Appellant takes issue with the apportionment of liability at 75%/25% that he was found to blame for in the accident jointly with the 2nd and 3rd Respondent. The Appellant submitted that the police abstract and the OB referred to indicate the matter was/is still pending under investigations and that the Trial Court finding that the failure of the Appellant to avail the driver can only be construed to mean that the driver is substantially to blame is erroneous and unfounded in law. The Appellant contended that the blame should be apportioned at 50:50 in the absence of independent evidence as to the occurrence of the accident.

180. The Trial Court in the test case, also noted that there was no eye witness who testified as to what could have transpired leading to the fatal accident. This court notes that PW2 testified in the test case that,



the driver and alleged turn boy were said to have fled from the scene of the accident. The driver would have testified as to the events that led to the accident.

181. Crucial witnesses such as the scene investigating officer, the investigating officer who would have given evidence as to the state of the scene and any efforts taken thereafter were not called to testify.
182. From PW2's testimony, a police officer, the driver ran away from the scene of the accident. According to the investigations of the officers who visited the scene, the driver of the trailer was to blame for the accident.
183. This evidence remains uncontroverted however it is hearsay evidence and not direct evidence.
184. According to the Black's Law dictionary, Direct evidence is evidence, that if believed, directly proves a fact in issue. Directly means that a person does not have to make any inferences or presumptions as to proof.
185. In the case of *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) the court stated;

“Direct Evidence” is evidence that establishes a particular fact without the need to make an inference in order to connect the evidence to the fact. It supports the truth of an assertion (in criminal law, an assertion of guilt or of innocence) directly, i.e., without the need for an intervening inference. It directly proves or disproves the fact. So Direct Evidence is real, tangible, or clear evidence of a fact, happening, or thing that requires no thinking or consideration to prove its existence. It does not require any type of reasoning or inference to arrive at the conclusion.

31. The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of proof...”

186. On the other hand, Appellant did not present in the Trial Court any evidence with regard to the occurrence of the fateful road traffic accident. The Evidence Act places the burden of proof on each party to prove its claim. The evidence on record is that a fatal road accident occurred between the saloon vehicle with 5 occupants and the trailer occurred.
187. PW2 produced the Police Abstract to the effect that the matter was pending under investigations. The OB indicated that the driver of the Trailer disappeared from the scene. The 3rd & 4th Defendant did not present direct evidence either to establish liability to the driver of the saloon vehicle, before the court to contradict the 1st and 2nd Respondent's case. Section 107 (1), 109 and 112 of the Evidence Act, Cap 80 Laws of Kenya provides:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him
188. In the case of *Motex Knitwear Limited Vs. Gopitex Knitwear Mills Limited Nairobi (Milimani)* HCCC No.834 of 2002, Lesiit, J. citing the case of *Autar Singh Bahra And Another Vs. Raju Govindji*, HCCC No.548 of 1998 appreciated that:-
- ‘Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.’”
189. The other issue that has been raised by the Appellant is that liability should be apportioned at 50:50 between the two drivers in the circumstances and asked that the court be guided by the case of *Spry, V P in Lakhamsi v Attorney General*, (1971) E A 118, 120 supra.
190. In this case there is no conflicting evidence as to the cause or happening of the accident. Instead, The Appellant did not tender any evidence and the Respondent gave through PW2 evidence confirming the accident occurred between both vehicles and caused death of the deceased persons.
- “It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence.
191. However, *Hancox J* in the Court of Appeal in the case of *Abbay Abubakar Haji Patuma Ali Abdulla Vs Freight Agencies Ltd*[1984] eKLR had this to say on the *Spry* case (supra)
- “But he (Lord Denning) expressly said that it was not settled law that where the evidence is insufficient to establish the negligence of any party, the court must find both equally to blame, and he left open the situation where, as in my opinion is the case here, there is a lack of evidence as opposed to a conflict thereof.
192. In such situations, though it is trite that in action for negligence, the burden of proof rests upon the plaintiff alleging it to establish the element of tort, negligence can be inferred in the absence of any either plausible explanation on how the accident occurred. This the rationale behind the doctrine of *re ipsa loquitur*. In the case of *Sally Kibiii and Another versus Francis Ogaro* [2012] eKLR, the court was faced with such a scenario and noted the following: -
- “The Plaintiff in the trial only produced two witnesses who admitted that they did not witness the accident and could not tell how it happened. The police abstract showed that the accident was caused by collusion of two vehicles and investigation were underway. The failure of the police to determine from the scene of the accident which motor vehicle was to blame and the absence of an eye witness diminishes the appellant’s chance to prove a case



of negligence against the defendant....to successfully apply this doctrine (res ipsa loquitor) there must be proof of facts that are consistent with negligence on the part of the defendant as against any other cause.....can safely presume that the mere fact that two cars being KAK 746J and KAG 331K collided, negligence was on the part of the defendant's cause and not the other. The plaintiff must prove fact which give rise to what may be called res-ipsa loquitor situation.”

193. The Respondents placed reliance on the doctrine of res ipsa loquitor which means according to the Black's Law Dictionary (8th Ed.) page 1336, “the thing speaks for itself”.

194. In *Nandwa vs. Kenya Kazi Limited* [1988] eKLR, Court of Appeal (Gachuhi JA) cited, with approval, a portion *Barkway vs. South Wales Transport Company Limited* [1956] 1 ALLER 392, 393 B on the nature and application of the doctrine of res ipsa loquitor as follows:

“The application of the doctrine of res ipsa loquitor, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed.”

195. In *Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni J.* citing the decision in *Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997* held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

196. In this matter there is no denying the fact that the person who would have been in a better position to explain what happened during the incident disappeared and PW2 the police officer summoned to testify informed the Trial Court this fact. PW2 unfortunately took no part in the investigation of the accident and turned up in court without the police file ostensibly to testify and produce the Police Abstract and OB.

197. In the absence of contrary evidence, it is clear the Plaintiff's evidence remains uncontroverted and unchallenged as to the circumstances of the accident as evidenced by PW1 & PW2 evidence. Trial Court determined who carried the larger degree of blame given the circumstances of the case.

198. Despite the conduct of the driver of the trailer, that he disappeared from the scene, he had a duty to report and not move from the scene and under Section 73 of the Traffic Act to stop and report the accident at the nearest Police Station. The Court cannot in good conscience aid a party to gain / take advantage of an act or omission that is contrary to law. In the absence of any explanation of the driver of the defendant/appellant's vehicle for the Trial Court to consider, the reasonable and logical conclusion was that he had caused the accident that resulted in massive loss of life. If he was scared or feared mob justice, he could have reported to any other Police Station and/or to the employer/owner of the vehicle. He did not. This Court infers blame, negligence and the fact that the driver caused the



- accident. He was /is entitled to fair hearing but by disappearance he waived the legal right/opportunity to participate in the Trial Court's hearing of the test case. The driver absconded and never resurfaced to participate in the Trial Court proceedings. Fair Trial was accorded to him and/or the Appellant and both did not attend participate or tender and evidence during trial.
199. The Court would consider apportionment of liability at 50%/50% if both parties testified and/or presented evidence and the evidence was conflicting then the Court would reasonably apportion liability at 50%/ 50% between drivers/owners/insurers of the vehicles involved in the accident.
 200. Secondly, if the Appellants and Respondents , all were drivers of their respective vehicles involved in an accident, this Court would consider liability on the basis of negligent driving, but not where the Plaintiffs were passengers, surely, what negligence would be attributed to passengers in the resulting accident? It is not logical and reasonable in the circumstances.
 201. Thirdly, it is unconscionable to demand direct evidence from witnesses from the Plaintiffs on the occurrence of the accident , when the it is clear that the ghastly accident that occurred close to 16 years ago, resulted in multiple deaths, the occupants of the Plaintiff's vehicle all instantly died save for the child and cannot possibly speak from the grave. The Court can only consider what is possible and/or plausible to be availed in the circumstances.
 202. The Accident occurred in the dead of the night, the Police Officers must have arrived at the scene and rushed the persons involved in the accident to hospital and there was no time to draw sketch map or road view, take photographs or any evidence as to how the accident occurred. By the time the rescue mission was over, the scene was disturbed/interfered with.
 203. It is for these reasons, this Court finds no legal basis to apportion liability at 50%/50% without evidence on occurrence of the accident and it would amount to undue advantage to the driver who absconded from the scene and untold unfairness to the departed passengers.

Quantum.

204. In *Mbogo & Another v Shah* [1968] EA 93, the Court, (Sir Newbold, P.) the court stated that:

“A Court of Appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice.”
205. The Court of Appeal in the case of *Johnson Evan Gicheru v Andrew Morton & Another* [2005] eKLR, stated:

It is trite that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.



206. In the case of *Kemfro Africa Ltd t/a “Meru Express Services (1976)” & Another v Lubia and Another (No.2)* [1985] eKLR:

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 damages.

207. The Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

Pain And Suffering

208. From the record, the court awarded Kshs 30,000 under this head in HCCA E 061, E 062 and E 063 of 2021 however this court has noted that in the judgment of HCCA E064 of 2021, *Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Faith Mukonyo Mutio)*, the Trial Court in the body of the judgment awarded Kshs 50,000 under this head but at the conclusion outlining the tabulation awarded Kshs 30,000 and the decree indicates Kshs 30,000. This Court upholds Ksh 30,000 as per the decree.
209. The Court notes that the deceased in HCCA E064 of 2021, *Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba(estate of Faith Mukonyo Mutio)* died on the spot and under the same circumstances as her husband and in laws who were with her in the same car. For clarity of record, the award is Kshs 30,000 for pain and suffering in HCCA E064 of 2021, *Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba(estate of Faith Mukonyo Mutio)*
210. With regard to HCCA E 061, E 062 and E 063 of 2021 this court persuaded by other authorities I have perused on this question and in particular the case of *Mercy Ben & Another v Mt Kenya Distributors & another* [2022] eKLR the court upheld an award of Kshs 50,000 for pain and suffering where the deceased is said to have died on the spot. The award given was Kshs 30,000 which I find it to be reasonable in the circumstances for each of the persons in the vehicle KBB 581P



Loss Of Expectation Of Life

211. From the record, the Trial Court awarded Kshs 150,000 for all the Appeals under this head. The Appellant has taken issue and referred to the case of Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the Court stated as follows-

“As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... 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 Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.

212. Taking into consideration the past authorities in respect of that award and inflation, it is my view that the sum of Kshs 150,000.00 cannot be said to have been manifestly excessive in the circumstances.

213. This court will therefore not interfere with the award of Kshs 150,000 that was awarded by the Trial Court in all the Appeals herein.

Loss Of Dependency

214. As regards the claim for loss of dependency, Ringera, J (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 held that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependents such an award as would when wisely invested be able to compensate the dependents for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and 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 the age of the deceased, the ages of the dependents, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

215. The court in Leonard O. Ekisa & another vs. Major K. Birgen [2005] eKLR stated as follows:

“Dependency is a matter of fact. It need not be proved by documentary evidence. In an African family setting, it is not unusual for parents to be dependents. There is no social welfare system that caters for old people in this country...”



216. Section 4(1) of the Fatal Accidents Act provides as follows:-

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused...”

217. Section 2 (1) of the same Act provides:-

“child” means a son, daughter, grandson, granddaughter, stepson or stepdaughter;

“parent” means a father, mother, grandfather, grandmother, stepfather or stepmother.

218. On the other hand, case-law provides; Dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

219. The Court shall consider each appeal independently on this issue of quantum as the award was different depending on the circumstances of each estate.

HCCA E061 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Isaac Wahaba Gichuhi (deceased)

220. From the documents produced, he was 18 years old as per the death certificate and was a student at Banita Secondary School High school. The Court considered the case of Chen Wembo & 2 others vs. I K K & another (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR where Hon. Meoli J stated:-

“Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court’s exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants”

221. The court awarded Kshs 1,200,000 as a global award. Looking at the case of J.N.K (Suing as the legal representative of the estate of MMM (deceased) vs Chairman Board of Governors Kanyakine Boys High School (2008) eKLR where an award of Kshs 1,000,000 was awarded for a 16 year old who was in form 4. This court thus finds the award under this head to be reasonable as awarded by the Trial Court.

HCCA E062 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of James Mwangi Wahaba (deceased)

222. From the record is a letter dated November 25, 2008 confirming he was a mechanic working with them earning Kshs. 25,000 and based in Mombasa. The question is whether this is sufficient to prove employment which the 1st Respondent contends.

223. The Appellant did not provide the court with evidence to show that this letter was not legitimate or genuine. the balance of probability tilts in favour of the 1st and 2nd Respondent who during the hearing stated that the occupants of the car were on the way to Mombasa where the 1st and 2nd Respondent herein lived and worked corroborating the contents of the letter..



224. This Court notes that the birth certificate of Richard Wahaba indicates his mother and father as Faith Mukonyo Mutio and James Mwangi Mutio who died during the accident. Therefore this issue is settled on dependency of the said child on his late parents.
225. In the circumstances, there is no issue raised in the appeal to cast aspersion to/ or indicate that the Trial Court acted on wrong principles or considered irrelevant factors, the Court misapprehended the evidence or the quantum was/is inordinately low or too high to warrant interference with the award under this head. The award of Ksh 5,000,000/-
- HCCA E063 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Monica Njoki Wahaba (deceased),
226. In this case, the deceased is said to have been a business woman who had operating retail shops in Nairobi but there is no document or any evidence to support this position. I therefore find that the use of the multiplier method was not appropriate and the court should have used a global award. That is of course not to say that only documentary evidence can prove income as it is possible for one to hold a paid job or earn from employment without formal documentation particularly in the informal sector and employment as stated in the case of Jacob Ayiga Maruya & Another V. Simeon Obaya [2005] eKLR. The Trial Court thus erred in using this method despite finding that there was no evidence on record to support the income. Taking into consideration various cases above, the age of the deceased and the lack of documentary evidence to warrant multiplier method and circumstances of the case. A global figure of 1,400,000/- is awarded to substitute the award of Kshs 1,800,000/= .
- HCCA E064 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Faith Mukonyo Mutio (deceased)
227. The testimony of PW1 was that the Appellant herein was a house wife but from the record there is no proof of earning the minimum wage or anything close to that on record. This court finds that in such a case, a global award would have been more appropriate. I therefore substitute the award of Kshs 1,636,620 with an award of Kshs 1,500,000/-
228. The appeal does not take issue with the Special damages therefore this court will not interfere with the finding of the trial court.
229. Since the appeals were partly successful, each party shall bear their own costs for this appeal.

Disposition

230. In the end, the Appeals partly succeed on quantum as outlined above. Liability is upheld at 25%/75%. Quantum for Loss for Dependency for Monica Njoki Wahaba (deceased), reduced to Ksh 1,400,000/- from Ksh 1,800,000/- and Loss for Dependency for Faith Mukonyo Mutio reduced from Ksh 1,636,620 to Ksh 1,500,000/-
231. HCCA E061 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Isaac Wahaba Gichuhi (deceased), judgment is entered as follows;
- i. Pain and suffering Kshs 30,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 1,200,000
 - iv. Special Damages Kshs. 96,150
 - v. Costs



- vi. Interest
Less 25%
232. HCCA E062 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of James Mwangi Wahaba (deceased)), judgment is entered as follows;
- i. Pain and suffering Kshs 30,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 5,000,000
 - iv. Special Damages Kshs. 96,150
 - v. Costs
 - vi. Interest
Less 25%
233. HCCA E063 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Monica Njoki Wahaba (deceased)), judgment is entered as follows;
- i. Pain and suffering Kshs 30,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 1,400,000
 - iv. Special Damages Kshs. 96,150
 - v. Costs
 - vi. Interest
Less 25%
234. HCCA E064 of 2021, Bash Hauliers Vs Richard Wahaba Wathuu & Peter Thuo Wahaba (estate of Faith Mukonyo Mutio (deceased)), judgment is entered as follows;
- i. Pain and suffering Kshs 30,000
 - ii. Loss of expectation of life Kshs 150,000
 - iii. Loss of dependency Kshs 1,500,000
 - iv. Special Damages Kshs. 96,150
 - v. Costs
 - vi. Interest
Less 25%

It is so ordered.

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH MARCH 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI



.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

