Mangaa & another (Suing as Personal Representatives of the Estate of Elijah Mangaa Ongeri - Deceased) v Kimutai & another (Civil Appeal E015 of 2022) [2023] KEHC 17516 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17516 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CIVIL APPEAL E015 OF 2022

FR OLEL, J

MAY 16, 2023

BETWEEN

NORAH KWAMBOKA MANGAA .... 1ST APPELLANT

SHEILLAH KERUBO MANGAA .... 2ND APPELLANT

SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF ELIJAH MANGAA ONGERI - DECEASED

AND

SOSPETER KIMUTAI .... 1ST RESPONDENT

KAMAU KARIUKI PETER .... 2ND RESPONDENT

(Being an appeal from the judgment and decree of Hon. E. Kelly (S.R.M.) delivered on 8th February 2022 in Naivasha CMCC no 723 OF 2003)

JUDGMENT

1. The Appellant's were the Plaintiff in the primary suit, where they sued the Defendant's as both the registered owner and beneficial owner of Motor vehicle KBR 031C (hereinafter referred to as "the suit motor vehicle"). It was alleged that on March 19, 2017 the deceased herein was a lawful passenger in the suit motor vehicle which was being driven along Nairobi -Naivasha road when the motor vehicle was so negligently, carelessly, recklessly driven and/or controlled by the Defendants their driver, servant or agent that it lost control and caused an accident resulting in the deceased suffering fatal injuries. The appellants filed the primary suit and sought for compensation under the *Fatal Accidents Act* and *Law Reform Act*, interest and costs of the suit.
2. The Respondents herein, who were the defendants in the primary suit filed their joint statement of defence dated November 9, 2017 essentially denying the contents of the Plaint and opined that if the

accident occurred if was caused and/or substantially contributed to by the negligence of the deceased. The respondent prayed that the suit be dismissed.

3. After the hearing, the Trial Court in its judgment delivered on February 8, 2022 dismissed the Appellant's suit with costs to the Respondents.

4. The Appellant being dissatisfied by this judgment filed a memorandum of Appeal on February 18, 2022 and raised grounds of appeal namely:-

   a. That the Learned Trial Magistrate erred both in law and in fact in apportioning liability to a party who had not been enjoined in the suit.

   b. That the Learned Trial Magistrate erred both in law and in fact in not considering that the Respondent having failed to enjoin a 3rd Party to the suit, ought to have been made to shoulder liability 100% as the Appellant was a passenger in Motor Vehicle Registration Number KBR 031C and never contributed to the occurrence of the accident.

   c. That the Learned Trial Magistrate erred both in law and in fact in not considering the evidence tendered thus awarding damages which were inordinately so low under all heads.

   d. That the Learned Trial Magistrate erred both in law and in fact in failing to appreciate the principles governing the award of damages namely that like cases attract similar awards and ignoring completely the Appellants submission thereon.

   e. That the Learned Trial Magistrate decision was unjust, against the weight of evidence adduced and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice. Thus, the trial court award is unstainable and baseless in the circumstances.

Facts of the Case

5. At the trial, the Appellant called 2 witnesses. PW1 was Norah Kwamboka Mangaa, she testified that the deceased was her husband who passed on March 23, 2017 due to fatal injuries sustained in a road traffic accident. He left behind four children who all depended on the deceased. She also relied on her witness statement where she attributed negligence to the defendants and their driver as the basis of what caused the accident and prayed for compensation. She produced into evidence various documents to support her case as Exhibits {1-8}. In cross examination, she testified that two of her children were two adults, while the other two were minors. She did not produce any birth certificates. The accident occurred on March 29, 2017 and she was not an eye witness. Further she did not have a report pointing negligence on the respondents. In re – examination she said she was issued with a police abstract.

6. PW2 was PC Josphat Makau who stated that he was aware of the accident that occurred on May 29, 2017 and was served with summons. He testified that it was a hit and run, serious road traffic accident which occurred at around 8.00pm at Karai area along Naivasha- Nairobi road. One unknown vehicle driven from Naivasha to Nairobi general direction made a right turn to enter National Oil petrol station and collided with another vehicle KBR 031C, Toyota Voxy driven by Sospeter Kimutai Kiplangat which was coming from Nairobi towards Naivasha general direction with seven passengers on board. The deceased was one of the passengers who suffered serious head injuries and succumbed to his injuries at Naivasha District Hospital.

7. It was his testimony that the other vehicle did not stop after the accident and no one identified it. No one was charged with any offence. The unidentified motor vehicle was to blame for the accident. An inquest file which was closed on November 20, 2019 by Hon Kimilu without laying blame on anybody.

He produced the police abstract into evidence. Upon cross examination, he said KBR 031C was not to blame for the accident and that no one identified the vehicle that contributed to the accident hence no one was arrest.

8. The Defendant called one witness, Rodgers Wafula who was also a police officer attached to Naivasha police station performing general traffic duties. He had the OB 29/3/2017 with regard to accident which occurred at around 8.00pm. He testified that the accident occurred at National Oil Petrol station. Motor vehicle KBR 031C was being driven by Sospeter Kimutai Kiplagat, when it got involved in an accident with an unknown motor vehicle which did not stop after the accident as a result Elijah Mangaa Ongeri suffered fatal injuries.

9. The driver of KBR 031C Toyota Voxy was driving from Nairobi to Naivasha, when suddenly, an unknown vehicle turned towards National Oil petrol station hitting vehicle motor vehicle KBR 031C and as a result of the impact the suit vehicle lost control and rolled several times and rested facing Nairobi General direction. The seven passengers on board were injured. The deceased was fatally injured and died at Naivasha District Hospital where he had been rushed for treatment. The suit vehicle was excessively damages. He said the scene was visited and the party to blame for the accident was the unknown motor vehicle. He produced police abstract as Defense Exhibit. In cross examination he stated that the accident was investigated by PC James Mwangi who had been transferred to Athi River. The accident matter was placed under inquest and closed. He said he did not produce court's determination on the inquest.

Appeal Submissions.

10. The Appellant filed submissions on December 14, 2022 and submitted that the Appellate court can interfere with a subordinate court award. He relied on the case of *Paul Kipsang Koech & Another vs Titus Osule Osore* [2013] eklr and *Kiwanjani Hardware Limited & Another vs Nicholas Mule Mutinda* [2008] e KLR.

11. As to whether the unknown motor vehicle was rightfully blamed for the accident, it was submitted while relying on Order 1 Rule 15 of the *Civil procedure rules* that where a defendant has not enjoined a 3rd Party as is the case herein, the court cannot apportion liability to such a party. Further that parties are bound by pleadings and in this case the Respondents were bound by their defence, they did not plead contributory negligence on the part of the unknown motor vehicle nor did they seek to issue a third-party notice to the owners of the said vehicle. The Appellant submitted that he had established that the accident was solely caused by the negligence of the driver of the suit motor vehicle where the deceased was a passenger. Reliance was placed on the case of *Benson Charles Ochieng & Another vs Patricia Atieno* [2013] eKLR, *David Meangi Kamunyu vs Rachael Njambi Ruguru* [2022] eKLR, *Mohamed Muyunga vs Vinoth Abwolet Eshepet* [2020] e KLR.

12. Secondly, it was submitted that the award the court would have given of Kshs 923,040 which was inordinately low. They relied on the case of *Kemfro Africa t/a Meru Express service, Gathogo Kanini vs AMM Lubia & Another* [1988] e KLR, *Bashir Ahemed Butt vs Uwais Ahmed Khan* [1982-88] KAR 5 on the interference of awards by the Appellate court, it was submitted that the award of pain and suffering should be Kshs 200,000 as the Appellant died while undergoing treatment at Naivasha district hospital.

13. On loss of expectation of life, the Appellant proposed Kshs 150,000 and relied on the case of *Jackson Kariuku Ndegwa suing as the administrator of the estate of Fabius Munga Kariuki vs Peter Kungu Mwangi* (2016) as the deceased was 53 years old and enjoying robust health with a promising future.

14. Under loss of expectation of dependency, it was submitted that the deceased was earning a net salary of Kshs 25,402 and he used to spend 1/3 of the salary of himself and 2/3 on his family. In addition, that the trial court erred by completely departed from the circumstances of the case, the Appellant had proven dependency. Reliance was placed on the case of *Kioko David Matundura vs Transline Logistics (EAN) Ltd* [2020[eKLR special damages, were proved and thus was also to be upheld.

15. The Respondent's filed submissions on January 16, 2023. On the question of liability, the Respondent's relied on section 107,108 and 109 of the *Evidence Act* and the cases of *Evans Otieno Nyakwana vs Cleophas Bwana Ongaro* [2015] e KLR and *East Produce (K) Limited vs Christophe Astiado Osiro*, Civil Appeal No 43 of 2001. The respondents submitted that the Appellant had the burden of proving that the accident was caused by the negligence of the Respondent. PW1was not a witness to the accident and her evidence amounted to hearsay and was inadmissible. The Appellant failed to call an eye witness to corroborate her evidence. Further PW2 and DW1 and the inquest exonerated the Respondent's as the accident was blamed on the unknown motor vehicle. Further reliance was placed on the cases of Benjamin *Mwneda Muketa , suing as the legal representative of Mercy Nkirote vs Abdikadir Sheik & 2 others* [2018] e KLR , *Ndugu Kimani vs Paul Njenga Gatheru* [2016] e KLR, *Mbilo Nzeki Munyasa & Anither vs Malde Transporters Limited* [2015] e KLR *Sally Kibii & ANotehr vs Francis Ogaro* [2012] e KLR *Benter Atieno Obonyo vs Anne Nganga & another* [2021] e KLR and *Kiema Mutuku vs Kenya Cargo Hauling Services Limited* 1991.

16. It was also submitted that this was the Appellants case and they were supposed to join all necessary parties at the trial and it was unfair for the Appellant to blame them for not joining other parties. On costs, it was submitted that they follow the event as provided for in section 27(1) of the *Civil Procedure Act*. The court was urged to dismiss the Appeal with costs.

Analysis & Determination

17. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court has a duty to subject the whole proceedings to fresh scrutiny and make its own conclusions. Further this Appeal can be summarized into issues of liability {Grounds 1and 2 of the Grounds of Appeal} and grounds related to quantum awarded {Grounds 3,4 and 5 of the grounds of Appeal}.

18. This court has a duty to subject the entire proceedings to fresh scrutiny in the case of *Selle & Another Vs Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court Is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abduk Hammed saif V Ali Mohammed Sholan(1955), 22 EACA 270

19. In *Coghlan V Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

> " Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises, which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen

20. The duty of proving the allegations raised lay on the person asserting them as provided for in section 107, 108 and 112 of the *Evidence Act* which provide that;

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

21. This was also stated by the Court of Appeal in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* NYR [2013]eKLR as follows;

> " We have considered the rival submissions on this point and state that section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

22. In the case of *Evans Nyakwana Vs Cleophas Rwana ongaro* (2015) eKLR it was held that

> " As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the Evidence Act, Chapter 80 laws of Kenya. Furthermore, the evidential burden...... is cast upon any party, the burden of proving any particular fact which he desired

the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

23. The balance of probabilities which is the standard of proof in civil cases was also elaborated by Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

24. With regards to road traffic accidents, the Court of Appeal in *Micheal Hubert Kloss & Another vs David Seroney & 5 Others* [2009] Eklr observed as follows:

> " 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) AC 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..."

25. The plaintiff testified and relied on her witness statement. Her evidence was that her late husband Elijah Mangaa Ongeri, was a lawful passenger in the suit motor vehicle which was being driven along Nairobi-Naivasha road. The said motor vehicle was recklessly driven by the respondent's servant, agent and/or driver that it lost control and caused an accident, resulting in her husband suffering fatal injuries. Her evidence was supported by the various documents produced.

26. The evidence of PW2 and DW1 was similar, they testified that the accident was caused by an unknown vehicle, which made a right turn to enter National oil petrol station and in the process, it collided with the suit motor vehicle causing it to loss control and roll several times. The unknown motor vehicle did not stop at the scene of the accident after it occurred and that no one noted the number plate. Further no one was charged with any offence. The trial court in its judgment observed that the appellant did not prove that the respondent was liable for the accident as it was caused by the unknown motor vehicle who unfortunately was not enjoined in the proceedings. She proceeded to dismiss the appellants case as against the respondent and found that he unknown motor vehicle was 100% liable for the accident.

27. In *Khambi and Another vs Mahithi and Another* [1968] EA 70, it was held that:

> "It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

28. The trial court relied on the evidence of both PW2 and DW1 to find that that the respondents were not to blame for the accident. Further the trial court made a finding that the unknown motor vehicle was liable for the accident and, it was the appellants duty to join the said unknown party but failed to do so. Unfortunately this was a serious misdirection and error of principle as both police officers based their evidence on hearsay and information received from third parties who were not identified, their statements to the police were not produced in court as evidence nor were they said informants called to testify and elaborate as to how the accident occurred to confirm the said allegation. Further such witnesses would also have to testify and explain to court what impact would make the suit motor vehicle lose control and roll several times but not cause any serious damage on the unknown motor vehicle that it could be driven away unnoticed.

29. The Court of Appeal in *Joyce Mumbi Mugi vs The Co-Operative Bank of Kenya Limited & 2 Others* Civil Appeal No 214 of 2004 opined that:

> "If a "matatu" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle…Vehicles, when normally driven at reasonable speed, do not just do certain things. Though the vehicle is being driven on a wet road by itself would not make the vehicle swerve onto the path of oncoming vehicle. If something of the kind happens there must be an explanation as to the reason for the particular event happening. Vehicles when normally driven on the correct side of the road and at reasonable speed do not run into each other."

30. It was similarly held in *Chao vs Dhanjal Brothers Ltd & 4 Others* [1990] KLR 482 that:

> "Where the circumstances of the accident give rise to the inference of negligence, then the defendant, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the accident was consistent only with the absence of negligence. Where the defendant relies on a latent defect, the evidential onus shifts to the defendant to show that the latent defect occurred inspite of the defendant having taken all reasonable care to prevent it. The defendant is not required to prove how and why the accident occurred, but in case of tyre burst (similar to pipe burst in this case) the defendant must prove or evidence must show that the burst was due to a specific cause which does not connote negligence but points to its absence or if the defendant cannot point

out such cause, then show that he used all reasonable care in and about the management of the tyre and that the accident may be inexplicable and yet if the court is satisfied that the defendant was not negligent, the plaintiff's case must fail."

31. As already determined above, the evidence presented by the police witnesses cannot pass the evidentiary test as set out is section 63 of the *Evidence Act*. Further the witnesses did not visit the accident scene to verify the information contained in the police file, no witness statement was produced nor did they produce any sketch maps of the accident scene to back up their claim. That being the case it was incumbent upon the respondents to call upon the driver of the suit motor vehicle to testified and clarify how the accident occurred. He too did not testify yet he too owed a duty of care to the deceased and ought to have demonstrated that he took all necessary steps to avoid the accident.

32. The appellants having proved that indeed an accident did occur involving the suit motor vehicle as a result of which a fatal injury occurred, the evidential burden shifted to the respondents to prove that they were not to blame. This evidentiary burden was not discharged under sections 109 and 112 of the *Evidence Act* and thus they must bear the burden of liability at 100%.

33. The other serious misdirection was the finding by the trial magistrate that the appellants failed to institute 3rd party proceedings as against the unknown motor vehicle. The appellants did not need to enjoin the third party as it was clear from their pleadings that they blamed the respondents for this accident. The respondents too did not plead contributory negligence by the said third party on their joint defence filed. Parties are bound by their pleadings and in this case the Respondents were bound by their statement of defence. If indeed the respondents wanted to blame the third party for the accident, it was them to file the 3rd party notice as they were the ones who sort to show that the 3rd party substantially contributed to the accident.

Quantum

34. In *Woodruff vs Dupont* [1964] EA 404 it was held by the East African Court of Appeal that:

> "The question as to quantum of damage is one of fact for the trial Judge and the principles of law enunciated in the decided case are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of fact from doing justice between the parties. So to use them would be to misuse them...The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are "such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself." The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendant.

35. Also in *Kemfro Africa Limited T/A Meru Express service, Gathogo Kanini Vs AMM Lubia & Another* which was cited with approval in *Mutungi Vs David Muasya Ndeleva* {2015} eKlr as follows;

> "........ It must be satisfied that either the judge, in assessing 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."

" .... It is trite law that the assessment of general damages is at the discretion of the trial court and the 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 the first instant"

36. However, in the same citation the court went further to state that;

"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 or leaving out of account some relevant one) or misapprehending the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

37. Though the appellants were not awarded and sum as damages, the trial court was duty bound in law to assess the same and did assess quantum as follows;

a. Pain and suffering Ksh 20,000/=

b. Loss of expectation of life Ksh 100,000/=

c. Loss of dependency Ksh 508,040/=

d. Special damages Ksh 295,000/=

Pain and Suffering

38. For pain and suffering, the appellants submitted that award should be enhanced. I do find that the trial court erred in awarding a sum of Ksh 20,000/= which was inordinately low and justified an interference by this court. The trial court also erred to find that the appellant died on the spot, while the evidence presented showed that he died while undergoing treatment at Naivasha District Hospital. The award of Ksh 20,000/= is this set aside and is enhanced to Kshs 100,000/= based on comparison for similar awards under similar circumstances.

39. The trial court did award as sum of Ksh 100,000/= for loss of expectation of life and this court finds the same to be reasonable.

Multiplier Ratio.

40. The trial court used a multiplier of 1/3 and made a finding that the appellants failed to prove that the deceased had dependent's and therefor spend 2/3 of his salary on himself and 1/3 on others. This finding is also plainly wrong and erroneous as it was pleaded and proved that the deceased was survived by his wife and four children some of whom were still minors. The chiefs letter dated June 9, 2017 was also produced as an exhibit to confirm the same. The multiplier ration is thus increased to 2/3.

Loss of Dependency

41. The uncontroverted evidence presented, was that the deceased was a civil servant employed under the Ministry of Public service and Youth, where he worked as a chief youth development officer. He was aged 53 years at the time of his demise and his net salary was Ksh,25,402/=. The trial court considered the vicissitudes and vagaries of life and found that he would have been employed for another 5 years. The court proceeded to assess damages. {Kshs 25,402 x1/3x5yrs x12 months Kshs 508,040/=}.

42. The magistrate fell in error to find that the deceased would have continued with his employment for another 5 years, yet it is common knowledge the retirement age is 60 years. As for vicissitudes of life, having attained the age of 53 years it is more likely that the deceased would have worked and retired at 60 years and probably lived longer. I would therefor interfere with the finding of the court on the issue of multiplicand and increase the same from 5years to 7 years. The damages awarded under this heading thus should have be calculated as follows. { Ksh.25,402 x2/3x7yrs x 12 months = 1,422,512/=}.

43. Special damages were pleaded at Ksh 295,000/= and the same was proved and awarded.

Disposition

44. Having found as above I do find that this appeal has merit. The Judgement of Hon Eunice Kelly {SRM} dated February 8, 2022 delivered in Naivasha CMCC No 723 of 2017 dismissing the appellants suit is hereby set aside in its entirety and judgment is entered in favour of the appellants therein as follows;

    a. Pain and suffering.................... Ksh 100,000/=

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

    c. Loss of Dependency...............Kshs 1,422,512/=

    d. Special Damages.....................Kshs 295,000/=

    Total Kshs 1,917,512/=

45. The appellant is also awarded costs of the primary suit plus interest thereof.

46. The costs of this appeal is also awarded to the appellant and the same is assessed at Ksh 250,000/= all inclusive.

47. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 16TH DAY OF MAY 2023.

RAYOLA FRANCIS

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 16TH DAY OF MAY, 2023.

In the presence of;

....for Appellant

....for Respondent

..Court Assistant