



Haroon Yuasa Limited & another v Mbeneka & another (Suing as the legal representatives of the Estate of Benard Nzau Muia - Deceased) (Civil Appeal 2014 of 2021) [2023] KEHC 21265 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21265 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL 2014 OF 2021
MW MUIGAI, J
JULY 24, 2023**

BETWEEN

HAROON YUASA LIMITED 1ST APPELLANT

EMMANUEL MUTIE 2ND APPELLANT

AND

MARY MBENEKA 1ST RESPONDENT

DOMINIC KYALO NZAU 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF BENARD
NZAU MUIA - DECEASED**

*(Appeal from the judgment of 25th November 2021 by Hon.
K. Kenei (RM) in Machakos in CMCC No. 594 of 2019)*

JUDGMENT

Background

Plaint

1. Vide a Complaint dated 9th September, 2019 and filed on 1st October, 2019 against the Appellant in which the Respondent claimed that at all material times relevant to the suit, the Appellant was the registered owner of motor vehicle registration number KBZ 599U Nissan Van. The Respondents brought the suit on their capacity as Administrators of the Estate of Benard Nzau Muia (deceased).
2. On 29TH June, 2019 the deceased was lawfully walking as a pedestrian off the road along Machakos-Kitui Road when at the Mwanyani area, the 2nd Appellant either by himself, his authorized driver, servant and/or agent drove, controlled and/or managed motor vehicle registration No. KBZ 599U so negligently



that he permitted the same to veer off the road and off to the extreme edge of the pedestrian walkway, hit and knocked down the deceased as a result thereof the deceased sustained fatal injuries. As a result of the said accident the deceased, who was a healthy man aged 69 years, a retired Police Officer at the time of his death worked as a farmer earning a monthly income of Kshs 40,000/- per month.

3. It was contended that following the said accident, the deceased lost his expectation of life and his estate has been put to loss and damage.
4. Particulars of special damages as per the Plaintiff were:
 - a. Funeral Expenses.....Kshs 119,042/-
 - b. Application for letters of administration. Kshs 30,000/-
 - c. Search Certificate for motor vehicle registration number KBZ 599U.....Kshs 550/-Total 149,592-
5. Averring that the dependants of the deceased have suffered loss and damage in that by the death of the deceased they have lost their means of livelihood and support.
6. Respondents prayed for judgment against the Appellants jointly and severally for:
 - a. Special damages in sum of Kshs 149,592/-
 - b. General damages under the Fatal Accident Act
 - c. General damages under the *Law Reform Act*
 - d. Cost of this suit
 - e. Interest on (a), (b) & (c) above at court rates; and
 - f. Any other further relief as this Honorable Court may deem fit and just to grant.

Defence (2nd Appellant's Defense)

7. The Appellant in his defense dated 11th December, 2019 opposed the Respondent's claims denying that he was the beneficial owner and in possession of motor vehicle registration Number KBZ 599U Nissan Van and placed the Respondent to strict proof thereof.
8. The Appellant averred and denied that he negligently drove, controlled and/ or managed the motor vehicle registration number KBZ 599U and allowed the same to veer off the road and knocked the deceased occasioning him fatal injuries. He placed the Respondent to strict proof thereof; he further denied the particulars of negligence as particularized in the plaintiff placing Respondent to strict proof thereof.
9. He averred that in the alternative and without prejudice to the foregoing, if an accident occurred as alleged which he still denied, the same was solely and/ or contributed by the negligence of the Respondent; the Appellant denied in entirety the contents of the Plaintiff save for the jurisdiction the Honorable Court which was admitted and prayed that the Respondent's suit against the Appellant be struck out with costs.



Reply To The 2nd Appellant's Defence

10. The Respondents, in their reply to defence dated 29th January, 2020 denied the allegations contained in the defence and reiterated the contents of paragraphs of the plaint together with the particulars of negligence set out in the said plaint; they affirmed the particulars of special damages and further lamented that the 2nd Appellant's defense was mischievous and intended to embarrass and delay the finalization of the Respondents' and urged the same to be struck out and the Respondents' judgment be entered as prayed in the plaint.

Hearing In the Trial Court

11. PW1, the Respondent adopted Written statement of 1/10/2019 and stated that the Deceased was her husband and that on 29/6/2019 she was called by her neighbor Benedetta Nthuku and informed that her husband had been involved in a road accident with Motor vehicle Reg KBZ 599 U. At the time of receiving the information, the deceased was taken to Machakos Level 5 Hospital. By the time she arrived the deceased died. That together with the Deceased they had 5 issues all adults. Testifying that the Deceased was a retired police officer and a farmer earning Kshs 40,000/- per month and she relied on him entirely for means of livelihood and support. She sought compensation.

PW1 produced List of Exhibits as follows;

- a. Death Certificate
 - b. Police Abstract
 - c. Post Mortem Report
 - d. Plaintiff's ID card
 - e. Letters of Administration ad litem
 - f. Bundle of receipts
 - g. Copy of Records
 - h. Demand Letter
 - i. Statutory Notice
 - j. Bank Statement
12. In cross examination, PW1 stated she resided with her late husband who was retired and they were farming and he assisted her financially. They lived in their own home and their children helped them to farm and relied on the deceased who was receiving pension. They have 5 children adults. The copy of records indicated the registered owner of the vehicle as 1st Defendant and receipts were for expenses incurred during deceased's burial. The Death Certificate indicates he was unemployed.
13. PW2, the Police Officer, PC Gideon Kipruto No 83568 stated that an accident occurred on 29/6/2019 at Mwanyani area along Machakos- Kitui road involving a Toyota Noah registration number KBZ 559U and a pedestrian. Testifying that the subject motor vehicle was being driven towards Machakos when the driver lost control and veered off the road hitting a pedestrian and that the pedestrian was the deceased herein and he died en route to the hospital. The driver of the vehicle fled from the scene. The pedestrian was walking off the road. He produced the Police Abstract as Exhibit.



14. In cross-examination PW2 testified that the accident was between the vehicle and a pedestrian and the matter was pending under Investigation (PUI) The Police File had the conclusive investigations. There was no sketch plan of the accident. The OB report was by the Investigation Officer who visited the scene. The motor vehicle was towed to the Police Station and the driver escaped from the scene. The Insurance Particulars were captured in the OB by Investigating Officer CPL Njagi who was transferred to Timau Police Station. He did not know who was handed over the Police file. The accident occurred on 29/6/2019 and 2 years later investigations were not complete. The investigations would have revealed who was the registered owner of the vehicle or if it was sold. He said in his opinion he blamed the Defendant.
15. PW3 Elizabeth Ngina Nduku, on her part testified that on 29/6/2019 she was standing outside her plot when she saw a vehicle from Kitui heading to Machakos. It lost control and was zigzagging on the road. It hit the pedestrian who was on the opposite side the road. She stated that her plot is about 100 meters from the road on the left side facing Machakos and she rushed to the scene, identified the Deceased as Bernard Nzau Muia and aided in rushing him to the hospital; according to her as they approached the Machakos Level 5 Hospital he stopped breathing and was declared dead on arrival.
16. PW3 blamed the driver of the subject vehicle and that the Deceased had tried to escape the subject vehicle followed him and she saw the driver come out through the windscreen and run away dressed in overalls. She blamed the driver who was driving at high speed. The vehicle overturned the deceased lay on the windscreen. The vehicle involved in the accident was Reg KBZ 599U.
17. In cross examination she testified that she heard a loud noise like instant brakes; there was no vehicle on the road; the road was straight and it stopped where there was a corner and that the Deceased did not contribute to the accident.
18. The matter was canvassed vide the written submissions.
19. Vide judgment delivered on 25th November,2021, Hon. K. Kenei was in agreement with the Respondents of 100% liability in favor of the Respondents against the Appellant and further awarded damages in favor of the Respondents herein as follows:
 - a. Damages awarded under the Law Reform Act. Ksh. 120,000/-
 - b. Damages under the Fatal Accidents Act. Ksh. 1,200,000/-
 - c. Special damagesKsh 137,592/-
 - d. Total award..... Ksh 1,457,592/-

Notice of Motion

20. The Appellant vide a notice of motion dated 25th April, 2022 sought orders to this Honorable court for an order of stay of execution of the Judgment delivered by the trial court together with the decree and all consequential orders in the suit pending the hearing and final determination of the application. The grounds of the application was inter alia that there was an initial 30 days stay of execution granted in favor of the Appellant in the lower court which according to the Appellant expired; that the entire execution commences the appeal will be rendered nugatory and that the Respondent was a person of unknown means hence the Appellant / applicant is apprehensive that if the decretal sum is paid out the Respondent may deal with it in a manner prejudicial to the Appellant/ Applicant; that the Appellant/ Applicant is ready and willing to furnish such reasonable security as the court may deem fit; further that application is brought without unreasonable delay and that the Appellant/ Applicant has a good and arguable appeal.



Replying Affidavit to the Notice Motion

21. The Respondents vide their affidavit in reply to the application dated 5th May,2022 opposed the application for reason of being irretrievably defective and must fail; stating that the Applicant/Appellant filed this appeal to delay the finalization their matter and that the Applicant is misusing the court and shopping orders as the said application ought to have been filed in the Trial Court before moving to this Court. The Respondents prayed that the application be dismissed with costs and execution proceed from where it had reached.

Hearing in the Trial Court

22. Vide an order of this Honorable Court on 7/6/2022 the Appellant was ordered within 90 days to pay half the decretal amount to the Respondents pending hearing and determination of the appeal.

The Appeal

23. Dissatisfied with the Judgment, the Appellant vide Memorandum of Appeal dated 15th December,2012 sought orders:
- a. The Appeal is allowed.
 - b. The judgment of the Lower Court is set aside and substituted with a proper finding/ judgment.
 - c. The cost of this appeal and that of the Trial Court to be awarded be awarded to the Appellant.
24. The Appeal is brought on the grounds THAT:
- i. The Trial Magistrate erred in law and in fact in awarding the Respondents as damages under both the Law Reform Act, of the case and Fatal Accidents Act which award was too excessive in the circumstances.
 - ii. The Court erred in law and in fact by holding the Appellant wholly liable for the accident when there was no sufficient evidence to support the finding.
 - iii. The Court erred in law and in fact by awarding the Respondents Special damages of Kshs 137,572/= which were not proved to the required standards.
 - iv. The Learned Magistrate erred in law and fact in failing to accord due regard to the Appellants Submissions and authorities on both liability and quantum.
25. The Appeal was disposed by way of written submissions.

Submissions

The Appellant's Submissions

26. The Appellants in their submissions dated and filed on 16th May,2023 reiterated his submissions in the trial Court (annexed to the Record of Appeal pages 53-58) and further highlighted on the Liability in which it is urged that the trial court erred in both law and facts in finding the Appellants 100% jointly and severally. Contending that the deceased was to entirely blame as he was the author of his own misfortunes. Reliance was placed on submissions on liability before the lower court (pages 53-55 of the Record of Appeal). Urging that the Respondents failed to discharge their duty of proving their claim on a balance of probability.



27. The Appellants on the issue of quantum relied on the case of Kenya Power Limited vs James Matata & 2 Others (suing as the legal representatives of the estate of Nyange Masaga (deceased) (2016) e KLR and while relying on the Court of Appeal authority in Butt Vs Khan (1911) 1 KAR stated:

“However, an appellate court cannot review the amount downwards merely because it could have awarded a lower figure if it was the trial court. It can only interfere with such an award if the same is inordinately high or inordinately low so as to come up with a wholly erroneous estimate.

This is a principle that is well settled in law. In this regard, the Respondents referred this court to the case of Butt vs Khan (1977) 1 KAR in which it was held as follows: -

“An Appellate court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

28. On the issue of loss of expectation, reliance is placed the submission filed in the lower court reference made to (page 55 of the Record of Appeal).
29. As regards pain and suffering it is the position of the Appellants that PW3 in trial court testified as recorded at page 83-84 of the record of appeal that the deceased person died on the same day of the accident. Urging that the court do set aside the award of Kshs 20,000/- and substitute it with an award of Kshs 10,000/-. They further relied on the case of Wachira Joseph & 2 Others vs Hannah Wangui Makumi & Another (2012) where Hon Charles Kariuki J upheld the award of Kshs 10,000/- awarded by the trial court for pain and suffering to a deceased who died on the same day of the accident.
30. Regarding the issue of loss of dependency, the Appellants submits that the Respondents claimed that the deceased was the bread winner of the family yet no evidence was adduced to prove those allegations. Further that the Respondent in her pleadings indicated that all their children were all adults and on cross-examination confirmed the same showing that they cannot depend on their father as they are adults that the only dependent is one Mary Mbeneka Nzau the plaintiff herein.
31. It is contended that where the amount of income and profession of the deceased cannot be accurately ascertained, the best approach would be to adopt a global award. Reliance made on the case of Moses Mairua Muchiri vs Cyrus Maina Macharia (suing as the personal representatives of the estate of Mercy Nzula Maina (deceased) 2016 eKLR, Ngaah J held: -

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case”

32. The Court is urged to set aside the award under the head of loss of dependency and substitute it with a global award of Kshs 250,000/=. Averring that allegations by PW1 that the deceased was the bread winner of the family were never backed with any concrete evidence hence unreasonable to say they were depending on the deceased.



33. Further the case of Rishi Hauliers Ltd vs Josiah Boundi Onyacha (2015) was relied on to buttress the issue of loss of dependency.
34. As to the issue of Special damages, it is contended that the trial court awarded special damages for Kshs 137,592/=. Opining that the rule regarding special damages is that they must be pleaded specifically and strictly proven by production of receipts. Urging that the court only grant special damages that have been proved by receipts that comply with the law. Reliance is made on Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR, where the court held that special damages need to be specifically pleaded before they can be awarded.
35. They finally submitted that the appeal be allowed and the trial court judgment be set aside and be substituted with court's own assessment.

Respondents' Submissions

36. Respondents vide their submissions dated 8th May,2023 and filed on 12th May,2023 submitted sequentially on their issues: on the issue of liability, it is submitted that PW2 PC No. 83568 from Machakos Police Station testified and gave clear evidence as to how the accident occurred as per the Occurrence book. It was further averred by the Respondents that PW2's testimony was that on 29/6/2019 at Machakos police station vide OB No. 26/26/06/2014 they received a report at about 12:00 PM of a fatal accident which occurred at Mwayani area involving a motor vehicle registration KBZ 559U driven by unknown male driver who had escaped after the accident.
37. Contending that on cross examination PW2 was clear that the police file was conclusive on the point of impact and that the final landing position of the motor vehicle and the pedestrian was on the extreme right side of the road as one faces the Machakos general direction.
38. It was the Respondents submission that the testimony of PW2 was corroborated by an independent eye witness of PW3 one Elizabeth Ngina Nthuku who on 29/6/2019 was standing outside her house which is about 100 meters from the main road at Mwanyani area on the left side of the road as one faces Machakos general direction when she witnessed the accident. Opining that the testimony of PW3 was clear concise and to the point and that upon cross-examination, PW3'S testimony was impeachable, uncontroverted and remained unshaken and she maintained that the deceased did not contribute to the accident.
39. Reliance was made on the case of Regina Wangeci vs Eldoret Express Co. Ltd (2008) e KLR, where the court held that:

“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favor unless the defendant provides some answer adequate to displace that inference.”
40. The Respondents submitted that the body of the deceased was on the windscreen on the motor vehicle off the road a circumstance that there was a prima facie evidence that the driver of the motor vehicle by going off the road was negligent. Further reliance was on the case of Hallwell vs Venables (1930)99



LJKB 353, as quoted in Susan Kanini Mwangangi & Another vs Patrick Mbithi Kavita (2019), it was held that:

“A driver of motor vehicle is held to have sufficient control over his vehicle and its surrounding circumstances to attract the operation of the principle in a suitable case. It is part of the experience of mankind that if a driver is exercising reasonable care, it is not usual for vehicles to overturn. In this case the vehicle overturned and therefore *res ipso loquitor* applies.”

41. On the issue of Quantum, it is the Respondents case that as PW1, PW2, PW3 testified, the deceased died on the way to the hospital on the same day of the accident, urging that Kshs 20,000/- awarded by the trial court was inordinately high and was fair and reasonable. Reliance placed on Oyugi Juma Joseph VS Grace Omwanda Ogolla & Another (2020) eKLR,

Where Kshs 20,000/- was awarded under this head to the estate of a deceased who died on the way to the hospital after the accident. The court upheld the award by the trial court and further noted that “Article in the International Review of Law and Economics: Pain and Suffering in product Liability Cases. Systematic compensation or capricious Awards by W. Kip Vicussi, it is argued:

“Pain and Suffering is generally recognized as being legitimate component of compensation but one for which we have not accepted procedure of measurement. Pain and Suffering is by no means a negligible component of awards. The general implication is that pain and suffering awards are not entirely random or capricious.”

In Rose versus Ford, it was held that where the period of suffering is short, only nominal damages are awarded...

The question is whether KShs. 20,000/= awarded by the trial court was excessive or inordinately high as the deceased died on the same day of the accident and before she reached the hospital, from the post mortem report produced in evidence. The other question is whether that award is erroneous or unreasonable. IN Sukari Industries versus Clyde Machumbo Jumbo Juma H.B. [2016] eKLR the court held:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased estate is entitled to compensation. The generally accepted principle is that normal damages will be awarded on this head for death occurring immediately after the accident...” “The trial court awarded Kshs. 20,000 for pain and suffering as the deceased died the same day of accident. I find this award reasonable and not excessive. I find no reason for interfering with the award. I uphold it.”

42. Regarding loss of expectation, it was the argument of Respondents that the deceased was 69 years old at the time of his death and that Kshs 120,000/- awarded was fair and reasonable. They relied on the case of Abson Motors & 2 Others v Kitsao & Another (administrators of the estate of the late Kitsao Kajefwa (Deceased) (2016) eKLR where the deceased was 85 years old and Kshs 100,000/- was awarded under this head. Similarly, the case of Elizabeth Mary Adembesa vs Shadrack Mwoki Harua, Mombasa HCCC No. 435 of 1992 where Mbogholi J awarded a sum of Kshs 70,000/- for loss of expectation of life for the deceased who was 68 years old. They also quoted the case of Wilson Saya v David Winga



Odongo (Suing as the legal representatives of Helida Awino- deceased (2018) eKLR to buttress this point.

43. It was averred that taking into account the similarities and the nature of the cases, the rate of inflation and the rising cost of living in Kenya, Kshs 120,000/- was fair and reasonable hence the court leaves this head undisturbed.
44. As regards the loss of dependency it submitted that PW1 at pages 73 to 75 Record of Appeal testified that the deceased was a retired police man but was then engaged in farming activities and even as at the time of his death the deceased was actively walking an indication that he was good in health and form. PW1 according to the Respondents submissions testified that the Deceased was earning Kshs 40,000/- per month. Contending that the trial court awarded a global sum of Kshs 1,200,000/-. They relied on the case of *Wilson Saya v David Winga Odongo (Suing as the legal representatives of Helida Awino-deceased (2018) eKLR* where the court held:

This Court however takes judicial notice of the fact that elderly women in rural areas in Kenya are mostly engaged in various economic activities and actually able to sustain their lives. I therefore find the monthly figure of Kshs. 10,000/= not to be without any basis even without proof of business income. The said sum is hereby affirmed. On the multiplier, the trial court found 10 years as ideal. From the various case law on record I am persuaded that the multiplier of 10 years for a 72-years old is on the higher side. I will hence also set it aside and substitute it with a multiplier of 5 years

Therefore: -

$$40,000 \times 12 \times 5 \times \frac{2}{3} = 1,600,000/-$$

45. On the issue of special damages, the Respondents that submitted that they pleaded Kshs 149,595/- and produced the receipts in proof of the same and the trial court awarded Kshs 137,592/- urging that this head be undisturbed as the receipts were produced and attached to pages 29,30,31,32,33 and 34. Further that the said amount amounts to reasonable funeral expenses.
46. They finally urged that the appeal be dismissed with costs to the Respondents.

Analysis/Determination

47. This Court considered pleadings filed grounds of appeal and submissions by parties through their respective Counsel on record and find issues for determination are ;
- Liability- who was/is to blame for the fatal accident that resulted in deceased's demise?
 - Who is the lawful owner of motor vehicle Reg No KBZ 559U
 - Quantum – under *Law Reform Act* & *Fatal Accidents Act*
 - Is quantum on the higher side?
48. The Court in discharging its mandate, this being a 1st appeal, it is trite law, that the court evaluates and reconsiders the evidence on record and draws its own conclusion while bearing in mind that the Court has neither seen or heard the witnesses and should make allowances in this respect. See *Peters vs. Sunday Post Ltd [1958] E.A.424*; *Butt vs. Khan [1981] KLR 349* & *Kemfro Africa Ltd T/A Meru Express Service Gathogo Kanini vs. A. M. Lubia & Olive Lubia (1982-1988) 1 KAR 727* & *Selle vs. Associated Motor Boat Co [1986] EA 123*.



49. In *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:-

“Denning J, in *Miller vs. Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

Liability

50. The accident is not disputed. The accident occurred on 29/6/2019 along Machakos- Kitui Road at Mwanyani area involving motor registration KBZ 599 U and the deceased Bernard Nzau Muia who was a pedestrian was lawfully walking on the side of the road. The tragic accident caused deceased’s death as evidenced by the Post Mortem Report the deceased died from head injury due to blunt force trauma as indicated also in the Death Certificate. The accident was recorded in the Occurrence Book (OB) of 26/29/06/2019 and Police Abstract produced as exhibit at trial.

51. The Respondents however dispute ownership of the suit motor vehicle Reg No KBZ 559U and deposed as ground of appeal that the Trial Court erred in law and in fact by holding the Appellant wholly liable for the accident when there was no sufficient evidence to support the finding.

52. With regard to confirmation of ownership of the motor vehicle Reg No KBZ 559U, the Respondents produced;

a. Motor Vehicle Copy of Records from NTSA as at 26/7/2019

The Registered owner of M/V Reg No KBZ 559U was/is Haroon Yuasa Limited PIN P0513XXXX0G

b. The Police Abstract of 23/7/2019, indicated the name and owner of the motor vehicle Reg No KBZ 559U as Emmanuel Mutie of P.O.Box 832 Machakos.

53. Both parties were sued as defendants, however according to the Trial Court’s judgment, 1st Defendant was never served and therefore did not enter appearance nor file Statement of Defence. The Insurance Company Kenyan Alliance Ins Ltd was notified vide the Statutory Notice and Demand Letter. These facts were not challenged during trial except through pleadings. The following cases depict the position of determining ownership of the motor vehicle thus;

Hon. Emukule J. in *Charles Nyambuto Mageto v Peter Njuguna Njathi* NKU HCCA No. 4 of 2009 [2013] eKLR the Court held:-

“From the interpretation of section 8 of the *Traffic Act* as elucidated above, a person claiming or asserting ownership need to necessarily produce a log book or a certificate of registration. The courts recognize that there are various forms



of ownership, that is to say actual possession, and/or beneficial, all of which may be proved in other ways, including by oral or documentary evidence such as the Police Abstract Report

54. Hon. Warsame J. (as he then was) in the case of Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001 held as follows:

“Whereas it is true that it is the responsibility of the plaintiff to prove that the motor vehicle which caused the accident belonged to the defendant and the production of a certificate of search is a valid way of showing the ownership, it is not the only way to show that a particular individual is the owner of the motor vehicle as this can be proved by a police abstract. Since a police abstract is a public document, it is incumbent upon the person disputing its contents to produce such evidence since in a civil dispute the standard of proof requires only balance of probabilities. Where the defendant alleges that the motor vehicle which caused the accident did not belong to him, it is up to them to substantiate that serious allegation by bringing evidence contradicting the documentary evidence produced by the plaintiff as required by section 106 and 107 of the *Evidence Act*. The particulars of denial contained in the defence cannot be a basis to reject a claim simply because a party has denied the existence of a fact as a fact denied becomes disputed and the dispute can only be resolved on the quality or availability of evidence.”

55. It is not enough to challenge the evidence of ownership and registration of the vehicle without adducing any evidence to controvert the evidence on record by producing any other means of proving ownership and registration of the vehicle other than what was presented by the Plaintiff /Respondent.
56. The Trial Court proceedings indicate that the Defendants did not adduce any evidence. Therefore, in the absence of any other evidence the Trial Court was on firm legal ground to hold defendants as registered owners of the motor vehicle Reg No KBZ 559U that was involved in the road traffic accident and as pleaded by the Plaintiff/Respondents and considering the question of ownership on evidence on record that 2nd Defendant was liable.
57. The Appellant took issue with the Trial Court holding the Appellant wholly liable for the accident when there was no sufficient evidence to support the finding.
58. The evidence on record by PW3 an eye witness to the accident is that on 29/6/2019 she was standing outside her plot when she saw a vehicle from Kitui heading to Machakos. It lost control and was zigzagging on the road. It hit the pedestrian who was on the opposite side the road. She stated that her plot is about 100 meters from the road on the left side facing Machakos and she rushed to the scene, identified the Deceased as Bernard Nzau Muia and aided in rushing him to the hospital; according to her as they approached the Machakos Level 5 Hospital he stopped breathing and was declared dead on arrival. PW3 blamed the driver of the subject vehicle and that the Deceased had tried to escape the subject vehicle followed him and she saw the driver come out through the windscreen and run away dressed in overalls. She blamed the driver who was driving at high speed. The vehicle overturned the deceased lay on the windscreen. The vehicle involved in the accident was Reg KBZ 599U.
59. Against this evidence and that of PW2 Scene Visiting Officer, the Appellant did not adduce any evidence to controvert these facts.

‘He who alleges must prove’. If the pedestrian was to blame in any way in causing the accident evidence ought to be led by the Appellant to prove such facts. As it is the evidence



of PW3 was tested through cross examination by the Appellant's Counsel but remained cogent and tangible evidence as to how the accident occurred.

60. 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. Schuler 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.”

61. There is no evidence to controvert the eye witness testimony which is direct evidence on how the accident occurred. PW3 saw the driver veer off the scene hit the deceased and he disappeared thereafter. Liability cannot be apportioned where no evidence is adduced or driver escaped from the scene. All parties are entitled to justice based on evidence adduced. In this case PW3 evidence remains intact on how the accident occurred. Liability is retained and upheld at 100/% against the appellant in favor of the Respondents.

Quantum

62. The Appellant took issue with quantum on the following areas;
- a. damages under both the Law Reform Act, of the case and Fatal Accidents Act which award was too excessive in the circumstances.
 - b. Respondents Special damages of Kshs 137,572/= which were not proved to the required standards.
 - c. failing to accord due regard to the Appellants Submissions and authorities on both liability and quantum.
63. This Court is guided by the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982-88) KAR where the Learned judges set out the parameters under which an appellate court will interfere with an award in general damages and held that: -

“An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low...”

Law Reform Act,

64. In 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.”

65. The Trial Court awarded for Pain & Suffering – Ksh 20,000/-.
66. Considering the deceased on the same day of the accident while being taken to hospital and died on the way. The Trial Court considered and relied on authorities by both parties; the Appellant cited cases between Ksh 10,000/- & Ksh 30,000/- and the Respondent between Ksh 50,000/-–Ksh 100,000/- The Trial court infact contrary to the appellant’s assertion that their authorities were not considered took the average from the Appellant’s proposal Ksh 20,000/-
Loss of Expectation of Life – Ksh 100,000/-
67. The Trial Court considered the Respondents authorities on Loss of Expectation of Life and the figure proposed was Ksh 200,000/-and the Appellant relied on a single authority and proposed Ksh 100,000/- .Again the Trial Court upheld the Appellants proposal of Ksh 100,000/- contrary to their claim that the Trial Court ignored their authorities and submissions.
68. This Court shall not disturb the above award.

Fatal Accidents Act

Loss of Dependency

69. Under the *Fatal Accidents Act* one has to determine the deceased’s income, dependency ratio and multiplier to be used as was stated in In Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another NRB HCC 1638 of 1998(UR) Ringera J (as he then was)
The Trial Court considered the widow and 5 children though adults were dependent on the deceased. The allegation of farming that drew a monthly payment/income of Ksh 40,000/- was not verified by the deceased’s statement of Account save for monthly pension. The Court considered the deceased’s age 69 years and referring to authorities cited by both parties took the view, in the absence of documentary proof of monthly income a global figure would suffice.
70. In Frankline Kimathi Maariu & another vs. Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the Court was dealing with a similar issue, it stated:

“(23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.”
71. In Jacob Ayiga Maruja & Another vs Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR where the court stated:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways.



If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”

72. The Appellants relied on authorities and proposed a global figure of Ksh 250,000/- while the Respondents proposed global sum of Ksh 3,000,000/- .The Appellant did not challenge that the deceased left a widow and 5 children as dependents but challenged that they depended on the deceased their late father, yet they were/are adults.

73. 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 dependants. There is no social welfare system that caters for old people in this country...”

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...”

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

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

74. Therefore, the law recognizes dependency of child/children of the deceased without any age cap provided. In today’s world and prevailing challenges, it is reasonable to expect adult children depending on aging parents for support.

75. The Trial Court relied on a similar case, where the deceased was aged 69 years old; in *Eston Mwirigi Ndege & Anor vs Damaris Kairari* (suing as the Legal Rep of the estate of Felix Kibiti(deceased) eKLR and took the global sum of Ksh 1,200,000/- again almost average of what both parties submitted figures and authorities submitted. I find no legal basis to disturb the award in the circumstances,

Special Damages

76. As regards special damages, it is trite law that they must be pleaded and proved. The following documents were produced;

77. The Plaintiff pleaded Kshs 149,592 and parties are bound by their pleadings. The payments proved were as follows;

- a. Advocates Fees Office Account- Ksh 30,000/-
- b. National Transport & Safety Authority- Ksh 550/-
- c. Funeral receipts photograph & video Ksh 22,000/-
- d. Coffin Ksh 17,000/-
- e. Post Mortem Ksh 15,000/-
- f. Clothing Ksh 43,000/-
- g. Machakos Funeral Home Ksh 16,500/-
- h. Mulleys Wholesale Purchases Ksh 9855/-
- i. ,, ksh 5,112/-



j. Naivas Super market Ksh 1275/-

78. The Court found the Total to be Ksh 155,180/- as per receipts presented. However, what was pleaded was Ksh 149,592/-

Disposition

1. From the above analysis and evaluation of the pleadings and submissions on record, this Court finds the judgment of the Trial Court in order in terms of liability and quantum.
2. Special damages enhanced as proved by receipts and pleaded to Ksh 149,592/-
3. Interest and costs
4. Judgment accordingly.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT ON 24/7/2023(VIRTUAL/ PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE

In the presence of:

Ms Hassan H/b Ms Kavita -For The Respondents

Ms Omari H/b -for The Appellants

COURT:

Stay for 30 days for execution granted.

M.W.MUIGAI

JUDGE

