Okwiri (Suing as administrator in the Estate of Tabitha Gladys Makokha) v Matunda Bus Services Ltd (Civil Appeal 102 of 2015) [2023] KEHC 19748 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19748 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 102 OF 2015

JRA WANANDA, J

JULY 7, 2023

BETWEEN

CAMILUS OKWIRI (SUING AS ADMINISTRATOR IN THE ESTATE OF TABITHA GLADYS MAKOKHA) ..... APPELLANT

AND

MATUNDA BUS SERVICES LTD ..... RESPONDENT

JUDGMENT

1. This Appeal is against a portion of the Judgment delivered on 4/9/2015 in Eldoret Chief Magistrate's Court Civil Case No.263 of 2014. It is entirely on the quantum of damages awarded as compensation for the death of a 51 years old female which arose as a result of a road accident.

2. The background of the matter is that by the Plaint filed on 15/04/2014 through Messrs Morgan Omusundi Law Firm Advocates and later amended then filed on 25/7/2014, the Appellant pleaded that the Respondent was the owner of the motor vehicle registration number KBK 901D Isuzu Bus, on 12/12/2013 the deceased, one Tabitha Gladys Makokha was a passenger aboard the Respondent's said motor vehicle while travelling along Eldoret-Webuye road within Jua Kali area when due to negligence and/or breach, the Respondent's driver caused the motor vehicle to loose control and hit another motor vehicle whereupon the deceased suffered severe injuries occasioning her death. The Appellant therefore sought general damages under the *Fatal Accidents Act* and the *Law Reform Act*, "special damages, funeral expenses and mortuary expenses of Kshs 139,723", loss of expectation of life, costs of the suit and interest.

3. The Plaintiff filed the suit in his capacity as the widower and also Administrator of the estate of the deceased, on his own behalf and also on behalf of the children of the deceased.

4. The Respondent filed its Statement of Defence on 11/06/2015 through Messrs Kairu & Mc Court Advocates. In the Defence, the Respondent denied the allegations made against in the Plaint.

5. However, subsequently, the parties recorded a consent on liability entering Judgment in favour of the Appellant at the ratio of 90:10.

6. The suit then proceeded to formal proof during which evidence was adduced by the respective parties. Thereafter, the Judgment was delivered on 4/09/2015. In the Judgment, the Learned trial Magistrate assessed and awarded damages to the Appellant in the following terms:

Pain and Suffering	Kshs 20,000.00
Loss of dependency	Kshs 360,000.00
	Kshs 380,000.00
Less loss of expectation of life	Kshs 70,000.00
	Kshs 310,000.00
Special damages	Kshs 114,523.00
Sub-total	Kshs 424,523.00
Less 10% contribution agreed by consent	Kshs 42,452.30
Total	Kshs 382,070.70
Plus costs and interest	.

7. The trial Magistrate arrived at the "loss of dependency" award of Kshs 360,000/- by adopting a multiplicand of Kshs 5,000/-, a multiplier of Kshs 9 years and a dependency ratio of 2/3 and computed as follows:

    Kshs 5,000 x 12 x 2/3 x 9 years = Kshs 360,000/-

8. The Appellant, being aggrieved with the Judgment, lodged this Appeal vide the Memorandum of Appeal filed on 17/9/2015. He raised the following grounds:

    i. That the learned Magistrate erred in law and in fact in failing to appraise properly all the evidence on record.

    ii. That the learned Magistrate erred in law and in fact by awarding the estate of the deceased/ Appellant a minimal/low amount in fatal damages which is not commensurate with her age and minimal wage earnings and which amounts to an erroneous estimate of damages on loss earnings and award under the *Law Reform Act* and the *Fatal Accidents Act*.

    iii. That the learned Magistrate erred in law and in fact by failing to consider the submissions by the Appellant.

    iv. That the learned Magistrate erred in law and in fact by failing to consider the elaborate evidence of the Plaintiff which was to the effect that the deceased estate loss and loss of earnings and dependency.

v. That the learned Magistrate erred in law and in fact by failing to consider that the deceased had dependants.

vi. That the learned Magistrate erred in law and in fact by failing to consider that the Defendant failed to totally rebut the Plaintiff's overwhelming evidence on record in terms of loss, loss of amenities, loss of dependency and earnings.

vii. That the learned Magistrate erred in law and in fact by not considering awarding the damages pleaded, submitted and proved considerably fairly.

viii. That the learned Magistrate erred in law and in fact by misapprehending the evidence on record and thereby reached erroneous conclusion and findings.

ix. That the learned Magistrate erred in law and in fact by failing to evaluate the evidence, by failing to take into account relevant factors and as a result arrived at erroneous conclusion and finding.

x. That the learned Magistrate erred in law and in fact in making conclusions, decisions and findings which he could not in law be entitled to make.

xi. That the learned Magistrate erred in law and in fact in all points of law.

Hearing of the Appeal

9. This Appeal had earlier been determined vide the Judgment delivered on 4/12/2019 by Hon. Lady Justice O. Sewe. However, the same was subsequently compromised and set aside and the Appeal directed to be heard afresh.

10. Pursuant to directions given, the Appeal was canvassed by way of written Submissions. The Appellant filed his Submissions on 14/11/2022 whereas the Respondent through its new Advocates, Kimondo Gachoka & Co. Advocates filed its Submissions on 17/1/2023.

Appellant's Submissions

11. On the principles to be observed by an appellate Court in deciding whether to disturb the quantum of damages awarded by the trial Court, Counsel for the Appellant cited the case of *Kemfro Africa Limited t/a Meru Express Services & Another vs Lubia & Another*. He submitted that trial Magistrate failed to exercise his discretion judiciously as the general damages awarded under the head of loss of dependency was excessively low, the multiplier of 9 years adopted in calculating loss of dependency where the deceased was 51 years and in business was unjustifiably low. He cited the case of *Butler vs Butler* (1984) KLR.

12. On proof of income, Counsel submitted that the Appellant (deceased's husband) testified that the deceased used to earn between Kshs 12,000-15,000/- per month from her business and that she was helping in providing for the family, that they were blessed with 6 children and the deceased was responsible for their education, clothing, food and all other basic needs. Counsel then cited the case of *Jacob Ayigo Maruja & Another vs Samuel Obayo*, CA 107/2002 (2005) eKLR.

13. On the choice of multiplier, Counsel submitted that the Magistrate misdirected himself in using a multiplier of 9 years where the deceased was 50 years and still under employable bracket and/or engaged in business, the multiplier of 9 years was unreasonable in the circumstances being that the deceased's source of income was by doing business which is not based on the retirement age. He cited the case of *James Mutinga Mbinda vs Stephen Mwatula and Another* (2021) eKLR and added that a multiplier of 15 years would have been reasonable in the circumstances considering that the deceased was 50 years

and was in good health. According to Counsel, the deceased could have worked until the age of 65 years earning a minimum salary of Kshs.15,000/- per month. He therefore proposed an award of Kshs 1,800,000/- in loss of dependency made up as follows:

Kshs 15,000 x 12 x 2/3 x 15 years = Kshs 1,800,000/-

14. In the end, Counsel proposed a total award in damages as follows;

Pain and Suffering	Kshs 20,000.00
Loss of dependency	Kshs 1,800,000.00
Loss of expectation of life	Kshs 100,000.00
Special damages	Kshs 146,873.00
Total	Kshs 2,066,873.00

Respondent's Submissions

15. On his part, the Respondent Counsel, in opposing the Appeal submitted that the trial Magistrate outlined that the reason why he could not apply the sum of between Kshs 12,000-15,000/- as the multiplicand was solely because there was no proof of income availed by the Appellant and that further, it was not stated clearly what line of work the deceased was engaged in. He cited the case of *Justo Mungathia Mwithalie & Another v Joseph Maore Angacia & Another (Suing as the legal representatives of the estate of EKM (Deceased)* [2022] eKLR in which the case of *Abdalla Rubeya Hemed v Kayuma Mvurya & Another* was cited with approval, to the effect that dependency is a matter of cat to be proved by evidence, despite averments that the deceased was a businesswoman, no evidence was tendered in proof, the Appellant did not avail a death certificate, the burial permit was not produced on purpose, the trial Court was then left to either apply the global sum approach or in the alternative apply the minimum wage applicable at the time.

16. Counsel maintained that the proposed by the Appellant that the Court applies the multiplicand of Kshs.15,000/= is speculative and without any factual basis in line of work of the deceased or the estimated and/or actual income, the Respondent had proposed that the trial Court applies the minimum wage approach or the amount closest to that which was Kshs 5,000/-, the minimum wage applicable for an unskilled worker as of 2015 was Kshs 5,218/-, where the line of work or income is unknown the Court can either apply the minimum wage structure or global sum approach, the Court did not err, an appellate Court will not interfere with an award of general damages by the trial Court unless the trial Court acted under a mistake of law or where it acted in disregard of principles or it took into account irrelevant matters or failed to take into account relevant matters or where it acted under a misapprehension of facts or where the amount awarded is either ridiculously low or high that it must have been erroneous estimate of the damage. He cited the case of *Kivati v Coastal Bottler Ltd.*

17. Counsel further submitted that the trial Court while applying the multiplier approach did not err as this is an issue of discretion and was guided by facts tendered in Court by way of evidence. He referred to the case of *Kangubiri Girls High School & Another v Jane Wanjiku* (Nyeri Civil Appeal No. 35 of 2014 eKLR and added that the trial Magistrate adopted a multiplier of 9 years bearing in mind that the deceased was 51 years. He cited the cases of *EMK & Another v EOO* [2018] eKLR, *Wachira Joseph*

& 2 Others v Hannah Wangui Makumi & Another [2021] eKLR, and *David Makau v Maua Mutie Ndunda* [2014] eKLR,

18. In conclusion, Counsel submitted that this being a civil claim, the degree of proof is lower that in criminal matters but still some degree of proof exists. He cited the case of *Miller v Minister of Pension* (1947) ALL ER 373 and *Charterhouse Bank Limited (under Statutory Management vs Frank Kamau* (2016) eKLR.

Analysis and Determination

19. This being a first Appeal, this Court has the duty to analyze and re-examine the evidence adduced in the lower Court and reach its own conclusions but always bearing in mind that it neither saw nor heard the witnesses testify and make allowance for the said fact. In regard thereto, the Court of Appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, stated as follows:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

20. Connected thereto is the principle that an Appellate Court will only interfere with the Judgment of the lower Court if the decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkube v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

> " A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion."

21. I have carefully considered the evidence adduced before the trial Court by both parties, the Grounds of Appeal and Submissions, together with the authorities cited.

22. I note that although in the Memorandum of Appeal and also in the body his Submissions, the Appellant's Counsel did not expressly touch challenge the amount of "loss of expectation of life" awarded by the trial Court at Kshs 70,000/- and "Special damages" awarded at Kshs 114,523/-, I note that in his tabulation of his proposed award, he has put forward an amount of Kshs 100,000/- in "loss of expectation of life" and Kshs 146,873/- in Special damages. I will therefore treat these two matters as forming part of the issues for determination.

23. I also note that although in his Judgment, the trial Magistrate did not expressly mention it, in his breakdown of the Judgment amount, he deducted the amount of Kshs 100,000/- awarded as "loss of expectation of life" from the aggregate figure awarded as "loss of dependency". Although neither of the parties touched on this issue, I am of the view that it is an important matter that needs to be examined by this Appellate Court. I will therefore also include it in the list of the issues for determination.

24. In my view therefore, the issues that arise for determination are the following:

    a. Whether the award of Kshs 70,000/- for loss of expectation of life was inordinately low.

    b. Whether adoption of the multiplicand of Kshs 5,000/- in loss of dependency was proper.

    c. Whether adoption of the multiplier of 9 years in determining loss of dependency was proper.

d. Whether the trial Magistrate was justified in deducting the amount of Kshs 100,000/- awarded as "loss of expectation of life" from the aggregate figure awarded as "loss of dependency".

e. Whether the award of Kshs 114,523/- for Special damages was sufficient.

25. As already stated, this Appeal is on quantum. It is however trite law that assessment of damages is a matter that is within the discretion of the trial Court and the Appellate Court ought to respect that discretion if properly exercised. This principle was expressed by the Court of Appeal in *Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenya) vs Kiarie Shore Stores Limited* [2015] eKLR as follows:

> " As a general principle, assessment of damages lies in the discretion of the trial court and an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either 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 high that it must be a wholly erroneous estimate of the damages."

26. On the mode of assessing damages, the Court of Appeal in *Odinga Jacktone Ouma v Moureen Achieng Odera* [2016] eKLR guided that "comparable injuries should attract comparable awards". Similarly, in *Simon Taveta v Mercy Mutitu Njeru* Civil Appeal 26 of 2013 [2014] eKLR the Court of Appeal observed as follows:

> " The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

27. The duty of this Court is to therefore consider and determine whether the amounts awarded in damages by the trial Court in this matter are comparable to the range of recent awards given by other Courts

28. I now proceed to analyze and answer the said Issues.

Whether the award of Kshs 70,000/- for loss of expectation of life was inordinately low

29. The trial Court assessed "loss of expectation of life" at Kshs 70,000/=. On this item, I find guidance in various decisions including the one by Hon. Justice A. Mabeya in *Lucy Wambui Kohoro v Elizabeth Njeri Obuong* (2015) eKLR and also by Hon. Lady Justice R.N. Sitati in Civil Appeal No. 113 of 2012 - *Makano Makonye Monyanche v Hellen Nyangena* (2014) eKLR in which she held as follows:

> " I find no reason to interfere with the award on loss of expectation of life under *Law Reform Act* as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries."

30. Indeed, I have perused a number of recent authorities and come to the conclusion that it is now almost uniform that at present, "loss of expectation" is awarded in the region of Kshs 100,000/-. I have not come across any passage in the trial Magistrate's Judgment explaining why he saw it fit to depart from this now fairly accepted figure of Kshs 100,000/-. Since as already stated, awards ought to be comparable, I am persuaded to interfere. Accordingly, I enhance the amount of Kshs 70,000/- awarded by the trial in loss of earnings Court to Kshs 100,000/-

Whether adoption of the multiplicand of Kshs 5,000/- in determining loss of dependency was proper

31. In this matter, it is clear there was no concrete evidence on what the deceased's earnings were. It was not also stated clearly what exact nature of work she was engaged in. It was merely stated that she was a businesswoman earning Kshs. 15,000/- a month. I therefore agree with the Respondent's Counsel that dependency is a matter of fact to be proved by evidence and that despite averments that the deceased was a businesswoman, no evidence was tendered to prove the averment. I am however aware of the holding in the Court of Appeal case of *Jacob Ayiga & Another v Simeon Obayo* [2005]e KLR where the Judges expressed themselves thus:

> " 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...."

32. It is on the above basis that absence of concrete proof of earnings cannot stop the Court from making awards for "loss of dependency". I also agree with the Respondent that in such situations, the global approach rather than the minimum wage-multiplier-multiplicand approach, is more preferrable when assessing "loss of dependency". This view was reiterated by Hon. Justice A. Ringera in Kwanzia vs. Ngalali Mutua & Another (citation not available), where he stated the following:

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

33. Similarly, Hon. Justice A. Mabeya in *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased* [2020] eKLR, stated as follows:

> (23) In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency.
>
> (24) The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.

34. For the said reasons, were I the trial Court, I would have most probably adopted the global sum method rather than the minimum wage-multiplier-multiplicand one. However, since choice of which method to apply is at the discretion of the trial Court and since only the Respondent, who has not filed a cross-

Appeal, is the one who raised this issue, I will say no more on the issue and will not interfere with the same.

35. Coming back to the multiplier method adopted by the trial Court, I note that in adopting the multiplicand of Kshs 5,000/-, the Court proceeded on the basis that it was not clear what business the deceased was engaged in as there was no proof of income to warrant adopting the multiplicand of Kshs 15,000/- proposed by the Appellant. Although the trial Magistrate did not expressly mention it, it appears that he used the minimum wage prevailing at that time in arriving at the figure of Kshs 5,000/-. I make this assumption because this is what the Respondent proposed in his written Submissions before the trial Court. According to the Respondent, the minimum wage applicable for an "unskilled" worker as at 2015 was Kshs 5,218/-, In the absence of any evidence to demonstrate what business she was engaged in or what career or academic professional qualifications she possessed, the trial Court appears to have placed the deceased under the category of a "general labourer" thus relying on the figure of Kshs 5,218/- and then rounding it off to Kshs 5,000/-.

36. I have looked at the Legal Notice No. 17 of 2015 published on 26/06/2015 in the Special Issue, Kenya Gazette Supplement No. 91 under the *Labour Institutions Act*, 2007 and found that for areas described as "former Municipalities", the minimum wage prevailing as at the date of the trial Court's Judgment delivered on 4/09/2015 for "general labourers" was Kshs 10,107.10/- per month and not Kshs 5,218/- as advanced by the Respondent's Counsel. I take judicial Notice that before the creation of counties by *Constitution* of Kenya 2010, Eldoret was a Municipality. The amount of Kshs 5,218/- indicated by the Respondent was for the previous minimum wage scales under the 2013 Regulations which was replaced by the 2015 Regulations.

37. In the circumstances, I adopt the minimum wage of Kshs 10,107.10/- as the multiplicand.

Whether adoption of the multiplier of 9 years in determining loss of dependency was proper

38. From the evidence adduced, it is clear that the deceased died at the age of 51 years. I agree that being in the informal sector, the deceased could have well worked past the 60 years age of retirement in Kenya as urged by the Appellant. There was indeed no evidence to the effect that the deceased was of ill-health or was impaired in any manner. However, taking into account the vicissitudes of life, the trial Court used its discretion and adopted a multiplier of 9 years thus capping the deceased's working life up to the age of about 60 years.

39. I have looked at comparable previous cases in terms of age and where, like herein, the deceased persons were engaged in similar informal self-employment and whose earnings could not be accurately ascertainable. I have come across the following decisions:

    i. In *Wachira Joseph & 2 others v Hannah Wangui Makumi & another* [2021] eKLR, while dealing with an Appeal concerning a 50 years old deceased, Hon. Justice C. Kariuki upheld a multiplier of 9 years.

    ii. In *David Makau v Maua Mutie Ndunda* [2014] eKLR, Hon. Lady Justice L. Mutende awarded a multiplier of 10 years where the deceased was aged 51 years.

    iii. In *Caleb Juma Nyabuto v Evance Otieno Magaka & another* [2021] eKLR, while dealing with an Appeal concerning a 50 years old deceased, Hon. Lady Justice R. Wendoh enhanced the multiplier to 15 years.

    iv. In *Techard Steam & Power Limited v Mutio Muli & Mutua Ngao* [2019] eKLR, while dealing with an Appeal concerning a 50 years old deceased, Hon. Justice G. V. Odunga reduced a multiplier of 13 years to 10 years.

40. From the foregoing, I deduce that in comparable cases, namely, where the deceased is in his or her early 50s and is involved in the informal sector where earnings cannot be accurately ascertained, the upper ceiling or yardstick used by the Court is that such deceased people could have worked up to 60-65 years. In view thereof, and applying the principles set out in *Hellen Waruguru Waweru* (supra), I find that a multiplier picked to fall within such range cannot, in my view, be deemed to amount to the award of damages "being so inordinately high or low as to represent an erroneous estimate" or that the trial Court "proceeded on wrong principles or that it misapprehended the evidence in some material respect and so arrived at a figure, which was either inordinately high or low or that the trial Court, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one."

41. I am therefore not persuaded that I should interfere with the trial Court's adoption of the multiplier of 9 years.

Whether the trial Magistrate was justified in deducting the amount of Kshs 100,000/- awarded as loss of expectation of life from the aggregate figure awarded as loss of dependency

42. As aforesaid, although in his Judgment the trial Magistrate did not expressly mention it, in his tabulation of the Judgment amount awarded, he deducted the sum of Kshs 100,000/- that he had awarded as "loss of expectation of life" from the aggregate figure that he awarded as "loss of dependency". As also already stated, neither of the parties touched on this issue but I have, nevertheless, found this to be an important issue that I cannot ignore and which needs to be determined by this Court.

43. Although he did not mention it, it is apparent that in making the said deduction, the trial Court applied the often wrongly understood school of thought that the Court should always deduct awards granted for "loss of expectation of life" where the Plaintiffs are the same beneficiaries under the *Law Reform Act* and the *Fatal Accidents Act*. The proponents of this view justify it as necessary to avoid "double benefit". The case often quoted for this misunderstood proposition is the Court of Appeal decision in *Kenfro Africa Ltd vs M. Lubia* (1982-88)1 KAR 727.

44. In *Maina Kamau & Anor vs Josephat Muroki Kangondu & Anor* CA No. 148 of 1989, the Court of Appeal subsequently clarified this proposition as follows:

> " The rights conferred by Section 2(5) of the *Law Reform Act* (Cap 26) Laws of Kenya, for the benefit of the estates of the deceased persons are stated to be in addition to and not in derogation of any rights conferred as the dependents of deceased persons by the *Fatal accidents Act*. This does not mean that damages can be recovered twice over, but if damages recovered under the *Law Reform Act*, devolve on the Dependants, the same must be taken into account in reduction of damages recoverable under the *Fatal Accidents Act*."

45. I believe it is now almost settled that the requirement in the *Law Reform Act* is to "take into account" the award under that statute when making an award under the *Fatal Accidents Act*. It does not at all provide that sums awarded to the estate of a deceased under the *Law Reform Act* must be deducted from damages awarded for "lost dependency".

46. In its even more recent decision made in *Hellen Waruguru Waweru (suing as the Legal Representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal reiterated this correct position in the following terms:

> " This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough;

duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the *Kenfro case* (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2)* and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:

An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction." The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction."

47. In view of the foregoing, I find that the trial Court fell into any error when, possibly wrongly believing that it was a mandatory obligation, deducted the award made under the *Law Reform Act* from the award made under the *Fatal Accidents Act*, moreso, because there is absolutely no explanation in his Judgment on his rationale for the deduction.

48. My above finding does not mean that I have ignored the requirement in the *Law Reform Act* to "take into account" the award made under that statute when making an award under the *Fatal Accidents Act*. On the contrary, I confirm that I have taken into account the fact that the dependants will receive a lumpsum payment as death benefits of the deceased and are also beneficiaries under the Law Reforms Act. I wholly appreciate that the spirit of the law is that no one should benefit twice or from double compensation for the same wrong. However, taking into and considering that the amount awarded under "loss of dependency" is only Kshs 727,711.20, I will not subtract any amount awarded under the *Fatal Accidents Act*.

Final award on loss of dependency

49. In view of the findings above and applying the multiplicand of Kshs 10,107.10/-, dependency ratio of 2/3 and multiplier of 9 years, I compute and award "loss of dependency" to the Appellant at the sum of Kshs 727,711.20 made up as follows:

    Kshs 10,107.10 x 12 x 2/3 x 9 years = Kshs 727,711.20

Whether the award of Kshs 114,523/- for Special damages was insufficient

50. With regard to special damages, I note that that in the Amended Plaint, the Appellant pleaded a sum Kshs 139,723/=. However, the trial Court awarded Kshs 114,523/- which was the amount that was strictly proven. As already stated, neither of the parties addressed this Court on this issue save for the Appellant urging this Court to award Kshs 146,873/- under this item.

51. In the Amended Plaint, the Appellant pleaded this prayer as a composite item described as "Special damages, funeral expenses and mortuary expenses of Kshs 139,723/-". The receipts provided were in respect to medical expenses, including mortuary fees. Funeral expenses per se were therefore not supported by receipts. In the circumstances, should the Appellant have been denied the claim for funeral expenses for failure to produce receipts?

52. It is trite law that a claim for special damages must not only be pleaded, but must also be strictly proved. This is because such claim represents what the party has actually lost in the form of the expenses incurred and he ought to be put back to the position he was in had he not been forced to incur the expense, hence the need to strictly prove the same.

53. However, on the matter of absence of Receipts for funeral expenses, the Court of Appeal in *Premier Diary Limited v Amarjit Singh Sagoo & another* [2013] eKLR stated as follows:

> "We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased - testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

54. Similarly, the Court of Appeal in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR held as follows:

> "We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on

burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. ....."

55. Further, in *JNK (suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School* [2018] eKLR, Gikonyo J having made reference to the above case held as follows:

> " In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased."

56. In view of the foregoing, while I agree that special damages must be pleaded and proved, a perusal of the above authorities reveals that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses.

57. In the circumstances, despite the failure to produce receipts, there really is no dispute that indeed there was a funeral following the deceased's death. The Appellant is therefore entitled to a reasonable award in funeral expenses. Having pleaded Kshs 139,723/- as "special damages, funeral expenses and mortuary expenses" and having produced receipts totalling Kshs 114,523/- which is what was awarded, the shortfall not supported and which I deem to represent funeral expenses is therefore Kshs 25,200/-. I am certain that this sum is way below what the family must have spent in actual funeral expenses but since a Court cannot award an amount exceeding what has been pleaded, I cannot award a higher figure than Kshs 25,200/- which I so award as funeral expenses. Consequently, I award the entire amount of Kshs 139,723/- pleaded in the Amended Plaint as "special damages, funeral expenses and mortuary expenses".

Final Orders

58. In the end, I make the following orders:

i. Accordingly, the Judgment of the trial Court on quantum is set aside and substituted as follows:

Pain and Suffering	Kshs 20,000.00
Loss of dependency	Kshs 727,711.20
Loss of expectation of life	Kshs 100,000.00
Special damages	Kshs 139,723.00
Sub-total	**Kshs 987,434.20**
Less 10% contribution agreed by consent	Kshs 98,743.42
Total	**Kshs 888,690.78**
Plus costs and interest	

ii. Since the Appeal has substantially succeeded, the Appellant is awarded the costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 7TH DAY OF JULY 2023

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WANANDA J. R. ANURO

JUDGE