



**West Kenya Sugar Company Ltd v Mayaka & another (Suing as the administrators /
legal representatives of the Estate of Edward Maserebu (Deceased)) (Civil Appeal
133 of 2022) [2023] KEHC 22418 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22418 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 133 OF 2022
RN NYAKUNDI, J
SEPTEMBER 22, 2023**

BETWEEN

WEST KENYA SUGAR COMPANY LTD APPELLANT

AND

JOHN MOENGA MAYAKA 1ST RESPONDENT

LILIAN NALIAKA KALENDA 2ND RESPONDENT

**SUING AS THE ADMINISTRATORS /LEGAL REPRESENTATIVES OF THE
ESTATE OF EDWARD MASEREBU (DECEASED)**

*(Being an appeal from the judgement and decree of Hon. Naomi Wairimu, Principal Magistrate
in Eldoret Chief Magistrate's Court Civil Suit No. 061 of 2021 delivered on 26th August, 2022)*

JUDGMENT

Coram: Before Hon. Justice R. Nyakundi

Mongeri & Company Advocates

Bryan Khaemba, Kamau & Company

Kigen & Co. Advocates

1. The appeal is both on quantum and liability. By a plaint dated 10/6/2019, the Respondents sued the respondent seeking general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Kshs.69,000/= and costs of the suit plus interest.
2. The accident was stated to have occurred on 14/8/2020, along Eldoret-Webuye Road at Turbo area. It is claimed that deceased was riding motor cycle registration number KMEP 615H when



the Appellant negligently drove his tractor registration number KAW 047B/ZB 6055 causing it to collide with the deceased's motor cycle and as a result, the deceased sustained severe injuries.

3. The Appellant filed his statement of Defence on 19/2/2021, denying the occurrence of the accident. Alternatively, he blamed the deceased for causing and or contributing to the said accident.
4. After trial Judgment was delivered on 28/10/2022 and the Appellant was found 70% liable and damages assessed as hereunder: -
 - a. Pain and suffering Kshs.180,000/=
 - b. Loss of expectation of life.....Kshs.100,000/=
 - c. Loss of dependencyKshs.19,459,928/=
 - d. Special Damages and Ad Litem.....Kshs.69,000/=
 - e. Total.....Kshs.19,678,928/=
 - f. Less 30%contribution.....Kshs.5,903678/=
 - g. Amount payableKshs.13,775,250/=
 - h. Plus, costs and interests
5. Aggrieved by the Judgment, the appellant filed an Amended Memorandum of appeal on the 26th June, 2023. The appeal raises (30) grounds which can be summed as follows: -
 1. That the learned trial Magistrate erred in law and in fact in apportioning liability at 70% to 30% in favour of the Plaintiff contrary to the evidence on record.
 2. That the learned trial Magistrate erred in law and in fact in failing to consider the Appellant's overwhelming evidence on liability thus arriving to a wrong assessment of damages.
 3. That the learned trial Magistrate erred in law and in fact in failing to consider the evidence on record and submissions made on behalf of the Appellant in arriving at her decision.
 4. That the learned trial Magistrate erred in law and in fact in awarding double compensation to the Respondent contrary to the law.
 5. That the learned trial Magistrate erred in law and in fact in awarding damages that were excessive in the circumstances.
6. The appeal was canvassed vide written submissions. The Appellant on 12/7/2023 filed submissions dated 26/6/2023 while the Respondent on 18/7/2023 filed submissions dated 16/7/2023.

The Appellant's Submissions

7. On liability Counsel for the Appellant submitted that PW1, a police officer testified and produced the police abstract dated 13/8/2020 which indicted that the cause of the accident was pending investigations. Counsel further submitted that PW1 admitted that she was not the investigating officer assigned to the case neither did she visit the scene of the accident. Counsel further argued that PW1 also admitted that the blame for the accident had not been



apportioned and she also told Court that the police file was incomplete and the deceased's motor cycle was unregistered and could not tell why the motor cycle's number plate was missing. Counsel added that PW1 also produced the post-mortem report which indicated that the deceased died on the spot and she also produced the inspection report for the Appellant's tractor which concluded that the tractor had no pre-accident defects.

8. Counsel argued that in view of PW1's evidence, the police abstract only shows that an accident was reported to the police and not proof of liability. Counsel maintained that the police in this case ought to have carried out investigations as to the circumstances giving rise to the accident which they did not. Counsel cited the of Fredrick Odongo Otieno V Al- Husnain Motors Limited [2020] eKLR in support of his arguments on the issue. Counsel argued but the findings in the aforementioned decision, the trial Court ought to have relied on the evidence of any eye witness to make a finding as to was liable for the accident. Counsel maintained that the police abstract in this case should have not guided the trial Court in making a finding on liability.
9. Counsel further submitted that PW1's evidence that the deceased motor cycle was unregistered and that the Appellant's tractor had no pre-accident defects contradicted the evidence of PW2 who claimed that the tractor had no lights and that the passengers were using a torch light to light the road. Counsel argued that the trial Court should have instead used the Certificate of Examination and Test of Vehicle report that was produced by PW1 in apportioning liability as no contradicting opinion was adduced by the Respondents to support their allegations that the tractor was not in good working condition. Counsel further argued that this was an expert report.
10. Counsel faulted the trial Court for not appreciating the probative value of the Certificate of Examination and Test of Vehicle report produced by PW in relation to the Appellant's tractor. Counsel reiterated that the deceased's motor cycle was unregistered and had a missing number plate.
11. With regard to PW2's evidence, one Joshua Munyilwa Shikuri, Counsel submitted that he is alleged to have been the eye witness to the accident in question. That he laid blame on the driver of the Appellant's tractor on the basis that the tractor allegedly occupied both lanes on the road and being driven at night while loaded with sugarcane and did not have lights and that one of the three passengers on the tractor was using a torch to light the way. Counsel argued that on cross-examination, PW2 admitted that he was behind the tractor and could not see the driver. He further admitted that he did not see the accident occur neither did he see the motor cycle while it was being ridden and only heard a loud bang and he did not also record a statement with the police or testify in any other case arising from the said incident. Counsel also added that in his testimony also told Court that the deceased's motor cycle was a superbike which can ordinary be presumed to be capable of being driven at a high speed.
12. Counsel further submitted that to counter the evidence by PW2, the Appellant called DW1 being the driver of the tractor who in his testimony blamed the deceased for the accident. Counsel argued that DW1 confirmed that the deceased was overtaking the tractor and fell in the process of doing so. He further argued that DW2 confirmed that he had not been charged in a traffic Court for the accident. Counsel argued that on cross-examination DW1 testified that the tractor had four lights, lighting each corner of the vehicle and confirmed that they were all working at the time of the accident. Counsel argued that DW1 told the trial Court that he did not hit the deceased and that he was at all material times driving on his lane. Counsel argued that DW1 also told the trial Court that he had put the tractor's hazards on and that



he was ferrying sugarcane which extended by one foot on each side of the tractor. Counsel argued that it was DW1's testimony that the deceased hit the tractor's tire on the left side and that notably the post-mortem report produced by PW1 indicated that the deceased suffered injuries on the left side of his head.

13. Counsel argued that a careful reading of the trial Court's impugned judgment shows that the Court heavily relied on the evidence of PW2 to apportion liability in the ratio of 70% : 30% in favour of the Respondents in spite of the fact that PW2 did not see the accident occur and accordingly could not give direct evidence as to the manner in which the accident occurred. Counsel maintained that Pw1 was not an eye witness but rather he was the first person at the scene of the accident. Counsel further argued that despite the trial Court noting that PW2 neither saw the motor cycle nor witnesses the accident occur since his view was obstructed the learned trial Magistrate still seemingly relied heavily on the evidence of PW2's evidence to apportion liability in favour of the Respondents. Counsel argued that PW2's evidence was circumstantial at best and should not have been assigned as much probative value as it was seemingly given or at all.
14. Counsel argued that it is trite law that an eye witness is a person who gives direct evidence on how an event took place and therefore his or her testimony would have more probative value compared to that of a corroborative witness who can only but provide circumstantial or indirect evidence. Counsel maintained that Pw1 only corroborated that an accident occurred but did not directly witness it. Counsel argued that the only witness who gave direct evidence on the circumstances of the accident was DW1. According to Counsel, the trial Court should have placed more weight on DW1's evidence and as a consequence either find it had not been proved that the Appellant was to blame for the accident or at worst apportion liability in the ratio of 50 % : 50%. Counsel relied on the case of *Jane Wanjiku Ngugi & Another V Anne Nyangigi Gitau [2020] eKLR* to buttress his arguments on the issue.
15. Counsel further submitted that the balance of proof in Civil cases is that of balance of probabilities. Counsel argued that, that being the case, the Respondents failed to prove to the required standard that the Appellant's driver (DW1) caused the said accident through negligence.
16. According to Counsel, the trial Court erred in apportioning liability in the ratio of 70% : 30% in favour of the Plaintiffs. Counsel reiterated that PW1 and PW2's testimonies were unreliable. Counsel argued that DW1 was the only witness who gave direct evidence and that the trial Court should have instead found that the Appellant's driver was not liable at all. Counsel argued that the trial Court should have instead adopted the contributory negligence principle and linked it to the evidence of PW1, PW2 and DW1 in apportioning liability in the ratio of 50%: 50% so that deceased and the DW1 shared blame equally in the absence of an eye witness.
17. On quantum, Counsel submitted that the trial Court should have not apportioned any liability to the Appellant. However, assuming that there was some blame attributable to the Appellant that is the ratio of 50%: 50%, Counsel argued that trial Court arrived at a wrong finding on quantum. Counsel further submitted that that the trial Court, the Respondents sought compensation under the *Law Reform Act* and the *Fatal Accidents Act*. That the trial Court awarded them Kshs.50,000/= less 30% for pain and suffering and Kshs.100,000/= less 30% contribution for loss of expectation of life under the *Law Reform Act* and Kshs.19,459,928/= less 30% contribution for loss of dependency under the *Fatal Accidents Act*.



18. Counsel argued that damages cannot be recovered twice in respect of the same transaction. Counsel maintained that the trial Court should have deducted the award issued under the Law Reform Act from the award issued under the Fatal Accident Act.
19. With regard to damages under the Law Reform Act, the Counsel submitted that the Appellant does not dispute the same save for mentioning that award under this heading is made on the alternative premise that the Appellant was liable in some way. Counsel argued that the Appellant was not liable at all.
20. With regard to damages under the Fatal Accident Act. Counsel submitted that with regard to the multiplicand, PW4 , the Head of Human Resources at Sun Culture Kenya Limited, testified that the deceased earned a net monthly salary of Kshs.83,879/= and produced the deceased's pay slip to that effect which evidence is not disputed by the Appellant.
21. With regard to the multiplier, Counsel submitted that the Court must always bear in mind the expectation of earning, life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and the dependants. Counsel further submitted that the Respondents urged the Court to adopt a multiplier of 29 years whereas the Appellant urged the Court to adopt a multiplier of 20 years. Counsel further submitted that the trial Court agreed with the Respondents and adopted a multiplier of 29 years on the basis that the deceased was in good health and that the retirement age in Kenya is 60 years. Counsel argued that the deceased was 31 years old at the time of his death, no evidence was adduced to show that he was in good health and could have reasonably continued working until the retirement age. Counsel faulted the trial Magistrate for equating the presumed balance of the deceased's working life to the multiplier. Counsel maintained that that whereas no evidence of vicissitudes of life or other imponderables or illness which would have shortened the deceased's working life were adduced by the Appellant at the trial, the uncertain nature of life ought to still have been taken into account by the trial Court. Counsel cited the case of to buttress his arguments on the issue. Counsel argued *Mary Florence Mwihaki V Francis Njuguna Mbui* (Suing as the legal representative of the estate of John Marekia Njuguna [2020] eKLR that taking into consideration that there are many vicissitudes of life that could have potentially curtailed the ability of the deceased to have worked until the age of 60 and that given that he worked in the private sector which faces so many potential uncertainties , a more reasonable multiplier of 20 years should have been adopted. Counsel cited the following cases to buttress his submissions; *Bash Hauliers V Dama Kalume Karisa and Another* [2020] and *Cromwell Mzame V Zablon Mwanyumba Lalu* (Suing as the Administrator of the estate of Allen Warito Lalu (Deceased) & Another [2020] eKLR to buttress his arguments on the issue.
22. With regard to dependency ration of 2/3 the same is not disputed as both parties agree that the deceased left behind a wife and two children.
23. Counsel argued that in assessing the damages under the loss of dependency the trial Court should have thus calculated as follows:

$$\text{Kshs.83,879/=} \times 12 \text{ months} \times 20 \text{ years} \times 2/3 = \text{Kshs.13,420,640/=}$$
24. With regard to special damages, Counsel submitted that the Respondents sought for special damages in the sum of Kshs.69,000/= made up of a police abstract – Kshs.200/=, funeral expenses Kshs.65,000/= and morgue clearance Kshs.3.800/=. Counsel further submitted that it is trite law that special damages are not only specifically pleaded but also strictly proved. In this case the Counsel maintained that the Respondents produced receipts to demonstrate



payment for these expenses and therefore the said sum is not disputed save for adding this concession is made on the alternative premise that the Appellant was liable.

25. In the end, Counsel submitted that the justifiable quantum of damages in the event of attribution of liability which is denied hereinabove without factoring apportioned liability and insurance policy limit which has already been settled by the insurer amounts of Kshs.13,639,640/= being Kshs.50,000/= for pain and suffering, Kshs.100,000/= for loss of expectation of life, Kshs.13,420,640/= for loss of dependency and Kshs.69,000/= as special damages. Counsel added that should the Court be inclined to apportion liability equally at the ratio of 50%: 50% and reduce the multiplier to 20 years on the basis of the Appellant's arguments then total award payable to the Respondents would be as follows:

General damages for pain and suffering	Kshs.	50,000	.00
General damages for loss of expectation of life	Kshs.	100,000	.00
General damages for loss of dependency	Kshs.	13,420,640	.00
Special damages	Kshs.	69,000	.00
Sub-total	Kshs.	13,639,640	.00
Less 50% contribution	Kshs.	6,819,820	.00
Less amount already paid by insurance	Kshs.	3,000,000	.00
TOTAL AMOUNT PAYABLE	3,819,820	.00	

The Respondents' Submissions

26. With regard to whether this Court should interfere with the judgment of the trial Court, Counsel for the Respondent submitted the trial Court herein had the opportunity to listen and observe the witnesses specifically PW3 the eye witness and evaluate the evidence first-hand. Counsel argued that there is no scientific formula of awarding damages and or allocating liability to the parties and that an appellate Court will only interfere in instances where there has been a misapplication of the law or where the award is not based on any evidence. Counsel cited the case of *Ainu Shamsi Haulier Limited V Moses Sakwa & Another* (Suing as the Administrators of the estate of Ben Siguda Okach (Deceased)).



27. With regard to the apportionment of liability, Counsel submitted that the trial Court apportioned liability at 70% : 30% in favour of the Respondent. Counsel argued that the Respondent called an eye witness who narrated to the trial Court how the accident had occurred. Counsel further argued that it was established in evidence of the Appellant's driver that the tractor was being driven with no head lights and that he was driving with the aid of torches. Counsel further it was around 8pm and that it was dark. Counsel further submitted it was also in evidence that the tractor was loaded with cane and was swerving from side to side of the road. Counsel further argued that the Appellant never called any other witness in the matter other than the driver who also confirmed that his loaded extended by one foot on each side of the tractor and also confirmed that he was not supposed to be on the road at the tie since the County Government had set a policy that barred sugarcane trucks from being on the road past 7:00pm to reduce the number of accidents occurring on the road. Counsel maintained that DW1 was not an independent eye witness as alleged by the Appellant since he was involved in the said accident as compared to PW2 who had no interest in the suit.
28. Counsel further submitted that the Appellant argues that the tractor was in good working condition and had headlights that were in a good working condition contrary to the Respondent's eye witness. Counsel argued that the Appellant never adduced any evidence before the trial Court including the motor vehicle inspection report and the last motor vehicle service documentation of motor vehicle registration number Kaw 047B/ZB 6055 New Holland Tractor before accident to contradict the evidence of the eye witness who saw first-hand that the driver of the tractor was driving with the aid e of torches. Counsel further argued the only inspection report produced was that of the deceased's motor cycle KMEP 615H BENELI – SUPER BIKE which showed that it had no pre-accident defects. Counsel added that DW1 never testified on the speed of the suit motor cycle, no evidence whatsoever was called by the Appellant before the trial Court to prove that on a balance of probability the motorist was racing to establish negligence on his part. Counsel maintained that the fact that the motor cycle is a super bike does not prove that the motorist was racing. Counsel cited the case of Elizabeth Gathoni Thuku (Suing as the Legal Representative of the estate of Charles Wathuta) V Peter Kamau Maina & Another to buttress his arguments on the issue of liability. Counsel maintained that the evidence on record proves that the Appellant was wholly liable for causing the accident and should have been found to be 100% liable.
29. With regard to PW1 not being the investigating officer and the whether the investigation was still pending was fatal, Counsel submitted that PW1's testimony only confirmed that an accident had occurred and that she produced the police abstract which showed the motor vehicle that involved. Counsel argued that PW1 did not indicate who was to blame for the accident and that in order to establish the degree of negligence the trial Court relied on the other evidence before it including that of the eye witness PW2 and that of DW1. Counsel cited the case of Catherine Mbithe Ngina V Silker Agencies Limited to support his arguments on the issue.
30. With regard to quantum, Counsel submitted that the trial Court awarded Kshs.50,000/= for pain and suffering which was within the conventional figure for pain and suffering. Counsel urged the Court to maintain the same and cited the case of Sukari Industries Limited V Clyde Machimbo Jumma [2016] eKLR to support his argument on the award on pain and suffering.
31. On loss of expectation of life, Counsel submitted that Kshs.100,000/= is within the conventional figure. Counsel cited the case of Antony Njoroge Ng'ang'a (Legal Representative



of the estate of the late Fred Nganga aka Fred Ng'ang'a Njoroge) V James Kinyanjui Mwangi & 2 Others to buttress his submissions on the award on loss of expectation of life.

32. With regard to loss of dependency, Counsel submitted that the trial Court awarded a sum of Kshs.19,459,928/= which was arrived at by adopting a dependency ration of 2/3 and a multiplier of 20 years and the salary of the deceased prior to his death as per his pay slip. Counsel argued that the trial Court put into consideration the fact that the deceased was employed on a contractual basis and used a multiplier on 20 years instead of 20 years. Counsel argued that the deceased was 31 years and would have been in employment for at least 29 more years. Counsel further submitted that a marriage certificate and certificates of birth were also produced as proof of dependency. Further that oral evidence of dependency by the parents was also adduced by PW3 who was the deceased's father. According to Counsel the trial Court was fair and considered the Appellant's position by reducing the multiplier by 9 years. Counsel cited the case of Wachira Joseph & 2 Others V Hannah Wangui Makumi & Another. Counsel therefore urged the Court to uphold the award of Kshs.19,459,928/=.
33. On whether the trial Court failed to consider the vicissitudes of life and whether it should have an impact on the award of damages, Counsel submitted that the deceased herein was young, energetic and of sound health. Counsel added that he was at the peak of his youth. According to Counsel the Appellant herein is inviting the Court to undertake a prediction for which possibilities are not known and anticipate how the deceased's life would have turned out if it were not for the accident. Counsel maintained that the life expectation of a person is known as well as the age of retirement. Counsel argued that when calculating dependency, the trial Court used a multiplier of 20 years placing the deceased at the age of 51 as the time for his retirement. According to Counsel, the multiplier used was this fair to the Appellant and the Appellant cannot again invoke the Court to further reduce it as a result of unpredictable events that might occur in person's life. Counsel cited the case of Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased) [2019] eKLR to buttress his submission on the issue.
34. With regard to special damages, Counsel submitted that Respondents were awarded special damages of Kshs.69,000/= which were specifically pleaded and proved. Counsel cited the case of Stanwel Holdings Limited & another v Racheal Haluku Emanuel & another [2020] eKLR to buttress his submissions on the award of special damages.
35. On whether the Respondents were awarded double compensation. Counsel submitted the law as well as precedents are clear on the issue of double compensation to persons who are beneficiaries under the Law Reform Act as well as dependants under the Fatal Accidents Act. Counsel relied on the decision in the case of Kemfro Africa Limited t/a "Meru Express Services [1976]" & another v Lubia & another (No. 2) [1987] KLR 30. Counsel further submitted that in this matter the dependants and the beneficiaries claiming under the Fatal Accidents Act and the Law Reform Act respectively are the same. Counsel added that the jurisprudence on double compensation is well established in case law and that beneficiaries who are also dependants are entitled to claim under both the Fatal Accidents Act and the Law Reform Act as dependants under the Fatal Accident Act and beneficiaries under the Law Reform Act. Counsel cited the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) V Kiarie Shoe Stores Limited [2015] eKLR on the issue of double compensation.
36. With regard to whether this Court should uphold the trial Court's decision, Counsel submitted that the trial Magistrate observed the law and deduced her judgment from the



evidence placed before her. Counsel maintained that she did not misappropriate the law or misdirect herself in any way, Counsel argued that the Respondents proved their case on a balance of probability by calling sufficient evidence. That the Respondents called an eye witness to the accident, the police officer, the deceased's father and the Human Resource Manager of SunCultre the deceased's employer. Counsel further submitted that the Respondents produced all the necessary documents in support of their claim. Counsel cited the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR to buttress his argument on the issue.

37. Counsel further faulted the Appellant for failing to include the order on decree in its record of appeal rendering this instant appeal incompetent for the reason that it poses a jurisdictional question as to whether this Court can hear and determine this appeal. Counsel relied on the provisions of Order 42 Rule (3) of the Civil Procedure Rule to support his arguments on this issue. Counsel argued that the aforesaid proviso is clear that aside from the judgment one ought to include an order or decree to the Memorandum of appeal for it to be competent. Counsel the Appellant to strike out the Appellant's appeal for failing to include the certified copy the decree to the record of appeal rendering it incompetent. Counsel cited the case of *Lucas Otieno Masaye V Lucia Olewe Kidi* [2022] eKLR and the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR to buttress his arguments on the issue. Counsel argued that from the foregoing decisions it is clear that an appeal can be rendered fatally defective in the absence of a decree. Counsel argued that the Appellant herein has not attached a copy of the decree and thus it follows that the appeal herein is incompetent and should therefore be struck out with costs to the Respondents. Counsel further argued that failure to put an order or decree is not just a matter of procedure but it speaks to the jurisdiction of the Court which is the backbone of a Court in determining any matter.
38. In the end, Counsel urged the Court to uphold the learned trial Magistrate decision and strike out the appellants' appeal.

Analysis and Determination

Liability:

39. The liability was apportioned in the ratio of 90%: 10% against the Appellant.
40. In *Stapley –v- Gypsum Mines Limited (2)* (1953) A.C 663 at P. 681 Lord Reid reasoned that: "To determine what cause 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 fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally."
41. The facts speak for themselves that an accident indeed occurred on 1/8/2020, involving motor vehicle registration number KAW 047B/ZB 6055 driven by the Appellant's driver and a motor cycle registration number KMEP 615H controlled by the deceased.



42. On the one hand, the Appellant blames the deceased for the accident, whilst on the other hand, the Respondents blame the Appellant. In this instance to determine where liability lies, the Court will draw upon the evidence at the trial Court.
43. PW1 PC No. 104403 W. Teresa Waceke, attached to Lumakanda Police Station testified that on 1/8/2020, an accident occurred involving Tractor Reg No. LAW.047b/ZB.6055 New Holland and unregistered motor cycle make Beneli Rose. That the accident occurred at Spring Park Area along Eldoret-Webuye Road at about 20:15 hrs at night. She produced the police abstract and told Court that the case is pending investigations and the rider Edward Maserebu Moenga died on the spot. She also told Court that a post mortem was conducted and produced a copy of the post mortem report. She also produced inspection reports for the tractor and the motor cycle respectively. She stated that she was not the investigating officer in the matter and also told Court that blame was not apportioned.
44. During cross- examination, she reiterated that she was not the investigating officer in the matter. She also stated that she never visited the scene and told the Court that she had the police file but it is incomplete. She stated that the investigating officer in the matter was Corporal Kibe, who had been transferred to Thika. She reiterated that the motor cycle was unregistered and could not tell why the number plate was missing. She reiterated that the owner of the motor cycle had died on the spot and thus they could not tell if it had a number plate. She stated that the accident was not given a course code and was still pending investigations. She reiterated that no was to blame and further stated that the remarks on the inspection report of 6/8/2020 were that it had no pre-accident defects.
45. PW2 Joshua Muniywa Shikuri, adopted his statement as evidence in Chief. He stated that on 1st August, 2020 at around 8:00pm, he was riding his motor cycle from turbo headed too Mwamba along Eldoret- Webuye road. That there was a tractor registration number KAW 047B/ZB 6055 that was travelling in front of him and headed to the same direction like he was. He stated that the said tractor was loaded with sugarcane, had three passengers on board and did not have lights and hat one of the passengers was using torch to light the way. He further stated that the said tractor was being driven so negligently in that it was occupying both lanes of the road making it difficult to overtake for the oncoming vehicles to properly drive on their lane. That on arrival at Spring Park Hotel he heard a loud bang the said tractor had collide with a motor cycle registration number KMEP 615H which was being driven by the deceased and which was travelling from Webuye to Eldoret. He sated that the tractor collided with the motor cycle in the middle of the road where the wreckage was found and that the deceased was thrown off the road. He stated that the rider of the said motor cycle had died on the spot and the body was take to Webuye mortuary while the tractor and the motor cycle were taken to Lumakanda police station. He blamed the driver of the tractor the accident for driving it at night, loaded with sugarcane and without lights on and drive it so negligently by occupying the entire road causing the rider to lose control this colliding.
46. During cross-examination he stated that Mwamba is between Turbo and Kipkaren. He told Court that he was going home from Turbo and that the tractor was coming from Turbo heading the same direction as him. He told Court that he was behind the tractor and that the tractor was carrying sugarcane which had been loaded across. He stated that he could not see the driver. He stated that the motor cycle rider was coming from the opposite direction. He stated that it did see the motor cycle while it was being ridden. He conceded that he did bot see the actual accident occur as his view was obstructed by sugarcane and just heard a loud bang. He stated that he did not record a statement at the police station and had not testified in



any other case save for this one. He told Court that the deceased died on the spot and that the tractor had (3) people who were sitting near the driver. He told Court that after the accident he was the first person at the scene and that other people came at the scene. He conceded that he did not see the people sitting in front of the sugarcane.

47. PW3 John Moenga Mayaka, testified that he is the deceased's father. He told Court that the deceased was 31 years old when died. He told Court that the deceased had studied up to the university level at The University of Nairobi where he had studied Environmental Engineering Bio System. He told the Court that before the accident the deceased was working with Sunculture for about (2) years. He further told the Court that the deceased was a director of the company representing countries like Togo. He testified that the deceased was married and had a wife called Lilian Naliaka Kalenda and had two children EM and GM who were (6) and (2) years old respectively. He told the Court that the deceased used to earn a net salary of Kshs.84,000/=. He also told the Court that the deceased's mother was still alive and that he was born in 1950 and was now retired since 2004. He told Court that the deceased's mother was a teacher and that she was also retired. He told Court the deceased's children live with him and depend on him. He testified that the deceased was their hope and that they were suffering. He told Court that he is sickly and that the deceased was the one who used to help him. He told Court that the deceased's daughter is in class (4) and the son was to start school next year. He also produced documents on the list of documents dated 16th December, 2020 as Exh. No. 1 to Exh No.27. He also told Court that they used to depend on the deceased and that he used to assist them in cultivating their land, taking them to hospital and would buy them clothes. He also told the Court that they incurred funeral expenses and asked for compensation for the death, loss of dependency, funeral expenses and loss of life expectation and also for pain and suffering. He also prayed to general and special damages.
48. During cross-examination, he reiterated that the deceased had two children. He stated that the wife works as a nurse. He stated that they both get pension. He reiterated that the deceased used to earn Kshs.84,000/= and that they spent Kshs.65,000/= as funeral expenses. He also stated that deceased died on the spot as he was coming from work.
49. PW4 Joan Achieng Sign, testified that she works at SunCulture Kenya Limited which is based in Nairobi and that she is the head of HR. She told Court that the deceased was one of their employees working as the Business Development Project Manager in charge of International Expansion. She testified that the deceased was earning a gross salary of Kshs.105,000/=. She produced the deceased's appointment letter and payslip of July which were documents from SunCulture confirming that the deceased worked there. She also produced the deceased's file which contained the deceased certificates marked as exhibit MFI-16 to MFI -19.
50. During cross-examination she produced her staff ID to show that she works for SunCulture. She also stated the deceased was earning Kshs.105,000/= and that his net salary was Kshs.83,879/=.
51. DW1 Cleophas Sikuku testified that he works as a tractor driver for the Appellant. He adopted his witness statement dated as his evidence in chief. In his statement dated he stated that
52. During cross-examination, he stated that he has been a tractor driver for 7 years and stated further he has never driven a vehicle. He told Court that the tractor belongs to the Appellant and that he is the Appellant's employee. He told Court that the rider died on the spot. He also stated that when the accident occurred it was not raining. He told Court that the accident occurred at 8:00pm. He conceded that they did not know that tractors with sugarcane were



not allowed on the road. He told Court that he only came to recently. He stated it was dark and that the tractor had 4 lights on each side. He told Court that all the lights were working and that the police had released him to continue with his trip. He stated that the accident had occurred near the shopping centre and that he did not hit the rider. He told Court that he was on his side of the road. He stated that he had sugarcane on the sides of vehicle and that he had put on the hazard light. He told the Court that the load extends by one foot on each side of the tractor and the lights were on when he took the tractor to Lumakanda Police Station the next day. He admitted that indeed there was an accident.

53. From the evidence tendered, it is no dispute that on 1/8/2020 an accident occurred and as a result of which the deceased herein lost his life. Whereas it is true that PW2 did not necessarily witness the said accident occur he was the first person at the scene of the accident. However, during cross-examination DW1 stated that the load on the said tractor extended by one foot on each side of the tractor. He also conceded that he did not know that tractors with sugarcane were not allowed on the road at night. PW2 also testified that he and the tractor were headed in the same direction and that the tractor was in the middle of the road and was swaying from side to side.
54. When I place the evidence on legal scale of balance of probabilities, it is more probable than not that due to the extended load on the tractor the Appellant's driver did not pay attention to other road users when he collided with the deceased's motor cycle. I do not find evidence to disapprove the account of PW2's and DW1's testimonies in the circumstances therefore, the tractor driver bears the bigger proportion of liability. Accordingly, the trial Court did not err in apportioning liability at 70% : 30% against the Appellant.

The appeal on liability fails and is dismissed.

Quantum:

55. As assessment of damages is at the discretion of the trial Court, this Court cannot interfere with the exercise of discretion thereof except where the trial court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages. See *Kemfro Africa Ltd Vs Gathogo Kanini Vs A.M.M Lubia & Another* as follows: -

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

56. In *Ezekiel Barngetuny –vs-Beatrice Thairu* HCC No. 1638 of 1988 where Justice Ringera (as he then was) held thus; -

The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents' and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate



consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature.”

57. The question is whether this court should interfere with the damages awarded by the trial court. As stated above, the discretion in assessing general damages payable will only be disturbed if the trial court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low.
58. The Appellant is not aggrieved by the award give by the trial Court under Law Reform Act but is aggrieved by the award given under the Fatal Accident Act.
59. In this case, there was proof that the deceased worked as a Project Manager at SunCulture Kenya Limited before his untimely death. This fact was not disputed. From the payslip produced in Court it is evident that deceased’s gross salary was Kshs.105,000/= whereas his Net Pay was Kshs.83,879/=. The trial Magistrate however adopted the sum of Kshs.83,873/= instead of Kshs.83,879/=. In light of the evidence adduced, the trial Court applied the wrong principle in assessing the multiplicand applicable in loss of dependency in this case. As such, the discretion thereto is amenable to interference by this Court. I will therefore set aside the sum of Kshs.83,873/= adopted by the trial Court and replace it with a sum of Kshs.83,879/= being the deceased’s Net Pay.
60. The Appellant has also faulted the trial Magistrate for adopting a multiplier of (29) years instead of (20) years as proposed. Further the Appellant has also faulted the trial Magistrate failing to take into account the vicissitudes of life and life expectancy. The evidence on record from the materials placed before Court indicates that the deceased was (31) years at the time of his death and that he worked as Project Manager at SunCulture Kenya Limited. There is no doubt that the deceased was employed and would have naturally worked up to the age of sixty. No evidence has been produced before this honourable Court to indicate that the deceased was perhaps in bad health. At the trial Court the Appellant proposed a multiplier of (20) years whereas the Respondents proposed a multiplier of (29) years. The trial Magistrate adopted a multiplier of (29) years. She relied on the findings in the following cases; Samwel Kimutai Koriri (suing as personal and Legal Representative of Estate) of Chelangat Silevia v Nyanchwa Adventist Secondary School) & another [2016] eKLR, Oyugi Judith & another v Fredrick Odhiambo Ongong & 3 others [2014] eKLR and Milkah Wanjiku Muthea v Daniel Kipkirong Tarus & another [2015] eKLR. However, taking into account the vagaries of life, I hereby adopt a multiplier of (25) years. Whereas the salary of the deceased was known the future could not be ascertained.
61. As for the dependency ratio the same is not in dispute as the deceased left behind a wife and two children.
62. Accordingly, loss of dependency is calculated thus: -
$$\text{Kshs.83,879/=} \times 12\text{months} \times 25\text{ years} \times 2/3 = \text{Kshs.16, 775,800/=}$$
63. With regard to special damages Kshs.69,000/= was pleaded and strictly proved by the Respondents who produced receipts as proof of the payments they made.
64. As for the issue of double compensation. The question of double compensation under the two Acts was explained by the Court of Appeal in Hellen Waruguru (Suing as the Legal



Representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Limited [2015] eKLR where it was held as follows:-

65. 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 dependents 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.
66. 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 of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents 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.
67. In view of the above there is no legal requirement for the Court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*.
68. From the judgment of the trial Court, I note that there is nothing to indicate that the Respondents benefitted from double compensations the argument by the Appellant on the issue cannot therefore stand.
69. In the end, I hereby enter judgment in favour of the Respondents in the following terms: -



Liability	70%	:	30%
General damages for pain and suffering	Kshs.	50,000	.00
General damages for loss of expectation of life	Kshs.	100,000	.00
General damages for loss of dependency	Kshs.	16,775,800	.00
Special damages	Kshs.	69,000	.00
Sub-total	Kshs.	16,994,800	.00
Less 30% contribution	Kshs.	5,098,440	.00
TOTAL AMOUNT PAYABLE	11,896,360	.00	

Each party to bear its own costs of the appeal.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT ELDORET VIA EMAIL THIS 22ND DAY OF SEPTEMBER 2023

.....

R. NYAKUNDI

JUDGE

