



Onyango & another (Both suing as personal representatives of the Estate of Tonny Otieno Odhiambo - Deceased) v Celus & another (Civil Appeal E164 & E168 of 2023 (Consolidated)) [2024] KEHC 15838 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15838 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E164 & E168 OF 2023 (CONSOLIDATED)**

AC BETT, J

DECEMBER 6, 2024

BETWEEN

GEORGE ODHIAMBO ONYANGO 1ST APPELLANT

FLORENCE ACHIENG NYAPARA 2ND APPELLANT

**BOTH SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF
TONNY OTIENO ODHIAMBO - DECEASED**

AND

SHILEHWA MURENJEKHA CELUS 1ST RESPONDENT

NELIUS WAYEGO KARIUKI 2ND RESPONDENT

(Being an appeal from the Judgment and decree of the Principal Magistrate's Court at Butali (Hon. CN Njalale) delivered on the 5th day of October, 2023 in Butali in Butali MCCC E120 of 2022)

JUDGMENT

Background

1. The Appellants filed a suit against the Respondents by a plaint dated 12th April 2022 seeking general and special damages under the *Fatal Accidents Act* and *Law Reform Act* for the death of the deceased through a road traffic accident which occurred on or about 18th January 2021 along Kakamega- Webuye road.
2. In brief, the Appellants' case was that on or about 18th January 2021, the deceased who was their son, was lawfully riding his motorcycle registration number KMEL 498 Q along Kakamega- Webuye Road when at Tande area or thereabout the 2nd Respondent negligently drove, managed and/or controlled motor vehicle registration number KCD 226 D Toyota S. Wagon that he caused and or permitted



to lose control and collide with motor cycle registration number KMEL 498Q which was also being driven along the same road.

3. The Respondents filed a statement of defence dated 22nd September 2022 where they denied the contents of the plaint stating that the accident was caused by the carelessness and recklessness of the deceased and put the Appellants to strict proof of their allegations to the contrary.
4. In its judgment dated 05th October 2023, the trial court upon considering the parties' evidence and submissions, equally apportioned liability to the parties.
5. On the issue of quantum, the trial court awarded as follows;
 - a. Pain and suffering Kshs.100,000/=
 - b. Loss of expectation of life Kshs. 150,000/=
 - c. Loss of dependency Kshs. 1,303,371.00/=
 - d. Special damages NilGrand Total Kshs. 1,553,371.00
Less 50 % liability
Final Award Kshs. 776,685.50/=
6. The Appellants, being aggrieved by the learned trial magistrate's decision, lodged an appeal vide a Memorandum of Appeal dated 24th October 2023 raising 7 (seven) grounds of appeal as follows;
 - a. THAT Hon. Learned trial magistrate erred in law and in fact and misdirected herself by using the minimum wage as the multiplicand and in computing loss of dependency when there was evidence to support a finding that the deceased was a university student.
 - b. THAT the Hon. Learned trial magistrate erred in law and fact by coming to conclusion that there was no evidence that the deceased was a university student, when there was sufficient evidence adduced to prove beyond any peradventure that he was a third year university student.
 - c. THAT Honourable learned trial magistrate misdirected herself in law and in fact in adopting the minimum wages as per the regulation of wages amendment order, applicable to a general worker as the multiplicand for income applicable to the deceased contrary to the evidence adduced by the plaintiffs that the deceased died on the 18th January 2021 while a student at Maseno university pursuing a bachelor degree of science pharmaceutical with IT thereby applying wrong principles when assessing the damages to be awarded.
 - d. THAT Honourable Learned trial magistrate erred in law and in fact in making findings on the multiplicand applicable not supported by the pleadings and evidence on record.
 - e. THAT Honourable learned trial magistrate erred in law and in fact by taking into account irrelevant considerations/ factors while awarding general damages.
 - f. THAT the learned trial magistrate further erred in law and in fact by failing to appreciate consider and take into account the appellant's submissions on the quantum of damages awarded in the circumstances.
 - g. THAT Honourable learned trial magistrate further erred by making decisions on the quantum that was erroneous, without proper basis and against the weight of the evidence.



7. The Appellants pray that the appeal be allowed and that this honourable court be pleased to set aside the judgment and the orders of the learned trial magistrate dated 5th October 2023.
8. Equally dissatisfied with the judgement, the Respondents filed their memorandum of appeal in HCCA 168 of 2023 dated 1st November 2024 on the following grounds;
 - a. The learned trial magistrate erred both in law and fact by failing to analyse all the relevant evidence availed at the trial on the liability;
 - b. The learned trial magistrate erred in law and in fact by failing to consider jurisprudence on liability and awarded an inordinately high percentage of liability against the Appellants;
 - c. The learned trial magistrate erred in law and in fact by failing to apply the correct legal principles when awarding liability which percentage was inordinately high;
 - d. The learned trial magistrate erred in law and fact by failing to consider the Appellant's submissions and judicial authorities on liability thereby arriving at an erroneous percentage;
 - e. The learned trial magistrate erred in law and in fact by failing to take into account the pertinent issues raised in the Appellants' submissions;
 - f. The learned trial magistrate erred in law and in fact by failing to take into consideration the nature and circumstances of the accident thus arrived at an erroneous decision on liability.

Appellants' Submissions

9. Vide submissions dated 27th March 2024, the Appellants' advocate submitted that the grounds of appeal raised in their Memorandum of Appeal could be summarized to the issue of quantum of damages on the loss of dependency. They referred to the case of *Butt vs. Khan (1977) 1KAR* as was quoted in *Andy Forwarders services Ltd & 2 others vs. Godfrey Githiri Njenga (2018) eKLR* and the case of *Chinibahi J Patel and another Vs. PF Hayes and Others (1957) EA 748* as was quoted in *Joseph Mwangi & another vs. Rose Carolyne Akinyi Odera & another (2019) eKLR* where the courts expressed themselves on the assessment of dependency.
10. The Appellants averred that they proved that at the time of his demise, the deceased was a university student at Maseno University in the school of Public Health & Community Development pursuing a degree of Bachelor of Science in Medical Biotechnology with IT. In support of this claim, the Appellants advanced that they produced the deceased's admission letter dated 3rd August 2015 and a condolences letter dated 26th January 2021 from the Vice Chancellor of the University. They further asserted that their claim that the deceased ran a boda boda business where he supplied fish to his customers remained uncontroverted.
11. They posited that the trial court misdirected itself in holding that there was no evidence that the deceased was a university student or that he had a side hustle, when sufficient evidence was provided.
12. They further opined that the trial court's decision to adopt the minimum wage applicable to a general worker amounted to misapplication of the law since it had been proven that the deceased was a fourth-year university student who was pursuing a professional course
13. In support of their averment that a court ought to consider damages based on the career path, they referred to the case of *Stella Awinja and another vs. AG HCC 195 of 1988 (unreported)* and the case of *RoseMary Mwasya vs, Steve Tito Mwasya and another (2018) eKLR*.



14. The Appellants pray that this court, in assessment of damages, should take into consideration the loss of earnings for the profession that the deceased was pursuing or would have pursued, had death not occurred. They submit that the deceased's starting salary would have been between Kshs. 110,000/= to Kshs. 150,000/= and they propose a multiplicand of Kshs. 110,000.
15. They further computed their proposed multiplicand as follows: $110,000 \times 12$ (months per year) $\times 30$ (number of years) $\times \frac{1}{2}$ (dependency ratio) = Kshs. 19,800,000.00/=.
16. With regards to the Respondents' appeal against the decision of the trial court on liability, the Appellants submitted that the investigating officer did not know whom to blame since the police abstract he produced as exhibit indicated that the investigations were not completed. They argued that despite the police officer's claim that he carried out investigations, he never produced any sketch plans, eye witness statements, inspection reports for the vehicle and motor cycle and/or an investigations diary to demonstrate the scope of investigations he had carried out.
17. The Appellants posited that DW1 testified and stated that he was the one driving the suit motor vehicle and that he was informed by the crowd at the scene of the accident that the motor cycle had a tyre burst which was most likely the cause of the collision. They further advanced that although there were people who witnessed the accident, the investigating officer did not record their statements and the 1st Respondent, who was at the scene of the accident, failed to call any of the eye witnesses to corroborate his evidence. The Appellants averred that the 1st Respondent introduced a new aspect of negligence but failed to bring any witnesses to corroborate it and that he equally failed to produce an inspection report that would confirm the same. They relied on the case of Peter Wafula Juma & 2 others vs. Republic (2014) eKLR where the court enunciated the legal burden of proof on contributory negligence.
18. The Appellants urged this court to uphold the trial court's decision on apportioning equal liability to each party since there was no independent evidence exonerating either the deceased or the driver of the suit motor vehicle.

Respondents Submissions

19. The Respondents' appeal was based on the issue of liability where the trial court apportioned equal liability between the parties.
20. In their submissions dated 12th April 2024, the Respondents raised two issues for determination as follows:
 - i. Whether the trial court erred in their decision on liability
 - ii. Whether the appeal be allowed and the judgment be set aside and or quashed.
21. On the first issue of determination, they asserted that the trial court failed to consider the following:
 - a. That the motorcycle rider's tyre burst;
 - b. That the motor cycle ridden by the deceased was overloaded;
 - c. That the police officer called to the stand by the plaintiff/appellants blamed the motorcycle rider;
 - d. That the plaintiff/ appellant failed to call any eye witness to adduce evidence of breach of duty by the respondent.



22. They submitted that the Appellants failed to prove negligence and the duty of care breached by the Respondents and referred to the case of *Anastassios Thomas vs. occidental Insurance Company* (2017) eKLR where it was held that there was no liability unless the damage was a “proximate” result of the negligence.
23. They contended that according to the police officer’s evidence, the accident was due to a tyre burst which led the deceased to lose control and that the same was corroborated by the 1st Respondent who claimed that it was the rider who had encroached in his lane. They asserted that the Appellants had failed to prove his negligence to the required standard. They Relied on the case of *Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another* (2015) eKLR where the court discussed the degree of proof that a party in a civil suit needs to attain to prove their case.
24. According to the Respondents, the Appellants had failed to prove their case on the standard of probability by failing to call an eye witness to corroborate their claims of negligence and they relied in the case of *Welch versus standard Bank Limited* (1970) EA 115 where the court pronounced itself on the effect of lack of sufficient evidence to a party’s case.
25. On whether the court should dismiss the appeal, the Respondents submitted on all the limbs of the quantum of damages.
26. On special damages, they averred that the Appellants’ claim on special damages should be dismissed since they did not produce receipts of the expenses they claimed to have incurred. They relied on the case of *Kenya Women Microfinance Limited Vs Martha Wangari Kamau* (2021) eKLR, *Joseph Kimani & Another Vs James Kangara Kahanya* (2017) eKLR and the case of *Samwel Martin Njoroge Kamunyu Vs Wycliff Yabwetsa Likhaya* where the courts insisted on the furnishing of receipts as proof of the expenses a party has incurred.
27. On the issue of pain and suffering, they quoted several cases among them *Joseph Kivati Wambua vs. SMM & another* (suing as the legal representatives of the estate of EMM) 2021 and submitted that since the deceased died on the same day, the appropriate sum ought to be Kshs. 10,000/=
28. On loss of dependency, they submitted that the court, in awarding damages under loss of dependency, should consider the multiplicand, the multiplier and the dependency ratio. They relied on the case of *Owuor Christopher & another Vs Charles Mutua Kingola & Another* (Suing as the legal representatives of the Estate of Muendo Mutua) (2021) eKLR and the case of *Miriam Moraa vs JOO & Another* (Suing as legal representatives of the estate of VNO) (2021) eKLR to support their averments.
29. On the determination of the multiplicand, they advanced that despite the Appellants’ claim that the deceased was a student at Maseno University pursuing a degree in Bachelor of Pharmaceutical science with IT, no transcripts were produced to ascertain the deceased’s academic success. They further averred that no salary survey was adduced in court in order for the proposed salary to be used as a multiplicand. They posited that since the deceased was a boda boda rider, he fitted the category of a general labourer and the court ought to apply Kshs. 7240.95/= as his minimum wage and adopt the same as the multiplicand.
30. The Respondents argued that since it had been established that the deceased was 24 years old at the time of his death, and the age of retirement is 60 years, the court should use a multiplier of 26 years. They relied on the case of *Bernard Kyalo Maithya Vs Philomena Kyumwa Mbithi & Joseph Mutunga* (suing as the legal representative of the estate of Mutinda Mbithi) (2019) eKLR where the court replaced a multiplier of 37 years for a 24-year-old and adopted a multiplier of 26 years.



31. On the dependency ratio, they asserted that Section 4(1) of the *Fatal Accidents Act* does not envision siblings as beneficiaries of a deceased person and thus the three siblings of the deceased should not have been considered in determining the dependency ratio. They submitted that the dependency ratio of 1/3 is sufficient since there was no evidence on record to prove that the siblings and parents were being taken care of by the deceased at the time of his death.
32. They went further and computed loss of dependency as follows; $7240.95 \times 30 \times 12 \times \frac{1}{3} =$ Kshs. 868,800/=.
33. The Respondents opined that the court award for loss of dependency was not inordinately high and suggested in the alternative, that this court should consider award a lump sum award and relied on the case of *Bon Ton Limited vs. Beatrice Kanaga Kereda* suing as Administrators of the Estate of Richard Alembi Ochenga (deceased) 2018) eKLR where the court awarded Kshs. 800,000/= and submitted that an award of Kshs. 1,000,000/= would be sufficient.
34. They asserted that the Appellants never submitted evidence that the deceased would have been a research scientist earning Kshs. 111,000/= and the claim was merely speculative and that no alleged current survey was presented in support of their allegations.
35. On loss of expectation of life, they urged the court to take into account the award for loss of dependency. They posited that the court ought to take into account the award under the *Law Reform Act* when making an award under the *Fatal Accidents Act* and they relied on the case of *Peres Wambui Kinuthia & Another Vs S.S Mehta & Sons Lt* (2015) eKLR where the court expressed the same views. They submitted that an award of the sum of Kshs. 100,000 is sufficient under this head.
36. They urged this court to find the Appellants solely liable for the accident in this case.

ANALYSIS

37. This being a first appeal, the court will rely on principles as set out in *Selle and another v Associated Motor Boat Company Ltd & others* [1968] 1EA 123:

“...this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”
38. Based on the aforesaid, this Court is under duty to delve into the factual details as presented in the trial Court, analyse the same, evaluate them and arrive at its own independent conclusions, keeping in mind that the trial Court had the advantage of seeing and hearing from the parties.
39. I have duly considered the evidence tendered at the trial court, the decision of the trial magistrate, the grounds of appeal for both parties and the rival submissions made on behalf of each party. The pertinent issues for determination that arise herein are as follows:
 - a. Whether the trial court erred in apportioning equal liability on both parties.
 - b. Whether the trial court erred in assessing the quantum of damages.



Whether the trial court erred in apportioning equal liability on both parties

40. The Respondents challenged the trial court's finding on apportionment of liability. According to the 1st Respondent, the deceased was solely responsible for the accident since he had a tyre burst and he had overloaded his motor cycle.
41. The 1st Respondent vehemently denied being negligent and insisted that the deceased was the one who was riding the motor cycle while swerving, causing him to veer off the road. The Respondents submitted that the court should find the deceased to be wholly liable for the accident.
42. PW2 testified that he came to the crime scene after the accident and that he was able to interrogate some of the eye witness but none came to testify as a witness. During cross examination, he stated that he did not know who was to blame between the deceased and the driver of the suit motor vehicle.
43. It is undisputed that an accident occurred which involved the deceased and the 1st Respondent. Neither PW1 nor PW2 witnessed the accident. The only person who was at the accident scene was the 1st Respondent who claimed that the deceased was to blame for the accident. He further stated that it is the crowd that informed him that the motorcycle tyre burst but he did not produce any eyewitness to testify in that regard. It is also notable that the Respondents did not produce any inspection report, sketch plan or a police file as evidence to support their case.
44. The Respondents' failure to adduce any evidence to corroborate their oral evidence draws this court to infer that the evidence they would have adduced might have been detrimental to their case or it would have held very little probative value. The court in the case of *Bernard Philip Mutiso v Tabitha Mutiso* [2022] eKLR cited with authority the case of *Bukenya & Others vs. Uganda* [1972] EA 549 and held that:

“It is a well-known rule of evidence founded on section 119 of the *Evidence Act* that the failure by a party to call as a witness any person whom he might reasonably be expected give evidence favourable to him may prompt a Court to infer that the person's evidence would not have helped the party's case and would have been prejudicial to its case and that the witnesses may have technically avoided to testify to escape being embarrassed on cross-examination.”

45. With that in mind, the 1st Respondent's testimony on how the accident occurred cannot be deemed to be wholly truthful. Additionally, since the deceased person is not around to defend himself, it would be unfair to consider the 1st Respondent's account of events as the gospel truth. It is also trite that every road user is bound to exercise caution and safety measures while using the road. The 1st Respondent was also under duty to exercise due caution as a driver. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”



46. Considering the absence of cogent evidence of either party, it is difficult to assess who was to blame for the said accident. When courts are faced with such doubt as to whom to apportion the blame to, it is safer to apportion equal liability to each party.
47. The court of Appeal in *Hussein Omar Farah v Lento Agencies CA NAI Civil Appeal 34 of 2005* [2006]eKLR while dealing with a similar issue observed: -
- “In our view, it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.”
48. Similarly, the court in *Simon & Another Vs Carlo & Others* [1970] EA 285 stated as follows: - “In the ultimate analysis of the evidence in the instant case, the circumstances are such that there is no concrete evidence of distinguishing between the two drivers. The drivers should therefore be held equally to blame...”
49. I am of the opinion that the trial magistrate was right in apportioning liability equally since there was doubt as to who was to blame for the accident. This court consequently upholds the trial court’s finding on liability.

Whether the trial court erred in assessing the quantum of damages.

50. On the issue of quantum, I am guided by the case of *Kemfro Africa Limited T/A Meru Express Services & Another -vs- Lubia & Another* [1987] KLR 30 where the court observed that: -
- “The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held to be that; it 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage ...”
51. On pain and suffering, the Appellants are of the view that the trial court’s award of Kshs. 100,000/= was well deserved but the Respondents assert that the amount awarded by the trial court was excessive since the deceased died on the same day. The Respondents proposed an award of Kshs. 10,000/= instead.
52. The generally accepted principle is that very nominal damages will be awarded on this head of pain and suffering if death follow immediately. Higher damages will be awarded if the pain and suffering was prolonged before death. The same sentiments were expressed in the case of *Hyder Nthenya Musili & Another Vs China Wu Yi Limited & Another* [2017] eKLR, where 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.”



53. In this case the deceased died the same day but he had to be rushed to hospital for medical assistance. Chances are that he suffered before he finally succumbed to his injuries.
54. The Respondents have failed to demonstrate that the trial magistrate, in arriving at the sum of Kshs. 100,000/= took into account irrelevant factors or that the award was inordinately high. I am therefore hesitant to interfere with the trial magistrate's discretion over the same.
55. I find that a sum of Kshs 100,000/= was rightfully awarded,
56. On the loss of expectation of life, the trial court awarded Kshs.150, 000/- for loss of expectation of life which according to the Respondents, the trial court should have taken into account in the award for loss of dependency.
57. The Court of Appeal in the case of Hellen Waruguru Waweru (Suing as the Legal representatives of Peter Waweru Mwenja (Deceased) vs. Kiarie Shoe Stores Ltd [2015] eKLR held as follows:-
- “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 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.” 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.”
58. On perusing the judgement of the trial magistrate, it is clear that the Appellants suggested an award of Kshs. 250,000/= under this limb and the Respondents did not submit in a lesser figure. The trial magistrate went ahead and awarded a sum of Kshs. 150,000/= and this in my view, shows that the learned magistrate took into account the award under loss of dependency.
59. Consequently, the trial court's award for loss of expectation at Kshs. 150,000/= is within acceptable limits and this court will not disturb the same.
60. Under the award of damages for loss of dependency, the Appellants challenged the trial magistrate's finding that the deceased was a general labourer when, according to them, they had proven that the deceased was a student at Maseno University undertaking a course in Bachelor of Pharmaceutical Science with IT.



61. The Respondents on the other hand urged this court not to interfere with the trial magistrate finding on earnings since the trial magistrate was right in computing the deceased's earnings as those of a general labourer.
62. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989* where it was held that:

“The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”
63. In *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)*, the court held at page 248 that:

“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' purchases. 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 dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”
64. It therefore follows that the method followed in awarding loss of dependency is the multiplicand (annual net income) multiplied by a suitable multiplier (expected working life lost by the deceased by the premature death), and further by a dependency ratio (ratio of the deceased's income utilized on her dependents).
65. However, the above approach works well where the deceased's earnings can be ascertained. Where there is no proof of earnings, the courts normally adopt the global/lumpsum approach.
66. According to the Appellants, the deceased aged 24 years, was a promising young man undertaking a course in Bachelor of Science Pharmaceutical Science with IT and if he had completed his course, he would have been employed as a Scientific Researcher earning between Kshs. 110,000/= to Kshs. 150,000/= per month.



67. They however never adduced any evidence to prove that the deceased was an outstanding student in school. All that they produced was an admission letter and a condolences letter but nothing to show that he excelled in his academics.
68. I note that no school records were tendered in court to show his performance in relevant subjects that would have led him to become a scientific researcher. However, in my view, that does not mean that the deceased would not have succeeded. I am however of the opinion that the trial court ought to have applied the global/lump sum approach.
69. In the case of *Chen Wembo & 2 others vs. I K K & another* (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR Hon. Meoli J stated:-
- “Even where there is evidence that a child was undertaking a professional course in a university, was brilliant and promising, the path is always fraught with imponderables. The speculative nature of the matter renders the court’s exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants”
70. In my view, the deceased was more than boda boda rider, there was evidence that he had enrolled as a student at Maseno University. The University Vice Chancellor recognised him as a student and sent a message of condolences to his family and so I hold that there was sufficient evidence of the deceased being an undergraduate student.
71. From the proceedings, the Appellants never produced any evidence that the deceased, had he lived, would have been a Scientific Researcher. They also did not produce any employment index showing the salary scale that they averred was the prevailing salaries for Scientific Researchers.
72. In the case of *Zachary Abusa Magoma -vs- Julius Asiago Ogentoto & Another* [2020] eKLR, the court awarded Kshs. 1,500,000/= for a deceased who was studying food and beverage at Gusii Institute. The deceased was not undertaking undergraduate studies in that case.
73. Closer home, the court awarded Kshs. 1,500,000/= for a twenty-six year old Chuka University student in the case of *Teresia Wanjiru Githinji -vs- Lucy Kanana M’rukaria & Another* (suing as legal representative of Ernest Gituura Nabea (deceased)[2021] eKLR. Earlier on, the case of *Peter Kibogoro Wanjohi -vs- Christine Wakuthi Mwaniki & Another* [2009] eKLR, the court made an award of Kshs. 2,500,000/= for a student studying Bachelor of Education.
74. In *Twokay Chemicals Limited vs. Patrick Makau Mutisya & another* [2019] eKLR, the appellate court upheld a global sum of Kshs. 1,500,000.00 for loss of dependency for a form two student.
75. It would reasonably be expected that the deceased would complete his studies, get into the job market and support his father. This court will therefore adopt a global figure to assess the damages payable under this head. Taking into account the evidence that was adduced in court that the deceased was a healthy young man, responsible, enjoying robust life, but also considering the uncertainties and vicissitudes of life, the court hereby awards Kshs. 2,000,000/= for loss of dependency.
76. In the end, I find that Civil Appeal No. E168 of 2023 lacks merit. I hereby dismiss it with no order as to costs. Civil Appeal No. E164 of 2023 is allowed as follows:-
- (a) Liability 50:50 as between the Appellants and Respondents
 - (b) Pain and Suffering Kshs. 100,000/=
 - (c) Loss of expectation of life Kshs. 150,000/=



(d) Loss of dependency Kshs. 2,000,000/=

(e) Special damages Nil

Total Kshs. 2,250,000/=

Less 50% contribution

T O T A L Kshs. 1,125,000/=

77. The Appellants shall have the costs of the said Appeal.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Oginga for Appellant in Appeal No. E164/2023

Ms. Kuria for the Respondent in Appeal No. E164/2023

Court Assistant: Polycap

