REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 30 OF 2018

ERICK WAHOME NDERITU..1ST APPELLANT

UNAITAS SACCO LIMITED...2ND APPELLANT

VERSUS

MERCY CHEPKORIR KOSKEI (Suing as the Legal Administrator of the estate

of BRIAN KIPCHIRCHIR ROTICH) (Deceased) ....RESPONDENT

(Being an appeal against the entire judgment of Hon. R. Amwayi Resident Magistrate in Molo Civil Case No. 196 of 2015 delivered on 2nd March, 2018)

JUDGMENT

On 25th November 2014 an accident occurred involving Motor Vehicle Registration number **KBC 811J** and the deceased **BRIAN KIPCHIRCHIR ROTICH** who was a pedestrian. He sustained fatal injuries. The respondent filed **Molo PM Civil Case No. 196 of 2015** on behalf of the deceased's estate seeking compensation in the following terms.

1. **General damages under the Law Reform Act and Fatal Accidents Act**
2. **Special Damages of Ksh 135,620/=**
3. **Costs of the suit**
4. **Interest on 1, 2,and 3 above at court rates**
5. **Any other relief this court may deem fit and just to grant**

The Appellants denied liability and negligence.

On 2nd March, 2018 Judgement was entered against them in the following terms.

1. **Liability 100%**
2. **Pain and suffering Ksh 20,000**
3. **Loss of expectation of life Ksh 200,000**
4. **Loss of dependency Ksh 912,000**
5. **Special damages Ksh 41,500**
6. **Total Ksh 1,173,500 plus costs and interest at court rates**

Aggrieved, the appellants lodged an appeal on 5th April 2018 on the following grounds:

> i. THAT the Learned Magistrate erred in law and in fact by failing to properly analyze the evidence on record thus wrongly found that the 1st and 2nd Appellants were jointly and severally liable for the traffic accident.
>
> ii. THAT the learned trial magistrate erred in law and in fact by relying on the testimony of PW1 on how the accident occurred yet the said witness confirmed during cross examination that the subject motor vehicle came from the rear and as such the witness did not see it before the impact.
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> iii. THAT the learned magistrate erred in law and in fact in failing to find that there was no sufficient evidence to prove on a balance of probability that the 1st Appellant's motor vehicle was involved in the accident which occurred on 25th November 2014.
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> iv. THAT the learned trial magistrate erred in law and in fact by failing to appreciate the doctrine of vicarious liability and hence apportioned blame on the 2nd appellant yet there was no evidence on record to prove or show that the subject motor vehicle was being driven for the benefit, use and or purpose of the 2nd appellant.
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> v. THAT the learned trial magistrate erred in law and in fact by using a minimum wage approach in calculating loss of dependency by using a multiplier approach despite the evidence on record that disclaimed the respondent's dependency.
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> vi. THAT the learned trial magistrate erred in law and in fact by using a minimum wage approach in calculating loss of dependency, having noted that the deceased was a student and not earning any wages whether provable or otherwise.
>
> vii. THAT the learned trial magistrate erred in law and in fact by adopting a multiplier of 38 years and thus failed to consider the vicissitudes of life and the doctrine of lump sum and accelerated payments.

The appellants pray that this appeal be allowed with costs

BRIEF FACTS

The Respondent vide a plaint dated 3rd July 2015 brought a suit against the Appellants. She alleged that the Appellants were the registered and beneficial owners of the Motor Vehicle. That on or about the 25th November 2014 while the deceased was lawfully walking as a pedestrian along Elburgon - Njoro road at Mastima area, the defendants' agent, employee and or driver in control of the Motor Vehicle drove the same carelessly and hit the deceased as a result of which he sustained fatal injuries.

They alleged that the Appellants were vicariously liable for the acts of the driver, employee or servant and relied on the doctrine of ***Res Ipso Loquitor***. Respondent averred that the deceased at the time of the accident was seventeen (17) years old and a student at Michinda Secondary School. The Respondent alleged that by the reason of the deceased's death the Respondent and other dependants have suffered mental anguish, loss and damage.

The Appellants vide their defence dated 18th December 2015 denied all the averments contained in the plaint in toto and stated that if at all the accident occurred then the same was caused and or substantially contributed primarily by the negligence of the deceased. They stated that the plea of ***Res Ipso Loquitor*** was not available at the stage of pleading, same being a derivative of and or an integral part of the Law of Evidence and they prayed that the Respondent's case be dismissed with costs to them.

THE RESPONDENT'S CASE

The Respondent called three witnesses. PW1 the mother of the deceased testified that she was informed that her son Brain Kipchirchir Rotich was involved in an accident on 25th November 2014. That while he was walking along Njoro/Elburgon Road heading to Molo was knocked Motor Vehicle registration number **KBC 811J** and taken to the hospital at Elburgon where he was treated then transferred to Provincial General Hospital in Nakuru.

She found him at the hospital. He was unconscious; he was taken for x-ray and later to ICU but unfortunately he passed on that night.

She produced supporting documents for her case: Death Certificate as Exhibit 1, Letters of Administration and the receipt thereof as Exhibit 2(a) and 2(b) respectively, Demand Letter and Receipt for postage as Exhibit 3(a) and 3(b) respectively. Letter to 2nd defendant Exhibit 4(a) and 4(b), Demand Notice to insurance and receipt of postage Exhibit 5(a) and 5(b) respectively, Postmortem report Exhibit 7, record of ownership and receipt of payment of Motor Vehicle search Exhibit 8(a) and 8(b) respectively, child's school identification card Exhibit 9, deceased report form Exhibit 10 and a bundle of receipts totaling Ksh.16, 026/= as Exhibit 11 (a) and 11(b) respectively.

She further testified that the deceased was her first born son. That he was a bright boy who used to be position one or two in school. That he had a promising future. That she had a lot of hope in him.

On cross examination she stated that she did not have receipts for Kshs.94, 600/= she was claiming, that deceased was living with her and he depended on her for upkeep. She stated that she sued the 2nd Appellant because it was the Registered Owner of the Motor Vehicle. She did not know the driver nor did she know whether he was an employee of either the 1st or the 2nd Appellant.

In re-examination, she stated that she was not at the scene at the time of the accident, that the vehicle was arrested and taken to the police station by police officers. That it is the police officers who knew the owner of the Motor Vehicle.

PW2 Hagai Kiprono Kipyegon testified that he was in company of the deceased and other friends escorting his brother one Hezron Yegon for GSU recruitment in Molo. While they were walking off the road a Motor Vehicle came from behind them and knocked the deceased, hit the fence, went back to the road and sped off. That the deceased sustained head injury and skull fracture.

That he took down Motor Vehicle’s registration number, proceeded to Elburgon Police Station and reported the accident. That his other friends took deceased to the hospital and they were referred to Provincial General Hospital in Nakuru. He was admitted to ICU. The following day they were informed he had passed on at night. He confirmed that it was his father who took the deceased to the Hospital.

On cross examination he confirmed that the accident occurred at a place called Mastima between around 6.00 a.m. and 8.00am. That they were walking on the left side of the road from Elburgon heading to Molo; that there were no bumps near the accident scene but there were stones and rocks besides the road ; that they were walking within the footpath of about 20meters; that he was walking besides the deceased who was on the right side of the road, his friend Hezron was walking 10 meters behind the deceased, that the deceased was on the right side next to the road when the Motor Vehicle came from behind them, completely veered off the road and only hit the deceased, proceeded to hit the fence then slowly swerved back to the road and sped off. He confirmed that he reported the accident at the police station and could not tell the exact speed of the Motor Vehicle.

In reexamination he testified that he blamed the driver for the accident as he drove at a high speed and failed to stop after the accident.

PW3 No. 63322 PC David Ngetich testified that from the information that came to his knowledge through the police file and the Police Abstract the accident occurred on 25.11.2014 at around 7am at Elburgon Township at a place called Mastima involving a private Motor Vehicle KBC 811J and the deceased who was a pedestrian. The accident was reported and the Motor Vehicle and the driver were later detained at Elburgon Police Station. That there was intention to charge the driver one George Wagaita Manga but it was established that he was shot on 4th December, 2014 and died in Nakuru. He testified that the police file for this case was brought to the court on 8th March, 2017 for the prosecutor to peruse but it apparently never returned to the police station and at the time of the hearing in this matter he only had the Police Abstract Report which had been issued by the Base Commander Molo Police station. He testified that he had worked with the said Base commander for two years and was conversant with his signature. His attempt to produce the PAR was objected to by the appellant’s counsel. That objection was sustained by the trial magistrate.

On cross examination he testified that he became aware of the case when he was asked to testify in the case and was given the PAR to produce. He was not the investigation officer. He testified that from the PAR the owner of the motor vehicle was Erick Wahome Nderitu, and the driver was George Manga.

THE APPELLANT’S CASE

Erick Wahome Nderitu was the sole witness for the appellants. He confirmed that the Motor Vehicle belonged to him. He denied any knowledge of an accident involving his Motor Vehicle that no one was ever charged with traffic offence with regard to the accident which occurred on 25.11.2014. However he confirmed that in March 2015 his brother in law was driving the motor vehicle towards Elburgon when at around 5.30pm he called and informed him that he had been arrested and was at Elburgon police station in regard to the accident. That the 2nd appellant was known to him as the financier of the Motor Vehicle and the said Motor Vehicle was not being driven for the benefit of the 2nd Appellant. On cross examination he stated that on 25th March, 2014 he was in Nakuru and had given the motor vehicle to a family friend by the name George Manga who was going to a funeral in Eldoret. That George called to notify him that he would be late as there was traffic at Timboroa. That when George Manga returned the Motor vehicle it did not have any dent and though he never produced any inspection report he confirmed the same had been conducted by the police and was found to be in a good condition.

After the full trial the learned trail magistrate found that on a balance of probabilities the plaintiff/respondent had proved that the accident occurred on 25th November 2014 involving the deceased and the Motor Vehicle registration number KBJ 811J. That it was due to the negligence of the deceased driver. That based on the copy of records produced the court held that the 2 nd defendant was the registered owner and proceeded to find them jointly and severally liable at 100%. The learned trial magistrate found and held as follows:

- **Pain and suffering** - that the deceased died the same day of accident but not on the spot and it therefore awarded the Respondent Kshs. 20,000/=
- **On loss of expectation of life** - that the deceased was a form one student in good general conditions and it awarded Kshs. 200,000/=
- **On loss of dependency**- that the deceased was 17 years old as per the death certificate and a good student at Michinda Secondary school as evidenced by the student’s report card; that as at the time of his demise, the deceased’s career path had not been known or determined but he would have earned some income had he lived to the age of working; would have supported his family up to the age of 55 years; adopted a ratio of 1/3 and multiplier of 38 years using the minimum wage of unskilled labourer of Kshs. 6,000/= awarded general damages of Kshs.912,000/=
- **Special damages** - awarded the Respondent Kshs. 41,500/= which had been specifically pleaded and strictly proved.

THE SUBMISSIONS.

The parties’ advocates took directions for the appeal to proceed by way of written submissions.

The Appellant's submissions were filed on 9th October, 2020.

They raised five issues for determination.

1. **Whether an accident occurred and whether m/v reg. no. KBC 811J was involved in an RTA**

2. **Whether the driver of MV reg. no. KBC 811J was 100% liable**

3. **Whether the 2nd appellant was vicariously liable for the acts of the 1st appellant**

4. **Whether the court, in assessing loss of dependency, ought to have used the global sum approach instead of the multiplier approach.**

5. **Whether the award of loss of expectation of life was excessive in the circumstances.**

The Respondent's brief submissions are dated 4th November, 2020 and filed on 11th December, 2020. The Respondent's position was that there is nothing wrong with the judgment of the learned trial Court on both liability and quantum. The respondent urged the court to dismiss the appeal with costs.

It is settled that as a first appellate court, this Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. See **Selle vs Associated Motor Boat Company Limited &others [1968] EA 123 @ 126**

It is also settled that the an Appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles, See ***Mwanasokoni – vs- Kenya Bus Service Ltd. (1982-88) 1 KAR 278*** *and* **Kiruga –vs- Kiruga & Another (1988) KLR 348.** The Appellate Court will only interfere with the conclusions and findings of a trial court if those findings and conclusions were not supported by evidence or were premised on wrong principles of the law. Where the impugned judgment entails the exercise of discretion such as the award of damages, the Appellate Court would be slow to interfere with such discretion unless the Appellate Court is satisfied that the discretion was not exercised judiciously. See the case of **I. P. Veronica Gitahi & Another -vs- Republic [2017] eKLR**.

I have carefully considered the evidence presented to the trial magistrate, and the submissions before me.

On the 1st Issue

It was the appellant's contention that the respondent had not proved that an accident occurred and that the appellant's motor vehicle was indeed involved in the said accident. This argument was based on the fact that the neither the police file nor the Police abstract was not produced in court. On this the appellant relied on **Section 107(1) and (2) of the Evidence Act:** that he who avers must prove. It was argued that the evidence of PW2 was not credible. How possible was it that a motor vehicle could veer off the road, hit the deceased, and have no dent? How credible was his evidence that he reported the matter but the Police Abstract was issued 100 days after the accident?

The appellant objected to the production of the Police Abstract hence the claim that it was issued 100 days after the alleged report is not supported by evidence. Neither was there evidence given by the 1st appellant that his motor vehicle had no dent as no report was produced to that effect.

What is clear is that there was the oral evidence of the three witnesses, which must be looked at separately and also as a whole. PW1 received report of accident, she found her son in hospital, and he died while undergoing treatment for Road Traffic Accident related injuries, there is a postmortem report, and the report to the police. All this evidence is not disputed.

How the accident happened, PW2 clearly explained that the motor vehicle hit the deceased from behind. When it swerved to the fence, and on its way back to the road he took down the registration number. This driver did not stop. Whether the same was inspected or not the evidence was not adduced.

It is evident that the fact that the Police file was not produced is the basis of the appellant's position that there was no proof that an accident happened. It is argued that the court did not have the benefit of looking at the said police file so as to ascertain the true position on how the accident occurred. Even though it is common knowledge that whenever an accident occurs the police officers are supposed to undertake investigation to determine the culpability of those involved, it also common knowledge that police officers will ordinarily reach the accident scene after the accident has occurred, and the credible evidence in any accident matter will be that of an eye witness who will testify on the circumstances of the accident.

In the case herein, the eye witness **PW2** testified on how the accident occurred. There was no contrary evidence advanced on the same by the Appellants his testimony was not controverted. In addition, in the Court of Appeal case of **Robinson Ochola Awuonda Vs House Of Manji [2015] eKLR** it was held that a police abstract report does not prove occurrence of an accident; it is proof that a report has been made to a particular police station. Proof that an accident took place requires credible testimony which may be by credible testimony of an eye-witness. In **Techard Steam & Power Limited V Mutio Muli & Mutua Ngao [2019] eKLR** the Court stated as follows**;**

> **"However, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report**

and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims"

From the foregoing it is evident that the absence of the Police file was not fatal to the case. The evidence of PW2 was not controverted and on the balance of probabilities, appears credible as to how the accident happened.

It was also his evidence that he took down the registration number of the motor vehicle and reported at the nearest police station. The testimony of the appellant confirmed that his motor vehicle was driven by the person named by the police officer at the material time, and there was the possibility that the motor vehicle had passed along that road. Hence the evidence as presented at the trial court placed the motor vehicle at the scene of accident. I find no error in the finding of the learned trial court on this.

On the second issue

It was submitted for the applicant that the deceased contributed to the accident. The analysis of PW2's evidence that he and the deceased and the other persons they were with that fateful morning were not walking in a single file is correct. Hence the possibility of there being contribution of negligence on the part of the deceased cannot be ruled out. The Court of Appeal in **Patrick Mutie Kamau & Another Vs. Judy Wambui Ndurumo** Court stated as follows;

> **"Pedestrians too owe a duty of care to other road users, and they ought to move with due care and follow the Highway Code…."**

In **TRAKANA MOMBASA LIMITED& ANOTHER VS. GEORGE AMWAYI ISAYA (2020) eKLR** the court stated as follows;

> **"The fact that 3 pedestrians were knocked from behind while walking places higher responsibility on the driver who should have been in a position to see them; if he was driving carefully, he should have been able to control the vehicle or reduce impact of the accident…….I agree with the trial magistrate that a larger blame lie on the part of the driver; however, on the other hand, I find contribution of 10% on the lower side. I am inclined to apportion liability of 20% on the part of the Appellant herein who died …"**

I find a contribution of 20% to be reasonable.

On the third issue

The respondent in her plaint described the appellants as follows;

> **"At all material times the 1st defendant was the owner in possession, insurance policy holder, beneficial owner and or the employer of the driver (deceased) in control of the m/v registration no. KBC 811J …the 2nd defendant was the owner, insurance policy holder, beneficial owner and registered owner of m/v registration no. KBC 811J ."**

In their defence dated 18th December 2018, the Defendants /Appellants denied the above and put the plaintiff respondent to strict proof thereof.

In their submissions the appellants argue that the 2nd appellant was merely a financier of the 1st appellant and that the appellant was the beneficiary of a loan to buy the said motor vehicle. Hence it was wrong for the trial court to have found that the both appellants were liable for the accident.

It is noteworthy that the appellants never produced any evidence to demonstrate this fact. It remains a mere allegation and they are bound by the same evidential rule that he who avers must prove.

The only thing they required of the respondent was to prove that they were either the registered/beneficial owners of the said motor vehicle. The respondent produced evidence that the 2nd respondent was the registered owner, while the 1st appellant was the insured.

I have been urged to make a ***finding that financiers are not vicariously liable for the acts or omissions of the employees or agents of their creditors as financiers have no beneficial interest in the day today activities of the insured property.*** The Appellants relied on the case of **General Motors Ea Ltd Vs. Eunice Alila Ndeswa & Anor [2014] eKLR**, **Jackson Musau Kalembe Vs. Prime Bank Limited & Another [2016] eKLR**, **Section 5 & 8 of the Traffic Act, CAP 403 and Movable Property Security Rights Act, No.13 of 2017** and submitted that the trial Court did not make a determination on whether the 2nd Appellant was vicariously liable.

With due respect that is not an issue in this case.

Parties are bound by their pleadings. It is the pleadings that produce issues, which parties call evidence to prove.

In the case of **Daniel Otieno Migore Vs. South Nyanza Sugar Co. Ltd. (2018) eKLR** the court stated that;

> **"It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at**

variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

There was nothing in the pleadings about the 2nd appellant being a financier of the 1st appellant. It only came up at the hearing when the 1st appellant stated it without producing any supporting evidence. A financing agreement of the nature referred to cannot be oral.

There was no evidence that the 2nd appellant was the financier of the 1st appellant. The 2nd appellant did not appear nor did it call any evidence. The evidence before court is that the 2nd appellant is the registered owner of the motor vehicle, while the 1st appellant was the insured and the one in possession, and the one who gave it out to the driver who was involved in the accident.

The respondents established what the appellants disputed, their being the beneficial and registered owners of the motor vehicle. The 1st appellant admitted to have given the motor vehicle to the person who was driving the motor vehicle at the time of the accident. Both the beneficial owner and the registered owners became vicariously liable for the acts of their driver, not as the financier but as the registered owner.

On the fourth issue

This issue pits the global sum award movement against the multiplier approach in determining general damages for loss of dependency. As illustrated by the numerous authorities cited by the appellants: viz

Oyugi Judith & Another Vs. Fredrick Odhiambo Ongong & 2 Others [2014] eKLR, Mary Khayesi Awalo & Another Vs. Mwilu Malungu & Another ELD HCCC NO.19 OF 1997 eKLR, **David Mbuba & Another Vs. Victoria Mwongeli Kimwalu & Another [2018] eKLR, Kenya Breweries Limited Vs Saro [1991] eKLR, Emmanuel Wasike Wabukesa Vs. Muneria Ndiwa Burman [2019] eKLR** and submitted that the global approach was most suitable under the circumstances. Based on comparable global sum precedents of **Oyugi Judith & Another Vs. Fredrick Odhiambo Ongong & 3 Others [2014] eKLR** and **Chhabhadiya Enterprise Ltd & Anor Vs Gladys Mutenyo Bitali** *(Suing as the administrators and personal representatives of the estate of LINET SIMIYU-Deceased)* **Civil Appeal No. 10 of 2017 [2018] eKLR** the appellants proposed that a global sum of Kshs.500,000/= would suffice.

Of note here is that these approaches are used by courts depending on the circumstances of the case. It has not been demonstrated that the Court of Appeal has closed the door on the multiplier approach hence there is no one way to this. My view is that every single case is different and as a court I have the discretion to determine the case on its own facts.

Our reality is that jobs are not available. Cases of young people completing school, even with multiple degrees and taking up casual jobs where they earn minimal wages are not strange. There are those who take up other opportunities and get to make more money than if they were employed. We are required to find a balance in order to address this reality. In my view the multiplier approach appears reasonable in this case and I want to agree with the view expressed by the Judge in **Board Of Trustees Of The Anglican Church Of Kenya Diocese of Marsabit Vs N I A (Minor Suing Through Her Next Friend I A I S) & 3 Others (2018) eKLR.**

First on the assessment of general damages the judge cited **Gammel – Vs - Wilson (1981) 1 ALL ER, 578** where the Court stated as follows at Page 593.

> **"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr. Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr. Picket, will have no difficulty. But in all cases, it is a matter of evidence and a reasonable estimate based on it."**

He also cited Nakuru HCCA No. 133/2003 where the trial magistrate had awarded Kshs. 720,000/00 for loss of dependency. The High Court *(Mugo, J)* dismissed the appeal and increased the award for loss of dependency to Kshs. 900,000/00. In doing so the learned judge stated as follows**: -**

> **"The deceased herein was aged 12 years old. He was a bright and confident child, as is demonstrated by the fact he would personally take interest in an Agricultural show and attend the same unaccompanied. His father testified that he was a clever and respectful boy. Clearly therefore, his future prospects can be said to have been quite good. He would probably complete his education at 22 years if he proceeded to University and probably become gainfully employed at 24 years. Being a Kenyan, he would be expected to contribute towards his parents' welfare and probably share his earnings with his siblings as well."**
>
> The judge further stated as follows: -

"I do not accept that the Deceased at 12 years of age was too young for the expectations of his adult life to be purely speculative without hope of realization. He may not have become a doctor or some other high profile professional; but he appeared endowed with sufficient intelligence to at least attain a first general degree in college which would have enabled him to secure a reasonable job that would have probably earned him a monthly salary (less statutory deductions) of about Kshs. 45,000/00. By the time he would have secured employment he would probably be 25 years old. His and the Plaintiff's expectations he would have been that he would have a full working life to about 60 years of age. But the vagaries and uncertainty of life must be factored into the equation; we live in an imperfect and sometimes dangerous world full of disease, accidents, civil strife and war."

He then went on to state on the case before him:

"The deceased was a form four student. She was 17 years old. My view is that even if it is not proved by evidence that the victim was a bright student or the profession he/she was dreaming to pursue, that alone cannot be a good reason not to award damages on loss of dependency if such a claim is established. The future is always unpredictable. Even those who do not pass with good grades at primary or form four (4) level can make it in future. There should be no discrimination between students in the same level of education. All what the court can do is to give a reasonable estimate. It is true that the deceased was not working. She was a student. However, having endured several years of education and her parents having catered for her education, it was expected that she was going to earn her living. We should not always be guided by the expected future formal employment. Our unemployment rate is quite high. There are no formal jobs readily available. She could as well have engaged in business in future and became a successful business woman."

I agree in principle that there is a fairness assessing each case on its own facts, on considering our living realities as Kenyans, and the expectations of parents, that Kenyans have been forced to take whatever job is available to earn a living, and an estimate or earnings by the standards of a casual labourer is fair in the circumstances of this case. That means that I find that the magistrate did not act on the wrong principle in applying the multiplier approach.

On the issue of the multiplicand of 38 years the appellant relied on **Emmanuel Wasike Wabukesa Vs Muneria Ndiwa Burman [2019] eKLR** where the court cited the case of **Sheikh M Hassan Vs Kamau Transportes (1992-88) 1 KAR 946** and **Teresia Sebastian Massawe** (Suing as the legal Administratix of the estate of the late **Silvia Sebastian Massawe) Vs. Solidarity Islamic (Kenya Office) & Another, Civil Appeal No.18 of 2017 [2018] eKLR** and submitted that a multiplier of 14 years would reasonable and fair compensation for the loss suffered by the respondent, proposing the sum of Kshs.336,000/=(6000x12x14x1/3)

After considering the authorities cited by the appellant on the multiplier and taking into account the vagaries of life, I am of the view that a multiplier of 25 years ought to be fair in the circumstances of this case.

Regarding the award on loss of expectation of life the Appellants relied on the cases of **Nota Tissue Products Vs Benjamin Obonyo Mukati & 4 Others [2020] eKLR, Leonard Nturibi Ambutu & Another Vs Rufus J K Kihato & Another** [**2018] eKLR, Virginia Simpano Mukami (Suing as the Legal Representative of the estate of William Lasiti Ole Kur (Deceased) Vs. Attorney General & Another** [**2020] eKLR, Njiru Benson Murage Vs Peter Njue Zacharia (Suing As The Administrator of The Estate of Justin Mukundi Njue) [2019] eKLR, Peter Ngigi Kuria & Another (Suing as the legal representative of the estate of Joan Wambua Ngigi) Vs. Thomas Ondili Oduol & Another [2019] eKLR** and urged this Court to substitute the trial court award with a conventional award of Kshs.100, 000/=. There are authorities on both figures Kshs. 100,000/= and Ksh 200,000. I find no reason to interfere with the trial magistrate's award of Kshs. 200,000/=.

Hence the appeal succeeds in part:

a. Liability apportioned at 80:20: the deceased to bear 20% liability.

b. The multiplier approach is applicable and a multiplicand of 25 years will apply. 6000x12x25x1/3=Kshs. 600,000/=

c. Pain and Suffering Kshs. 20,000/=

d. Loss of expectation of life Kshs. 200,000/=

e. Special damages Kshs. 41,500/=

f. Total Kshs. 861,500 less 20%= Kshs. 689,200/=

g. The award of the trial court is substituted with an award of Kshs. 689,200/= plus costs below and interest at court rates from the date of the Judgment below.

h. The appellant will have 1/3 of the costs of this appeal.

DATED AND DELIVERED BY EMAIL BY CONSENT OF PARTIES THIS 11TH MARCH, 2021.

MUMBUA T MATHEKA

JUDGE

Court Assistant: Edna

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