



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CIVIL APPEAL NO. 82 OF 2019**

**HAJI ASHRAF.....1<sup>ST</sup> APPELLANT**

**A. AMIRALLY.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**SIDI MASHA KALAMA &**

**EUNICE KITHI MAGOGO (Legal representative of the**

**estate of KENGA FONDO (Deceased).....RESPONDENTS**

**(An appeal from the Judgement of Chief Magistrate Hon. Dr. Julie Oseko sitting at Malindi Law Courts made on 10<sup>th</sup> September 2019 in CMCC No. 339 of 2014)**

**Coram: Justice Reuben Nyakundi**

**M/s Machuka & Co. Advocates**

**M/s Wambua Kilonzo & Co. Advocates**

**JUDGEMENT**

**Background**

The respondent was a pedestrian along Gede-Watamu road on or about 22/3/2014 when the appellants motor vehicle registration KAS 900D was so negligently driven, managed and or controlled that it veered off its lane to hit the deceased. As a result, the deceased who was off the road sustained fatal injuries.

The respondent who filed suit on behalf of the estate of the deceased averred in the plaint that the accident could not have occurred save for the negligence acts of the 2<sup>nd</sup> appellant. Accordingly, the respondent in the claim sued for award of damages under the Fatal Accidents Act and Law Reform Act. The matter was fully heard by Hon. Oseko and at the conclusion of it all found the appellants jointly and severally guilty of contributory negligence apportioned at 90% versus the pedestrian herein the deceased at 10%. Further on damages the learned trial magistrate awarded the deceased estate a total decretal sum of 2,158,546/= plus costs and interest.

Being aggrieved with the entire judgement the appellants preferred an appeal to this court based on the following grounds:

- 1. That the honourable trial magistrate erred in law and fact in disregarding vital evidence adduced by the defendants/appellants in arriving at her decision and as such arriving at a wrong finding particularly in disregarding and trivializing, the evidence of DW1.**
- 2. That the honourable trial magistrate erred in law and fact in failing to correctly evaluate the testimony of the defence witness thereby making a wrong apportionment on liability and on quantum of damages and awarding an inordinately/astronomically very high award to the plaintiff/respondent.**
- 3. That the honourable trial magistrate erred both in law and fact by disregarding and or failing to evaluate the evidence adduced by both the plaintiff and the defendants in apportionment of liability putting in mind the entirety of the circumstances.**

**4. That the honourable trial magistrate erred both in law and fact as she placed undue credit and reliance on the plaintiff witness accounts considering the entirety of the circumstances of the case.**

**5. That the honourable trial magistrate delivered judgment based on extraneous considerations and wrong principles of law and fact.**

At the hearing grounded on written submissions learned counsel for the appellants submitted that the learned trial magistrate failed to appraise and appreciate the evidence correctly with regard to the proximate cause of the accident. Learned counsel reciting the evidence of each of the witnesses for the respondent opined the burden of proof was never discharged to warrant an apportionment of 90% on vicarious liability. The complaint was that the deceased, as a pedestrian could have shouldered a greater percentage of contributory negligence on the strength that he failed to take due care and attention as a pedestrian. Further, learned counsel argued and submitted that the inclusion of the testimony of the police officer (PW2) who did not investigate the accident amounted to hearsay under the Evidence Act, hence inadmissible. In regard to the foregoing ground, learned counsel cited and relied on the following authorities; **David Kajogi M'mugaa vs Francis Muthomi 920120 eKLR, Robert Koskei Saina vs Samson Kiboio Kirumet [2016] eKLR, Isaack Michael Okenye vs Lacheke Lubricants Ltd [2017] eKLR, Peter Omedi vs Clement Ochieng [2006] eKLR, Stephen Onsumu Kibage vs Rebeka Mwangi Simion [2017] eKLR.**

To that extent learned counsel's argument was that the best in the circumstances would have attracted equal apportionment of liability as between the deceased and the appellants' agent, servant or driver incharge of the aforesaid offending motor vehicle.

It was further submitted on behalf of the appellants that assessment of quantum was erroneous and irrelevant factors were taken into account by the learned trial magistrate. Evidently, from the learned counsel's submissions each of the heads in which the assessment of damages was quantified by the trial court became a subject matter of this appeal.

According to the commentary by the learned counsel to start with pain and suffering an award of Ksh.50,000/= was in his view manifestly excessive. Hence in his submissions a value assessment of Ksh.10,000/= would have been apportioned. For purposes of this submissions, learned counsel placed reliance on these authorities; **James Gakunya & Anor vs Premiums Kariuki Githinji [2015] eKLR, Herjer Singh Pandal vs Hellen Aketch Okudho [2018] eKLR, Catherine Mwendwa Mungi vs Lucy Nkoyae Kamwamba [2019] eKLR, Put Sarajevo Gen-Eng. Co. Ltd vs Esther N. Njeri & Anor [2014] eKLR.** It follows therefore that learned counsel contention was to have the court set aside the assessment of Ksh.50,000/= with a substituted figure of Ksh.10,000/= for pain and suffering.

Secondly, learned counsel for the appellants attacked the award on loss of dependency as being too high, therefore erroneous estimate of the damage suffered by the deceased estate. His main concerns were on the adoption of a multiplier of 20 years instead of 15 years which he considered fair and just in the circumstances of the case. In his submissions learned counsel argued that the learned trial magistrate should have applied the principles in **Roger Dainty vs Mwangi Omar Haji [2004] eKLR, Samuel Mwaura Kimani vs Clement Gachunga, Michira Chunga vs John Kariko HCC No. 27of 1989.** It was pursuant to these authorities learned counsel argued and submitted that the multiplier of 20 years be varied and substituted with that of 15 years in favour of the deceased estate.

Finally, learned counsel also complained of an award on funeral expenses assed by the trial court at Ksh.50,000/=. He thought it was relevant on the facts of the case to award Ksh.20,000/= as funeral expenses. Learned counsel relied upon the case of **(L) B vs Antonella Cantaluppi [2015] eKLR.**

On the part of the respondents' counsel he submitted on liability to the effect that contrary to the appellants' counsel submissions, his arguments are distinguishable based on the evidence at the trial court. Again, learned counsel submitted that the deceased was not crossing the road but hit while off the road on the right hand side, being the lawful side and not the motorable road for the appellants' vehicle. Learned counsel reiterated on the evidence produced by both the respondents and appellants' witnesses to drive home his point on liability. Learned counsel went on to submit and placed reliance on the dicta in **Alsamah Enterprises Ltd & Another vs D.M (Minor) HCCA No. 15 of 2014, A.N. Isaak Hardware Ltd vs Francis Chiuri Wanjiku CA No. 8 of 2013.** His contention was to the effect that even the 10% apportionment was not justified given the evidence and facts of the case.

Apart from liability, learned counsels submitted and weighed on the issue of assessment of damages. According to learned counsel, the appellants have not laid any material before court to necessitate interference with the assessment on pain and suffering of Ksh.50,000/=. He also made pertinence comments drawing inference from the decisions in **Maureen Alukwe HCC No. 26 of 2005 at Nakuru, Kenya Power Ltd vs James Matata & 2 Others suing as the legal representatives of the estate of Nyange Masaga [2016] eKLR.**

Additionally, learned counsel for the respondents submitted that the arguments on loss of dependency hold no ground given the fact that the deceased died at the age of 35 years. Equally, learned counsel submitted that the deceased was economically involved with work which earned him Ksh.1,000/= per day. That in the normal circumstances, labour in the informal market rarely provides documentary evidence argued learned counsel for the respondent. With regard to this issue, learned counsel cited the cases of **Mwanzia vs Ngala Mutua Services Mombasa Ltd, Mashua Hassan Nzuka suing as an administrator of the estate of the Juma – Mohamed, Moses Akumba & Another vs Hellen Karisa Thoya [2017] eKLR.** In learned counsel's argument, there is nothing appellants have availed for this court to differ with the decision of the court below. That leaves, the question of funeral expenses. The respondents' counsel claimed and submitted that the trial court had time to evaluate the circumstances on this award. Leaned counsel submitted and urged the court not to interfere with the assessment for no sufficient reasons have been provided for by the appellants.

Having considered the evidence and submissions on appeal from both parties as represented by their respective counsels, it is now my singular duty to delve into the determination of the appeal.

#### **Analysis and Determination**

This being a first appeal the duty is sacrosanct and well settled in the principles outlined in a plethora of cases; **Lake Flowers vs Cila**

What is emphasized in these authorities is the fact of the matter that the first appellate court approaches an appeal by having a fresh scrutiny and evaluation of the evidence afresh. Secondly, there can be no doubt that the trial court had the advantage of seeing and hearing witnesses navigate the circumstances on causation and assessment of damages. This advantage on the truthfulness and demeanor of a witness is not accorded an appeal's court. Therefore, when it comes to the demeanor of witnesses it's the trial court judgement that carries the day.

In relation to that issue, care and caution would obviously be necessary to ensure the court does not overturn the impugned findings and decision in absence of conditions obtaining at the time on demeanor and convincingness of a witness at the trial. This power is also limited in certain respects as stated in the cases of *Mbogo vs Shah* [1968] EA 93 which *De Lestang V.P* observed:

**“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, or because it has misdirected itself or because, it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It would be wrong for this court to interfere with the exercise of the trial court's discretion merely because this court's decision would have been different.”**

In this appeal, distilling further on grounds of appeal they are fundamentally deducible to the following key outstanding issues;

1. Did the respondent prove on the balance of probabilities that the 2<sup>nd</sup> appellant was negligence.
2. If, so was there evidence by the same standard to prove contributory negligence as the cause of the accident.
3. Did the learned trial magistrate error in apportioning liability at 10%: 90% as against the appellants on contributory negligence to the cause of the accident.
4. If so in what proportion could the measure of assessment of damages be said to be supported with the evidence given before that court.

*Issues 1, 2 and 3 considered together in consolidation for purposes of clarity and their nature of inter-section to evaluate and make findings on liability.*

### The Law

To begin with negligence as defined by *Perly Chartersworth on Negligence 5<sup>th</sup> Edition Chapter 1* “*is the omission to do something which a reasonable man, guided upon those considerations ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and a reasonable man would not do. To determine whether an act was negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage.*”

Torts are legal wrongs that persons suffer at the hands of another due to an act of negligence. In *Donoghue v Stevenson* [1932] AC, the **House of Lords** held that “**a person should be able to sue another who causes them loss or damage. That is what the court referred to as the duty of care to their neighbours.**” Therefore, the claimant or plaintiff is under a duty to prove on a balance of probabilities the following elements:

- (a) That the defendant owed a duty of care.
- (b) That the defendant breached that duty of care.
- (c) That the claimant/plaintiff suffered loss or damage as a direct consequence of the breach.

The reason for all these is that for purposes of proof the court in *Regina Wangeci v Eldoret Express Co. Ltd* [2008] eKLR held that:

**“In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts, which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.”**

It follows that the concept of a duty of care has a correlation with the concept on proximate cause as explained in *Anns vs Merton London Borough Council* [1977] AC in which the court observed that;

**“Proximity simply means that the parties must be sufficiently close, so that it is reasonably foreseeable that one party's negligence would cause loss or damage to the other. Fairness means that it is fair, just and reasonable for one party to owe the duty to another.”**

What does this mean to the appellants' case? From the record, evidence on causation was given by PW2 – Cpl. George Nyabei of Malindi Police Station. it's acknowledged that PW2, was neither the investigating officer nor the traffic police officer who was the first responder to the scene of the crime. Apparently, all what he told the court dependent on the transcripts and record of information contained in the police

file. The scene was visited and a sketch map drawn by a different police officer not summoned to allude to the evidence collected to document circumstances of the accident. It was claimed by the appellants' counsel that PW2 evidence can best be described as hearsay, within the exclusion clause of inadmissible evidence to prove existence of a fact in issue under **Section 107(1) of the Act**.

A panoramic view on PW2 account he blamed the appellants' driver for the accident in which the deceased succumbed to death. The trial magistrate admitted evidence of the driver (DW1) to the owner of the motor vehicle who denied any acts of negligence as the proximate cause of the accident. Besides DW1 testimony, it's also in record that an insurance investigator (DW2) testified that on instructions from the insurance company he did investigate the accident. It was stated by DW2 that on observation and analysis of the evidence documented at the scene apparently the pedestrian was the one to blame for the accident. In relation to the two versions, it's clear from the learned trial magistrate judgment that both parties contributed to the accident apportioned at 10% : 90% on contributory negligence.

The question which calls for an answer therefore is whether the learned trial magistrate was right in apportionment of contributory negligence at a ratio of 10% : 90%. The basic principle undermining the defence of contributory negligence is that people should take reasonable care for their own safety as well as for that of others.

In determining whether a person has been guilty of contributory negligence, it is considered that the following factors are relevant in exercising discretion to apportion the percentage as a measure of negligence.

- a. The probability that the harm would occur if care was not taken.**
- b. The likely seriousness of the harm.**
- c. The burden of taking precautions to avoid the harm.**
- d. The social utility of the risk creating activity in which the person was engaged.**

In my view, the defendants' behaviour is a highly important factor in arriving at a finding of both duty and negligence acts to give effects to shouldering contributory negligence.

In the case of **Grant v David Pareedon et al Supreme Court of the Caribbean in Civil Case No. 91 of 1987** held as follows:

**“Where there is evidence from both sides to a civil action for negligence involving a collision on the roadway and this evidence, as is nearly always usually the case, seeks to put the blame squarely and solely on the other party, the importance of examining with scrupulous care any independent physical evidence which is available becomes obvious. By physical evidence I refer to such things as the point of impact, drag marks (if any), location of damage to the respective vehicles or parties, any permanent structures at the accident site, broken glass, which may be left on the driving surface and so on. This physical evidence may well be of critical importance in assisting a tribunal of fact in determining which side is speaking the truth.”**

In the present case at the trial before Hon. Oseko (CM) it appeared that the evidence of PW2 painted a picture on the approaches taken by the appellants' driver to necessitate the accident occurrence. The investigations report which one could say was admitted under **Section 77 of the Evidence Act** comprises public information carried out as such by a police officer in the course of his public duty. The report which was prepared by another police officer, with knowledge on traffic accidents with leave of the court can be produced without calling the maker who may not be easily procured to produce it as evidence in court. The foundation to that effect was laid before the trial court which permitted another police officer to produce it.

In terms of **Section 33 of the Evidence Act** the evidence by a police officer is considered more independent in comparison with that of an investigating officer acting under instructions of the insurance company. My observations being that such investigators would always align their findings to purpose the objective to find fault against the claimant/plaintiff in a suit for damages. The monetary interest likely to accrue binds such an investigator to give binder evidence which only goes in favour of the defendant to exonerate him or her of any negligence which was the cause of the death or injury.

What the findings of DW2 did was to change the point of impact inconsistent with the circumstances of the accident as founded by PW2 documented investigations. From the perspective of PW2, the scene was visited and a sketch plan drawn as a necessary component of the investigations. In his able and concise recommendation there was no proposition of the deceased crossing the road. Therefore, contributory negligence on the part of the appellants largely remains to be based on the aftermath inquiry done by the traffic accident unit which acknowledged that the scene was immediately on occurrence of the accident. That is in contrast with DW2 who stated to have visited the same on or about two months after the accident. In his report there was no account of a witness statement or an eye witness to buttress his observations and opinion.

If the respondents' evidence sufficiently showed that the appellants materially knocked the deceased off the road it ought to be presumed as such, unless there is direct or circumstantial evidence to avert the scenario. In my view, the rebuttal testimony by DW2, DW2 failed to controvert documentary evidence of the sketch plan which gave affirmative findings to negative the appellants' defence on liability. It appears to me that the trial court had the duty to carry out an examination of the evidence of PW2, with the greatest care, weighing it with that of DW1 on the incident on the road which claimant case wholly dependent upon. It is difficult for an appeal court to rule the trial court as being out of legal and factual order going by the principles in **Peters v Sunday Post [1957] EA**. It's always a reminder to the appeal court to carefully weigh and consider the evidence bearing in mind that it has neither heard, seen or made impressions of witnesses which is solely purview of the trial court.

The appellants seem to say that the death of the said deceased was caused by his own negligence and that he should have exercised

reasonable care and caution having seen the vehicle approaching and avoided the accident. However, it has been truly said by PW2, in producing the sketch plans that the collision occurred off the tarmac and contribution if any should be minimal to say the truth.

Bearing the case on this point as disposed off by the learned trial magistrate I find no reason to interfere with the findings on liability to which the fatal injury complained of in this case is attributable. That is the fact to be proved and in adherence to the rules on adjudication and the circumstances being such as are equally consistent with the evidence by the respondents.

The next issue was that the damages were not properly assessed under the heading of general damages on this much guidance is to be found in a number of case law to assist in the exercise of discretion. In the case of **Southern Engineering Co. Ltd vs Musungi Mutia [1985] KLR 730:**

**“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case. The question to principles behind the award it is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries, since no two cases are precisely the same, either in nature of the injury or in age of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award.**

**It need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of the case bear comparison with the facts of another before comparison between the awards in the respective cases.”** (See also **Odunga’s Digest on Civil Case Law and Procedure** pg 3651 paragraph 57-6 (a) (D) (e).

With regard to the appellate court jurisdiction, it is important to bear in mind and remind myself the well settled principles in **Channan Singh & Anor vs Channan Singh & Honda [1955] 22 EACA 129, Butt vs Khan CA No. 40 of 1977, Mariga vs Musila CA No. 66 of 1982**, where the courts explained **“that on appeals the court is only entitled to interfere with the assessment of damages if it is inordinately low, and it represents an entirely erroneous estimate or the party asking for an increase or a reduction must show that the trial judge in making that assessment did so by taking into account wrong principles or misapprehended the evidence in some material respect. Further, a member of an appellate court when he or she naturally and reasonably say to himself or herself what award would I have made and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views and opinions so that final figures are not necessarily wrong if they are not the same figure as his or her own.”** (See also **West & Son v Shephard [1963] 2 ALL 625 and 635**).

Having thus examined the preliminary principles relevant to determining this appeal, the next considerations concerns the appellants’ grounds touching on assessment of damages.

The main heading is on the claim for loss of dependency under the **Fatal Accidents Act (Cap 32 of the Laws of Kenya)**. It was held for example in **Cookson v Knowtes [1979] AC 556 at 575** **“that under the Fatal Accidents Act the court has to make the best estimates that it can having regard to the deceased age and state of health and to his actual earnings immediately before his death, as well as to the prospects of any increase in his earnings due to promotion or other reasons. But it has always been recognized and is clearly suitable, that when events have occurred, between the date of death and the date of trial, which enable the court to rely on ascertained facts rather than on mere estimates, they should be taken into account in assessing damages.”**

It’s also appropriate to rely on the principles in **Mariga v Musila [1984] KLR 251**, in which the court observed **“where the working life of a living plaintiff has been shortened by injury he suffers loss of prospective earnings and is entitled to an award for the lost years being the period which he would have worked had he not suffered the injuries and in such a case, plaintiffs are not deducted from his net salary in assessing the appropriate multiplier. It is also to be observed that an estimate of prospective loss must be based in the first instance, on a foundation of solid facts, otherwise it is not an estimate or a guest. It is therefore important that evidence should be given to the court of as many solid facts as possible. One of the solid facts that must be proved to enable the court to assess prospective loss of earnings is the actual income, which the plaintiff was earning as at the time of injury or death.”** (See **Migregor on Damages 14<sup>th</sup> Edition**).

In the instant case the evidence as to what actually happened is to be found in the circumstantial evidence of PW1 and PW2. According to PW2, the deceased was suddenly hit off tarmac by the appellants’ motor vehicle. This was a situation which the appellants’ driver made attempts to exonerate himself together with his witness, but there is nothing to indicate that the deceased would have any time in which to take avoiding action. The appellants’ case is that of a nature presented on the accident to cast a doubt to the investigations conducted by the traffic police officers but nothing emerged to demonstrate to the trial court that the deceased being the author of his own misfortune. That wrongful death is therefore liable to compensation by the appellants under vicarious liability.

In the testimony of the administrators to the estate of the deceased (PW1) it’s stated that the age of the deceased at the time of the fatal injuries was 35 years. Further from the evidence he worked as a mason. Based on his occupation and state of health it is expected that the deceased would have continued to be part of the labour market utilizing his skills as a mason. The administrators produced Grant of Letters of Administration in support of the claim dated 3/9/2014. There was also the certificate of death confirming that on 22/3/2014 the deceased died of cardio pulmonary arrest due to severe head injury. PW1 also testified that the deceased during his life time had been blessed with a family whose death they suffer from due to loss of dependency.

At the trial in seeking to determine an appropriate multiplier and multiplicand and the prospects of finding continuous labour to earn the deceased a monthly income of Ksh.30,000/= was dim. Therefore it was plausible for the learned trial magistrate to have a trade off by adopting a minimum wage of Ksh.13,201/= as a baseline net income with a multiplier of 20 years given his age of 35 years.

As reiterated in various cases case law, the multiplier – multiplicand approach is a model of calculating the loss of income for the benefit of the deceased estate to cater for lost years arising out of the wrongful death caused by the tort-feasor.

In so far as the multiplicand is concerned its clear from the judgement of the trial court that a 2/3% ratio was adopted to calculate arithmetically the net income after deductions of any other statutory regulated income. However, what is missing in that approach is the evidence of what the deceased expenses were, and the amount specifically spent for the benefit of his dependants.

I am of the conceded view and its indeed the law in Kenya, that whatever other factors which are intelligible to take into account by a trial court there ought to be sufficient proof on the net income devoted in support of the widow and children of the deceased during his or her life time.

Looking at the facts of this appeal in totality, the purpose of the whole object in assessing damages for lost years is to be exercised in consonant with the principles in **Gammel vs Wilson & Others and Furness & Another vs B. & S. Massey Ltd [1982] AC 27** in which **Lord Scarman** held as follows:

**“The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficult, 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 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 mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters, but in all cases, it is a matter of evidence and a reasonable estimate based on subtle mathematical calculations based as they must be on events or consequences of a life which he will not live are out of place. The judge must make the best estimate/known facts and on the his or her prospects at the time of his death.”**

Dealing with this head of damages the learned trial magistrate took an approach of two-thirds as a multiplicand to demonstrate of what income went to cover his expenses each year and his annual surplus to achieve the sum of Ksh.2,112,160/=. That means loss of dependency to be 2/3 as the rest was spent for the deceased personal leisure and social activities.

On my part I am entirely satisfied s to the genuineness of the evidence and reasons given by the respondents on the income of the deceased. This inspiration is drawn from the fact that the deceased being a mason is not disputed. It happens however that in our jurisdiction husbands quite often feel that it's not necessary to keep books of accounts on family expenditures which might expose them to a risk of family audit. Some of those family audit queries on expenditure can sometimes be a source of acrimony luckily to injure feelings and relationships. Financial secrecy and lack of transparency and unwillingness to engage with their spouses creates a weighted scale on unverifiable data when it comes to intestate litigation. In this approach claims under this category to calculate loss of dependency almost to a high degree borders on subjective test. Overall, all is not lost on the emphasis of the database and the indicators on financial flows as it has been mitigated by the Court of Appeal Predominant Principle in **Jacob Ayiga case (Supra)**. That question is equally acknowledged that not many citizens are financially illiterate, and that way they escape high standard of scrutiny. That is certainly the case here as the learned trial magistrate had no financial statement of account to enquire further to ascertain the widow and children dependency.

In **Harris v Empress Motors Ltd [1984]**, the English courts have taken a reasonable approach which justify the circumstances adopted in our local situations in the interpretation on award of damages under lost years. In that court it was held thus **“in the course of time, the courts have worked out a simple solution to the problem of calculating the net dependency under the Fatal Accidents Act in cases where the dependants are wife and children. In past the calculations called a tedious inquiry into how much housekeeping money was paid to the wife, who paid how much for the children's shoes etc. this has all been swept away and the modern practice is to deduce a percentage from the net income figure to represent what the deceased would have spent exclusively on himself. The percentages have become convenient in the sense that they are used unless, there is sticking evidence to make the convenient figure inappropriate, because there is no departure from the principle that each case must be decided on its own facts where the family unit was husband and wife, the convenient figure is 330% and the rationale of this is that broadly speaking the net income was spent as to one-third for the benefit of each and one third for their fair benefit; where there are children the deduction falls to 25%. It is therefore permissible in our jurisdiction to emphasize that the claimant suing for damages is entitled to a fair and reasonable compensation for the loss and damage. I am prepared myself to defend the approach taken by our courts not to subject assessment of damages to a rigid mathematical formula likely to occasion injustice in the final figure as no case is identical with the other. Nevertheless, it is my opinion that court bear in mind the years of purchase of each dependant in reference to any loss or gain attributable to that death. It is incredible to accept that assessment of damages is a hard; matter of dollars and cents subject to the element of reasonable future probabilities.”** (See **Davis Fulter vs Attorney General CL [1993] FI 152**).

The discretion exercisable on the claim under Law Reform and Fatal Accidents Act is one in which **Lord Mansfield describes in Rex vs Wilkes [1770] 4 Burn 2527** as follows **“Discretion, when applied to a court of justice, means sound discretion guided by how it must be governed by rule, not by numour, it must not be arbitrary, vague and fanciful, but legal and regular.”**

It is tolerable, therefore as held in **Galta v Hatega [1981] HCB 56**, in such cases of assessment of damages a proper approach be to work out the duration of the dependency of each child with the average figure as a multiplier. This is aimed at putting the estate or the plaintiff who suffered harm due to the wrongful act of the dependant in the same position before loss or harm occurred.

These elaborate English decisions provided a firm legal foundation in which our jurisprudence has taken domesticated as reflected in the following cases on damages claimed under the Law Reform Act and Fatal Accidents Act; **Kensales Ltd & Anor v Kanabar CA No. 99 of 1989**, **Auni Bakari & Anor vs Hadija Olesi CA No. 70 of 1985**, **William Juma v Kenya Breweries HCC No. 3514 of 1985**, **Kassam v Kampala Aerated Water Co. Ltd, Butt v Khan [1981] KLR 345**.

Precisely the award of damages is to the estate of the deceased and such damages take the form of damages for loss of expectation of life, for lost years, for pain and suffering, and funeral expenses. The rule is children recover the portion of income their deceased father or mother

would have expended on them during his or her working or business life while under the age of 18 years old. The multiplier principle donates the estimate of the probable length of period the deceased could have been active within the income wage blanket which retirement if in public sector or on business occupation. Obviously, courts are to factor in the uncertainties of such formal or informal business had the deceased lived which is likely to impact years of purchase and income. The general view of such uncertainties include vicissitudes of life like the Global Covid-19 pandemic which has ravaged the world social-economic growth as a measure of a country's GDP. In the end the court has a duty to carry out an assessment fairly based on comparable awards and well settled jurisprudential principles. It is never an algebra arithmetic formula form of assessment.

For my part, I am in doubt that the learned trial magistrate considered the facts and evidence to establish dependency and essentially the claim for loss of dependency in respect of the multiplier of 20 years and a multiplier of 2/3 it was pointed out by the appellant to the court to look for a misdirection or error which on search and trace from the record has not been forthcoming. It was suggested that I interfere with the assessed and final award on lost years, but in accordance with the terms of the impugned judgement there are no sufficient grounds visible to affect that determination by the learned trial magistrate.

I have also considered the submissions made on behalf of the appellant for the court to deal with the assessment of funeral expenses and loss of expectation of life.

When it comes to assessment of damages for pain and suffering the courts in **Limpoh Choo v Candem & Slighton Area Health Authority [1980] AC** held thus **“An award for pain and suffering is payable but depends upon the plaintiff's personal awareness of pain and her capacity for suffering and if the plaintiff dies from his injuries shortly after the accident an award of damages in respect of pain and suffering may be appropriate if the evidence justifies.”**

Counsel for the appellants submitted that the deceased died the same day and its therefore not justifiable for the trial court to award Ksh.50,000/=.

In this jurisdiction, in a number past awards, compensation for each individual case raises from a nominal Sh.10,000 to Sh.200,000/=. As much as there is need for consistency from my observation I am safely of the conceded view that unless there is evidence of the deceased persons being rendered permanently unconscious immediately after the accident the assessment be left to the discretion of the trial courts.

I presume there is no automatic shutdown of the human organ system following an accident. It's likely that though short-lived, the pain caused to an accident victim who soon thereafter succumbs to death can be of an excruciating pain with great shock on impact.

In summary, therefore under the present rival arguments the entirety of it is that the appellants have failed to persuade the court to set aside and vary the award of Ksh.50,000/= for pain and suffering.

On loss of expectation of life, the rule provides for conventional sum subject to a few exceptions on general terms as provided for under the Law Reform (Miscellaneous) Act which vests all causes of action in a person survived on death for the benefit of his or her estate. The Act creates a right to recover funeral expenses and those other claims which accrue in the deceased immediately before death are transferred to his or her estate. One such claim is for loss of expectation of life. The threshold and ceiling figures are linked to the range of past awards intended to represent a fair and proportionate conventional sum under the claim for loss of expectation of life. Despite the variations the functional approach of the courts is an attempt to assess the compensation under this head to provide the estate of an injured person with reasonable solace for the misfortune.

It is clear from the relevant part of learned trial magistrate judgement that she did understand fully the substance and application of the law to the facts of the case. In the circumstances, I have come to the conclusion that the just course here is to disallow the appeal with costs to the respondents.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6<sup>TH</sup> DAY OF APRIL 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:**

*In view of the Public Order No. 2 of 2021 and subsequent circular dated 28<sup>th</sup> March 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21(1) of the Civil Procedure Rules. ([wambuakilonzoadvocates@gmail.com](mailto:wambuakilonzoadvocates@gmail.com) [advocatematini@gmail.com](mailto:advocatematini@gmail.com) )*