REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 167 OF 2017

TIPPER HAULIERS LIMITED.....1ST APPELLANT

SALIM JALALA MWAITA.....2ND APPELLANT

VERSUS

MERCY CHEPNGENO TOWET AND JOEL KIPKEMOI (LEGAL REPRESENTATIVES

OF THE ESTATE OF THE LATE FRANKLIN TOWET (DECEASED).....RESPONTENT

(Being An Appeal From The Judgement /Decree Of Hon. B Mararo (Pm) Dated 6th December 2017 In Nakuru Cmcc No. 343 Of 2013)

JUDGEMENT

1. This appeal stems from an accident that occurred on **19th of July, 2017** involving motor vehicle registration number KZE 882 Isuzu FTR and KBF 328/ZC 9752. Out of the said accident the driver of motor vehicle registration number KZE 882 one Franklin Cheruiyot died on the spot. The respondents filed suit against the appellants claiming inter alia general and special damages. The matter proceeded to its conclusion where the court rendered its judgement apportioning liability at 50:50 shared between the Appellants and the Respondents herein. On quantum the court awarded **Kshs. 3,318,846.40** less 50% plus costs and interests of the suit.

2. The appellants being aggrieved by the judgement of the trial court, have filed a memorandum of appeal raising the following grounds;

a. That the judgment of the trial court be reviewed and set aside and be replaced with a judgement dismissing the claim before the lower court.

b. That the court does re-assess the damages applicable in accordance with the law.

c. That the learned trial magistrate erred in law in finding the appellants 50% liable notwithstanding the police evidence wholly exonerating the appellants from blame.

d. That the learned trial magistrate erred in law in failing to hold and find as the police investigator did that the subject accident was wholly attributable to the negligence of the driver of motor vehicle registration number KZE 882 Isuzu FTR whose estate is represented by the respondents herein.

e. That the learned trial magistrate erred in law in relying on inconsistent and unreliable evidence of a passenger in motor vehicle registration number KZE 882 Isuzu FTR.

f. That the learned trial magistrate erred in law for awarding excessive damages for pain and suffering without a basis for doing so.

g. That the learned trial magistrate erred in law and in fact in awarding excessive damages for loss of expectation of life.

h. That the learned trial magistrate erred in law in adopting a multiplicand that was not proved.

i. That the learned trial magistrate erred in law in adopting an excessive multiplier.

j. That the learned trial magistrate erred in law and in fact in failing to hold and find that the deceased's earning, having not been proven the minimum wage applicable for driver should have been adopted.

k. That the learned trial magistrate erred in law and in fact in failing to discount and take into account the award under the Law Reform Act in making the award under the Fatal Accident Act.

3. When the matter came up for hearing the court ordered that the same be canvassed by way of written submissions.

Appellant's submissions

4. The appellant submitted that the accident occurred along Naivasha- Nakuru road towards the direction of Nakuru just past the Gilgil flyover. There are 3 lanes on that section of the road with one reserved as the climbing lane. On the left side of the middle lane as one faces Naivasha is a continuous yellow line that bars drivers heading to Naivasha general direction from using it. Those vehicles ought to stick to the extreme left of the road and reserve the middle lane for vehicles heading to Nakuru. **Pursuant to section 60 (1) (m) of the Evidence Act,** the court shall take matters of local notoriety into consideration.

5. According PW2 a police officer's evidence, KZE 882 ought not be driven on the middle lane as there was a continuous yellow line an indication that vehicle heading to Naivasha ought not use the middle lane. The said vehicle should have been driven on the extreme left hence the driver of KZE 882 Isuzu FTR was on the wrong. PW2 stated that if the Driver of the said vehicle was alive he would have been charged with a traffic offence. The testimony absolved the Defendants from any blame regarding the accident in this suit.

6. The evidence of PW3 is wholly unreliable based on the testimony that she did not see the accident and did not know what happened. An eye witness account ought to be so clear as to lay basis as to the circumstances of the accident and erase any doubts that be. In the circumstance the appellants urge the court to disregard the evidence of PW 3 who was a purported eye witness and who had nothing significant as regards the accident to testify in court.

7. Based on the foregoing, the Appellants submit that there was no basis for finding the Appellants 50% liable for the accident when all the evidence points to the deceased's own negligence. A party suing in negligence is required to prove the particulars of negligence alleged in the Plaint.

8. This was the holding of the Court of Appeal in the case of **Mt. Elgon Hardware v United Millers Ltd C.A 19 996** where it was held that ***"it is the duty of a party alleging negligence to prove the same and a party cannot be allowed to prove that which he has not pleaded...".***

9. The appellants submitted that injuries suffered by the Claimant, do not only have to arise from the negligence of another party as the respondents themselves could be held to blame for the said injuries and/or accident. It is not always that a party who has been sued is to be blamed for the accident especially when the evidence points to the Claimant's negligence. A fact of accident and death does not translate to negligence on the part of the Respondent.

10. In the case of **Statpack Industries vs. James Mbithi Munyao Civil Appeal Case No. 152 of 2003.** Honourable Justice Alnashir Visram, (as he then was) stated:

"Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

11. Causation and blameworthiness are two important elements that needs to be considered in apportionment of liability. The plaintiff has to prove causal nexus between the defendant's negligence and his alleged damage/ loss. The appellants submitted that in the instant case the defendant cannot be held liable for the occurrence of the said accident since it is the respondent who flouted traffic rules and encroached into the lawful lane of the appellant. The appellants submitted that the respondents failed to prove their case on a balance of probability, hence it's case warrants a dismissal.

12. The appellant further submitted that in the event liability is apportioned, the court should find that the appellant only contributed 20% and 80% be borne by the deceased estate since the deceased greatly contributed to the occurrence of the accident. The appellant urged the court to abide by the principle that "He who alleges must prove" in assessing quantum herein. The court should award comparable injuries with comparable awards as was held in the case **of West (H) & son Ltd v Shepherd (1964) A.C 326 at page 345 and the case of Osman Mohammed & Anor v Saluro Bundit Mohammed Civil Appeal No. 30 of 1997.**

13. The appellants submitted that the trial courts award of Kshs. 20,000 for pain and suffering was inordinately high as compared to the precedents set out in various courts. They submitted that an award of Kshs. 10,000 is sufficient under this head since the deceased died on the spot. They placed reliance on the case of **Easy Coach Bus Services & Another v Henry Charles Tsuma and another (suing as the administrators of and personal representatives of the estate of Josephine Weyanga Tsuma- deceased) [2019] eKLR.**

14**.** Under the head of loss of expectation of life, the appellants submitted that Kshs. 200,000 was manifestly high and an award of Kshs. 80,000 would have been sufficient in the circumstances. They relied on the Easy Couch case (supra) where the court awarded Kshs. 80,000 where the deceased was 33 years old as the deceased in the instant suit.

15. The appellants submitted that from the plaintiff's case it couldn't be ascertained how much the plaintiff was earning prior to his death. The deceased's occupation was not proved hence it was wrong for the trial court to rely on a driver's minimum wage of Kshs. 13,385.40.

The Respondents failed to produce any documents to prove the deceased's employment. Not even a driving licence, tax returns, m-pesa statements, or bank statements were produced to shed light on the earnings if at all.

16. The appellants relied on the case of **Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others 2014 eKLR** and stated that evidence that fails to prove a fact goes to no issue and should be disregarded. The respondent in cross examination stated that the deceased was a businessman but did not prove that fact in evidence hence they failed to prove their case.

17. The appellants urged the court to be guided by the provisions of Legal **Notice No.197 Regulation of Wages (General) (Amendment) Order 2013** and adopt a minimum wage of Kshs. 9,024.15 which is the minimum wage for a general labourer at the time of death.

18. The appellants submitted that the deceased died at the age of 33 and that a multiplier of 12 years would be sufficient considering the vicissitudes of life that have lowered the life expectancy to 45 years. They placed reliance on the case of **Rose Munyasa & Another v Daphton Kirombo & Another [2014] eKLR.**

19**.** They submitted that since dependency was proved a dependency ratio of 2/3 would be reasonable in the circumstances. So the damages awardable would be Kshs 9,024.15 x12x12x2/3 = Kshs. 866,318.40. The court should also deduct the award from the law Reform Act. They placed reliance in the Court of Appeal case of **Maina Kaniaru & Another v Josephat Muriuki Wangidu Civil Appeal No. 148 of 1989** where it was held "an award made under the law Reform Act should be considered in reduction to the award made under the Fatal Accidents Act. If the court doesn't consider reduction, the same would amount to double compensation.

20. The appellants submitted that the plaintiff only proved special damages of Kshs. 25,500 and the same should be awarded. They also submitted that the grand total should be subjected to a contribution of 80% of the respondent's contribution.

Respondent's submissions

21. The respondent submitted that in re-examination PW2 confirmed that there was a pending inquest before court in Naivasha as the cause and circumstances surrounding the deceased's death were unknown hence no one was yet to be established blameworthy. This meant that conclusive investigations had not been conducted in this matter.

22. The respondent submitted further that PW3 who was an eye witness being a loader in KZE 882 indicated that they were hit on their lane. Upon cross-examination he stated that they were hit in the middle lane and that their driver was not on the wrong. The respondent submitted that PW3 evidence should be relied on rather than that of PW2 since PW2 was neither the investigating officer nor an eye witness.

23. The respondent submitted that determinations of traffic case if there would have been any, are not binding on a court in reaching its determination on liability. The appellants failed to call any witness to controvert the evidence of the plaintiff thus leaving the same unchallenged. The respondent relied on the case of **Trust Bank Ltd v Paramount Universal Bank Ltd & 2 Others** as cited in the case of Linus **Nganga Kiongo and & 3 others v Town Council of Kikuyu (2012) eKLR** where it was held;

> **"It is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."**

24. The trial court apportioned liability at 50/50 despite the evidence on record pointing liability to the Appellants and the appellants having failed to tender any evidence. The respondent submitted that an award of Kshs. 20,000 for pain and suffering wasn't excessive even though the deceased died on the spot and so the trial court did not err in awarding the same. She placed reliance on the case of **Stella Kanini Jackson & Another V. Kenya Power & Lighting Company Limited (2012) eKLR** in which the deceased died on the spot and Kshs. 20,000/ was awarded for pain and suffering.

25. The deceased was aged 33 years at the time of his death. The Respondent in her submissions had submitted for an award of Kshs. 250,000/= under this limb and relied on the case of **Purity Karimi Njoroge & 2 others v Alice Wangui Ndungu & 3 others (2016) eKLR** where the deceased 36 years at the time of his death and was awarded Kshs. 200,000= for loss of expectation of life. Factors of inflation and the age of the authority were put into consideration. The trial court awarded Kshs. 200,000 under this limb which amount was not excessive but within range of the awards made in the circumstance.

26. The Respondent at the trial court testified that the deceased was a driver earning Kshs. 15,000/= per month. Though no proof of earning was tendered, the Respondent relied on the case of **Jacob Ayiga Maruja & another v Simeon Obayo Civil Appeal No. 167 OF 2002,** Justices Omolo, Tunoi & Githinji, J.J.A as relied on in **Michael Murigi Karanja V Mohammed Salim Kassam 2015 eKLR** where it was held that***;***

> **"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way to prove earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."**

27. The Respondent went further to rely on the on the **Regulation of Wages (General) (Amendment) Order, 2012** which provides for Kshs.13, 385.40 as the earnings of a driver in a municipality which was applicable at the time the deceased died. The respondent submitted that the trial court was not in error and pray that this Honourable court upholds the multiplicand adopted by the trial court.

28. The deceased was 33 years at the time of his death. The deceased was prior to his death of good health. The Respondent in her submissions had submitted for a multiplier of 37 years as the number of years the deceased was expected to work given that the deceased was not restricted by the official retirement age of 60 years. The respondent submitted further that the deceased would have worked as a driver until the age of 70 years or even more being in a private business. It is important to note that no vicissitudes of life were put before the trial court or proved hence the trial court did not err in adopting a multiplier of 27 years and the same was not excessive. The respondent prays that this court upholds the multiplier of 27 years.

29. The respondent relied on the case of Easy Couch (supra) where reference was made to the case of **Chunibha/ J Pateland Another vs. Pf Hayes and Others 1957 EA 748 749** where the Court of Appeal stated:

30. "...it is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this court to determine or explore those imponderables. The duty of this court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire. In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life ... In Benedita Wanjiku Kimani (supra) Emukule J awarded a multiplier of 16 years to a deceased aged 44 years at the time of his death..." and prayed that this court upholds the multiplier of 27 years given that no vicissitudes of life were put before the trial court or proved.

31. The respondent submitted that the trial court rightly applied its mind in awarding damages for dependency under the Fatal Accidents Act and also for pain and suffering and loss of expectation of life under the Law Reform Act without deductions. The respondent relied on the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores ltd** as referred in the case of **Crown Bus Service ltd & 2 others v Jamila Nyongesa and Amida Nyonges (Legal Representatives of Alvin Nanjala (deceased) [2020] eKLR** where it was held that;

> **"There is no requirement for the trial court to discount or reduce the damages in Fatal Accidents' Act with the awarded recovered under the Law Reform Act. The submission by the appellant that the trial court erred by failing to deduct the award under the Law Reform Act of Kshs. 100,000 for loss of expectation of life and Ksh.50000 for pain and suffering and thus made a double award is therefore erroneous."**

32. The respondent also relied on the case of **Petronilla Anyango Owino v James Omondi (Suing as Legal Representative of the Estate Jared Owino Oduol) [2018] eKLR** where the court held: **"…..Section 2(5) of the Law Reform Act is clear that the rights conferred for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act. The provision is clear and not ambiguous. It therefore follows that the school of thought that progates for deduction of the award of damages under Law Reform Act from damages under the Fatal Accidents Act is erroneous."**

33. The respondent submitted that the requirements laid down in Kemfro Africa case were not satisfied and so there is no misdirection or error on the part of the learned magistrate in the ways he assessed the damages. The damages awardable are reasonable and within the range of awards made in such circumstances and should therefore not be disturbed.

34. The respondent submitted that the appeal should be found lacking in merit, the trial court's judgement be upheld and the appeal be dismissed with costs to the respondent.

Issues for determination

35. I have perused through the entire record of appeal and considered the submissions by counsel for both parties. There is only one issue for determination in this suit namely;

Whether the award on liability and quantum against the appellants was well founded.

36. This being the first appeal, it is this court's duty under **Section 78 of the Civil Procedure Act** to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of **Selle v Associated Motor Boat Co. Ltd (1968) EA 123 cited by the appellants where Sir Clement De Lestang (V.P)** stated that:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally''.**

37. PW2 a police officer testified on behalf of the investigating officer who had been transferred to Garissa and confirmed that an accident occurred on 19/07/2012 wherein the driver of Motor vehicle KZE 882 Isuzu FTR died on the spot. He stated that the point of impact was in the middle of the road and yet the two motor vehicles were being driven in the opposite direction. He clarified that there was a climbing lane at the scene of the accident which ought to be used by motor vehicles which headed to Nakuru general direction. Motor vehicle KZE 882 Isuzu FTR was headed to Naivasha general direction and it ought not to have used the middle lane as there is a continuous yellow line. Motor

vehicle KZE 882 Isuzu FTR should have been driven on the extreme lane hence it's driver (deceased) was on the wrong. PW2 also testified that according to the sketch plan the driver of Motor vehicle KZE 882 Isuzu FTR was to blame for the accident.

38. PW3 a loader in the said motor vehicle and who was called as an eye witness testified and stated that he did not see the accident. He also stated that the accident occurred between 2.00 a.m. and 2.30 a.m. and that it was dark completely. He also confirmed that there was a climbing lane that is supposed to be used by oncoming motor vehicles. He denied to having been hit on the middle lane and insisted that they were hit on their lane. He also confirmed that the grass that they were carrying was on the road. He also confirmed that the other driver was in the middle lane and that the cabin was on their lane.

39. The appellants failed to call the driver of motor vehicle registration number KBF 328 H/ZC 9752 to shed light on how exactly the accident occurred. PW2 confirmed that he was not the investigating officer and that he relied on the sketch plan to conclude that it is the driver of Motor vehicle KZE 882 Isuzu FTR that was on the wrong.

40. The sketch plan was however not produced in court. The matter is pending as an inquest is being conducted hence investigations have not been completed. PW3 insisted that driver of Motor vehicle KZE 882 Isuzu FTR was not on the wrong as the accident occurred on their rightful lane.

41. From the evidence adduced it is not clear who was to blame for the accident as the police abstract which was produced in support indicated that the accident was pending under investigations. No police file was produced in court in support of PW2's evidence. The two parties involved in the accident blame each other for causing the said accident. Indeed, it was difficult for the trial court to clearly ascertain who to completely shoulder liability, hence the trial court was right to apportion liability at a ratio of 50:50.

42. In the case of **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR**, the Court of Appeal in Nyeri held that;

> **"There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50."**

43. Similarly, in the case of **Valley Bakery Ltd & another Musyoki [2005] eKLR** Kimaru J pronounced himself as follows;

> **"This court will resolve the contradiction apparent in the evidence adduced by the 2nd Appellant and the Respondent by apportioning liability on a 50:50 basis. The Appellants and the Respondent will therefore share the blame equally for the said accident. I therefore reverse the finding of the trial magistrate on liability and substitute the said decision with the finding of this court apportioning liability at the ratio of 50:50."**

44. This court pursuant to the evidence as adduced by the parties does not find any reasons to depart from the findings by the trial court on liability and the weight of the above authorities. The apportionment of 50;50% is appropriate in the circumstances.

45. On quantum, an award on damages is a discretionary matter to be applied judiciously by a trial court. Being a discretionary matter, it is now well settled that an appellate court would rarely interfere and can only do so following the principles laid out in the case of **Kemfro Africa Ltd T/A Meru Express Services & Gathogo Kanini -Vs- Aziri Kamau Musika Lubia & Another (Nbi C.A No. 21 Of 1984)** where the Court of Appeal made the following guiding observations;

> "**The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that 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 have been a wholly erroneous estimate of the damages.**"

46. The above decision was in my view premised on the fact that damages must be commensurate with injuries and should not appear like it is greater or conferring a benefit to a party over the injuries suffered.

47. Similarly, the court in **Amos Wenyere & another v Ashford Muriithi Muregi & 2 others [2017] eKLR** stated;

> **"It is now a settled position that an award of damages is a matter of discretion on the part of the court seized of the matter and as in all discretionary matters the same is exercised judiciously depending on circumstances of each case but the guiding factor in regard to quantum of damages is that it should not be either too low to amount to an injustice or too high to amount to unjust enrichment of the victim. Damages should as matter of law compensate the victim and restore him or her to as much as possible to the position he/she was prior to the accident".**

48. There is no dispute that the Deceased suffered fatal injuries and died on the spot. In the case of **Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA NO. 68 of 2015 [2016] eKLR** where the deceased had died immediately after the accident and the trial court had awarded Kshs. 50,000/= for pain and suffering, Majanja J. stated as follows;

> **"[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring**

immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

49. In view of the foregoing I would be inclined to say that even though the deceased died on the spot he must have experienced some sort of pain and therefore the award of Kshs. 20,000 by the trial court was not excessive in the circumstances.

50. On the issue of loss of expectation of life, the appellants contended that the sum of Kshs. 200,000 awarded by the trial court was manifestly high. They proposed an amount of Kshs. 80,000. In my view the award was not inordinately high since the deceased died at a very young age of 33 years.

51. See the case of Mercy **Muriuki & Another –Vs- Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** where the Court observed that: -

"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."

52. On the issue of the multiplicand, the appellants submitted that there was no prove of the deceased's occupation as a driver. The use of documentary evidence is not the only way to prove the profession of a person. The deceased died while in the course of business as a driver, Pw1 testified that the deceased was a driver earning a salary of Kshs. 15,000/= per month and the loader PW3 also stated that he had known the deceased for long as they had worked together since the year 2005. He confirmed that the deceased was a driver.

53. The trial court recognized the fact that there was no documentary evidence to prove the earnings that the deceased was receiving as a driver. Therefore, the trial Court was right when it opted to use the minimum wage for a driver.

54. This position was similar to the decision of the Court of Appeal in **Jacob Ayiga Maruja & Another vs. Simeon Obayo [2005] eKLR** that:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things. In this case, the evidence of the respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed."

55. The appellants also contended that the multiplier of 27 years that was adopted by the court was excessive. In **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another NYR CA Civil Appeal No. 35 of 2014 [2014] eKLR** the Court of Appeal adopted the findings by Nambuye, J.A in **Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005** where it was stated that, "***The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously with a reason."***

56. The trial court assumed that the deceased would have lived and worked till the retirement age of 60 years. Taking into consideration the nature of work that the deceased engaged in and also considering the vagaries of life, I agree with the trial courts findings.

57. The appellant also raised an issue of double compensation. They called upon this court to deduct the award from the law reform Act. In disagreeing with the sentiments of the appellants I would rely on the court of appeal case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR** where WAKI, NAMBUYE & KIAGE, JJA held:

"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise."

57. In view of the above there is no legal requirement for the court to deduct the amount awarded under the **Law Reform Act** from the award made under the **Fatal Accidents Act**. The argument by the advocates for the appellant on the issue does not stand.

58. For the above reasons this court does not respectfully find any reasons to fault the trial courts findings on all the grounds raised by the appellants.

59. The appeal is hereby dismissed with costs to the respondents.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 1ST DAY OF JULY 2021.

H .K. CHEMITEI

JUDGE