



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: D. K. Kemei, J)

CIVIL APPEAL NO. 48 OF 2018

SILVESTER MEUMA MUSYOKA *alias*

SILVESTER MUEMA..... APPELLANT

VERSUS

ANNA KAMANTHE NYAMAI

ALEX MUTUA NYAMAI(Suing as Legal Representatives

and on behalf the Estate of

JOSHUA MUEMA NYAMAI(Deceased).....RESPONDENTS

(An appeal from the judgment of Hon.A.Lorot (SPM) in Machakos CMCC No.832 of 2015

delivered on 18th day of April 2018)

BETWEEN

ANNA KAMANTHE NYAMAI

ALEX MUTUA NYAMAI(Suing as Legal Representatives

and on behalf the Estate of

JOSHUA MUEMA NYAMAI(Deceased).....PLAINTIFFS

VERSUS

SILVESTER MEUMA MUSYOKA *alias*

SILVESTER MUEMA.....DEFENDANT

JUDGEMENT

1. By a Complaint dated 26.10.2015 filed on 27.10.2015, the Respondents who are the legal representative herein sued the Appellant for the death of **Joshua Muema Nyamai**. In the Complaint, it was pleaded that on 2.09.2014, the deceased was a lawful pedestrian walking along Machakos-Wote Road when at Muumandu Market motor vehicle registration number KBQ 074Y knocked him down and he succumbed to his injuries.

2. In the Complaint, the Respondents sought general damages for pain, suffering and loss of amenities under the Law Reform Act and Fatal Accident Act, special damages of Kshs. 54,050/- plus costs and interest of the suit. The particulars of negligence against the Appellant, his authorised driver, servant and/or agent were duly pleaded. In addition, it was pleaded that the Appellant was vicariously liable for the act of his driver, servant and/or agent. The Respondents filed list of witnesses, statement and list of documents dated and filed on even date.

3. The Respondent defended the suit by filing his defence on 18.02.2016 together with list of witnesses, witness statement and list of documents dated on even date. The respondent denied that he was the registered owner of the suit motor vehicle as well as denied the date, place or in the manner set out in the Plaint as regards the accident and the particulars of negligence as pleaded. In the alternative the Respondent pleaded that if there was such accident, it was caused by the sole and/or substantially contributed to by the negligence of the deceased herein particulars whereof he pleaded. The particulars of aforesaid Statutes and loss and damage as pleaded were denied by the Respondent and the Appellants were put to strict proof. In response, the Respondents filed a Reply to defence on 2.03.2016 reiterating the contents of the Plaint. The Respondents filed Supplementary list of witnesses and his witness statement on 3.05.2017 while the Appellant filed further list of documents dated 6.10.2017 and filed on 11.10.2017.

4. On 14.2.2018 the case proceeded to hearing in earnest. **PW1 No.77247 PC Robert Tomno** attached at Machakos Police Station Traffic duties, testified that on 3.09.2014, one Silvester Musyoka reported on 2.09.2014 at 9 pm that while driving motor vehicle registration number KBQ 074Y, Toyota Noah from Wote direction at around 9pm he knocked down a pedestrian who was crossing the road from the left side of the road at Muumandu area. According to him, the accident was recorded vide OB No.3.09.2014 by PC Menza who was transferred to Nyanza Region but who had visited the deceased whereby he had noted that the deceased had a left leg fracture and head injuries. He further stated that the hospital visit was booked vide OB No.11 of 3.09.2014 at 1045 hours. He testified that the deceased died while undergoing treatment. He added that the police abstract was issued on 6.05.2015 and which he produced as *Pexhibit 1*. He confirmed that the accident was reported on 3.09.2014 at 0015 hours by Silvester Musyoka (driver) while the accident had occurred at 2100 hours on 2.9.2014.

5. In cross-examination, PW1 stated that the status of the matter is not clear and he didn't have the police file but confirmed that the abstract indicated that the case was 'pending under investigation'. He stated that the sketch plans were in the police file. According to him the investigation officer should have drawn a road view of the scene because the scene had been disturbed. He added that the file must have been disposed since it was 4 years ago. He stated that he was only summoned around 9.50 am that day. According to him, his testimony was based on the OB report which reflected who was to blame. He stated that there was no eye witness. He testified that he was familiar with the road. According to him, before you reach Muumandu, there are bumps. In re-examination, he stated that he had the initial OB report. According to him, it was the driver who reported the accident. He added that the motor vehicle had moved from the scene and no sketch was drawn. Finally, he stated that the deceased was not blamed for causing the accident.

6. **PW2, Annah Wamanthe Nyamai**, stated that the deceased was her son. She adopted the evidence in her statement dated 26.10.2015 and filed on 27.10.2015. She produced the list of documents dated 27.10.2015 as *Pexhibit 1* to *10* respectively. She stated that she was asking for compensation for loss of her son. In cross-examination, she stated that the accident occurred on 2.09.2014 and that her son died on 3.09.2014. She added that the deceased was a young man who was unmarried. According to her, the deceased operated a butchery. She stated that she had no reason to lie.

7. **PW3, Joshua Mutie Titus**, adopted the contents of his witness statement filed on 3.5.2017. In cross-examination, he stated that he witnessed the accident but did not report to the police neither did he take the deceased to the hospital but maintained that an ambulance took him to hospital. He testified that he followed the motor vehicle that knocked the deceased which was driven to the Chief's camp. He disputed that he had been paid to testify. He stated that he didn't know if the deceased had come from a bar. He stated that he was new in the area. According to him, he saw people piling in the area. He stated that there was a bump before from Machakos direction and that the motor vehicle was from Wote direction and it had not hit the bump. According to him, the deceased was hit off the road. He added that the motor vehicle approached in a zigzag manner at a high speed. He testified that he attended the deceased's funeral and left his contacts. He stated that he did not report to the police. He stated that he could not remember the burial date. He maintained that he was an eye witness. According to him there was a light on the busy road. In re-examination, he stated that he did not report to the police but witnessed the accident. According to him, the deceased was off the road on the left facing Wote direction while the motor vehicle was from Wote towards Machakos. According to him, the motor vehicle left its lane and was being driven in a zigzag manner and knocked the deceased. The Respondents closed their case paving way for the Appellant to testify.

8. **DW1, Silvester Muema Musyoka**, adopted the contents of his witness statement filed on 18.2.2016. He stated that he had never been charged with any traffic offence. According to him, as you approach Muumandu Market from Makueni there is a bump and another bump when negotiating the corner towards Machakos. It was his testimony that once he crossed the first bump around 10 to 15 metres, the accident occurred. According to him, at that moment he was driving at a speed of 15 to 30 Kp/h. He stated that he was not to blame for the accident.

9. In cross-examination, DW1 stated that there were two bumps at Muumandu. According to him, there was no bump after the first one. He stated that the accident occurred after he climbed the first bump at 9 pm and that he did not take the injured to hospital. According to him, there were few vehicles on the road. He stated that he was not speeding since he was climbing a bump. It was his testimony that he drove his motor vehicle to AP Post in Muumandu to report the accident but stated that he left his motor vehicle at the accident scene. He maintained that he moved the motor vehicle slightly. According to him, the deceased fell on the left side of the road. He testified that he moved the motor vehicle 45 minutes after the police had visited the accident scene and added that the police were AP Officers from Muumandu Chief's camp. In re-examination, he stated that his motor vehicle was at the scene when he had gone to the Chief's camp. According to him, he reported the accident at the AP Camp but was referred to Machakos. He stated that the police officers from Machakos did not visit the scene with him.

10. DW1 further stated that the deceased was assisted to get into the ambulance which almost took an hour to reach the scene of the accident. According to him, he did not run over the deceased. Finally, he maintained that at 15kp/h and 30 kp/h braking distance is normally zero metres. The Appellant's closed his case.

11. In his judgement, the learned trial magistrate held the Appellant 100% liable for the death of the deceased. As regards damages, the learned trial magistrate awarded the Respondents for:-

(a) **Pain and suffering** **Kshs.80,000/-**

(b) **Loss of Expectation of life** **Kshs.100,000/-**

(c) <i>Special damages</i>	<i>Kshs. 54,050/-</i>
(d) <i>Loss of dependency</i>	<i><u>Kshs.1,800,000.00/-</u></i>
Total	<i><u>Kshs.2,034,050.00/-</u></i>

Plus costs of the suit and interest from the date of judgement.

12. Aggrieved by the learned trial magistrate's decision, the Appellant appealed citing the following grounds:-

- (1) ***THE learned trial magistrate misdirected himself and erred in law and in fact by holding that the Plaintiffs had proved their case against the Defendant on a balance of probabilities.***
- (2) ***THE learned trial magistrate misdirected himself in law and in fact by disregarding the Defendant's witness testimony and holding the Appellant 100% liable for the accident the subject of the suit.***
- (3) ***THE learned trial magistrate misdirected himself in both law and in fact by holding the Defendant 100% liable for the accident whereas evidence on record called for dismissal of the suit on liability or a higher degree of contribution from the deceased and thus arrived at an erroneous finding on liability.***
- (4) ***THE learned trial magistrate erred in law and in fact by considering facts outside the evidence adduced and hence awarded earnings of Kshs. 15,000/- not supported by any evidence and hence arrived at an erroneous award.***
- (5) ***THE learned trial magistrate erred in law and in fact by failing to find that the deceased's earnings were not proved at all by any evidence and hence arrived at an erroneous award.***
- (6) ***THE learned trial magistrate grossly misdirected himself and erred in law and in fact by awarding a dependency ratio of 2/3 which was unsupported by evidence thus rendering the whole assessment of damages erroneous.***
- (7) ***THE learned trial magistrate misdirected himself and erred in law and in fact by finding that the Plaintiffs entirely depended on the deceased in awarding a dependency ratio of 2/3.***
- (8) ***THE learned trial magistrate misdirected himself and erred in law and in fact in failing to find that the deceased was not married and hence apply a dependency ratio of 1/3 instead of 2/3.***
- (9) ***THE learned trial magistrate misdirected himself and erred both in law and in fact by considering extraneous matters and going out of the ambit of the proceedings and evidence tendered before him and hence arrived at an erroneous decision on quantum.***
- (10) ***THE learned trial magistrate misdirected himself and erred in law and in fact by failing to consider the Defendant's written submissions on record thus arrived at an erroneous finding on liability and quantum.***
- (11) ***THE learned trial magistrate erred in law and in fact by failing to uphold precedent and the doctrine of stare decisis.***

13. The Appellant prays for orders that:-

- (a) ***The appeal be allowed***
- (b) ***The whole Judgement delivered on 18.4.2018 against the Appellant on liability be set aside.***
- (c) ***The Respondent's suit in the lower court be dismissed with costs to the Appellant***
- (d) ***That without prejudice to the foregoing, liability be apportioned equally between the Appellant and the Respondents.***
- (e) ***Without prejudice to the foregoing, the whole of the judgement delivered on 18.4.2018 against the Appellant on quantum be set aside.***
- (f) ***In the alternative, damages awarded to the Appellant be set aside and this court does assess the proper damages payable to the Respondents***
- (g) ***The Appellant be awarded costs of this appeal; and such other and/or further relief as this court may deem just to grant.***

14. This appeal was canvassed by way of written submissions. The Appellant's and Respondents submissions are dated 2.06.2021 and 22.06.2021 respectively.

Determination

15. I have considered the evidence presented before the trial court as well as the submissions filed in this appeal.

16. This being the first appeal court, I am therefore required to re-evaluate and subject the evidence before trial court to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same as observed in **Selle vs. Associated Motor Boat Co. Ltd [1968] EA 123** and in **Peters –vs- Sunday Post Limited [1958] EA 424**.

17. The particulars of negligence were pleaded by both the Appellant and Respondents. This is a civil claim where the burden of proof squarely lay on the Respondents to prove their case against the Appellant. It is trite that the standard of proof in civil claims will be on a balance of probabilities. Consequently, the issue that fall for determination is *whether the Respondents proved their case on a balance of probabilities against the Appellant*.

18. In his witness statement recorded on 10.09.2013, the Respondent admits that he was the registered owner of motor vehicle registration number KBQ 074Y. The Respondent has also not disputed the occurrence of the accident. The Appellant disputed the manner in which the accident occurred. According to the Appellant, the deceased abruptly attempted to cross the road from the left to the right. He saw the deceased while at a very short distance and since there was an oncoming motor vehicle, he asserts that he could not swerve to the right and that he applied the brakes but it was too late. According to him, the deceased landed on the Appellant's motor vehicle bonnet and windscreen. According to him the deceased looked drunk.

19. The Appellant has denied any liability. It is submitted that due to the existence of bumps on the road it was impossible to speed. The existence of the bumps on the said road was admitted by PW3 who is said to be an eye witness. The Appellant stated that he could see clearly since his motor vehicle headlights were on. According to the Appellant, he did not run over the deceased since the Certificate of Examination and Test of Motor vehicle confirmed that the bonnet was dented and windscreen smashed. The Appellant faults the learned trial magistrate for finding that the Appellant tried to escape. According to the Appellant, the deceased contributed to the accident by crossing the road when it was not safe to do so. The Appellant blames the deceased.

20. The Respondent's case finds support from PW1 and PW3's evidence. PW1 is a police officer attached at Machakos Polics station while PW3 was an eye witness. It is submitted that PW1's evidence was corroborated by PW3. According to the Respondents, the deceased was knocked down by the suit motor vehicle while he was way off the road. The injuries sustained by the deceased cannot be compared to the Appellant's assertions that he was driving at a low speed. According to the Respondents, the Appellant interefered with the scene of the accident by removing his motor vehicle from the scene hence plausible conclusion that the Appellant attempted to escape and not wait for the police to visit the scene. According to the Respondents, the deceased was not to blame.

21. Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.

22. This is called the legal burden of proof. There is however evidential burden of proof which is captured in sections 109 and 112 of the same Act as follows:

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.

23. As was held in **Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334**:

“As a general proposition under section 107(1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in section 109 and 112 of the Act..”

24. What is the meaning of proof on a balance of probabilities? In **Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

25. In the case **Nadwa vs. Kenya Kazi Ltd (1988) eKLR**, the Court of Appeal observed:

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

26. PW3 adopted the contents of his witness statement where he stated the deceased had crossed the road and was way off the road when he was hit by the Appellant’s motor vehicle. The Appellant’s evidence stated that at 9.00pm he could see clearly since his motor vehicle headlights were on. At the same time he states that he saw the deceased at a very short distance hence not able to swerve as there was an oncoming motor vehicle. He didn’t state whether he hooted to the deceased. Further, I note that the Appellant submitted that the Certificate of Examination and Test of Motor vehicle attached at page 45 of the Record of appeal confirms that the deceased fell on the bonnet and windscreen but however the same was not produced before the trial court as part of the evidence. In cross-examination, the Appellant stated that the deceased fell on the left side of the road. I note that the Appellant did not controvert PW3’s evidence that the suit motor vehicle was being driven in a zig zag manner apart from stating that he was not speeding since he had just driven over a bump which slowed down his motor vehicle. In cross-examination, PW3 stated that the Appellant’s motor vehicle had not hit the bump and was being driven at a high speed. Simmillary, I note that in the Appellant’s witness statement, the issue of the bumps was not mentioned. PW3 ‘s evidence that the suit motor vehicle was being driven in a zig-zag manner remain unchallenged.

27. In *Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR* the court stated as follows:-

“In my view, a statement made on oath should as a matter of fact be expressly denied on oath. If not challenged, it remains a fact and the truth for that matter.”

28. The accident occurred at 9.00pm in the darkness although the Appellant stated that the suit motor vehicle headlights were on. According to the Appellant, it was the deceased who crossed the road when it was not safe to do so. The court in *Masembe vs. Sugar Corporation and Another [2002] 2 EA 434*, held that:-

“When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster that will permit his court at any time to avoid anything he sees after he has seen it.... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.... There may be occasions when criminal or traffic offences are committed without giving rise to civil liability.”

29. PW1 stated that the deceased was not blamed for causing the accident. The police abstract shows that the matter is pending investigations (‘PUT’). PW1 didn’t have the police file and the sketch plan. I note that PW1 was not the investigating officer. According to the Appellant, he has never been charged with any traffic offence for the accident. I associate myself with *Mwera, J.* (as he then was) in *Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007* who was of the opinion that:

“Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it...Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein, although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent...The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him.”

30. The Appellant owed a duty of care to other road users such as the deceased. On the other hand, I note that PW3 the eye witness never stated whether the deceased took any measures to avoid the accident. PW3 only stated that the deceased was way off the road. If it is true that the suit motor vehicle headlights were on, then it was possible for the deceased to notice an oncoming motor vehicle and avoid being hit. The deceased also ought to have been cautious on the road since it was at night. In my view, the deceased will shoulder part of the liability but at a smaller extent of liability.

31. In the premises, I set aside the finding of the learned trial magistrate against the Appellant of 100% liability and substitute with an apportionment of liability at 20% against the deceased and the Appellant to shoulder 80%. The decision of *Abdalla Rubeya Hemed vs. Kajumwa Mvurya & Anotehr[2017]eKLR* relied on by the Respondents is distinguishable to this case in that the deceased in that case was aboard the suit motor vehicle when it lost control and the deceased reacted by jumping out of the motor vehicle.

32. As regards damages awarded, the Appellant faults the learned trial magistrate for finding that Kshs.15,000/-was the deceased’s income as well as the dependency ratio of 2/3 to be applicable when the same had not been supported by any evidence. According to the Appellant, the entire quantum awarded should be set aside.

33. The Appellant calls upon this court to set aside and review the award. This court is cautioned as held in the case of **Bashir Ahmed Butt vs. Uwais Ahmed Khan [1977]1KLR 1** where the court held that:-

“An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge (magistrate) proceeded on wrong principles, or that the misapprehended the evidence in some material aspect and so arrived at a figure which was inordinately high or low.”

34. In **Woodruff vs. Dupont [1964] EA 404** it was held by the East African court of appeal that:

“The quantum of damages being a question of fact for the trial Judge the sole question for determination in this appeal is not whether he followed any particular rules or the orthodox method in computing the damage claimed by the plaintiff, but whether the damages awarded are “such as may fairly and reasonable be considered as a rising according to the usual course of things, from the breach of the contract itself.”

35. It is submitted by the Appellant that the learned trial magistrate award of Kshs. 80,000/- for pain and suffering was erroneous. Before the trial court, the Respondents had proposed an award of Kshs.100,000/- while the Appellant proposed Kshs.20,000/-. According to the postmortem and deceased's death certificate, death occurred 3 days later after the accident.

36. In **Jecinta Ruguru vs. Beatrice Muthoni Muthike (Suing as the Legal Representative of the Estate of the Late Isaac Muthike Nyaga) [2021] eKLR Njuguna J.** stated that:-

“The law is that damages for pain and suffering in fatal accident claims are designed to compensate the deceased's estate for the pain and suffering the deceased endured before death. That is why courts as a matter of practice award a conventional sum of KShs.10,000 in cases where the deceased died either on the spot or moments after the accident.”

37. In my view the deceased must have endured a lot of pain for 3 days. I find no reason to disturb the award.

38. On the award for loss of expectation of life, the learned trial magistrate awarded Kshs. 100,000/-. It is submitted by the Appellant that the award of Kshs.100,000 was not guided by precedent. The Appellant relied on the case of **HCCC No.63 of 2010 Joseph Kahiga(Suing as the Administrators of the Estate of the late Lydiah Wanjiku Kahiga & Another vs. World Vision Kenya & 2 Others[2014]eKLR** where court awarded Kshs.50,000/-. The Respondents relied on the case of **Kimunya Abedinego Munyao vs. Zipporah S Musyoka & Another [2019]eKLR** where the court awarded Kshs.100,000/- to a deceased aged 41 years.

39. In my view, the award of Kshs. 100,000/- was reasonable. It was not excessive. The Appellant's proposal to award Kshs.50,000/- was below the conventional figure as observed by the court in **Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) (2019) eKLR** 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 pain and suffering the awards range from Kshs. 10,000/- with higher damages being awarded if the pain and suffering was prolonged before death.”

40. As regards the award for loss of dependency, the Appellants faults the learned trial magistrate for considering extraneous matters. It is submitted by the Appellant that the learned trial magistrate disregarded the deceased's earnings of Kshs.10,000/- pleaded in the Complaint yet it is trite that parties are bound by their pleadings. According to the Appellant, there was no evidence that the deceased earned Kshs.10,000 per month. The Appellant submitted that in the absence of monthly earnings of the deceased the court ought to have resorted to the minimum wage for unskilled persons as observed in **HCCA No.108 of 2008 Philip Musyoka Mutua vs. Veronicah Mbura Mutiso[2018]eKLR**. The Appellant has referred the court to the minimum wage of Kshs. 5,437 stipulated in the **Legal Notice No.116 Regulations of Wage(Agricultural Industry) (Amendment) Order,2015**. According to the Respondents, Kshs.15,000/- was reasonable.

41. The Appellant faults the learned trial magistrate for finding that the deceased was unmarried yet he stated in his judgement that the deceased supported his parents and siblings. According to the Appellant, the dependency ratio of 2/3 was erroneous since the deceased was only survived by his mother and no siblings. The father is deceased. The Respondents submitted that the Appellant's position is mistaken since the Chief's letter found at page 20 of the Record of Appeal indicated that the deceased was survived by two dependants namely Annah Kamanthe(Mother) and Benard Nyamai Nzoka(Father) (Deceased) hence 2/3 was appropriate. The Appellant relied on the case of **Henry Waweru Karanja(Suing as the Legal Representatives of the Estate of Francis Wainaina Ng'ang'a(Deceased) [2017]eKLR** where court reversed 2/3 dependency ratio for an unmarried man to 1/2.

42. According to the Appellant, a multiplier of 15 years adopted by the learned trial magistrate was erroneous. The court should have adopted 10 years. In the converse, the Respondents submitted that the deceased was 45 years old and in good health hence able to live upto 60 years. The Appellant relied on the case of **Re Estate of John Paul Lubalo Were(Deceased)[2010]eKLR** where for a deceased aged 31 years, the court adopted 29 years as multiplier.

43. **Ringera J.** in the case **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another Nairobi HCCC NO. 1638 OF 1988 (UR)** stated as follows:-

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable

figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."

44. In the Plaintiff at paragraph 8, the Respondents pleaded that the deceased earned a total of Kshs. 10,000. In her witness statement dated 26.10.2015, PW2 Annah Kamanthe Nyamai stated that the deceased earned approximately Kshs.30,000/- and gave her Kshs.15,000/- for upkeep. In cross-examination, PW2 only stated that the deceased had a butchery business. According to the learned trial magistrate while adopting Kshs.15,000/- as reasonable earnings instead of Kshs.30,000/- stated that he had not seen tax returns to validate the earnings. He went ahead to state that the business would have overheads like rent,staff,knives,electricity and other outgoings and the location being Muumandu market Kshs.15,000/- would be reasonable.

45. As regards the observation by the learned trial magistrate that there were no tax returns availed in respect of the deceased's business, the Court of Appeal in *Jacob Ayiga Maruja & Another vs. Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005]eKLR* stated 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."

46. Similarly, *Nyakundi J.* in the case of *Joseph Mwangi Wanyeki vs. Alex Muriithi Mucoki & another [2019] eKLR* stated that:-

"I take judicial notice that is not every man or woman in an income generating venture has the ability to keep proper book of accounts, track daily sales, profit and loss account or even own a bank account. In so much as it may sound popular and an ideal approach as a model of business accountability, the level of financial illiteracy among our citizenry are factors that should not be used against any claimant in calculating the average net income to assess damages under the Fatal Accident Act."

47. It therefore follows that if the documents can be availed it is good but lack of documents will not be fatal to the case.

48. The Appellant has urged the court to apply the minimum wage of Kshs.5,437 for unskilled employee. It is trite that the court will apply the minimum wage where earnings have not been proved. However, that will only be when there is absence of income that the court will apply the minimum wage as held by *Asike-Makhandia J.* in *Nyamira Tea Farmers Sacco vs. Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011]eKLR*.

49. Similarly, *Ngaah, J.* in *Moses Mairua Muchiri vs. Cyrus Maina Macharia (suing as the personal representative of the estate of Mercy Nzula Maina (deceased)), [2016] eKLR* stated thus:

"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case."

50. In the Plaintiff, the Appellants pleaded Kshs.10,000/- while in the witness statement Kshs.30,000/- was pleaded as deceased's income. It is trite that parties are bound by their pleadings. The evidence adduced by PW2 in court was insufficient. She only stated that the deceased had a butchery business. The deceased occupation in the death certificate is indicated as 'Nil'. In my view the learned trial magistrate should have applied the minimum wage since the income was not proved.

51. The accident occurred on 2.09.2014 hence the applicable minimum wage should be the wage stipulated in **the Regulation of Wages (Agricultural Industry) (Amendment) Order, 2013** and not the 2015 Wage Order. PW2 only stated that the deceased had a butchery. The deceased was an unskilled employee. According to the 2013 Wage Order, the wage for an unskilled employee is Kshs. 4,854. I shall adopt the Wage of Kshs.4,854/- and set aside Kshs. 15,000/-.

52. On the choice of multiplier, Appellant submitted that the learned trial magistrate would have applied a multiplier of 10 years instead of 15 years. According to the Respondents the deceased who was in good health was capable of living upto the retirement age of 60 years. I am guided by *Ringera J.* in *Leonard Ekisa & Another vs. Major Birgen [2005] eKLR* where the learned Judge stated that in determining the right multiplier, the right approach is to consider *the age of the deceased, the balance of earning life, the age of the dependant, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.*

53. The deceased was aged 45 years at the time of his demise. He had his mother as the only dependant at the time of his demise. The deceased was healthy. The Appellant has not cited any authority in support of 10 years as the appropriate multiplier. The deceased was not employed, so it was possible for him to have worked for more than 60 years but taking into consideration the uncertainties of life, I find no reason to disturb the learned trial magistrate choice of multiplier.

54. As regards the dependency ratio, the learned trial magistrate applied 2/3 for the reason that the deceased was unmarried. Section 4(1) of the Fatal Accidents Act Cap 32 is to the effect that an action under the Act is for the benefit of the *wife, husband, parent and child of the deceased*. Siblings are not beneficiaries under the said Act. The deceased was unmarried and survived by his mother(PW2).PW2 stated that the deceased gave her Kshs. 15,000/- for her upkeep. The Appellant submitted that 1/3 is the appropriate ratio since it is only PW2 who was depending on the deceased. In *Albert Kubai Mbogori vs. Violet Jeptum Rahedi [2017] eKLR* the court held that *the degree of dependency on the deceased's income is a matter of fact.*

55. *Mwongo J. in Joseph Ndirangu Thuo & another vs. Kamau Ngugi (suing as the legal administrators of the estate of Peter Waweru) [2019] eKLR* stated at paragraph 12 that:-

“It would appear from a review of the decisional law on this point that our Courts tend to lower the dependency ration when the deceased is an unmarried child and the claimant is the parent. This is occasioned by the presumption that such a child spends less at home by virtue of being unmarried, a presumption that can be rebutted by actual evidence.”

56. In *Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR*, the court used a dependency ratio of $\frac{1}{2}$ on an unmarried son aged 30 years. In cross-examination, PW2 stated that she was a farmer. It means therefore that she was not entirely dependent on the deceased hence a ratio of $\frac{2}{3}$ is high. I agree with the Appellant that $\frac{1}{3}$ was an appropriate ratio. I adopt $\frac{1}{3}$ as the dependenc ratio. In the result the damages for lost of dependency are now calculated as follows: ***Kshs.4,854/- x $\frac{1}{3}$ x 12 x 15 = Kshs. 291,240/-***

57. From the foregoing,I find the appeal partially succeeds. I hereby set aside the lower court’s judgement in **CMCC No.832 of 2015** and substitute thereof by apportioning liability against the Appellant in favour of deceased at 80:20. As regards, damages, I award as follows:-

a. Pain and Suffering	Kshs	80,000/
b. Loss of Expectation of Life	Kshs	100,000/
c. Loss of Dependency	Kshs	291,240/
d. Special Damages	Kshs54,050/
	Kshs	525,290/
Less 20% contributory negligence	Kshs105,058/
Total award at	Kshs.	...420,232/-

58. Each party shall bear their own costs in the appeal while the Respondents will have full costs and interest in the lower court.

It is so ordered.

DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2021.

D. K.KEMEI

JUDGE

DELIVERED AT MACHAKOS THIS 12TH DAY OF OCTOBER,2021. G. V. ODUNGA JUDGE