



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 9 OF 2019

J W N (Suing as the Administrator of the Estate of the deceased S M M).....PLAINTIFF

VERSUS

KASSAM HAULIERS LIMITED.....DEFENDANT

JUDGEMENT

1. The plaintiff herein, **J W N**, brought this suit as the administrator of the Estate of the deceased, **S M M**, claiming damages arising from a road traffic accident which occurred on or about the 17th December 2018 around 9.30 PM at Mwamba Hills along the Nairobi-Mombasa Road. According to the plaint, the Defendant was the registered owner of Motor Vehicle Registration Number KBW 868R ZE 5489 which was insured with Takaful Insurance of Africa Ltd. On that day, the deceased was travelling towards Nairobi from Emali in his motor vehicle registration number KAY 443A when the defendant's motor vehicle registration number KBW 869R ZE 5489 travelling in the opposite direction towards Mombasa, was so carelessly and negligently driven by the defendant's driver, servant and/or agent that it overlapped so as to overtake other slow moving vehicles and rammed into motor vehicle registration number KAY 443A. This was despite the fact that the deceased swerved to the left so as to allow motor vehicle registration number KBW 869R ZE 5489 to pass. As a result, the deceased sustained critical and severe injuries that resulted to his death. Following the accident, the driver of motor vehicle registration number KBW 869R ZE 5489 was blamed for causing the accident, fled from the scene of the accident was at large and evaded police as he was being sought for purposes of prosecution of causing death by dangerous driving. The Defendant herein was therefore sued based on his vicarious liability.

2. It was contended that the Defendant's driver's particulars of negligence were overlapping; encroaching onto the rightful course of travel of motor vehicle registration number KAY 443A; driving too fast and without due care and attention; failing to keep any proper lookout or to have any sufficient regard for traffic on the aforementioned road; failing to brake, stop, slow down or swerve; failing to maintain proper control of motor vehicle KBW 868R ZE 5489; disregarding the presence of motor vehicle registration number KAY 443A and by extension the deceased; losing control of motor vehicle KBW 868R ZE 5489; ramming onto motor vehicle registration number KAY 443A; and causing the accident. The Plaintiff also relied on the Doctrine of *Res Ipsa Loquitur*, the **Traffic Act** and the Highway Code to establish the defendant's liability.

3. According to the plaint, as a consequence of the matters aforesaid the deceased's estate has suffered loss and damage. In the particulars pursuant to the **Law Reform Act** Cap 26 and the **Fatal Accidents Act** Cap 32 of the Laws of Kenya, it was pleaded that the suit was brought on behalf of the estate of the deceased **S M M** and also on behalf of the dependants and beneficiaries of the estate who were disclosed as:

- a) **J W N** – Wife of the deceased
- b) **P N M** – Daughter of the deceased (Minor Aged 8 Years).
- c) **P W M**- Daughter of the deceased (Minor Aged 6 Years).
- d) **G M M** – Son of the deceased (Minor Aged 6 Months).

4. It was further pleaded that at the time of his death, the deceased was aged 31 years and was in good health. He was a business man owning two trucks which he used to offer transport services on (sub) contract basis. At the material time he was driving back to Nairobi having gone for a mop up having been subcontracted by Ponty Pridd Holdings who had a contract with KBL to deliver/transport beer. For the said services he was paid at a rate commensurate with his deliveries. It was averred that the deceased was taking care of his young family and for the period between 1st August 2017 and October 2018 he made Kshs 2,341,440/= for the 3 Months thus was making an average of Kenya Shillings Seven Hundred and Eighty Thousand Four Hundred and Eighty (Kshs 780,480/=) per month.

5. According to the plaint, by his death, the deceased's dependants have lost the support they were receiving and would have received from

the deceased and have therefore suffered loss and damage and so has his estate. The deceased's dependants and estate also incurred expenses in laying him to rest which they claimed and the said expenses were itemised as follows:

- i. P.C.E.A Kikuyu Hospital Kshs. 6200/=
- ii. Letters of Administration Ad Litem Kshs. 675/=
- iii. Funeral announcement expenses (to be availed later)
- iv. Funeral Services: Funeral and Hearse Package to be (to be availed later)
- v. Search Kshs. 550/=

TOTAL Kshs 7, 425/=.

6. It was pleaded that by reason of the aforesaid matters, the deceased was fatally injured, he has suffered loss and the plaintiff therefore claimed damages for his own behalf and that of his estate for:

- a) General Damages under the *Law Reform Act* and *Fatal Accidents Act*.
- b) Special Damages of Kshs 7, 425 (Rest to be availed later).
- c) Costs of the suit and interest from the date of loss i.e. 17th December 2018.

7. On 17th July, 2019, the parties herein recorded a consent on liability by which judgement was entered for the plaintiff against the Defendant in the ration of 90:10 and the matter proceeded to formal proof.

8. In her evidence, **Julia Wambui Ngaruyia**, PW1, testified that the deceased was her husband who died as a result of a fatal road accident on 17/18th December, 2018. She relied on her statement filed herein in which it was stated at the material part that the deceased died on the same day of the accident. It was averred that at the time of his death the deceased was 31 years old in good health and was a businessman owning two trucks which he was using for transport. At the time of his death he had been subcontracted by Ponty Pridd Holdings who had a contract with KBL Limited to deliver/transport beer which service he was paid at a rate commensurate with his deliveries. It was stated that for the period between 1st August 2018 and October 2018 he made Kshs 2,341,440/= for the 3 Months thus was making an average of Kenya Shillings Seven Hundred and Eighty Thousand Four Hundred and Eighty (Kshs 780,480/=) per month and was taking care of his young family.

9. Before this court, PW1 added that the deceased had two vehicles Reg. Nos. KAZ 952R and KAY 443A and was transporting Keg Barrels from Ponty Pridd Holdings as a subcontractor and was being paid per delivery. According to the witness, in August, 2018 the deceased was paid Kshs 739,400/- by cheque while on October he made Kshs 813,188/=. In September, he made Kshs 788,852. According to PW1, during those months, the deceased made a total of Kshs 2,351,440.00 between 1st August, 2018 and October 2018, averaging Kshs 718,480/= for both trucks. After the deceased's death, one of the said trucks, KAY 433A, was involved in an accident and was yet to be compensated while the other truck was being used by the deceased's brother.

10. According to PW1, the deceased was running the business himself and the witness was unable to make that kind of money. As a result of the loss, the estate incurred funeral expenses, Hospital expenses in the sum of Kshs 6,2000/=, mortuary expenses, expenses in conducting search being Kshs 550/= and Kshs 675/= for the grant. All these documents were exhibited.

11. In cross-examination, PW1 stated that the deceased had a subcontract which was between Qualified Holdings and the deceased which contract the witness left at home. According to the witness the deceased had two vehicles and two employees. It was disclosed that the deduction was only Kshs 25,000/= which was payment to the said employees per month. She however admitted that there were other expenses such as insurance which was being paid once per year as well as business expenses. She stated that she had bank statements. She stated that invoices were raised and that the contract each year.

12. In re-examination, she stated that the net amount was Kshs 1,237,500/= after deductions of Kshs 830,188/= which deductions were being made at source.

13. In the submissions by the Plaintiff, it was contended that from the death certificate produced by the Plaintiff, the deceased died of traumatic chest injury as a result of the accident hence the deceased died in a lot of pain and was therefore entitled to an award for his pain and suffering. The Plaintiff relied on **Nairobi HCCC No 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased vs. Elijah Oketch Adellah [2015] eKLR, Ougo, J** awarded Kshs 50,000/= on 6th February 2015 for pain and suffering where the deceased died shortly after the accident. Further reliance was placed in **Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another vs. Hellen Karisa Thoya [2017] eKLR** where **Chitembwe, J** upheld an award Kshs 50,000/= on 4th October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain. Similarly, the Plaintiff relied on Machakos High Court Civil Appeal No 50 of 2016 - **Kenya Power and Lighting Co Ltd vs. Sophie Ngele Malemba & Another [2019] eKLR** where the deceased who had died on the spot was awarded Kshs 50 000/= for pain and suffering by the trial court which award was upheld on appeal **Kemei, J** on 23rd January 2019. It was therefore submitted that an award of Kshs 50, 000/= would be sufficient under this head. Taking into account the conceded contribution at 10%, it was submitted that

after his apportionment in liability the amount to be awarded under this head will be Kshs 45, 000/=.

14. As regards loss of expectation of life, it was submitted that it was the plaintiff's evidence that the deceased was an active man in the transport business and was paid at a rate commensurate with his deliveries. With his earnings of Kshs 739, 400/= for the month of August 2018, Kshs 788, 852/= for the month of September 2018 and Kshs 813, 188/= for the month of October 2018 he was a man of means and would have achieved much with his life both socially and financially but his expectation was cut short by the cruel hand of death in the hands of the defendant's negligence. In this regard the Plaintiff cited Nairobi HCCC No 34 of 2016 - **Silas Mugendi Nguru vs. Nairobi Women's Hospital [2014] eKLR** and **Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & Another vs. Hellen Karisa Thoya [2017] eKLR**, **Kiambu HCCA No 16 of 2016 - Henry Waweru Karanja & Another vs. Teresiah Nduta Kagiri (suing as the legal representative of the estate of Francis Wainaina Ng'ang'a (deceased) [2107] eKLR**. It was submitted that from the evidence on record, the deceased died aged 31 years. The death certificate reveals that the only cause of death was of traumatic chest injury due to motor vehicle accident. There is no other known health complications that would have shortened his life. Until his death, the deceased was a husband and a father of three minor children who solely relied on him for their housing, clothing education, medical, food and general wellbeing. He would have wanted to see his children grow. By his death they have lost their sole bread winner. His wife has lost consortium. It was therefore submitted that an award of Kshs 200, 000/= for loss of life expectation is comparable and would suffice. Since the plaintiff, conceded to contribution at 10% after her apportionment in liability the amount to be awarded under this head will be Kshs 180, 000/= which the Court was urged to award.

15. Regarding loss of dependency, it was the Plaintiff's submissions that so as to properly assess damages under the ***Fatal Accidents Act*** the Court is guided by the Deceased's **income**, the **dependency ratio** of his dependants and the **multiplier** to be used which is derived from his/her age and projected to how long the deceased could have worked and whether or not he/she left behind some dependants. Reference was made to Machakos HCCC No 53 of 2014 - **Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another [2017] eKLR** in in which **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngeturu & Another, Nairobi HCCC No. 1638 of 1988** was cited with approval.

16. Regarding dependency ratio it was submitted that it is not in issue that all the deceased children are all of minority age and are barely 10 years old. It is further not in issue that the deceased's widow is a housewife and is not financially able to fill the deceased shoes in his absence as she was also relying on the deceased for her own subsistence.

17. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1/3 which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice. As regards the multiplicand, it was submitted that as at the time of the deceased death he was driving back to Nairobi having gone for a mop up of Keg containers having being subcontracted by Ponty Pridd Holdings who had a contract with KBL to deliver/transport beer which service he was paid at a rate commensurate with his deliveries. In the periods between 1st August 2018 and October 2018 he made Kshs 2,341,440/=, having made Kshs 739, 400/= for the month of August 2018, Kshs 788, 852/= for the month of September 2018 and Kshs 813, 188/= for the month of October 2018 and thus an average of Kenya Shillings Seven Hundred and Eighty Thousand Four Hundred and Eighty (Kshs 780,480/=) per month which amount was deposited in his account as per the bank deposit slip deposit with Ms. Cooperative Bank. As shown in his subcontract statement his gross earnings for the months of August 2019 were Kshs 1,094,500, September Kshs 1,166,000/= and October Kshs 1,237,500/= thus Kshs 3,498,000/= for the period between August 2018 and October 2018 which comes to an average of average of Kshs 1,166,000/= per month. As the law requires we take into account his net earnings as opposed to gross earnings it was submitted that the amount to be taken into consideration is his net average net earnings of 780,480/= per month as opposed to his average gross earnings of Kshs 1,166,000/=. Put in other words it's the average sum of Kshs 780,480/= per month which was deposited into the deceased account which monies he spent on himself and supported his wife and children with food, shelter, clothing and was paying school fees for his children as well as medical expenses.

18. It was thus submitted that the plaintiff having produced documentary evidence in form sub-contract statement with Ponty Pride Holdings and bank deposit slips showing actual deposit for the payment of Kshs 2,341,440/= for the period between August 2019 and October 2019 she has proved that the deceased average income after expenses and taxes was Kshs 780, 480/= which amount the court was urged to adopt as the multiplicand more so as the sum is after the deceased deductions.

19. With respect to the multiplicand, it was submitted that it is not in dispute that the deceased was aged 31 years and in transport business as per the evidence led by the plaintiff. It is further not in dispute that were it not for the cruel hand of death as a result of the accident, the deceased who was without any known health complications would have lived and grown his business up to the age of 80 years or more as there is no retirement age in business and/or driving which would be a further 49 years. However, owing to uncertainties of life we are alive to the fact that probably he deceased would have worked till the age of 70 years thus another 39 years as opposed to 49 years thus the court was urged to adopt a multiplier of 39 years. As such the plaintiff expectation under this head would thus be as follows.

$$780, 480 \times \frac{2}{3} \times 12 \times 39 = 243,509,760/=$$

20. As the plaintiff has conceded to contribution at 10% after his apportionment in liability the amount to be awarded under this head will be Kshs 219,158,784/=.

21. According to the Plaintiff, had the position been different and the plaintiff was unable to prove her earnings, the Court would still have been expected to make a lump sum award of damages where it felt that there is insufficient evidence to establish the deceased's net income with which to multiply and in this regard the Plaintiff relied on Nairobi HCCC No. 318 of 2012 - **Mary Njeri Murigi vs. Peter Macharia & Another [2016] eKLR**.

22. It was therefore submitted that had that been the case, the Plaintiff would have asked the court to still award the sum of Kshs 215,000,000/= in damages after having factored the plaintiff's admitted contribution on 10% liability.

23. On special damages, the Plaintiff relied on **Machakos HCCC No 53 of 2014 - Hyder Nthenya Musili & Another vs. China Wu Yi Limited & Another [2017] eKLR** and submitted that the Plaintiff pleaded special damages of Kshs 7,425/= and in her evidence she accepted that she does not have all the receipts she wished to have produced and relied upon and therefore ought to be awarded Kshs 7,425/= and as the plaintiff has conceded to contribution at 10% after her apportionment in liability the amount to be awarded under this head will be Kshs 6, 682.5/=.
24. Based on section 26 of the ***Civil Procedure Act***, the Plaintiff urged to Court to also award costs and interest as the same have been pleaded.
25. In conclusion, the Plaintiff urged the Court to make award pain and suffering - Kshs 50,000/= less 10% contribution (Kshs 45, 000/=); Loss of expectation in life - Kshs 200,000/= less 10% contribution (Kshs 180, 000/=); loss of dependency - Kshs 243,509,760/= less 10% contribution (Kshs 219,158,784/=) and special Damages - Kshs 7,425/=less 10% contribution (Kshs 6, 682.5/=). Grand total 243,767,185/= less 10% contribution 219, 390,466/= with costs and interests.
26. The Defendant on its part submitted that it was confirmed to the court by the respective counsel for both sides that Kshs. 3,000,000.00 has already been paid to the Plaintiff by the insurance company. The Plaintiff is thus pursuing further claims against the Defendant in person and not through its insurance.
27. According to the Defendant, the Plaintiff stated that at the time of the accident, the deceased was a businessman owning two trucks which he used to offer transport services on contract and that he had been subcontracted by Ponny Pridd Holdings who had a contract with KBL Limited to deliver/transport beer which service he was paid at a rate commensurate with his (deceased) deliveries. The Plaintiff produced the deceased sub-contractors statement with Ponty Pridd for the month of August 2018, September 2018 and October 2018 which statements revealed that between 1st October 2018 and 31st October 2018 the money payable for the services rendered was Kshs. 813,188.00. yet in any business in Kenya, V.A.T is payable. Further to the above, the said statement is not certified by Ponty Pridd Holdings to be a true copy. The Plaintiff testified and admitted during cross-examination that the deceased had employees (drivers) who assisted in the business. She stated that Kshs. 25,000.00 per month was being paid to the employees. It was therefore submitted that the Plaintiff had employees who earned salaries and therefore not possible to take home Kshs. 780,480.00 as income.
28. The Plaintiff confirmed that she did not have the subcontract signed between her late husband and Ponty Pridd Holdings. This is a crucial document to prove that indeed there was a binding contract between parties thereto. Further to that, if at all there were any services offered by the deceased to Ponty Pridd Holdings, which is strictly denied and in the absence of a subcontract, then the Plaintiff ought to have availed copies of invoices raised after service or delivery notes to prove contractual relationship between parties to any contract. None of these documents were produced. Even if there was a subcontract between the deceased and Ponty Pridd Holdings, which is denied, then there must be a clause for the period of the contract. Contracts are for fixed period of time, they are not indefinite. Once a contract is executed, it terminates upon completion of the task and parties may choose to either enter into a new contract or not. It was therefore submitted that the Plaintiff's allegations that the deceased would have worked upto seventy (70) years under the same contract is not substantiated by any documentary evidence.
29. According to the Defendant, the allegations that the Plaintiff used to make Kshs. 780,480.00 per month has not been proved. The Plaintiff produced a customer transaction voucher from co-operative bank indicating that cheques were deposited into account number 01104543179700 belonging to the deceased. However, cheques are not a guarantee that there is money in the account. The Plaintiff did not produce a bank statement to show how much money the deceased was taking home which would have been proper proof of the income earned by the deceased after deduction of all expenses.
30. To the Defendant, the mere allegations by the Plaintiff that she could not access her late husband's bank statement from the bank are unfounded as she is the legal administrator of her late husband's estate and thus the authorized lawful person to access such documents. No proof of efforts made to bank to be supplied with such document.
31. It was therefore submitted that the Plaintiff has failed to prove, firstly, that there was a contract between the deceased and Ponty Pridd Holdings for transport of beer; for lack of the subcontract between the parties therein; and, secondly, that the monthly income was Kshs.780,480.00 for lack of sufficient documentary evidence; more so, there were employees who earned salaries and therefore if at all the alleged money was the monthly income, which is denied, then the same was subjected to deductions from salaries and other expenses which had an effect of reducing it.
32. It was submitted that this claim was brought under the ***Fatal Accident Act*** and the ***Law Reform Act***, under the ***Insurance (motor vehicle 3rd Party Risk) Amendment Act, 2013*** 'dependency' is defined as that part of the deceased's earnings that s/he spent on the maintenance or financial support of his/her dependants; 'earnings' are defined as revenue gained from labour or services and includes income or money or money received from employment, business or occupation or in the absence of documentary evidence of such revenue, the applicable minimum wage under the ***Labour Relations Act, 2007***, or the determination of the reasonable income whichever is higher; while 'multiplier' is defined as the number of years a dependant would reasonably have been expected to receive financial support from the deceased. The Act further provides a formula for computing loss of dependency to be multiplier x earnings x 12 months x the dependency ratio which is the same formula that has been in Application under common law.
33. Regarding loss of dependency, it was submitted that the Plaintiff alleged that the late husband was into transport industry and that he had a contract for delivery of beers with Ponty Pridd Holdings. No proof of income received was produced before court. Accordingly, the Defendant proposed a multiplicand of Kshs. 10,000.00 being the minimum wage applicable. With respect to dependency ratio, it was submitted that since the deceased was married with three (3) minors who were depending on him for livelihood, $\frac{2}{3}$ as the dependency ratio ought to be applied since it is assumed that the deceased used more of his earning to support the dependants than he spent on himself. As for the multiplier, it was submitted that the deceased was aged 31 years old at the time of his death. Putting all factors into consideration, the vagaries and vicissitudes of life, the Defendant submitted that a multiplier of 29 years is reasonable since given the nature of his work, he could have lived up to 60 years. It was therefore proposed that the Plaintiff be compensated as follows: -

Kshs.10,000.00 x $\frac{2}{3}$ x 12 months x 29 years = Kshs.2,320,000.00

34. Regarding damages under the **Law Reform Act**, it was submitted that Kshs. 50,000.00 is sufficient under the head of loss and suffering while Kshs 100,000.00 suffices under loss of expectancy.

35. It was submitted however that since the Plaintiff herein is a dependant of the estate of the deceased, she ought not to benefit under both the **Law Reform Act** as well as under the **Fatal Accident Act**. It means that the amount awarded to the Plaintiff under **Law Reform Act** for pain and suffering as well as loss of expectancy should be deducted from the award made under the **Fatal Accident Act** based on the court of Appeal in **Maina Kamau and Another –vs- Josephat Muriuki Wangonde and Another** cited with approval in **Josephat Wachira Maina and Another –vs- Mohammed Hassan**, Civil Appeal Number 43 of 2003.

36. The Defendant therefore computed the award as hereunder;

Loss of Dependency = Kshs. 2,320,000.00

Loss of expectation of life-----Kshs. 100,000.00

Pain and suffering-----Kshs. 50,000.00

TOTAL-----Kshs. 150,000.00

Total award for General Damages Kshs. 2,320,000.00 + Kshs. 150,000.00 = Kshs. 2,470,000.00.

37. This should be subjected to the liability apportionment herein.

38. On special damages, it was submitted that section 3(1B) of The **Insurance (Motor Vehicle Third Party Risks) Amendment Act** Number 50 of 2013 is clear that the above compensation on General damages shall include but not limited to the medical expenses thus extending to special damages. The Court was therefore urged to find so in respect of any Special damages that the Plaintiff may specifically prove in accordance with the law.

39. The Defendant concluded that Kshs. 3,000,000.00 paid by the insurance company towards this claim is sufficient in the circumstances as submitted above and that the same should be inclusive of costs.

Determination

40. In this case, the only evidence as to the time of death of the deceased was from PW1 who stated in her statement that the deceased died on the same day of the accident. Without evidence as to how long after the accident he died the assumption is that he passed away immediately after the accident. I therefore agree that an award of Kshs 10,000.00 being general damages for pain and suffering is reasonable.

41. Regarding damages for loss of expectation of life, in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004**, the Court of Appeal made an award of Kshs 100,000.00 under that head which I also find reasonable.

42. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

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

43. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which **Ringera J.** as he then was, held at page 248 that:

“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”

44. In this case, no issue has been taken with regards to dependency ratio of $\frac{2}{3}$ which I also find proper in the circumstances.

45. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased... The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

46. In this case the deceased was married with a very young family that depended on him.

47. As regards the multiplier, the deceased was aged 31 years. He was running his own business. I agree with **Ringera, J** in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** that:

“In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased...The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case.”

48. In this case, the deceased’s disclosed earnings were from a subcontract. The length of the said contract is not known to the Court as the same was not exhibited. No one contended that the subcontract would have been for life. It could not have been since it depended on the existence of the main contract. Without evidence of the lifespan of the said subcontract, this Court must do its best in the circumstances and arrive at an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. The deceased was clearly not an idle person. He had purchased two trucks which he was using to do his business. Even without the said contract, he would have continued earning. However, one cannot say that his earnings would have been as lucrative as what he was earning under the said subcontract. While I agree with the Defendant that the multiplier of 29 years is reasonable, it is my view that the proposed Kshs 10,000.00 as the multiplicand is unreasonable.

49. Taking into account the expenses that he would have to incur such as payment of taxes, salaries and outgoings in respect of motor vehicle repairs it is my view that a multiplicand of Kshs 200,000.00 is reasonable. Accordingly, the loss of dependency would work out as follows:

$$200,000.00 \times 29 \times 12 \times \frac{2}{3} = 46,400,000.00$$

50. Therefore, the total award would be Kshs 46,400,000.00 + 100,000.00 + 10,000.00 + 7, 425.00 = 46,517,425.00.

51. As regards the double award, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) the capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased. Similarly, the Court of Appeal in **Eliphias Mutegi Njeri & Another vs. Stanley M’wari M’atiri Civil Appeal No. 237 of 2004** held that:

“As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards...Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-.”

52. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award leaving a balance of Kshs 46,417,425.00. The said sum when discounted by 10% brings the award to Kshs 41,775,682.50.

53. It was conceded that the Plaintiff had already been paid Kshs 3,000,000.00 by the insurance thus leaving a balance of Kshs 38,775,682.50.

54. While the general damages will accrue interests at court rate from the date of the judgement till payment in full, the special damages will accrue interests at the same rate from the date of filing suit till payment in full. The Plaintiff will have the costs of this suit.

55. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 6th day of February, 2020

G.V. ODUNGA

JUDGE

In the presence of:

Mr Kimeu for Mr Madhare for the Defendant

CA Geoffrey