



**Theuri v Kimatu (Suing as the Personal Representative of the Estate of Agnes Kimatu)
(Civil Appeal E226 of 2023) [2025] KEHC 14415 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14415 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E226 OF 2023
NIO ADAGI, J
OCTOBER 1, 2025**

BETWEEN

JULIUS WAGURA THEURI APPELLANT

AND

KAVINDU KIMATU RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF AGNES
KIMATU**

*(Being an Appeal from the Judgment and Decree of Hon. P. Wechuli, dated & delivered on
24th August, 2023 in Kithimani Principal Magistrate's Court Civil Case No. 443 of 2016)*

JUDGMENT

Brief facts

1. The Respondent herein was the Plaintiff before the trial court. In a Plaint dated 22nd December 2016, the Respondent sued the Appellant for damages under both the *Fatal Accidents Act* and the Law Reforms Act, in their capacity as the Personal Representative of the Estate of AK (Deceased). The Respondent in her suit also sought Special damages in the sum of Kshs.80,550.00 together with the costs of the suit and interest.
2. The Respondent's case was that, on or about 8/3/2014, the deceased was a lawful pedestrian walking along Matuu-Mwingi when at Kivandini Area motor vehicle registration number KBW 218B was driven so carelessly and negligently that it veered off the road, swerved and knocked the deceased down thereby occasioning her to sustain fatal injuries. The Respondent attributed the accident to the negligence of the Appellant's driver, servant, agent and/or representative.
3. The Appellant herein was the Defendant before the trial court. In a Statement of Defence dated 23rd June 2017 the Defendant denied the occurrence of the accident and averred that if indeed the same



- occurred then it was not due to the Appellant's negligence but rather the same was solely caused and or substantially contributed to by the negligence of the deceased. The Appellant equally denied that the Respondent is entitled to any damages and costs.
4. The matter proceeded for hearing and at the end of the trial, judgment was entered in favour of the Respondent as follows:
 - a. Liability at 50:50 in favour of the Respondent
 - b. Loss of Dependency- Kshs.8,880,000/=
 - c. General Damages for Pain and Suffering - Kshs.10, 000/=
 - d. General Damages for Loss of Expectation of Life - Kshs.100,000/=
 5. Aggrieved with the decision of the trial court, the Appellant filed this appeal in which he raised 9 grounds of appeal basically challenging the capacity of the Respondent to institute the suit and the quantum for damages awarded under the Fatal Accident Act and special damages. The Appellant does not seem to be challenging liability.
 6. The appeal was canvassed through written submissions. The Appellant's submissions are dated 20th March 2025 whilst the Respondents submissions are dated 9th May 2025.

Appellant's Submissions

7. The Appellant submitted that that the learned trial Magistrate applied wrong principles in assessing quantum of damages and liability. Reliance was placed on the case of Purity Wambui Murithii v Highlands Mineral Water Co. Ltd [2015] eKLR the Court of Appeal relied on *Kemfro Africa Ltd t/ a Meru Express Service Gathogo Kanini v A M Lubia & Olive Lubia*.
8. The Appellant in submitting on Ground 3 of the Memorandum of Appeal, referred to the Plaintiff in which the following are listed as Dependents of the deceased.
 - a. Kavindu Kimatu 69 years Mother.
 - b. KK 14 Years Daughter.
 - c. KK 9 years Daughter.
 - d. MK 6 Years Daughter.
 - e. MK 5 Years Daughter
9. The Appellant submitted that he noted that four (4) of the beneficiaries were minors and the Respondent should not have been granted the letters of administration to sue as the sole Plaintiff. Reference was made to *In Re Estate of Joseph Rongoei Kerich (Deceased)* [2009] eKLR where the court held:

“I find that because minors were involved there must be two administrators/administratrix as provided under Section 58 of the *Law of Succession Act*. I further find under Section 41(2) this court has powers to “refer back a matter for consideration of confirming the identity shares and interest of persons beneficial entitled to the estate inter alia”.
10. The Appellant contended that the trial court ignored this critical point from the onset.



11. In canvassing the issue on quantum, the Appellant submitted on Grounds 1, 2, 4, 5, 7, 8 and 9 of the Memorandum of Appeal.
12. While relying on the cases of *Butt v Khan* 1977 1 KAR 1, *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR and *Osman Mohammed & Ano. v Saluro Bundit Mohammed*, Civil Appeal No. 30 of 1997, the Appellant submitted that it is a settled principle in the law that the court while assessing quantum shall not adopt such wrong principles in awarding damages. The court shall not award damages that are so inordinately high or inordinately too low.
13. The Appellant referred to Paragraph 6 of the Plea where the Respondent Pleaded as follows.
 - “ 6. 6.The Deceased was hardworking and diligent robust health and good physical shape who was a business lady aged 33 years making an average income of Kshs.30,000/= which she used to maintain herself and take care of her family.”
14. That during the hearing, PW1 stated that the deceased was a business woman earning Kshs.30,000/= per month but she did not have the proof. She further did not have any permits of this shop where the deceased was working.
15. That the trial court after analysing the evidence, erred in law by making a finding that the deceased was a business woman despite there being no proof. There was a dispute as to whether the deceased was working and the burden of proof was on the Respondent to prove this. That interestingly, at the last Paragraph of the Judgment the learned trial magistrate erred in law by making a finding as follows:-
 - “ I find that the deceased used to earn Kshs.30,000/= per month as a businesswoman was not controverted by any contrary evidence from the Defendant.”
16. The trial court in making a finding that the deceased earned Kshs.30,000/= per month was unreasonable. The court further adopted a multiplier of 37 years yet the deceased was aged 33 years.
17. The Appellant submits that there was no justification for the trial court to make a finding that the deceased earned Kshs.30,000/= when that fact was never proved by the Respondent for the court to shift the burden of proof to the Appellant.
18. The Appellant cited Section 3 (4) of the *Evidence Act* states that:-
 - “ A fact is not proved when it is neither proved nor disproved.”
19. The Respondent did not therefore prove the said fact.
20. The Appellant further referred to the *Evidence Act* at Section 107 provides thus:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

Section 109 of the *Evidence Act* further provides;

- “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 that fact shall lie on any particular person”.



21. These two sections carry forward the often-repeated evidential adage: “he who asserts must prove”.
22. The Appellant submits that the trial magistrate acknowledged that the Respondent did not have any proof that the deceased actually earned Kshs.30,000/= or was engaged in any income generating activity at all as none was even mentioned to the trial court but despite this the court erroneously used the same Kshs.30,000/= that had not been proved.
23. Further it was submitted that although the learned trial magistrate quoted the case law of Annalisa Muigai & Another v Beatrice Waithera Gatiri (2020) where the court stated that failure of proof by documentary should entitle the court to adopt the minimum wage. The trial court did not follow the same position relied therein.
24. That there is no iron-clad rule that if there is no documentary evidence of earnings the Court must resort to the minimum wage where there is alternative evidence by which the Court can approximate the earnings of the Deceased. In the previous case evidence was led on bodaboda and selling of tomatoes, while in this case she is just a business woman no mention of any commodity or service.
25. In the present case there was no proof that the deceased was a business lady either running a shop, selling 2nd hand clothes “Mitumba” or even running a grocery business. The trial court therefore erred in arriving at a conclusion that the Appellant did not disapprove the same. The Appellant posed a question that: “How could the Appellant disapprove what had not been proved?”.
26. Reliance was place on the case of Phillip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR where the court stated:

“No evidence was however adduced to prove that he engaged in the same business at the time of his demise. There was no proof of his actual earning at the time of his demise. Had the Respondent produced any statement of account it would have proved his estimated monthly earning.

Therefore, in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee which by then stood at approximately 6,000/- in the circumstances I would set aside the multiplicand of Ksh.10, 000/- adopted by the trial court and substitute it with Ksh.6,000/-.”
27. The Appellant maintains that the Respondent did not produce any document to prove employment or earnings in regards to the same. It is his submissions that the court should adopt the regulation of wages (general)(amendment) order 2015 under the heading General labourer which provides for the salary of Kshs.5,844/= as there was no proof that the deceased was doing any business at all.
28. The Appellant cited the decision in Catholic Diocese of Machakos & Another v Janet Munaa Mutua & Another [2021] eKLR where Justice G V Odunga in allowing the appeal before him held that the trial magistrate should have used Regulation of Wages (General) (Amendment) Order, 2015 in deciding of wages for the deceased who was a mason at the time of the accident.
29. The Appellant argue that in order to properly assess damages under the *Fatal Accidents Act*, it is necessary to determine the deceased’s income, the dependency ratio of his dependants and the multiplier to be used. That this Court should be guided by the manner of assessment of damages for



loss of dependency as aptly explained by Ringera J. (as he then was) in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another*, Nairobi HCCC No. 1638 of 1988 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. 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.”

30. J. A. Mwera J stated in *Authur Nyawate Omutondi v United Millers Limited and 2 others* (2009) eKLR In HCCC NO. 152 of 2004

“Proof of income is basic to the claim of loss of dependency under the Fatal Accident Act because the claim can only be supported financially by what was earned in last pounds and cents. If the award of dependency is not proven then no award on dependency can issue”

31. The Appellant submits that the trial magistrate erred in awarding a sum of Kshs.8,880,000/= despite the fact that the Respondent could not prove that the deceased used to work as a businesswoman.

31. Further that, despite there being no proof the trial court awarded a sum of Kshs.30,000 as the wages of the deceased instead of using decided law as above or even the minimum wage available at the time as the courts have decided previously which he alluded to on the same page.

32. The deceased was 33 years old at the time of her death. In determining the multiplicand, the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing years the deceased would have worked bearing in mind the expectation of earning life of the deceased and also the vicissitudes of life.

33. At the time of her death the deceased’s income was uncertain. The Appellant submits on the award of the multiplicand by relying on the quoted decisions as follows;

34. In *Authur Nyawate Omutondi v United Millers Limited and 2 Others* (2009) eKLR in HCCC NO. 152 of 2004, the court in its discretion made an award of Kshs.4,000 to a lady in rural Migori. In *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR, Judge R. E. ABURILI stated under paragraph 61 of her judgment as follows:

“..... whereas I agree that where a person is employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time.....”

35. *Jacob Ayiga Maruja & Another V Simeon Abayo*, Civil Appeal No.167 of 2002, the Court ascribed to the minimum wage bill at the time of death to calculate the deceased’s earnings.

36. The Appellant submitted that in considering the nature of the deceased’s occupation was one of intense labour, a multiplier of 15 years be should have been used.



37. In Amos Mungulusi Syomau & Another v. Mawingo Bus Services & Another Machakos HCCC No.64 of 1997 decided on the 19th day of April, 2002 wherein the deceased was aged 35 years and the court applied a multiplier of 15 years.

38. In Charles Mukumi Njoroge v Asaph Kiberenge HCCC No. 339 of 1990, the deceased was aged 29 years, a multiplier of 15 was used.

The Appellant calculated the total damages awardable as follows:-

Loss of dependency5, 844 x 2/3 x 12 x 15 =Kshs.701,280.00

Pain and SufferingKshs. 10,000.00

Loss of Expectation of LifeKshs 100,000.00

Total Kshs. 811,280.00

Less 50% Liability. Kshs.405,640.00

Grand Total Kshs.405,640.00

39. On special damages, the Appellant relied on ground 6 of the memorandum of appeal and submitted that a party is bound by his pleadings. Special damages must be specifically pleaded and proved at the trial. He referred to Order 2 rule 4 of the Civil Procedure Rules. It is the Appellant's submission that the trial court erred in awarding Kshs.80,550/=. The trial court should only have awarded Kshs.30,550/=.

40. With regard to special damages, it is submitted that only those that were specifically pleaded and proved be awarded. However, should the court take the generous approach of awarding special damages for funeral expenses where they are not pleaded, the court was urged to adopt a reasonable sum as stated by Waki J in Florence Rebecca Kalume v Coastline Safaris and another (1996) eKLR.

41. In the Court of Appeal at Nairobi Civil Appeal No.283 of 1996 David Bagine v Martin Bundi it was emphatically postulated at page 2 that:-

“Special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C. J, the Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak throw them at the head of the court, saying , this is what I have lost, I ask you to give me these damages. They have to prove it”.

41. The Appellant prayed that the Lower Court award under special damages should be set aside in view of the above decided authority.

42. In conclusion the Appellant submitted that in view of the above submissions and decided authorities, it is clear that the trial court's award of damages was inordinately high and manifestly excessive in the circumstances and prayed that the decision on quantum be set aside as well as the award under Law Reform Act should be deducted to avoid double compensation and subject to contribution. The Appellant prayed that the appeal be allowed.

Respondent's Submissions

42. The Respondent submitted on two issues for determination, first whether the Respondent was entitled to make the claim under the Fatal Accidents Act and Law Reform Act and second whether the trial court erred in apportioning liability and assessing quantum as it did.



43. As regards capacity to sue, the Respondent submitted that Section 4 of the *Fatal Accidents Act* Cap 32 provides as follows: -

“ 4. Action to be for benefit of family of deceased

(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased: and in every such action the court may award such damages as it may think proportionate to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:

Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person”

44. The Respondent submits that the import of the above provision is that it does not place a restriction on the persons who may bring an action under the *Fatal Accidents Act* at all as it provides that the administrators of the estate of a deceased may do so, This means that it is not compulsory that the Respondent ought to meet the provisions of Section 58 of the *Law of Succession Act* like in a succession matter where devolved property is expected to be held in trust for beneficiaries who have not attained the age of majority.

45. The Respondent invited this court to take judicial notice that this Court has no jurisdiction to determine this issue at this stage as the same lies rightly in the family court and not at the appeal stage. The Respondent submit that there was a valid Grant Ad Litem dated 1/11/2016 which adduced as P.Exh7 which was obtained by the Respondent for purposes of filing the Suit and the same has never been challenged and or revoked and as such, the Respondent was duly appointed as the deceased's personal representatives for the purposes of this suit and not for purposes of a continuing trust as anticipated by Section 58 of the *Law of Succession Act*.

46. It is therefore the Respondent's submission that there is no evidence on Record to rebut the Respondent's legal capacity to bring the claim as per Section 4 of the *Fatal Accidents Act* Cap 32, and urge this court to find that the Respondent was correctly recognized as the deceased's parent and was thus entitled to bring the claim having duly been issued with a Grant Ad Litem by a competent court.

46. On quantum, the Respondent submitted that it is trite that the standard of proof, in civil matters, is on a balance of probabilities however narrow both on quantum and liability. Reliance was placed on *Miller v. Minister of Pensions* (1947) 2 ALL ER 372 where the court discussed the burden of proof and stated:-

“ 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 is 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 lose, because the requisite standard will not have been attained.”

47. The Respondent referred to the laid principles espoused by the Court of Appeal in *Arrow Car Ltd v. Elijah Shamaffa Bimomo & 2 Others* (2004) eKLR where it was held thus: -

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former court of Appeal of Eastern Africa to be that it must be satisfied that either 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 be a wholly erroneous estimate of the damage.”

48. That in this case, the Respondent testified that the deceased was a business lady and to prove that fact, she produced the Death Certificate as PExt1 which showed that the deceased was a business lady and the Respondent therefore did prove her case to the required standard. The Court awarded Kshs.8,880,000.00 less 50% contribution under loss of dependency. The Appellant did not take issue with the award under loss of expectation of life and pain and suffering hence the Respondent urged the court to uphold the same.

49. The Respondent took issue with the Appellant’s contention that the award made for loss of dependency under *Fatal Accidents Act* was on the higher side in view of the fact that there was no prove of earnings by way of documentation. Reference was made to the case of *Ayiga Maruja Another -v- Simeone Obayo* (2005) eKLR the Court observed as follows:-

“We do not subscribe to the view that the only way to prove the profession of a person must be by way of production of certificates and that the only way of proving earning 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 that earn their livelihood in various ways. If documentary evidence is available that it well and good. But we reject any contention that only documentary evidence can prove these things.”

50. It is submitted that the Respondent herein was the mother of the deceased and the deceased also left minors under the custody of the Respondent upon her demise. The Respondent is therefore entitled to benefit and the Death Certificate did indicate that the deceased was a business lady and according to the evidence on record, she was earning Kshs.30,000/= per month. That the Appellant did not dispute that evidence on record and as such, there was no need for the court to use the global award reward when there was evidence that the deceased was a business lady.

51. The Respondent referred to the determination of Ringera, J. (as he then was) in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another — Nairobi HCCC. No. 1638 of 1988* (unreported) at page 248 as cited in *Alliance One Tobacco (K) Ltd v Isack Jandi Mbane* [2015] eKLR where it was held thus: -

“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. "

52. The Respondent submitted that in this case, the deceased died at 33 years of age as shown in her Certificate of Death. The deceased was also a working in the informal sector being a business lady and she would have worked up to the age of 80 years and had at least 47 years as submitted by the Respondent in the trial court but the trial court adopted an average of 37 years which the Respondent submits was fair and just and the same should not be disturbed without any justifiable reason.
53. The Respondent therefore urged this court to find that the Respondent proved his case against both Appellants herein on a balance of Probabilities, as no a plausible defence was offered and more importantly, the third party that was largely blamed for the accident by the Appellants was never enjoined in the proceedings for the court to apportion blame to the alleged 3 Party if any. That the Appellants were wholly to blame for the accident as rightly held by the trial court and the Respondent urge the court to find as such and uphold the trial court's finding on the issue of liability.

Analysis and determination

55. The duty of this court as a first appellate court is to re-evaluate the evidence and arrive at its own conclusions. In so doing, the court must take into account the fact that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: *Selle & Another v Associated Motor Boat Co. Ltd & Another* (1968 (E.A. 123)).
56. I have gone through and carefully considered the Record of Appeal dated 17th September 2024I and written submissions filed herein.

To begin with, I note that the Appellant has not raised any ground in the memorandum of appeal touching on the issue of quantum and I take it to mean that the appeal does not challenge liability.
57. I also note that the grounds of appeal in the memorandum of appeal revolve around three issues which include; (i) the Respondent's capacity to institute the suit, (ii) the quantum of damages under Loss of dependency and (iii) Special damages. I will therefore proceed to determine the appeal based on the three issues above.

(i) The Respondent's capacity to institute the suit

62. Ground 3 of the memorandum of appeal states that the Learned Magistrate erred in law and in fact by failing to make a finding on the capacity of the Respondent who is the sole Administrator whereas the Deceased had indicated over 4 dependants, three who are still minors thereby failing to take judicial notice on the requirement that the suit ought to have been filed with 2 Administrators therein. In his submissions, the Appellant submits that he had noted that 4 of the beneficiaries are minors and the Respondent should not have been granted the letters of administration to sue as the sole Plaintiff. That the trial court ignored this critical point from the onset. The Appellant relied *In Re Estate of Joseph Rongoei Kerich (Deceased)* [2009] eKLR the court held:-

"I find that because minors were involved there must be two administrator/administratrix as provided under Section 58 of the *Law of Succession Act*. I further find under section 41(2) this court has powers to "refer back a matter for consideration of confirming the identity shares and interest of persons beneficial entitled to the estate inter alia".



63. The Grant issued by the Court on 1st November 2016 to the Respondent was a limited one. It was limited only to prosecuting and/or defending suits or representing a suit. In legal parlance, that is what is referred to as the locus standi.
64. According to Black's Law Dictionary (8th ed), Locus standi is defined as:
- “The right to bring an action or to be heard in a given forum; standing.”
65. The Court in *Trouistik Union International & Another v Jane Mbeyu & Another* Civil Appeal No. 145 of 1990, stated that Locus standi is a primary point of law, almost similar to that of jurisdiction, since the lack of capacity to sue or be sued renders the suit incompetent.
66. From the pleadings, it was the Appellant, as the administrator of the estate, who lodged a suit against the Respondent vide the Plaint dated 22nd December 2024, seeking general damages under the *Law Reform Act* and Fatal Accident Act.
67. I have read the Appellant's Statement of Defence dated 23rd June 2017 and have not come across any issue raised on the Respondent's capacity to institute the suit. The Appellant did not raise any objection to the Respondent's capacity to institute the suit and only raised it for the first time in the memorandum of appeal and in his submissions.
68. Section 4 of the *Fatal Accidents Act* Cap 32 under which the suit was instituted provides as follows: -
4. Action to be for benefit of family of deceased:
- (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused and shall, subject to the provisions of Section 7, be brought by and in the name of the executor or administrator of the person deceased: and in every such action the court may award such damages as it may think proportionate to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
- Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person”
69. The import of the above provision is that it does not place a restriction on the persons who may bring an action under the *Fatal Accidents Act* at all as it provides that the Administrators of the estate of a deceased may do so,
70. This means that it is not compulsory that the Respondent ought to meet the provisions of Section 58 of the *Law of Succession Act* like in a succession matter where devolved property is expected to be held in trust for beneficiaries who have not attained the age of majority.
71. It is my considered view that this court cannot be invited to determine the capacity of the Respondent through the memorandum of appeal and submissions at this late stage of the case. This court finds that the Respondent had a valid Grant Ad Litem dated 1st November 2016 which she adduced as P.Exh7 and which was obtained by the Respondent for purposes of filing the suit and the same has never been challenged and or revoked and as such, the Respondent was duly appointed as the deceased's personal



representatives for the purposes of this suit and not for purposes of a continuing trust as anticipated by Section 58 of the *Law of Succession Act*.

72. The Appellant cannot fault the trial magistrate for having ignored what was not presented before him for determination. This ground of appeal is thus unfounded and has to be declined.

Determination on quantum

(ii) the quantum of damages under Loss of dependency

73. The fact of the matter of assessment of damages is purely at the discretion of the trial court of facts. The idea that an appellate Court would fundamentally differ with the trial Court is neither here nor there. That is the attention of the principle in *Loice Kagunda v Julius Gachau Mwangi CA 142 OF 2003* the Court of Appeal held that:-

“We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence a appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons make a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles.” (See *Mariga v Musila {1984} KLR 257*).

74. Under the Fatal Accident Act, the deceased was aged 33 years old and had 4 children aged 14, 9, 6 and 5 years old. That she was hardworking, diligent, robust health and in good physical shape who was a business lady making an average income of Kshs.30,000/= per month which she used to maintain herself and take care of her family.
75. In his judgement, the trial magistrate found that the deceased used to earn Kshs.30,000/= per month as a businesswoman was not controverted by any contrary evidence from the Defendant.
76. The trial court further adopted a multiplier of 37 and dependency ratio of 2/3 thus the multiplicand was calculated as $30,000 \times 37 \times 12 \times 2/3 = 8,880,000$.
77. The Appellant submits that the Respondent did not produce any document to prove employment or earnings in regards to the same. It is his submission that the court should adopt the regulation of wages (general)(amendment) order 2015 under the heading General labourer which provides for the salary of Kshs.5,844/= as there was no proof that the deceased was doing any business at all. Reliance was placed on the decision in *Catholic Diocese of Machakos & Another v Janet Munaa Mutua & Another [2021] eKLR* where Justice G V Odunga in allowing the appeal before him held that the trial magistrate should have used Regulation of Wages (General) (Amendment) Order, 2015 in deciding of wages for the deceased who was a mason at the time of the accident.
78. The Appellant argues that in order to properly assess damages under the *Fatal Accidents Act*, it is necessary to determine the deceased’s income, the dependency ratio of his dependants and the multiplier to be used. That this Court should be guided by the manner of assessment of damages for loss of dependency as aptly explained by Ringera J. (as he then was) in *Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another, Nairobi HCCC No. 1638 of 1988*.



79. The Appellant referred to the case of Mary Njeri Murigi v Peter Macharia & another [2016] eKLR, Judge R. E. ABURILI stated under paragraph 61 of her judgment as follows:

“..... whereas I agree that where a person is employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time.....”

80. Reference was also made to the case of Jacob Ayiga Maruja & Another V Simeon Abayo, Civil Appeal No.167 of 2002, the Court ascribed to the minimum wage bill at the time of death to calculate the deceased's earnings.

81. The Appellant submitted that in considering the nature of the deceased's occupation it was one of intense labour, a multiplier of 15 years should have been used.

82. The Appellant cited the case of Amos Mungulusi Syomau & Another v. Mawingo Bus Services & Another Machakos HCCC No.64 of 1997 decided on the 19th day of April, 2002 wherein the deceased was aged 35 years and the court applied a multiplier of 15 years.

83. Also, in Charles Mukumi Njoroge v Asaph Kiberenge HCCC No. 339 of 1990, the deceased was aged 29 years, a multiplier of 15 was used.

The Appellant calculated the total damages awardable as reflected under his submissions at paragraph 40 hereinabove and urged this court to award the same.

84. The trial court's Record show that, the Respondent testified that the deceased was a business lady and to prove that fact, she produced the Death Certificate as PExt1 which showed that the deceased was a business lady and the Respondent therefore did prove her case to the required standard

85. I note that the Respondent did not at all mention the kind of business the deceased was engaged in at the time of her death. This would have at least shed light on nature of the business and assist in giving an idea or approximate earning of the deceased.

86. Guided by the authorities cited by the Appellant which I find to be persuasive, it is my finding that the trial court erred in arriving at a conclusion that the Appellant did not disapprove that the deceased was a business lady whereas the Respondent had not proved the same.

87. It is my further finding that the income of a deceased cannot be proved by a Death Certificate.

88. I will agree with the Appellant that the trial Magistrate ought to have applied the Regulation of Wages (General)(Amendment) Order 2015 under the Heading General labourer which provides for the salary of Kshs.5,844/= which was applicable then.

89. Dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR as follows:-

“Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.”

90. I find that the dependency ratio of 2/3 is reasonable considering that the deceased died at the age of 33 years and left behind 4 children and a mother who relied on her for care.



91. The multiplier is the number of years that the deceased would have been in gainfully income earning engagement. The deceased was engaged in private business would have been expected to be so engaged up to the age of about 65 years. In this case, I find it reasonable to apply a multiplier 30 years taking into account the uncertainties of life and relying on the case of *Mariera v Nzuki & Anor (2021) KEHC* and *Haji Ashraf & Anor v Sidi Masha Kalama & Another (2021) eKLR*.
92. This court is inclined to disturb the trial court's award under this head by adopting a multiplicand of Ksh.5,844/= per month, a multiplier of 30 years and dependency ratio of 2/3 of calculated as follows:-

$$\text{Kshs.5,844} \times 12 \times 30 \times 2/3 = \text{Kshs.1,317,120.00}$$

(iii)Special damages.

93. I have perused the record and just as the trial magistrate, I am persuaded that the Plaintiff proved the special damages of Kshs.80,550/= as pleaded. Further, on the funeral expenses, it is my view that the amount of Ksh.50,000/= was just and reasonable. I will not disturb this award. However, it is my finding that the special damages are not subject to contribution. I am guided by the holding of the court in *Hashim Mohamed Said & Another v Lawrence Kibor Tuwei [2018] eKLR* where the court stated that special damages should not be subjected to the apportionment.
94. The Appellant did not challenge the award of Kshs.100,000/= under loss of expectation of life and Kshs.10,000/= for pain and suffering and I therefore uphold the same.
95. In the final analysis, it is my finding that the Respondent had the capacity to institute the suit under Section 4 of the *Fatal Accidents Act* and further that there is a reason for this court to partly interfere with the trial court's award on general damages as follows:
 - a. Liability 50%: 50% in favour of the Respondent is upheld.
 - b. The award of Ksh.10,000/- for pain and suffering is upheld.
 - c. The award of Kshs.100,000/= for loss of expectation of life is upheld.
 - d. The award of Ksh.8,880,000/- for dependency under the *Fatal Accidents Act* is set aside and substituted with an award of Kshs. 1,427,120.00/=
 - f. The total awards under orders b, c and d above are subject to 50% contribution $(10,000 + 100,000 + 1,317,120) \div 2 = \text{Kshs.713,560/=}$
 - e. The award of Special Damages is Ksh.80,500/= is upheld and shall not be subjected to apportionment.
 - f. The total award is Kshs.794,060/=
 - g. Since the Appellant has succeeded partially, each party shall bear own costs of the appeal.
 - h. Stay of execution granted for Thirty (30) Days.

Order accordingly.

JUDGMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 1ST OCTOBER 2025.

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 1ST OCTOBER 2025.



In the presence of :

Mr. Muriuki..... for Appellant

Ms. Chelangat hb for Mr. Mwiha..... for Respondent

Milly Grace..... Court Assistant

