REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL NO. E047 OF 2025

EEDI KENYA LIMITED

MATHIAS KIPYEGON RONO.....

.....APPELLANTS

VERSUS

BEATRICE BITUTU ORONDO &
JARED MUNGA
[Suing as the legal representatives of the estate of the late DANIEL MOKORO MUNGA (Deceased)] **.....**

RESPONDENTS

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. G.N. Barasa (RM) dated 1.04.2025 arising from Kisii CMCC No. E955 of 202022. The lower court heard the parties and proceeded to render the impugned judgment in the following terms:
    a. Liability 100%
    b. Loss of expectation of life Ksh 150,000/=
    c. Loss of dependency Ksh. 6,720,000/=
    d. Special damages Ksh. 323,550/=
    e. Pain and suffering Ksh. 20,000/=

Total Ksh. 7,213,520/=

2. The Appellants were defendants in the lower court. The Respondents were administrators of the estate of Daniel Mokoro Munga (deceased). The appeal is on both liability and quantum. The appellants raised the following grounds of appeal:

    a) The trial magistrate proceeded on wrong principles to adopt an amount of Ksh. 60,000/= as the deceased's monthly net income for assessment of damages for loss of dependency thereby arriving at a figure so inordinately high that manifestly represents an entirely erroneous estimate.

    b) The trial magistrate erred in law and fact to fix the deceased's monthly income on the basis of an unverified contract contrary to the evidence showing no such contract existed.

    c) The trial magistrate erred in law and fact by failing to properly consider and analyze the evidence on whether the deceased had employment and ascertainable income thereby arriving at wrong conclusions on the deceased's income.

    d) The trial magistrate erred in law and fact to adopt 14 years as a multiplier thereby failing to consider other vicissitudes of life that ought to be considered.

    e) The amount of damages awarded by the trial magistrate are against public interest and prevailing economic conditions.

f) The trial magistrate erred in law and fact to award special damages of Ksh. 323,550/= pleaded without proof that the deceased's representatives incurred such expense.

g) The trial magistrate erred in law and fact to hold appellants 100% liable for the traffic accident contrary to the evidence showing that the deceased contributed to occurrence of the accident.

3. In summary, the appellants raised several grounds in the appeal and contended that the lower court erred in liability and quantum of damages. This was mainly on the multiplier of 14 years and multiplicand of Ksh. 60,000/=. This they averred were based on wrong principles and unsupported by evidence including an unverified employment contract. The other issue they raised was award of unproven special damages of Ksh. 323,550/=.

4. The appeal raised three issues, that is:
   a. Liability
   b. Quantum of general damages
   c. Special damages

Pleadings

5. The Respondents filed a Plaint dated 30.11.2022, seeking both general and special damages arising from a road traffic accident that occurred on 09.06.2021 along the Kisii–Keroka

road at Keumbu. In the said plaint, the Respondents prayed for the following special damages:

a. Funeral expenses ..... Ksh. 30,000/=
b. Cost of letters of administration ..... Ksh. 35,000/=
c. Catering services ..... Ksh. 150,000/=
d. Purchases of branded drinking water ..... Ksh. 20,000/=
e. Purchase of flowers and paying of coloured eulogies ..... Ksh. 42,000/=
f. Purchase of coffins, hiring hearse and lowering gear ..... Ksh.46,000/=
g. Motor vehicle search ..... Ksh. 550/=

Total

Ksh.325,550/=

6. The Respondents set forth the particulars of negligence of motor vehicle registration number KCM 897T. They sought general damages under the Law Reform Act and the Fatal Accidents Act, as well as damages for loss of consortium.

7. It was pleaded that the deceased was survived by a widow and two children, aged 13 and 7 years. The deceased, aged 46 years at the time of his death, was described as a businessman

and college tutor, leading a happy and vigorous life prior to the accident. It was further pleaded that he suffered excruciating pain before his demise.

8. The Appellants filed a defence dated 08.02.2023, in which they denied driving the motor vehicle recklessly or negligently as alleged. They instead attributed the occurrence of the accident to the negligence of the deceased, setting out particulars thereof in their defence. The particulars of negligence pleaded were rather hilarious and peculiar, alleging that the deceased was walking on the highway instead of areas reserved for pedestrians, and further, that he failed to take due care for his own safety and had hung onto a moving motor vehicle at the time of the accident.

Evidence

9. The first Respondent testified first, and the court permitted cross-examination of the witnesses. She stated that she was the widow of the deceased and produced exhibits 1 to 19 in support of her case. She testified that she was below forty years of age and had lost consortium as a result of the deceased's death.

10. Upon being recalled for cross-examination, she stated that the deceased was a part-time lecturer at Kisii University and also had a letter of engagement from Angelic Teachers College. She conceded that she did not have an official letter

of permanent employment or any payslips, but only the contract of service. She also produced the deceased's academic certificates.

11. Regarding funeral expenses, she testified that there were no external contributions toward the burial. She denied the assertion that the deceased was engaged in the sugarcane business.

12. On re-examination, she stated that the deceased was a motivational speaker, writer and a part-time teacher in schools colleges(sic). She stated that the deceased was doing consultation and was heading to Keroka from Riosinde Secondary School.

13. The second witness is not named. However, from the anecdotal evidence, he was Robert Gesage Abuga Ticha. He stated that he recorded a statement dated 30.11.2022. He blamed the motor vehicle. On being recalled for cross examination he stated that he was a businessman in Keroka and witnessed the accident occurred. He stated that someone was walking off the road from Kisii direction to Keroka. He stated that the back door opened all of a sudden and hit him on the chest and he fell on the road. He testified that he had recorded a statement dated 30.11.2022, in which he attributed blame for the accident to the motor vehicle in question.

14. Upon being recalled for cross-examination, he stated that he was a businessman in Keroka and that he witnessed the accident as it occurred. He narrated that a person was walking off the road from the Kisii direction towards Keroka, when the rear door of the vehicle suddenly opened, striking the pedestrian on the chest and causing him to fall onto the road.

15. On defence hearing, Mathias Kipyegon Rono testified that he was driving the accident motor vehicle when he heard that he had hit someone from behind. He testified that upon looking through the side mirror, he saw someone lying on the ground. He stated that he was unable to alight from the vehicle as members of the public were baying for his blood. He thereafter parked the vehicle and reported the incident to the police.

16. He maintained that he did not see himself hitting anyone, and that the door had been properly locked and was firm prior to the incident. He stated that he only heard a bang, but did not hit anyone from the front. He further explained that he did not know what caused the bang, although he later saw someone lying on the side of the road. He added that he ordinarily locked the door whenever he was delivering goods.

17. DW2 was PC Kiserera attached to Kisii Police Station, undertaking traffic duties. He stated that the accident

occurred. The driver failed to keep on the left side and hit a pedestrian off the road. The OB recorded that the vehicle veered off the road and hit a pedestrian. On re-examination, he stated that the pedestrian was walking on the left side of the road, facing Kisii Town from the Keroka direction.

Submissions

18. The appellant filed submissions dated 3.09.2029 stating that the court relied on wrong principles in finding a sum of Ksh. 60,000/= as a multiplicand. The court was urged to use the minimum wage or global award. Reliance was placed on the case of **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] KEHC 5958 (KLR)**.

19. They also relied on the case of **Kimilili Hauliers Limited V Maurice Msindano Musungu** (Suing as Dependant of Jackson Odhiambo Okoth Deceased) [2012] KEHC 4511 (KLR), where A. Mshila, held as follows:

> The court also concurs with the Respondents submissions that no employer gives casual employees payslips and that the trial magistrate correctly addressed and issue of the multiplicand by finding that in the absence of evidence as proof of income the Government minimum wage guideline for unskilled labourers set by the Ministry of Labour be applied.

20. They also relied on the case of **Enyamira Tea Farmers Sacco V Wilfred Nyambati Keraita** (suing as the personal representative of) Mary Nyaboke Keraita- Deceased [2011] KHC 3253 (KLR), where Asike-Makhandia J, as he then was, held that:

> **In the absence of proof of income, the trial magistrate ought to have reverted to the Regulation of wages (General Amendment Order 2005) and which came into force on 1st April, 2004. It is to be noted that the judgment herein was crafted and delivered on 30th March, 2005. Using this as a guideline, the magistrate should have settled for a round figure for Kshs. 4,000/= as the multiplicand.**

21. It was further submitted that the court erred in relying on an unverified contract which was not an employment contract. The respondent did not even produce a salary, revenue returns. The court was urged to use the minimum wage as Regulation of wages (General Amendment Order 2022). It was their case that the court ought to have taken into consideration vicissitudes of life as held in the case of **Leonard O. Ekisa & another v Major K. Birgen [2005] KEHC 2214 (KLR)**.

22. Regarding funeral expenses the appellant submitted that funeral expenses ought to be modest. A figure of less than

100,000/= could have sufficed. Reliance was placed in the case of **Ndeti Muli & 2 others v Hogla Mkando Omari & another (Both suing as representatives of the Estate of Francis Mwatembo Mulonza) [2019] KEHC 11336 (KLR).**

23. On liability, they stated that the deceased was standing on the verge of the highway. This fact did not come out of any witness evidence.

24. The Respondent filed submissions dated 6.11.2024 by which it was submitted in material that the findings of the lower court were correct and should be upheld.

Analysis

25. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

26. This court's jurisdiction to review the evidence should be exercised with caution. In the cases of **Peters vs Sunday Post Limited** [1958] EA 424, the court therein rendered itself as follows:-

> "It is a strong thing for an appellate court to differ from the findings on a question of fact, of the

> judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

27. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** this principle was enunciated thus:

> "…this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court … is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect…"

28. The first question is liability. It is not easy to understand the case of the appellant. They seek to recant the appellant's case. It is important to note that the duty of the court is not limited to regurgitating evidence. The court has a duty to enlighten the ignorant. Knowledge is an invaluable gift, and part of that gift lies in sharing it, whether by offering information, advice,

or skill, to empower others. Ignorance may sometimes appear blissful, but there exists both a moral and legal duty to dispel it, particularly where ignorance may lead to harm.

29. In this case, the 2nd Appellant stated that he did not know the cause of the "bang." Yet, the outcome of that bang was the death of the deceased. Although he claimed not to know what happened, he was informed by DW2 that the accident occurred when he, the 2nd Appellant veered off the road and fatally hit the deceased.

30. The Appellants cannot now be heard to recant their own evidence. PW2, on the other hand, witnessed the occurrence of the accident, and his testimony was neither challenged nor discredited. There was equally no evidence to suggest that the deceased in any way contributed to the accident. The burden of proving contributory negligence lay with the Appellants, and they failed to discharge it. Liability cannot exist in the absence of fault. In the case of **Kiema Muthuku v Kenya Cargo Handling Services Ltd** (1991) 2 KAR 258, the court of appeal posited as doth:

> *There is, as yet, no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.*

31. On the aspect of contributory negligence, California Supreme Court, stated as follows in the case of **MacDrugall App V Central Railroad Co. Rbr 63 Cal 431**:

> "In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

32. In the comparative jurisprudence in the case of **Calvin Grant V David Pareedon et al** Civil Appeal 91 of 1987, Theobalds J enunciated as follows; -

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

33. However, in this case, there was no scintilla of evidence to suggest that the deceased contributed in any way to the occurrence of the accident. The uncontroverted testimony of PW1 and DW2 established that the accident was wholly occasioned by the recklessness of the second Appellant. Consequently, the appeal on liability is devoid of merit and is hereby dismissed.

34. We now turn to the award of damages. This is limited only to damages under the Fatal Accidents Act. The aspect of loss of expectation of life and pain and suffering are not subject of the appeal. It must be remembered that damages are at large and are not a mathematical exercise. Where the deviations in the overall award are minimal, the court will not interfere with the award under the various heads, except for special damages that require specificity. In **Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others** (2019) eKLR , Justice D.S. Majanja held as doth:

> **"General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would, as far as possible, be compensated by comparable awards, but it must be recalled that no two cases are exactly the same."**

35. In any case the same are minimal. The award of Ksh. 20,000/= for a person who died on the spot is proper. The award for loss of expectation of life was a sum of Ksh. 150,000/=. This was proper for a 46-year-old who had almost half his life ahead of hm.

36. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry and the economy. In the case of **H. West and Son Ltd v. Shepherd [1964] AC.326** (supra), it was stated that:

> …but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional…

37. Under loss of dependency, the court will address two aspects, that is, the multiplier and the dependency ratio. Courts are not compelled to adopt multiplier method in cases where the exercise is a grope in the dark; speculation on the important aspects of lost years or dependency. This was well

stated by Ringera J (as he then was) in the case of **Kwanzia Vs Ngalali Mutua & another** that:

> "The Multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known 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."

38. Regarding dependency, George Dulu J, in the case of **Leonard O. Ekisa & another v Major K. Birgen [2005] eKLR**, stated as follows:

> With regard to dependency, I have to rely on the case of 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-
>
> "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."

The learned Judge went further to state on the same page that -

"I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track. If I may say with admiration, such was the appellate bench in Bor – vs- Onduu [1982- 1992] 2 K.A.R. 288"

39. To be able to set aside damages, the court cannot do so arbitrarily or capriciously. There are set parameters for setting aside an award of damages. In the case of **Jane**

Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> **In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the grounds of excess or insufficiency.**

40. The court cannot base an appeal decision on conjecture, hyperbole, and surmises. The court cannot pick a figure arbitrarily. The duty of the court regarding damages is settled, and the state of Kenya's economy and the people generally, as well as the welfare of the insured public, must be at the back of the mind of the trial court. In the case of **Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR**, Keller JA stated the following regarding the award of damages.

> "This court has declared that awards by foreign courts do not necessarily represent the results that should prevail in Kenya, where the conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision, and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil

> Appeal 29 of 1982 (Law, Potter & Hancox JJA)March 30,1983. The general picture, all the circumstances, and the effect of the injuries on the person concerned must be considered.
> The fall in the value of money generally and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling must be taken into account.
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
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> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

41. Finally, in deciding whether to disturb the quantum given by the lower court, the court should be aware of its limits. As an exercise of discretion, it should be done judiciously and conclusively in circumstances to ensure that the award is not too high or too low to be an erroneous estimate of damages.

42. The court of appeal pronounced itself succinctly on these principles in **Kemfro Africa Ltd Vs. Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27** as follows: -

> The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

43. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is **Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713** at paragraph c, where the learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> **"The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."**

44. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. In the case of **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR** the court stated as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Ksh,.18,000/= per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the Fatal Accidents Act.

45. The court then has to juxtapose the facts with the law. The court found that the deceased was earning 60,000/=, and a multiplier of 14 years was applied. The question is whether the multiplier of 14 years is excessive. The second one is whether the multiplicand of Ksh. 60,000/= was excessive. The two children are 13 and 7 years. The widow was said to be under 40 years. The widow was according to the record, born in

1981, hence 40 years in 2021. A multiplier of 14 years in the circumstances is not inordinately high.

46. The next question is whether a sum of Ksh. 60,000/= was proper. I have read the entire record and I am unable to find the basis for award of Ksh. 60,000/= as a multiplier. The court did not consider the evidence of DW3. It is important to rule one way or another whether the said evidence is credible. Without such a finding, the High Court is left at a deep blue sea. The court is then left to determine the same. In that connection, the court of appeal has guided us. In the case of **Sugut v Jemutai & 3 others** (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> "I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual findings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any

> particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

47. So what was the evidence in the court below? The death certificate indicated that the deceased was a businessman. However, the only evidence of business was a contract dated 1.2.2018 from Angelic Teachers College. The deceased had a Bachelor of Arts degree from the University of Nairobi. He had results for masters where he was to resit. There appears to have been a scholarship for MBA.

48. The purported contract dated 1.02.2018 was a contract for a site plan, where the deceased was to execute a contract in 2 weeks. He was to develop a site plan, architectural plans in respect of a two story building with a swimming pool included. This was not a contract for services but contract of services. It is in short, not a contract of employment.

49. The business name registered as Bedaquip Technology Solutions was registered in 2010. There appeared to be a letter from Mathare Training Centre. DW3 found the letter to be fictitious. It is no wonder that the respondent only stated that the deceased was a businessman. There were no payslips or account numbers showing income. It cannot be true that

the deceased was employed. It was that the deceased was doing odd jobs and was not in employment. There was no evidence of a business.

50. Consequently, the award of Ksh 60,000/= is set aside as it is not based on fact. The letter from Kisii University College is dated 2011. It is not evidence of employment. When a party wishes to prove employment or business, it is their duty to tender such evidence. In the circumstances, dependency could not be based on the multiplier multiplicand approach. I say so because a minimum wage could not equally apply in the absence of evidence of employment and earning. As was held by Ringera J, (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993**:

> *...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."

51. Based on the foregoing dispositions, it is the finding of this court that the lower court ought to have applied the global sum approach which was the most suitable approach for finding loss of dependency in the circumstances of this case. I am unable to interfere with the discretion of the lower court. I am fortified by the reasoning of the court in the case of **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR** as follows;

> **On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment**

on loss of dependency under the Fatal Accidents Act.

Special Damages

52. The appeal on special damages was to the effect that the amount claimed was not proved. The court has perused the record. The first document was a handwritten receipt issued by Ms. Nyagaka & Company Advocates on 25.05.2022. The other is a letter titled receipt purporting to be from 360 Hotel. It is not a receipt in a manner of speaking. There is also a delivery invoice number 300. Another hand filled receipt from Fair Springs dated 16.6.2021 for Ksh 20,000/=. A receipt from Haradianne Services dated 15.06.2021 for Ksh.46,000/= for coffin, lowering gear, and hearse. A quotation from Sunlex for Ksh.42,000/=. A receipt for Ksh. 550/= was produced for an official search.

53. Cost of letters of administration was actually lawyer's fees. The respondent is at liberty to agree on any amount of fees with his lawyer. However, if ever the amount was payable, it is the fees paid to court. None was provided in evidence. In any case, this was a payment that was giving the respondent title to claim. The amount of legal fees is not recoverable. A sum of Ksh. 35,000/= is therefore set aside.

54. The other aspect was catering services of Ksh. 150,000/=. Before the court deals with the issue of whether the amount is payable, the court must deal with whether the receipt was proved. The document is fictitious. What constitutes a receipt

is circumscribed under the VAT Act. A letter of this kind is not a receipt.

55. The second one was branded water for Ksh. 20,000/=. The same may or may not be true. However, these were hotel services that are not germane to the burial of the deceased. They are not *sine qua non* to the burial. Purchase of flowers and paying of coloured eulogies were not separated. Burial expenses were placed separately from each other. Eulogies are foreseeable. However, five star services are not foreseeable. The sum of Ksh. 42,000/= is consequently set aside.

56. The receipt for Ksh.46,000/= is correct and proved. The expenses that were germane to the burial were funeral expenses of Ksh. 30,000/=, purchase of coffin and hiring hearse and lowering gear for Ksh.46,000/=. The wreaths services are part of burial and as such a sum of Ksh 20,000/= is reasonable.

57. One of the aspects the respondents forgot is that this burial occurred in 2021. There was a general moratorium on catering and disco matanga as part of the Covid-19 protocols. It is thus not possible that some immense catering took place. In any event parties are entitled to mitigate losses by not engaging in extravagant expenses.

58. The respondent has a duty to mitigate losses. The respondent cannot incur unreasonable expenses and expect to

recover the same. Not every expense incurred in carrying out burial is a reasonable expense. In the case of **African Highland Produce Limited v John Kisorio [2001] KECA 364 (KLR),** the Court of Appeal [Tunoi, Owuor & Keiwua JJ A] held as follows;

> It is manifestly clear that the plaintiff did not take reasonable steps to mitigate the loss which he sustained consequent upon the accident. Being a man of considerable means he could have within 21 days, repaired his BMW car instead of incurring unnecessarily heavy hire charges. He did not act prudently. A prudent man would certainly not have acted in the way the plaintiff did. He acted, in our view, unreasonably. The learned judge was in error to allow the plaintiff any loss of user for more than 21 days. The plaintiff is entitled only to the loss of user for 21 days which period was necessary to effect in full all repairs on the BMW car. There was no justification whatsoever in law to allow him to enjoy and to harvest from an illegal territory.

59. The Court of Appeal [Makhandia, Ouko & M'inoti, JJ.A] in **Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited** [2016] KECA 56 (KLR), held as follows:

> We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved. Further the facts in that case are clearly distinguishable from the facts of this case. ..

> We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. However, the claim herein did not fall in that class.

60. In **Premier Diary Limited v Amarjit Singh Sagoo & another** [2013] KECA 95 (KLR), the court of appeal stated as follows:

> We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Ksh. 400,000/= was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Ksh. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that

sum without in any way breaching the general rule we have referred to on the issue of special damages.

61. In the case of **Jacob Ayiga Maruja & another v Simeon Obayo** [2005] KECA 202 (KLR), the Court of Appeal [Omolo, Tunoi & Githinji, JJ.A] stated as follows:

> What has caused us some considerable difficulty is the award of Shs.117,325/= as special damages arising out of funeral expenses. That is the complaint in ground three of the memorandum of appeal. Of that sum Shs.4,000/= was claimed as the cost of the coffin, Shs.5,000/=, was claimed as mortuary bill and Shs.106,850 as funeral expenses. There was another Shs.1,475/= claimed in respect of the filing of an application for letters of administration. We think the claim for Shs.4,000/= as cost of the coffin and Shs.5,000/= as mortuary fee were reasonable in all the circumstances of the case though one would think receipts for these could have been produced. But we are not prepared to differ with the Judge on these items. What is particularly worrying to us is the award of Shs.106,850/= as funeral expenses. The respondent who is a church pastor produced a receipt from the Kakamega Town PEFA Church showing that he had received from that church Shs.115,850/= for the purpose of:
>
> "Supplying food & materials for Thomas Ndanny Obayo Funeral" and in his evidence, he said the money was a loan to him and he had to refund it. The materials to be bought or paid for must have been the coffin, (Shs.4,000/=), the mortuary bill

> (Shs.5,000/=), transportation of the body from Kakamega to its place of interment and so on. We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on.

62. The alleged funeral expenses were exceedingly high. The purported supply of food is, in the court's view, wholly misconceived. An award of Kshs. 30,000/= towards funeral expenses, though not specifically supported by evidence, would constitute a reasonable allowance in the circumstances. However, a claim of Kshs. 150,000/= for food is manifestly excessive and cannot be deemed reasonable.

63. Though the parties did not address the issue, it is a matter of local notoriety that Legal Notice No. 129 of 2020, the *Public Health (COVID-19 General Safety) Regulations*, was in force at the material time. The court takes judicial notice that on 17th June 2021, the Ministry of Health declared thirteen counties, including Kisii County, as COVID-19 hot zones. Pursuant thereto, funerals were required to be conducted within 72 hours and attendance was limited to a maximum of fifty persons.

64. There is no stretch of imagination under which such an elaborate celebration could have taken place in the face of the prevailing COVID-19 regulations. Consequently, apart from the amount being manifestly unreasonable, the claim is not credible. For lack of a better term, the alleged expenses appear fictitious and were never incurred. It was, in essence, a failed attempt to reap where they had not sown. Moreover, hotels are not in the habit of issuing fictitious receipts of the nature produced in evidence. Hotels are statutorily obligated to issue Electronic Tax Register (ETR) receipts reflecting the catering levy and VAT paid. Back street receipts, like the paper produced, alleging to be from 360 Hotel, bring shame to the dispensation of justice.

65. It must be borne in mind that, in matters relating to burial, not all expenses incurred are refundable. Only those legitimately expended to facilitate the actual burial qualify for reimbursement. Where a family elects to provide hotel or hospitality services, such costs cannot properly be classified as funeral expenses. Even where substantial sums are shown to have been spent, they must bear a proximate relation to the interment of the deceased and not amount to a display of affluence. This principle extends to items such as the coffin. For instance, if a party were to expend Kshs. 1,000,000/= on a coffin, such expenditure would not be deemed reasonable. Extravagance or wastage can never constitute part of

refundable expenses. I have no difficulty setting aside the sum of Ksh. 150,000/= as unreasonable.

66. Special damages for motor vehicle search Ksh. 550/= were proved. The court therefore awards a sum of Ksh. 96,550/= made up as follows:

a. Funeral expenses .... Ksh. 30,000/=
b. Flowers and wreaths ..... Ksh. 20,000/=
c. Purchase of coffins and hiring hearse and lowering gear ... .. Ksh.46,000/=
d. Motor vehicle search .... Ksh. 550/=

Total

Ksh.96,550/=

67. In the circumstances, the appeal is allowed. The next question is costs. The issue of costs is governed by Section 27 of the Civil Procedure Act, which provides as follows:

> **(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full**

> **power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**
>
> **(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

68. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

> **It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.**

69. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of **Jasbir Singh**

Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

70. The foregoing clearly demonstrates that the appeal has largely succeeded, save for the issue of liability. In

accordance with the principle that costs follow the event, the appellant shall be entitled to costs assessed at Kshs. 155,000/=.

Determination

71. In the upshot, I make the following orders: -

a) The appeal on liability is dismissed.
b) Appeal on special damages is allowed. The sum of Ksh. 325,550/= is set aside. In lieu thereof, judgment of Ksh. 96,550/= is entered.
c) Appeal on loss of expectation of life is dismissed.
d) Appeal on the loss of dependency is allowed. The award is set aside and replaced with a sum of Ksh. 2,500,000/=.
e) Appeal on pain and suffering is dismissed.
f) 30 days stay of execution.
g) Costs of Ksh 155,000/= to the appellant.
h) The respondent will have costs in the lower court.
i) File is closed.

DELIVERED, DATED and **SIGNED** at **NYERI** on this **23rd** day of **October, 2025**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellants

Mr. Nyariki and Mr. Nyagaka for the Respondents

Court Assistant – Michael