REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CIVIL APPEAL NO. E009 OF 2023

BETWEEN

BADAR HARDWARES LIMITED…….....1ST APPELLANT

SAMUEL ALEXANDER MUKANDI……2ND APPELLANT

AND

MONICA NTHENYA KIOKO

& KASYA KATUMO KETI (suing as legal representative of the estate of BENJAMIN KIOKO KASYA-DECEASED) ……. RESPONDENTS

(Being an appeal from the judgment and decree in the Kilungu Principal Magistrate's Court, PMCC No. E100 of 2021 by Hon. F. Makoyo (Principal Magistrate).

JUDGMENT

1. Badar Hardwares Limited and Samuel Alexander Mukandi were the defendants in Kilungu Principal Magistrate's PMCC No. E100 of 2021. They were sued for a claim of general and special damages following a road traffic accident involving their motor vehicle, with registration number KBS 954S, and the deceased, who was a pedestrian. As a result of the accident, the deceased suffered fatal injuries. The Parties entered into a consent on liability. The appellant was to bear 70% of the liability, while the respondent was to bear 30%. The respondent was awarded Kshs. 1,520/= in special damages and Kshs. 2,145123.80 general damages before apportioning liability.
2. The appellants were dissatisfied with the judgment and filed this appeal through Macharia Burugu & Company Advocates. They raised the following grounds for appeal:
    a) The learned magistrate erred in law and in fact in failing to give weight to, fathom or to consider the appellant's written submissions and authorities.
    b) The learned magistrate erred in law and fact in assessing damages excessively.

c) The learned magistrate erred in law and fact in using an excessive multiplicand and multiplier.

3. The respondent opposed the appeals through Gesare Oginda & Company Advocates. They filed a cross-appeal, but during submission, they opted not to submit about it. I therefore understood this to mean that they had abandoned the same.
4. This Court is the first appellate court. I recognize my duty to assess all the evidence on record, considering that I did not have the advantage of observing the witnesses testify and noting their demeanour. I will be guided by the decision in the case of **Selle vs Associated Motor Boat Co. Ltd. [1965] E.A. 123**, in which it was held that the first appellate court must reconsider and evaluate the evidence presented before the trial court, assess it, and draw its conclusions in the matter.
5. The respondent was a passenger in the respondent's bus. He was travelling with his father, who testified to an accident around the Sultan Hamud area. He blamed the bus driver for the accident. The respondent did not testify. **In Baker vs Market Harborough Industrial Co-Operative Society Ltd [1953] 1 WLR 1472 at 1476,** Denning L.J. (as he then was) observed inter alia as follows:

   Every day, proof of collision is held to be sufficient to call on the defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the court would unhesitatingly hold that both were to blame. They would not escape liability simply because the court had nothing by which to draw any distinction between them…
6. The appellants did not tender evidence. The learned magistrate did not have any other version for consideration. They cannot be heard to claim that the liability was incorrectly determined. The appeal on liability is dismissed.
7. The appellant argued that the learned magistrate made an error in awarding excessive general damages. Before an appellate court can intervene in an award of damages, it must be satisfied that a wrong principle of law was applied, irrelevant factors were considered, relevant factors were omitted, or the award is inordinately low or high. These principles were established by the Privy Council in **Nance vs British Columbia Electric Railways Co. Ltd. [1951] AC 601 on page 613,** where it stated:

   The principles applicable under this head are not in doubt. Whether the assessment of damages is made by a judge or jury, the appellate court is not justified in replacing the

awarded figure with another simply because it would have provided a different amount if it had initially tried the case. Even if the tribunal of first instance was a judge sitting alone, the appellate court must be satisfied that the judge, in determining the damages, applied an incorrect principle of law (such as considering irrelevant factors or omitting relevant ones); or, failing this, that the amount awarded is so inordinately low or high that it constitutes a wholly erroneous estimate of damages (Flint vs Lovell [1935] 1KB 354), as affirmed by the House of Lords in Davis vs Powell Duffryn Associated Collieries Ltd. [1941] AC 601.

8. The deceased died aged 43 years. The retirement age is 60 years. There was no proof of earnings by the deceased. When a similar issue confronted Ringera J. (as he then was) opined, in **Mwanzia vs. Ngalali Mutua and cited D.M.M (Suing as The Administrator and Legal Representative of The Estate of L K M vs. Stephen Johana Njue & another [2016] eKLR** as follows:

   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 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.

9. In the instant case, since the earning was not proved, the trial court ought to have used the global award approach. The award, in my view, was high in the circumstances. The same is set aside and substituted with a global sum of Kshs. 1,500,000.00.
10. The awards in the other heads were not contested.
11. The appeal has been partially successful, as indicated in paragraph 8 above. The respondent will bear half the costs of this appeal.

Delivered and signed at Makueni, this 14th day of November 2025

KIARIE WAWERU KIARIE

JUDGE