Moses Makori Osiemo & Leonard Ombati Osiemo (Suing as the Legal Representative of the Estate of Florence Kemunto - Deceased) v Okemwa (Civil Appeal E129 of 2024) [2026] KEHC 662 (KLR) (26 January 2026) (Judgment)

Neutral citation: [2026] KEHC 662 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E129 OF 2024

DKN MAGARE, J

JANUARY 26, 2026

BETWEEN

MOSES MAKORI OSIEMO AND LEONARD OMBATI OSIEMO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FLORENCE KEMUNTO - DECEASED) ..... APPELLANT

AND

ABIGAEL MORANGI OKEMWA ..... RESPONDENT

(Being an appeal from the Judgment and decree given in Kisii CMCC E593 of 2023- given on 25.06.2024 by Hon. Stella Abuya -CM)

JUDGMENT

1. This is an appeal from the Judgment and decree given in Kisii CMCC E593 of 2023- given on 25.06.2024 by Hon. Stella Abuya -CM. The Appellant is the legal representative of the estate of Florence Kemunto (deceased) who was the plaintiff. After hearing the parties, the court entered judgment as follows:

    a. Liability - against the Respondents at 100%

    b. Pain and suffering – Kshs. 20,000/=

    c. Loss of expectation of life – Kshs. 100,000/=

    d. Damages under *Fatal Accidents Act* – Nil

    e. Special damages – Kshs. 50,550/=

    f. Costs and interest of the suit

2. The Appellant was aggrieved by the finding and filed the Memorandum of Appeal on 19.07.2024 on the following grounds:

    a. That the learned trial magistrate misdirected herself by awarding the ap[lellant herein in the sum of Ks. 120,000/= only.

    b. That the learned trial magistrate misdirected herself by awarding the appellant herein special damages in the sum of 50,550/= only.

    c. That the learned trial magistrate misdirected herself in failing to award any amount under loss of expectation of life.

    d. That learned trial magistrate misapprehended the authorities in awarding general damages that were inordinately low.

    e. That learned trial magistrate erred in law and descended into the arena of disputants in awarding general damages as though she spoke for the respondents.

3. The appellant prayed that the amounts be enhanced and that amounts under loss of dependency be awarded. The appellant's anger at the judgment is palpable in the memorandum of appeal and submissions. As I write this judgment, I keep wondering for whom we write them. At the end of time, it is all vanity, but writing we must. The results may please or annoy one party or another. Judgments are not for placarding parties but ensuring they are heard. Even the very well-written judgments must respect the sensibilities, especially on matters beyond our comprehension.

Pleadings

4. The Appellant filed suit via a plaint dated 27.07.2023, claiming damages arising from a fatal traffic accident involving motor vehicle registration number KAS 222E on 29.03.2023 along the Kisii- Migori road.

5. He claimed under the Fatal Accident Act and *Law Reform Act*, where he stated that the deceased had seven children listed by name under paragraph 8 of the Plaint. The Appellant contended that the deceased was 71 years of age. The suit was defended by a defence dated 28.08.2023.

6. Special damages of Ksh. 110,550 was sought, being a succession, a sum of Ksh. 50,000/=, motor vehicle search 550/=, and Ksh. 60,000/= being funeral expenses. Damages were sought both under the *Fatal Accidents Act* and the *Law Reform Act*.

Submissions

7. The respondent filed submissions dated 24.10.2025, where they reiterated the duty of the court as set out in the case of Lukenya Ranching & Farming Co-operative Society vs Kavoloto [1970] EA 414 and Kanga v Manyoka [1961] EA 705.

8. They urged the court to retain damages for pain and suffering of Ksh. 20,000/=. Reliance was placed on the case of Julius Ngobito Muriungi v John Gichunuku Mairoki [2021] KEHC 1543 (KLR).

9. They urged the court to retain damages for loss of expectation of life. Reliance was placed on the case of Mary Wanjiku Gitau & another (suing as the administrators of the Estate of Kenneth Mbugua Chege - Deceased) v Kenya Power & Lighting Co. Limited [2021] eKLR.

10. On loss of dependency, they submitted that the deceased was 71 years old, hence long past the retirement age. There was no proof of dependency or livelihood. No amount ought to have been given.

Reliance was placed on the case of Wanjiku & another (Suing as the Personal Representatives of the Estate of Joseph Njoroge Wanjiru (Deceased)) v Mwaniki & another (Civil Appeal E109 of 2023) [2025] KEHC 6712 (KLR) (6 May 2025) (Judgment). In that case Nzioka J, held as follows:

> Finally, on the issue of the proof of income of the deceased, the trial court stated as follows:
>
> 22. The plaintiff did not produce for the court's consideration proof of such earnings or even the deceased's account to demonstrate that, indeed, he was making any amount from his business. The court shall adopt the global sum approach to accord damages in this case to reach an award of Kshs. 800,000.
>
> Consequently, the judgment of the trial court is upheld save for an additional award of Kshs 80, 000 for loss of consortium.

11. The value of this decision to the appellant's argument is lost on me. Nevertheless, it is good law.

12. They further stated that the appellant should not benefit from both the *Law Reform Act* and the *Fatal Accidents Act*. They relied on a decision of Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others [2014] KEHC 8815 (KLR). The court must, at this stage, acknowledge that it was involved in the decision, as an advocate for the parties in the case, in his earlier life. The court, Majanja DAS, held as follows at paragraph 19:

> 19. As explained by the Court of Appeal, the duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, hence an award for lost years under the former Act and for loss of dependency under the latter Act will go to the same persons. This principle does not mean that the estate of the deceased should be denied damages for pain and suffering and loss of expectation of life, which are only awarded under the *Law Reform Act* for the benefit of the estate. The issue of double compensation or duplication of awards does not arise in these circumstances (see Beneta Wanjiku Kimani (suing on behalf of Estate of Samuel Njenga Ngunjiri) v Changwon Cheboi & Another NKU HCCC No. 373 of 2008 [2013]eKLR). The only award that could be duplicated is an award for lost years under the *Law Reform Act* given to the same dependants who are set to benefit under the *Fatal Accidents Act*. The learned magistrate therefore erred in failing to award damages for pain and suffering and loss of expectation of life to the estate of the deceased.

13. Further reliance was placed in the case of Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727 and Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah (2015) eKLR. They prayed that the appeal be dismissed with costs.

The Appellant's Submissions

14. The appellant filed submissions dated 8/9/2025, where they faulted the court's judgment. On damages for pain and suffering, they submitted that the deceased died on the spot. However, an amount of Ksh 20,000/= was on the lower side. Reliance was placed on the cases of Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others (2013) eklr, Kenya Power and Lighting Co Ltd v Sophie Ngele Malemba & another [2019] KEHC 10424 (KLR) and Moses Akumba & Leonard Mwalimu Mweru v Hellen Karisa Thoya [2017] KEHC 737 (KLR).

15. It was their case that the loss of expectation of life was within limits and should remain. Effectively, they abandoned an appeal on this limb.

16. On special damages, a sum of Ksh. 110,550 was said to have been proved. The court was urged to allow the same.

17. The linchpin was the limb on loss of dependency. The appellant conceded that the deceased was 71 years old and her youngest child was 35 years old. They still stated that the mere fact that the last born was 35 years does not mean that she was not dependent upon. They urged the court, based on evidence, to apply either a multiplier or a global award. Reliance was placed on the case of Albert Odawa V Gichimu Gichenji [2007] KEHC 1358 (KLR), where, Martha Koome, J, as she then was, posited as follows:

> On the issue of loss of dependency, no evidence whatsoever was adduced before the trial court on the deceased's earnings and thus the multiplicand of Kshs.8,100/= was without basis. In the absence of evidence of actual earnings of the deceased, the correct approach would have been to assess the deceased income by applying the basic salary which is paid to unskilled workers. This would also have been difficult as the age of the deceased was not stated so the best option would have been to apply the global award. In this case the age of the deceased was not indicated and, in the circumstances, I would consider the global award for the loss of the dependency and give a global sum of Kshs.400,000/=.

18. The appellant urged the court to have regard to the number of dependants, the age of the dependants, and the level of dependency. In countering, a counter-narrative[forgive the tautology] that there can be no dependency for adult sons and daughters, they relied on the case of West Kenya Sugar Company Limited & another v Wafula & another (Suing as Legal Representatives of the Estate of Alfred Namaemo Wafula) [2025] KEHC 6170 (KLR), where Limo R K J posited as follows:

> 15. In situations or cases where it is difficult to ascertain the income of a deceased person because of absence of documentary proof like pay slip, employment contract or any other evidence, the emerging jurisprudence is to award a lump sum or global sum depending on circumstances of age, social set up or any other indicator.
>
> 16. In this instance the deceased was aged 52 years. He was expected to work for another 8 years or so but even after retirement he would still be expected to offer moral and material support to his family. Taking the inflationary trend and decided cases a global award of Kshs.1.4 million in my considered view is fair.

19. Further reliance was placed on the case of Moses Maina Waweru vs Esther Wanjiru Githae (Suing as the personal representative of the estate of the late David Githae Kiriro Taiti (2022)) eKLR, where a sum of Ksh. 800,000/=was awarded to the estate of a 68-year-old deceased.

20. The court was urged to allow the appeal on the three limbs.

Analysis

21. We must, as we write, not re-ignite mourning, remind people of the eschatological reality of life, death, judgment, heaven, and hell. Even where a prayer is dismissed, it must be dealt with dignity and humility. That is why the law invented the concept of nominal damages. It is important to recognize loss, especially involving death, without being dismissive.

22. The factual matrices are not in dispute since liability is not challenged. The only question to be dealt with is whether the court erred in awarding three out of the facets of damages, that is, damages for pain and suffering, damages for loss of dependency, special damages and funeral expenses.

23. 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. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the law looks in their usual gusto, held by as follows: -

> ".. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

25. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In the case of Peters vs Sunday Post Limited [1958] EA 424, 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..."

26. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR , Justice D.S Majanja held as follows:

> "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."

27. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> "In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in

local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

28. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being an exercise of discretion, the exercise should be done judiciously, considering the circumstances, to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

29. The Court of Appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Service. 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.

30. 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 Counsel, 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..."

31. 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. So, my duty as the appellate court is threefold regarding quantum of damages:

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

32. To be able to do this, I need to consider similar injuries, take into consideration inflation, and other comparable awards. The appellant contended that the court erred both in law and fact by finding that the loss of dependency was not proved.

33. The court will deal with the three limbs in the inverse order, that is, pain and suffering, special damages, loos of dependency.

34. In respect to pain and suffering, it is conceded that the death was on the spot; in such a case, only nominal damages are granted. They range between 10,000/= to 100,000/= depending on the length of suffering and the excruciating nature of pain.

35. The damages for pain and suffering were addressed in the case of Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W Musyoka stated as doth:

13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:

> (5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

36. Thus, having regard that this amount was nominal damages, an award of Ksh 20,000/= though low, cannot be said to be so inordinately low as to amount to an erroneous estimate of damages. The appeal on this limb is therefore dismissed.

37. The next issue is the special damages and funeral expenses. The court awarded amounts for legal fees and search. However, the court declined to award damages for funeral expenses. I have my known position regarding legal fees. However, it is not one of the issues in this matter. The only issue is the failure to award funeral expenses. I have not seen the raison d'être for not awarding. It can only be discerned that the court awarded legal fees due to receipts and failed to award the funeral expenses, hopefully on the same line. This will be surprising since the question is settled and I do not expect such a position from the court.

38. Though decidedly special damages, there is no strict rule as to the funeral expenses. The appellant did not lead much valuable evidence on these expenses. However, they must have been incurred. In the case of Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR, the court stated:

> 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. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case.

39. Further, in the case of Premier Diary Limited v Amarjit Singh Sagoo & another [2013] KECA 95 (KLR), the Court of Appeal [Onyango Otieno, Azangalala & Kantai, JJ. A] addressed funeral expenses and their notoriety in Africa as follows:

> 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 Kshs. 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 Kshs. 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.

40. A sum of 60,000/= was pleaded and was reasonable. In the circumstance, I award the same.

41. The next issue is the elephant in the room, award of damages for loss of dependency. Before dealing with it, I wish to discourage idle debate about whether damages can be awarded under both the law reform and the *Fatal Accidents Act*. This debate has been put to rest for decades now. It appears the respondents are keen to resurrect the ghosts that arose in addressing the ratio decidendi in the decision of Kneller JA in the case of Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) 1982-88] 1 KAR 727. The correct and full decision is reported as [1987] KLR 30.

42. This was fully addressed by the court of appeal in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] KECA 318 (KLR), where the learned judges of appeal stated as follows:

> This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise.
>
> 21. The confusion appears to have arisen because of the different reporting of the Kenfro case (supra), which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kemfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:
>
> > 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
> >
> > 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has

the right to sue under the *Law Reform Act* in respect of the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages.

43. It is hoped that this decision lays to rest the ghosts of reduction of and reduction from. In other words, the courts will continue to consider the award under both acts in reduction of the damages awarded under the *Fatal Accidents Act*. The court will, however, not award those damages in reduction from the damages under the said Act.

44. It must be remembered that the *Fatal Accidents Act* does not limit the age of the dependants but the character. Section 2 of the *Fatal Accidents Act* defines a child as a son, daughter, grandson, granddaughter, stepson, or stepdaughter. Ipso facto, one does not cease being a child by virtue of being the age of majority. The only difference is the level of dependency. To hold that the children cannot depend on the 71-year-old mother is to stretch imagination and amend the *Fatal Accidents Act*. Put in another way, does a 71-year-old mother become so useless that her death is a good riddance?

45. Does it mean then that there is carte blanche to unlawfully cause the death of persons above the age of 60 years? There is absolutely no basis for tying human life to employment. This is a small portion of society that exchanges their freedom and time for a defined pay. Business and other income-generating activities continue beyond the age of 60.

46. The only difficulty at this age is sometimes a diminished capacity to generate income, but not that they become a vegetative state. Even pensioners earn a living and can be relied upon to contribute not only to financial stability but also to social cohesion and direction. I do not accept as the law that after 70 years, one cannot be awarded loss of dependency.

47. Section 4(1) of the *Fatal Accidents Act* provides as follows:

4. (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 be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may give such damages as it may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the persons entitled in such shares as the court by its judgment shall find and direct.

48. The question of dependency by children and the dependency of children has been addressed. There is no need to have actual proof of dependency, in the case of China Civil Engineering & Another vs Mwanyoha Kazungu Mweni & Another 2019 eKLR and Moses Maina Waweru vs Esther Wanjiru Githae (Suing as the personal representative of the estate of the late David Githae Kiriro Taiti (2022)) eKLR addressed this aspect more successfully.

49. While addressing children who have no income at all, the high court in the case of Joshua Muriungi Ng'anatha v Benson Kataka Lemureiyani [2016] KEHC 2367 (KLR) stated as follows:

> 54. In the case of Kenya Breweries Ltd vs Saro (1981) KLR 408, the Court of Appeal sitting in Mombasa stated as follows:-
>
> > In the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact."
>
> 55. Kneller, JA (as he then was) in Hassan –Vs- Nathan Mwangi Kamau Transporters & 5 Others (1986) KLR 457 made similar observation when he stated that:-
>
> > The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy (sic)at its worst."

50. There was thus evidence that the wife was dependent on the deceased. However, given that the deceased was a farmer, there may be no evidence of the actual amounts earned. But we must remember that this is Africa, and Africa is our business. It is not expected that Africans will keep records of every earning they make. This was the same position held by Kneller, JA (as he then was) in Hassan V Nathan Mwangi Kamau Transporters & 5 Others (Supra). Given a scenario where we have a 71-year-old, nominal global awards will suffice. The deceased was at the tail end of his life, with 9 years remaining to 80 years.

51. We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an 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 made 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 Manga vs Musila [1984] KLR 257)."

52. While addressing the question of global award, the court of appeal [Masime JJ A & Omolo Ag JA] in the case of Kenya Breweries Ltd v Saro [1991] KECA 12 (KLR), posited as follows;

> In our view damages are clearly payable to the parents of a deceased child, irrespective of the age of the child and irrespective of whether there is or there is not evidence of pecuniary contribution. The High Court authorities which were cited to us, such as Abdullahi v Githenye [1974] EA 110, Maurice Miriti v Feroze Construction Co Ltd HCCC No ... 1979, NRB, (unreported) and so on, all go to support the contention that damages are payable irrespective of age and such like considerations. In Abdullahi v Githinye, supra, the deceased girl was only 7 years old. Kneller, J (as he then was) awarded shs 8,000/- in 1974. In Miriti v Firoze, supra, the boy was in a nursery school. Nyarangi, J (as he then was) awarded a total of Shs 70,000/= in 1982 for loss of expectation of life. We are satisfied that the learned judge was right in awarding damages to the respondent following the death of his son and we reject

ground of appeal that the learned judge erred in holding that the respondent was entitled to claim damages under the *Fatal Accidents Act*. The respondent was entitled to do so under section 3 and 4(1) of that Act and under the authorities to which we have referred.

53. In my view, by failing to award damages for a 71-year-old is to posit that the deceased was so useless that his death was a good riddance. In cases where pecuniary contribution cannot be proved, especially for a farmer, the court must assess based on the surrounding factors. Even in his late years, the deceased could provide support that may not even cost money. The support is priceless.

54. Doing the best I can, a global award of a sum of Ksh. 800,000/= for loss of dependency will suffice. Therefore, I set aside the order dismissing the award under loss of dependency and substitute it with an award of Ksh 800,000/=.

55. 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.

56. 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.

57. 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, before, during, and subsequent to the actual process of litigation.... 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.

58. The Appellant is thus entitled to costs. A sum of Ksh. 105,000/= will suffice. The Appellant will also have costs in the lower court.

Determination

59. The upshot of the foregoing is that I make the following orders:

a. The appeal is allowed.

b. I set aside the order dismissing the award general damages for loss of dependency and substitute it with an award of Ksh. 800,000/=.

c. I set aside the order declining to award funeral expenses and award a sum of Ksh.60,000/=.

d. The appeal on pain and suffering and loss of expectation of life is dismissed.

e. This works out as follows:

a. 100% liability against the Respondent

b. general damages for loss of dependency Ksh. 800,000/=.

c. Loss of expectation of life of Kshs. 100,000/=.

d. Special damages 50,550/=

e. Pain and suffering Ksh 20,000/=.

f. Funeral expenses Ksh 60,000/=

Total 1,030,550/=.

f. Costs and interest of the suit in the lower suit shall go to the Appellant.

g. Costs of Ksh. 105,000/= to the appellant for the appeal.

h. 30 days stay of execution.

i. 14 days right of appeal.

j. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 26TH DAY OF JANUARY 2026. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

Represented by:-

Mr. Gachihi for the Appellant

Ms. Munji for the Respondent

Court Assistant – Michael