REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MERU

CIVIL APPEAL NO. E204 OF 2023

PATRICK MUSYOKI NZAU………………………………………1ST APPELLANT

PASHA ENTERPRISES LIMITED……………………………2ND APPELLANT

VERSUS

BISHARO ALI HASSAN & RUKIA ADDULAHI (Suing as the Legal Representatives of the estate of Ali Hassan Boru)……………………………………………………………………RESPONDENTS

(Being an Appeal from the Judgment of Hon. L. Mutai (C.M) in Isiolo CMCC No. 49 of 2015 delivered on 24th of October, 2023)

JUDGMENT

1. This Appeal arises from the judgment of the learned Chief Magistrate Hon. L. Mutai delivered on 24.10.2023 in Isiolo Civil Suit No. 49 of 2015 wherein judgment was entered in the following terms;

1. Liability 100%
2. Pain and Suffering Ksh. 30,000
3. Special Damages Ksh. 30,000
4. Loss of Expectation of Life Ksh. 100,000
5. Loss of Dependency (Ksh. 52,500 × 12 × 25 × $^{2}/_{3}$) = Ksh. 10,500,000

2. Aggrieved by the said Judgment, the Appellants set forth the following grounds in the Memorandum of appeal dated 13th November, 2023;
   1. The learned magistrate erred in fact ended up misdirecting herself in awarding exorbitant quantum of damages of Ksh. 10,660,000/= for pain and suffering, loss of dependency and loss of expectation of life by failing to appreciate and be guided by the prevailing range of comparable awards, the age of the deceased, the deceased's dependants and vicissitudes of life.
   2. The learned magistrate erred in fact and law by issuing a conflicting decision that is erroneously higher than the decision that had been made previously by the same court with similar jurisdiction.
   3. The learned magistrate erred in law and fact by disregarding the proceedings of the court and the judgment/orders that had been issued therein on the same subject matter, issued by a magistrate of similar jurisdiction.

4. The learned magistrate erred in law and fact in the manner she apportioned liability at 100% against the appellants which was against the weight of the evidence adduced.
5. The learned magistrate misdirected herself into using wrong principles in the assessment of loss of dependency and the multiplier applicable and thus awarding sums that are inordinately high in the circumstances.
6. The learned magistrate erred in law and fact in not finding that the respondent failed to prove liability on the part of the appellants.
7. The learned magistrate erred in law and fact in failing to analyze the evidence adduced by the appellants.
8. The learned magistrate erred in law in making such a high award as to show that the magistrate acted on a wrong principle of law.
9. The learned magistrate’s award on general damages was so high as to be entirely erroneous.
10. The learned magistrate’s award for general damages was made without considering the evidence before the Court and failed to appreciate the age of the deceased, dependants and the profession of the deceased, and authorities on comparable awards and hence ended up making an excessive award.
11. The assessment and award on damages is manifestly excessive and inordinately high.
12. The learned magistrate erred in law and fact by awarding damages that were inordinately high.

13. The whole judgment and award on damages was against the evidence before the court.

Oral evidence

3. **PW1 Bisharo Ali Hassan**, one of the Respondents herein, adopted her witness statement dated 23/6/2015 as her evidence in chief, and produced the documents filed therewith as exhibits. She told the court that the vehicle the deceased was travelling in was involved in an accident, which she did not witness.
4. **PW2 PC Charles Mwita**, told the court that he was not the investigating officer in this case, and the driver of the accident motor vehicle could not be charged because he escaped.
5. **PW3 Amos Maingi** adopted his statement dated 5/10/2021 as his evidence in chief. He told the court that he was traveling with Adan and Hassan Ali in Motor Vehicle Registration No. KBS 967 N, when a trailer that had lost control, hit them. They had stopped by the road side when their vehicle was hit by the trailer, and the driver of the trailer was charged but he absconded.
6. **PW4 Sheikh Debaso Ali**, the secretary of Supkem, Isiolo, affirmed that the deceased worked as a Programme Officer at Supkeme Council from 2012 to the time of his death, and he produced the payslip of the deceased as proof thereof.

Submissions

7. The Appellants did not file any submissions.
8. The Respondents, through the firm of Kiautha Arithi & Co. Advocates, filed submissions dated 8/11/2025, citing ***Abok James Odera & Associates v John Patrick Machira T/A Machira & Co.***

Advocates (2013) eKLR, on the duty of a first appellate court. Counsel submitted that the death of the deceased on the same day cannot be construed to mean that he experienced no pain, and cited ***Sukari Industries Ltd v Clyde Machimbo Juma (2016) eKLR, Catholic Diocese of Kisumu v Sophia Achieng Tete [2004] eKLR and Abass v WGH (Suing as the administrator of the estate of WGH Deceased) [2023] KEHC 18019 (KLR)***. Counsel contended that the award of Ksh. 100,000 for loss of expectation of life reflected a structured and conventional computation, anchored in evidence and guided by settled principles, and cited ***Halake v PK alias PK (Suing as the Administrator of the Estate of BGM Deceased) [2023] KEHC 18914 (KLR) and Beatrice Wangui Thairu v Hon. Ezekiel Bangetuny & Another Nairobi HCC No. 1638 of 1988 (UR)***. Counsel submitted that the assessment of damages for loss of dependency was sound, consistent with judicial practice and reasonable, and cited ***Rukwaro & another v Maina [2025] KECA 177 (KLR) and James (Suing as the Legal Representative of the Estate of James Kayongi King'ori) v M'Mbirithi & another (Civil Appeal E033 of 2024) [2025] KEHC 10642 (KLR)***.

Analysis and Determination

9. This being a first appeal, the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and draw its own conclusions on the same.

10. In ***Selle & another v Associated Motor Boat Co. Ltd [1968] EA*** the court held 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 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."

11. I have considered the appeal herein, the trial court's judgment which is the subject of this appeal as well as the submissions on record.

12. The issues for determination therefore are whether apportionment of liability at 100% was proper and whether the awards made by the trial court were manifestly exorbitant.

13. The general rule is that a trial court's apportionment of liability should not be interfered with except in exceptional cases, since it is an exercise of discretion. In ***Khambi and Another v Mahithi and Another [1969] EA 70***, it was held thus: ***"(i) An apportionment of liability made by a trial Judge will not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous (Brown v. Thompson (3) and Shariff v. Shethna (2) followed; (ii) the trial Judge had taken into account all material facts and considerations and his apportionment should not be disturbed and an appellate court will not***

consider itself free to substitute its own apportionment for that made by the trial Judge."

14. With respect, the consent on liability recorded by the parties on 14/3/2017, was effectively set aside when the matter commenced afresh.

15. The Respondents pleaded that the deceased was travelling as a lawful passenger in motor vehicle Registration No. KBS 962 N when the 1st Appellant so negligently drove motor vehicle registration No. KBT 715 T that it veered off its lane and fatally hit the deceased. PW3, an eye witness therein, corroborated those averments, when he stated that, ***"We were in motor vehicle registration KBS 967 N. We were hit by a trailer that had lost control. We had stopped the vehicle by the road side when our motor vehicle was hit. The accident was very fast. The trailer found us off the road on its opposite side."***

16. In the absence of any rebuttal by the Appellants that the deceased was contributorily negligent, I am satisfied that the Appellants were wholly to blame, and trial court's apportionment of liability was proper.

17. The principles to be considered by an appellate court in deciding whether to disturb the trial court's assessment of damages were set out by the Court of Appeal for East Africa in the *locus classicus* case of ***Butt v Khan [1978] eKLR*** thus; ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong***

principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.”

18. On pain and suffering, the 1st Respondent recorded in her statement that, ***“I went to the scene and found out that my husband was one of those who had been involved in the accident and had been rushed to Isiolo general hospital and later to Matta hospital and later to Kiirua hospital where he passed away at around 8.30 p.m even before he was admitted.”***

19. Having regard to the considerable, albeit brief, pain and suffering endured by the deceased before his demise, I find that the sum of Ksh. 30,000 was warranted.

20. On loss of expectation of life, it is trite that the conventional figure awardable under this head is Ksh. 100,000, which is what the trial court awarded.

21. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency were extensively dealt with by Ringera, J *(as he then was)* in ***Marko Mwenda v Bernard Mugambi & another Nairobi HCCC No 2343 of 1993*** that: ***“In adopting a multiplier the court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments***

throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

22. The 1st Respondent stated that the deceased, ***"was working with SUPKEM (Supreme Council of Kenya Mislims) earning a salary of Kshs. 52,500/= as a monitoring and evaluation officer. He died at the age of 31 years. Before his demise, he used to take care of me and our children, his mother who is the 2nd plaintiff herein and his brother ADAN HASSAN for who he used to pay school fees. He died while ADAN had just***

completed high school and he was to sponsor him through college."

23. Her testimony was corroborated by PW4, the secretary of Supreme Council of Kenya Muslims, the deceased's employer, that he was earning a gross salary of Ksh. 52,500, as evinced by the exhibited pay slip and the letter dated 9/3/2015.

24. I find that the adoption of a multiplicand of Ksh. 52,500, representing the deceased's gross income, was erroneous. The proper approach would have been to apply the net income of Ksh. 42,357.60, being the net pay after statutory deductions.

25. On the multiplier, the deceased was aged 31 years when his life was untimely and cruelly cut short by the Appellants' negligence.

26. I find that the multiplier of 25 years was reasonable, bearing in mind the vicissitudes and vagaries of life that may invariably shorten the normal working life of sixty years.

27. The Respondents pleaded that the deceased was survived by his wife, 2 school going children, a toddler and his mother.

28. In light of the foregoing, I am satisfied that the dependency ratio of $^2/_3$ was proper, because, expectedly, the deceased supported his aforesaid dependants in the ordinary course, as any responsible man would.

29. The upshot from the foregoing is that the appeal is partially merited and it is allowed in the following terms:

    1. The award for loss of dependency will thus be Ksh. 42,357.60 $\times 12 \times 25 \times {}^2/_3$ = Ksh. 8,471,520.
    2. The other awards remain unaffected.

30. Each party to bear own costs of the appeal.

DATED AND DELIVERED AT MERU THIS 27TH DAY OF JANUARY, 2026.

S.M. GITHINJI
JUDGE

APPEARANCES:

Ms. Kerubo holding brief for Mr. Kiaura for the Respondent.

Mr. Muli for the Appellant (Absent)