Makori v Kerubo & another (Suing as the legal representative of the Estate of the Late Joseph Abdalla David) (Civil Appeal E004 of 2024) [2025] KEHC 3117 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 3117 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E004 OF 2024

DKN MAGARE, J

FEBRUARY 27, 2025

BETWEEN

EZEKIEL OCHOGO MAKORI ..... APPELLANT

AND

MARY KERUBO ..... 1ST RESPONDENT

DAVID SIRO ARONI ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH ABDALLA DAVID

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. P.K. Mutai (PM) dated 18.12.2023 arising from Kisii CMCC No. E662 of 2021.

2. The Memorandum of Appeal dated 14.3.2023 is on liability and quantum. The Appellant posited that the lower court erred in law and fact in finding the Appellant 100% liable for the accident and proceeding to award the quantum of damages that were inordinately high.

3. The Respondent filed suit on 6.7.2021 and claimed damages for an accident that occurred on 8.3.2019. The deceased was riding his motorcycle Registration No. KMCX 817H, along Igare-Amariba road in the Matunwa area. The Appellant, his driver or agent, negligently and dangerously drove his motor vehicle Registration No. KCS 279B violently and fatally hitting the deceased.

4. The Respondents set forth particulars of negligence for the accident motor vehicle. They pleaded special damages and general damages under the *Law Reform Act* and *Fatal Accidents Act*.

5. The Appellant entered appearance and filed a defence dated 14.4.2020 denying the particulars of negligence and injuries pleaded in the plaint. He set out a whopping 17 elements of negligence,

including walking while drunk in a zig-zag manner. They even blamed the deceased for walking and causing the death of the rider, who happened to be the deceased.

6. The lower court heard the parties and proceeded to render the impugned judgment in which the court found as follows:

    a. 100% liability against the Appellant

    b. Ksh 30,000/- for pain and suffering

    c. Ksh. 1,853,440 for loss of dependency

    d. Ksh. 100,000/- for loss of expectation of life, and

    e. Ksh. 141,000/- for special damages

    Total – Kshs. 2,124,440/-.

7. For the avoidance of doubt, the special damages included funeral expenses. Aggrieved by the lower court's finding, the Appellant lodged the Memorandum of Appeal dated 14.8.2023 hence this appeal. The following grounds were pleaded:

    a. The learned magistrate erred in law and fact in finding liability of 100% against the Appellant.

    b. The learned magistrate erred in law and fact in awarding general damages that were excessive.

    c. The learned magistrate erred in law and fact by not considering the Appellant's submissions.

    d. The learned magistrate erred in law and fact in failing to correctly evaluate the evidence tendered in court.

Evidence

8. During the hearing, PW1 was Mary Kerubo. She relied on her witness statement dated 6.6.2021. She testified that the deceased was her husband. He was 28 years old. They had 3 children. He was the sole provider in the family. She produced documents in her list of documents dated 6.6.2021. On cross-examination, it was her testimony that her husband was a businessman. That she incurred over Ksh. 120,000/= for funeral expenses, and there was a fundraiser. In reexamination, it was her stated case that the deceased was a rider and used to earn between Ksh. 700-800/= per day.

9. PW2 was No. 85663 PC Kenneth Walombi of Kisii Police Station. He produced the police abstract. According to him, the accident occurred on 8.3.2019 at 1600 hrs. The investigating Officer was PC Karera, who was away on transfer. The matter was still pending under investigation. On cross-examination, he testified that he was not the investigating officer. He had no police file in court.

10. PW3 was Gladys Orusa Onchea. She relied on her witness statement dated 25.4.2022. She was resting beside the road and witnessed the accident. She was waiting for her husband, who was coming home with some goodies. The husband alighted from motor cycle registration number KMCX 817H ridden by the deceased. Ta motor vehicle registration number KCS 279B approached at a very high speed from Igare general direction. It was moving in a zig zag manner. The motorcycle tried to avoid it by moving further left, but the same hit him and threw the cyclist (the deceased herein) off the road. She blamed the driver of KCS 279B who veered off the road at a very high speed. She stated that the deceased was her son.

11. He died after several hours on the night of the accident. A birth certificate for a minor aged 8 years at the time of the demise of the deceased was produced.

12. The Appellant closed his case without calling witnesses.

Submissions

13. The Appellant filed submissions dated 5.12.2024, in which it was submitted that the Respondent did not prove his case on liability against the Appellant. He did not cite authorities.

14. On damages, it was submitted for the Appellant that there was no evidence that the deceased suffered in hospital before death and Kshs. 10,000/- would be an adequate award under pain and suffering. Reliance was placed on Moses Koome Mithika v Doreen Gatwiri & Another (2020) eKLR.

15. It was also submitted that using the minimum wage bill as Ksh. 7,240/= to discern earning was erroneous, as the correct amount for the rider ought to have been Ksh. 5,000/=.

16. The Respondent filed submissions dated 6.1.2025. It was submitted that the lower court correctly found the Appellant 100% liable based on the evidence by the Respondent. On quantum, the Respondent submitted that the award under general damages was proper and ought not to be interfered with. She cited EMK v EOO (2018) eKLR.

17. It was also submitted that the award on loss of expectation of life of Kshs. 100,000/= was proper as the deceased was in good health, aged 29 years. He cited EMK & Another vs EOO (2018) eKLR to support the submission that Ksh. 30,000/- awarded under pain and suffering was proper as the deceased was involved in a gruesome accident.

18. On loss of dependency, it was submitted that the deceased was 28 years at the time of the accident, and left three children and a widow and therefore the finding of the lower court was correct. Reliance was placed inter alia on the case of Roger Dinty v Mwinyi Omar Haji & Another (2004) eKLR to support the argument that a multiplicand approach based on the minimum wage bill was proper as applied by the lower court.

Analysis

19. This being a first appeal, this court must 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 demeanor of the witnesses and hearing their evidence firsthand.

20. 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..."

21. 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 this court 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..."

22. The Appellant urged me to find that the lower court erred in finding 100% liability against the Appellant. They propose that the Judgement of the lower court be set aside. On the other hand, the Respondents' case is that the judgment of the lower court was correct on both quantum and liability and should not be disturbed.

23. The court is asked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant was 100% liable for the accident. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

24. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it

is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

27. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of Appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
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> This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

28. In re-evaluating the evidence, the Appellant's case is that PW2, the police officer, could not confirm the point of impact and was the investigating officer. He could not give clear position of how the accident occurred. PW1 was also not at the scene, and so tendered hearsay evidence on the occurrence of the accident. The Appellant, however, did not controvert the evidence tendered by PW4 who witnessed the accident. As the lower court's finding was based on the evidence of the eye witness, this court, too, does not find a basis to interfere with that evidence. PW4 was ardent on the cause of the accident, which she attributed to overspeeding and driving in a zig-zag manner on the part of the Respondent.

29. The Appellant also failed to offer a plausible explanation to prove contributory negligence. The motor vehicle could not have just caused the accident if it had been controlled and managed. As was held in Kenya Bus Services Ltd V Dina Kawira Humphrey Civil Appeal No. 295 of 2000, the Court of Appeal, per Tunoi, Omollo and Githinji JJA observed quite correctly that:

> " Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."

30. The above decision was also cited with approval by the Court of Appeal in Nairobi Civil Appeal No. 179 of 2003—in Re Estate of Esther Wakiini Murage V Attorney General & 2 others [2015] e KLR, where the Court of Appeal reiterated as doth: "Well-driven motor vehicles do not just get involved in accidents..."

31. In a courtroom situation, we deal with empirical evidence on what is more probable than the other. In the case of Embu Road Services V Riimi (1968) EA 22, the courts held inter alia as doth; -

> " Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only

with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

32. The Respondent proved the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused as against the Respondent. In the case of Caparo Industries PLC v Dickman {1990} 1 ALL ER 568 and Chun Pui v Lee Chuen Tal {1988} RTR 298, the court stated as follows:

> " The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused."
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> In Caparo case (supra) the Court stated:
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> "What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

33. Without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that caused the damage were caused by different persons so as to assess the degree of their respective responsibility and blame-worthiness and apportion liability between or among them accordingly. The Appellant failed in this duty. The lower court was correct in its finding on liability and the same is upheld. In Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, it was held that:

> " Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage was caused by the negligent acts of different persons to assess the degree of their respective responsibility and blame-worthiness, and apportion liability between or among them accordingly... There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasor, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

34. The Appellant filed a defence but did not call the driver of the accident motor vehicle at the hearing. The evidence of the Respondent as to the occurrence of the accident was largely uncontroverted. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga suing through *Stanley Muriga –vs-Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* it was stated that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."

16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

35. I am in consonance with the reasoning of the court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

36. Therefore, the defence filed by the Appellant in the lower court thus contained mere allegations that were not substantiated in evidence and I so find. However, even if no defence was filed, the Respondent still retained the duty to prove her case on the balance of probabilities. The Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> " It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

37. Where the Respondents proved their case to the required standard, it was the duty of the Appellant to prove contributory negligence which in my view he failed. PW3's evidence was uncontroverted. It was clear that the motorcycle was hit by the matatu. The evidence of PW1 that the matatu was trying to overtake but there was an oncoming lorry stood unshaken and I go by it. In the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " 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".

38. Without defence evidence, the court cannot consider contributory negligence. There is no basis for attributing negligence to the deceased. The evidence of PW3 was found cogent and reliable. She did not shake on cross-examination. The questions of bribery are otiose. They were not pleaded and were evidence-led. Allegations of bribery must meet criminal standards. Once allegations of

bribery are levelled, they must be first pleaded then proved. The standard is as set out in the normal criminal practice. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481 , comes in handy in describing the legal burden of proof in criminal matters, that;

> " Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

39. In the case of R vs. Lifchus {1997}3 SCR 320 the Supreme court of Canada explained the standard of proof as doth:-

> " The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt."

40. Casting aspersions on a witness is futile. Therefore, I find no basis to disturb the finding of the learned magistrate on liability and hold that the Respondent proved want of care on the part of the driver of KCS 279B. I agree with the reasoning of the Court in the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR where Nyakundi J referred to Wayne Ann Holdings Limited (T/ a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
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> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when

contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

41. The court finds no basis for interfering with the liability at 100% against the Appellant. I dismiss the appeal on this head.

42. On damages, the Appellant submitted that Kshs. 10,000/= would be an adequate award under pain and suffering. The lower court awarded Ksh. 30,000/- under this head. For pain and suffering, in Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph *21* the Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

43. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased dies later on. In this case, the deceased passed away on the same day of the accident. There is no evidence that he was taken to any hospital prior to his death.

44. The question therefore is whether the award of Kshs 30,000/= for pain and suffering was excessive. On the award for pain and suffering, in Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased vs. Elijah Oketch Adellah [2015] eKLR, the court awarded Kshs 50,000/= on 6th February 2015 for pain and suffering where the deceased died shortly after the accident.

45. In Malindi Civil Appeal Nos. 17 of 2015 & 18 of 2015—Moses Akumba & another vs. Hellen Karisa Thoya [2017] eKLR, the court upheld an award of Kshs 50,000/= on 4 October 2017 and observed that although there was a sudden death. It is clear that the deceased must have suffered a lot of pain.

46. Similarly, in Machakos High Court Civil Appeal No 50 of 2016 - Kenya Power and Lighting Co Ltd vs. Sophie Ngele Malemba & Another [2019] eKLR the deceased who had died on the spot was awarded Kshs 50,000/= for pain and suffering by the trial court which award was upheld on appeal.

47. The Appellant proposed Ksh. 10,000/= under this heading, while the Respondent submitted the award of Kshs. 30,000/- was proper. Based on the above case law, I am persuaded that the award of Kshs. 30,000/= is proper and the same is upheld as the Respondent did not appeal for any higher amount. Had they done so, the court would not have been averse to awarding the same. This is because of the nature and extent of the injuries leading the deceased to die past midnight on 9.3.2019.

48. On loss of expectation of life, the Appellant did not submit the manner in which this award was excessive. I find that the award of Ksh. 100,000/- under loss of expectation of life was not excessive and

is hereby upheld. It is not in dispute that the deceased died at the hospital past midnight on 9.3.1019. The deceased died after several hours of excruciating pain. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the award range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

49. Under the dependency ratio, to interfere with the finding of the lower court on loss of dependency, this court has to find a basis in law and in fact. It is not a random but a serious evaluation of all the circumstances. The Appellant's case is that Kshs. 5,000/= would have been applied as a minimum wage bill as there was no proof of income. The lower court adopted a multiplier of 32 years and a multiplicand of 2/3 with an income of Kshs. 7,240/= per month based on the minimum wage for the year 2018. In 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 ground of excess or insufficiency.

50. The award of a multiplier of 32 years appears slightly higher. It is, however, not inordinately excessive, given the vicissitudes and vagaries of life. Thirty-two years was not excessive. The deceased could still have lived and cared for the wife up to the biblical age of 70 years. He was a young man. I cannot set aside the multiplier only to replace with a slightly less, for example 29-30 years. This will be substituting the lower court's discretion with that of this court. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie 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.

51. The court cannot disturb this award as it is not inordinately excessive. It does not matter that had this court been sitting, it could have given a slightly less figure. It is not lost on me that the parties differ on 5 years only. This is not a ground for setting aside the discretion of the lower court. Deceased had a wife and three children of tender years. The dependency ratio of 2/3 was proper in the circumstances of this case.

52. The applicable wage bill was the Regulation of Wages (General) (Amendment), 2018, which the court applied. I dismiss the appeal by the Appellant that there was no proof of income. The Court of Appeal

in Jacob Ayiga Maruja & Another vs Simeone Obayo CA Civil Appeal No. 167 of 2002 [2005] eKLR stated:

> " We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things."

53. The Appellant did not challenge that the deceased was a driver. The Court in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, held at page 248 that:

> " 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."

54. Therefore, the deceased was 28 years at the time of the accident. I cannot reduce the small margin from 32 years. The minuscule difference was an aspect of discretion. This court cannot substitute the court's discretion for its own. Such marginal reduction cannot be a basis for allowing the appeal. There is no basis to fault the award by the lower court as the exercise of discretion did not subvert relevant considerations. 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*.

55. I find that there was no error of principle in the judgment of the lower court. There is no fast rule regarding retirement at 60 for private workers. A full life is 70 years. The deceased had a whole lifetime ahead of him. In 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 ground of excess or insufficiency.

56. There was no appeal against the award of special damages. The lower court awarded Kshs.141,000/= for special damages as pleaded and proved. I will not disturb this finding. The appeal on quantum is, therefore, dismissed in limine.

57. 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.

58. 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.

59. Costs follow the event. The appeal has been dismissed. Costs shall go to the Respondent at a sum of Kshs. 155,000/=.

Determination

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

a. The appeal against quantum and liability is dismissed.

b. The Appellant shall pay the costs of the appeal of Ksh. 155,000/= to the Respondent.

c. 30 days stay of execution.

d. Right of appeal 14 days.

e. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 27TH DAY OF FEBRUARY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Kipyegon for the Appellant

E.N. Omandi for the Respondents

Court Assistant – Michael