



REPUBLIC OF KENYA



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**Yogi Krupa Enterprises Limited v Ogechi & another (Civil Appeal
E025 of 2023) [2025] KEHC 1117 (KLR) (26 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1117 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL E025 OF 2023
DKN MAGARE, J
FEBRUARY 26, 2025**

BETWEEN

YOGI KRUPA ENTERPRISES LIMITED APPELLANT

AND

VERONICA KIYAKA OGECHI 1ST RESPONDENT

ZACHARY MAGARA SIMEON 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. S.N. Abuya (CM), dated 14.2.2023, arising from Kisii CMCC No. 274 of 2021.
2. The Memorandum of Appeal dated 14.3.2023 concerns both 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 an inordinately high quantum of damages.
3. The Plaintiff dated 9.2.2021 claimed damages for an accident that occurred on 18.7.2020. The deceased was riding his motorcycle Registration No. KMCF 444C along Keumbu-Nyabisabo road in the Rigena area when the Appellant's driver or agent dangerously drove a motor vehicle Registration No. KCF 725Z ISUZU NPR, knocking down the deceased, hence the accident.
4. The Respondents set forth particulars of negligence for the accident motor vehicle and pleaded special damages and general damages under the *Law Reform Act* and *Fatal Accidents Act*.
5. The Appellant entered appearance and filed defence dated 14.4.2020 denying the particulars of negligence and injuries pleaded in the plaintiff. The lower court heard the parties and proceeded to render the impugned judgment in which the Court found 100% liability against the Appellant and awarded Ksh. 20,000/= for pain and suffering, Ksh. 2,027,480/= for loss of dependency and Ksh. 100,000/= for loss of expectation of life, making a total compensation of Kshs. 2,147,480/=



6. Aggrieved by the finding of the lower court, the Appellant lodged the Memorandum of Appeal dated 14.8.2023 hence this appeal. The memorandum of appeal is concise, devoid of verbosity, repetition, or empty rhetoric. Increasingly, such precise memoranda of appeal are rare despite the expectation of the law. This memorandum of appeal bespeaks only a singular issue of liability. In *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR, the court stated as follows:

“We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs.” The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues...”

Evidence

7. During the hearing, PW1 was Zachary Magara Simeon. He relied on his witness statement filed in court. He also produced the documents in the bundle of documents dated 9.2.2021. It was his testimony that the deceased was 27 years old and his brother. On cross examination, he testified that the deceased left a wife and 2 children. He was earning Ksh. 30,000/= per month from the motorbike. The witness did not witness the accident.
8. PW2 was Richard Angwenyi. He relied on his witness statement. He testified that he witnessed the accident. That he was on the right side coming from Keumbu heading to Nyabisabo, where he stayed. The motorbike passed him and the lorry was also coming from the opposite side of the road at a high-speed heading to Keumbu. The lorry came to the right side and collided with the motorbike. It was a straight road and the deceased died after few minutes.
9. PW3 was No. 88300 PC Moses Kasera of Kisii Police Station. He produced the police abstract. He testified that the road accident was investigated by PC Samuel Kimutai who was not available. The matter was still pending under investigations. On cross examination, he testified that the matter was pending under investigation.
10. PW4 was Dr. Daniel Nyameino, Senior Clinician at Kisii Teaching and Referral Hospital. He produced the Postmortem report as done on 20.7.2020. The Respondents closed their case thereafter.
11. DW1 was Daniel Mwadime, the driver of the accident lorry. He testified that on the material day, an oncoming motor cyclist drove to his lane. He swerved to the extreme left to avoid the accident. The motorcyclist rammed on the right-hand side of the vehicle. On cross examination, it was his case that he was from Nyabisabo to Keumbu direction heading to Nairobi carrying luggage. The deceased rode the motorcycle into the lorry’s direction and as he tried to avoid him, the motorcycle hit the lorry’s tire and the deceased fell.

Submissions

12. The Appellant submitted that the Respondent did not prove liability within the meaning of Section 107 and 108 of the *Evidence Act*. It was also submitted that the account of PW2, the eye witness was contradictory to the pleadings in the plaint as to the occurrence of the accident.
13. To support the argument that the Respondent failed to prove case against the Appellant, the Appellant cited Eldoret HCCA No. 102 of 2005 *Sally Kibii & Another v Dr. Francis Ogaro*.



14. On damages, it was submitted for the Appellant that a global sum of Kshs. 1,000,000/= was fair compensation and the court ought to have awarded so. It was the submission of the Appellant that income was not proved. Reliance was placed on Eldoret HCCC No. 19 of 1997 Mary Khayeri Awalo & Another v Mwilu Malungu & Another (1999) eKLR.
15. The Respondent filed submissions dated 21.7.2024. It was submitted that the lower court correctly found the Appellant 100% liable based on the evidence of the eye witness. Reliance was placed on Kansa v Solanki (1969) EA 318 to anchor the submission that there was no contrary evidence to support the argument that the lorry caused the accident.
16. On quantum, the Respondent submitted that award of Kshs. 100,000/= for pain and suffering was proper, and relied on Mercy Muriuki & Another v Smuel Mwangi Nduati & Another (2019) 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 v EOO (2018) eKLR.
18. On loss of dependency, it was submitted that the award of Kshs. 2,027,480/= was proper and supported. The basis of statutory minimum wage of Kshs. 7,240.95, ration of 2/3 and multiplier of 35 years was proper as the deceased had 2 children that he provided for. He cited Among others Crown Bus Services & 2 Others v Jamilla Nyongesa & Amida Nyongesa (2020) eKLR.

Analysis

19. 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.
20. This court's jurisdiction to review the evidence should be exercised with caution. In the case 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. I must bear in mind that I did 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. 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.
22. In the case of Mbogo and Another vs. Shah [1968] EA 93 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 it 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.”



23. 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...”

24. 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.

25. The Appellant urged me to find that the lower court erred in finding 100% liability against the Appellant. They propose that the judgment of the trial 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.

26. I am 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 cast 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.”

27. 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 proposition 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.”

28. 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 than 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.”

29. 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.....”

30. 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;-

“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.

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 loose because the requisite standard will not have been attained.”

31. In re-evaluating the evidence, the Appellant’s case is that the deceased herein while heading to Nyabisabo direction rode his motorcycle into the opposite lane and so was negligent for hitting the lorry on its own lane facing Keumbu direction. PW2 was the eye witness. His account was that the road was straight at the point of the accident and he was walking on the right side of the road facing Nyabisabo. The lorry came to the right side where the motorcycle was and collided with the motorcycle.

32. What I gather from the account of the PW2 and the DW1 is that the accident occurred due to a collision since the motorcycle and the lorry were moving in opposite directions of the road. According to PW2, it is the lorry that moved into the lane of the motorcycle and according to DW1, it is the motorcycle that moved into the lane of the lorry. Therefore, head on collision was not disputed and I dismiss the assertion by the Appellant that the manner of occurrence of the accident as pleaded was not proved. The fact that DW1 lost control, and knocked down the deceased was proved to the required standard. The account given by the Appellant is not plausible. Had the motor cycle left its lane, then, it was to be head on collision. It appears that the Appellant’s driver, was in a speed that he could not manage the lorry.

33. On the balance of probabilities, the Respondent proved 100% liability against the Appellant. The case of PW2 was simple and straight forward. The lorry was driven in the wrong lane where the deceased



was riding the motorcycle hence the collision. The Appellant failed to prove contributory negligence even though pleaded. Whereas DW1 alleged that the deceased drove into the lane of the lorry, this was far from the truth. DW1 testified that he swerved to his extreme left. If so, was he not driving on the left? Why couldn't he swerve off the road? He did not give any account of circumstances that would have led the deceased to lose control and him to avoid the accident now that he was driving on upslope. Clearly, DW1 caused the accident.

34. The Appellant consequently failed to offer a plausible explanation to prove contributory negligence. The motor vehicle could not have just caused the accident if well 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.”

35. 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....”

36. In a court room 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 court 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)*.

37. The Respondent therefore, 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 Appellant. 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 determinants of negligence were 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.”

In *Caparo* case (*supra*) the Court stated:

“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.”

38. Therefore, without proper defence of contributory negligence, the court could not determine whether the act or acts of negligence that 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 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.”

39. I therefore find no basis for interfering with the liability at 100% as against the Appellant. I dismiss the appeal on this head.
40. On damages, the Appellant in the lower court proposed an award of Ksh. 100,000/= for loss of expectation of life and a global sum of Kshs. 1,000,000/= for loss of dependency. It was also submitted that no award would be required under pain and suffering as the deceased died on spot.
41. 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).

42. 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 die 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.



43. The question therefore is whether the award of Kshs 20,000/= for pain and suffering was proper in the circumstances as the deceased died a few minutes after the accident. I have also had a look at other cases as highlighted below. 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.
44. In Malindi Civil Appeal No. 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 4th October, 2017 and observed that although there was sudden death, it is clear that the deceased must have suffered a lot of pain.
45. 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.
46. The appellant proposed no award under this head while the Respondent submitted that the award of Kshs. 20,000/- was proper. That is not the case. Any amount between 10,000/= to 50,000/= still amounts to minimal award. I find no basis to interfere with this award. Therefore the award of Kshs. 20,000/= is upheld as the Respondent did not appeal for any higher amount. It is not in dispute that the deceased died a few minutes after the accident. To this court, this is not entirely the same as dying on the spot as found by the lower court. However, the deceased did also not die after suffering elongated pain for some hours. There is an erroneous tendency to think that once the deceased dies at the scene of the accident, then it is death on the spot. That is far from the truth as the deceased can die at the scene of the accident even a day after the accident if they have no one to rescue them or remove them in good time. 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.”
47. I also find that the award of Ksh. 100,000/- under loss of expectation of life was not excessive and is hereby upheld. That is the figure that the Appellant proposed in the lower court.
48. To interfere with the finding of the trial court on loss of dependency, I have to find basis. The Appellant’s case is that a global sum was necessary as opposed to multiplier approach. It was submitted that there was no bank statement or evidence of earning by the deceased.
49. The lower court adopted a multiplier of 35 years and a multiplicand of 2/3 with income of Kshs. 7,241/- per month based on wage bill 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. It is this court's finding that the award based on 35 years failed to take into account the vicissitudes and vagaries of life. 35 years was excessive in the circumstances. The age of the wife and dependency was not provided. There was paucity of evidence on this aspect. Nevertheless, her existence was not disputed. The deceased was aged 29 years and had 2 children. They did not require 35 years to depend on the deceased. On the other hand, there was no doubt that the dependants suffered loss.
51. The deceased left children 11 and 3 years old respectively. This does not however take away 2/3 dependency ratio. It only means that substantial award will go to the children. The applicability of the minimum wage appears speculative. The applicable wage bill was the Regulation of Wages (General) (Amendment), 2018 applied to employees. The deceased was a rider in private business with fluctuating income. The multiplier is not ideal for this kind of deceased. A global figure is more ideal than speculative.
52. In the case of *Buyala v Amwayi* (*(Suing as the Legal Representatives in the Estate of Shem Kokonya - Deceased)*) (*Civil Appeal 63 of 2022*) [2024] KEHC 618 (KLR) (19 January 2024) (Judgment), P.J.O. Otieno J posited as follows:

On the award of general damages under the head loss of dependency, there are two schools of thought on how to calculate damages in respect thereto. One school advocates for tabulation using the multiplier, the multiplicand and the dependency ratio while the other school advocates for a global award. Both are indeed at the choice of the trial court for it is known that there is no magic in the multiplier approach. The aim of the court is to do justice by awarding a sum that compensates the victim rather than enrich her and merely punishing the tortfeasor.

53. The court continued as follows:

In *Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi* (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR where the court that where there is no satisfactory proof of the monthly income by salary proved or employment, so that it is not possible to determine the multiplicand, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach or the minimum wage as the appropriate mode of assessing the loss of dependency. It said:

“The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap.”

54. Further, in the case of *Nairobi Bottlers Ltd & another v MW* (Suing as the legal representative of the estate of KM W) [2021] eKLR, Gikonyo J posited as doth:

19. Let me tap from decided cases. In *Seremo Korir & Another vs. SS* (Suing as The Legal Representative of the Estate of MS, Deceased) [2019] eKLR, the court said:

“22. In the lower court's judgment, the learned trial magistrate applied the minimum wage scale of Kshs. 12,000/- as the multiplicand. The learned trial magistrate further held that the deceased was a pupil based on a letter from the deceased's school and that the deceased was 12 years old, a fact that was not contested. It was the appellants'



submission that where the issue of the amount earned by a deceased and their profession is unsettled, courts adopt a lump sum/global sum instead of delving into estimating incomes and professions. On the other hand, the respondent submitted that the learned trial magistrate had the discretion to either adopt the multiplier method or the global assessment method....

27. In this case, I am in agreement with the submissions of the respondent that courts have the discretion to apply either the ‘global sum’, ‘separate heads’, or ‘mixed’ approaches in awarding damages and that it is not cast in stone that just because the deceased was a minor, then courts can only apply the global/lump sum approach”
20. Similar position was taken in the cases of Charles Ouma Otieno & another vs. Benard Odhiambo Ogecha (suing as Brother and Legal Representative and Administrator of the Estate of the Late Oscar Onyango Ogecha (Deceased) [2014] eKLR, Chen Wembo & 2 others vs. IKK & another (suing as the legal representatives and administrators of the estate of CRK (Deceased) [2017] eKLR Oshivji Kuvenji & Another vs. James Mohammed Ongenge [2012] eKLR
21. From the above, it should be clear, therefore, that the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case.
55. Going into the minimum wage and multiplier, when the age and dependency of the wife is speculative, does not provide safety and assurance in the scientificity of the award. The award should reflect the special circumstances of the case without necessarily going into the realm of conjecture and surmise.
56. In *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* and quoted in *Albert Odawa vs Gichumu Githenji NKU HCCA No. 15 of 2003 (2007)*, KLR, Justice Ringera stated;
- “The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where 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 amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the I dismiss the appeal by the Appellant that there was no prove of income. The appellant did not challenge the fact that the deceased was a boda boda rider. He could have died in the course of his business. He must have earned income from the boda boda business and a minimum wage bill was appropriate. The Court in *Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngatuny & 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.”

57. The deceased was only 29 with a young family working as a motorcycle rider, who met his untimely death due to the accident. An award of Ksh. 2,027,480/- is excessive in the circumstances. A suggestion of 1,000,000/= as a global figure is inordinately low in the special circumstances of the case. Doing the best I can, I find that a comparable global award of Ksh 1,600,000/= will suffice as an ideal award in respect of Loss of Dependency. This is also informed by 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*.

58. There was no appeal against the award of special damages. The lower court dismissed special damages for want of proof. I will not disturb this finding.

59. 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.

60. 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.

61. In the circumstances, costs follow the event. The changes were minimal as the success was split. In the circumstances, each party shall bear their own costs. They are so awarded.

Determination

62. In the upshot, I make the following orders: -
- a. The appeal against liability is dismissed.
 - b. The appeal against the award on pain and suffering is dismissed.
 - c. The appeal on loss of expectation of life is dismissed.
 - d. The award of Ksh. 2,027,480/- regarding Loss of Dependency is set aside and substituted with an award of Ksh. 1,600,000/=, to attract interest from date of judgment in the lower court.
 - e. Each party shall bear their own costs.
 - f. Right of appeal 14 days.
 - g. Stay of execution for 30 days.
 - h. The file is closed.

**DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 26TH DAY OF FEBRUARY, 2025.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Ombati for the Respondents

Court Assistant – Michael

M. D. KIZITO, J.

