



**Ribiru v Ndung’u (Suing on Behalf of the Estate of the Late Joram Ndung’u Mwaniki) & 2 others (Civil Appeal 37 of 2023) [2024] KEHC 339 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 339 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 37 OF 2023  
FN MUCHEMI, J  
JANUARY 25, 2024**

**BETWEEN**

**ELIZABETH WAIRIMU RIBIRU ..... APPELLANT**

**AND**

**PAUL KINYANJUI NDUNG’U (SUING ON BEHALF OF THE ESTATE OF THE LATE JORAM NDUNG’U MWANIKI) ..... 1<sup>ST</sup> RESPONDENT**

**LUCY WANGECHI NDUNG’U ..... 2<sup>ND</sup> RESPONDENT**

**CIC GENERAL INSURANCE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal from the Judgment and Decree of Hon. G. Omodho (SRM) delivered on 22nd May 2019 in Thika CMCC No. 613 of 2014 as consolidated with CMCC No. 612 of 2014)*

**JUDGMENT**

**Brief facts**

1. This appeal arises from the judgment in Thika CMCC No. 612 of 2014 as consolidated with CMCC No. 613 of 2014. The claims arose arising from a road traffic accident whereas the appellant was found to be fully liable and judgment was entered in favour of the respondents. The 1<sup>st</sup> respondent was awarded general damages of Kshs. 500,000/- for loss of dependency, Kshs. 10,000/- for pain and suffering, Kshs. 100,000/- for loss of expectation of life and Kshs. 123, 422/- as special damages. The 2<sup>nd</sup> respondent was awarded Kshs. 102,500/- as general damages for pain, suffering and loss of amenities.
2. Dissatisfied with the court’s decision, the appellant lodged this appeal citing 12 grounds of appeal as follows:-
  - a. The learned trial magistrate erred in fact and in law in finding the appellant vicarious liable for the accident in question;



- b. Whether the learned trial magistrate erred in law and in fact in failing to consider the issue of liability between the 3<sup>rd</sup> respondent and the appellant;
  - c. Whether the learned trial magistrate erred by awarding an inordinately high award for loss of dependency;
  - d. Whether the learned trial magistrate erred in law and in fact in awarding special damages of Kshs. 123,422/- in CMCC No. 613 of 2014 yet the 1<sup>st</sup> respondent pleaded for a sum of Kshs. 118,422/-
3. Parties put in written submissions to dispose of the appeal.

### **Appellant's Submissions**

4. The appellant submits that the trial court erred by finding that she was vicariously liable for the activities of the driver yet no evidence was adduced to prove any agency relationship between her and the driver. Moreover, the appellant states that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were categorical that they had borrowed the subject motor vehicle from her driver. In the absence of evidence to link the driver and the appellant, the appellant contends that no relationship between herself and the driver was proved by the respondents to lead to a finding of vicarious liability on the appellant for the acts of the driver. To support her contentions, the appellant relies on the cases of *Securicor Kenya Ltd vs Kyumba Holdings Ltd* [2005] eKLR and *Joseph Wabukho Mbayi vs Frida Lwile Onyango* [2019] eKLR.
5. The appellant further submits that the trial court erred by failing to consider the evidence adduced by the respondents that the cause of the accident was a tyre burst. The appellant states that PW2 testified that she had a loud bang before the accident occurred which led to the driver losing control of the subject motor vehicle. Relying on the case of *Joash Musikhu Vuranje vs Wanjiru Mwangi & Another* [2016] eKLR, the appellant submits that the main cause of the accident was the tyre burst and no evidence was adduced by the 1<sup>st</sup> & 2<sup>nd</sup> respondents to demonstrate that prior to the accident, the driver of the motor vehicle was negligent or reckless. Thus the appellant argues that finding her 100% liable for the negligence of the driver yet he was not enjoined as a co-defendant in the suit was erroneous.
6. On the issue of damages, the appellant submits that the trial court awarded special damages of Kshs. 123,422/- to the 1<sup>st</sup> respondent yet he only pleaded for Kshs. 118,442/-. Special damages ought to be specifically pleaded and proved and the appellant contends that since the 1<sup>st</sup> respondent did not specifically plead special damages in the sum of Kshs. 123,422/-, he was not entitled to that award and thus it ought to be set aside.
7. The appellant relies on the cases of *David Mwaniki Waithera & Another vs Jemimah Mwikali Moto* [2020] eKLR and *Florence Kaniaru vs Dominic Muteti Ndambuki & Another* [2005] eKLR and submits that the deceased was 73 years old and all his children were adults and thus it cannot be said that they depended on him. Furthermore, the wife of the deceased did not testify to prove that she was a dependant of the deceased. As such, the appellant argues that the sum awarded by the trial court being Kshs. 500,000/- was inordinately high and ought to be set aside.
8. In the event the court does not dismiss the claim under loss of dependency, the appellant cites the case of *Eston Mwirigi Ndege & Another vs Damaris Kairiari* (Suing as the legal representative of the estate of Felix Kibiti) [2018] eKLR and urges the court to award a sum of Kshs. 200,000/- as reasonable compensation.
9. The appellant argues that the trial court erred by finding that no evidence was adduced to show how the 3<sup>rd</sup> respondent was negligent despite the appellant producing a policy document whereby the 3<sup>rd</sup>



respondent indemnified her in case of death and bodily injury to third parties. The appellant relies on Section 10 of the *Insurance (Motor Vehicles Third Party Risks) Act* and submits that the 3<sup>rd</sup> respondent is duty bound to indemnify her claim and the 3<sup>rd</sup> respondent's claim that the claim against it by the appellant had not crystallized does not hold. The appellant further relies on the case of *Pan Africa Insurance Company Ltd & 2 Others vs Clarkson & Southern Limited* [2008] eKLR and submits that the trial court failed to consider the issue of liability as between her and the 3<sup>rd</sup> respondent despite directions having been made that the issue would be canvassed during the trial.

### **The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' Submissions**

10. The 1<sup>st</sup> & 2<sup>nd</sup> respondents put in submissions urging the court to dismiss the appeal but they did not file submissions on the substantive appeal.

### **The 3<sup>rd</sup> Respondent's Submissions**

11. The 3<sup>rd</sup> respondent submits that the trial court did not err in finding the appellant vicariously liable for the activities of the driver as the appellant stated that on 28/1/2013 that her husband had the motor vehicle registration number KBS 916N and he gave it to a friend, Alex. The 3<sup>rd</sup> respondent further states that the appellant added that Alex had the authority to drive the motor vehicle, a fact confirmed by the appellant in her testimony. The 3<sup>rd</sup> respondent further submits that it carried out its investigations which revealed that the subject motor vehicle was on hire at the time of the accident.
12. The 3<sup>rd</sup> respondent relies on Section 107 of the *Evidence Act* and the cases of *Treadsetters Tyres Ltd vs John Wekesa Wepukhulu* [2010] eKLR; *Amani Kazungu Karema vs Jackmash Auto Ltd & Another* [2021] eKLR and *M'mbula Charles Mwalimu vs Coast Broadway Company Limited* [2012] eKLR and submits that the appellant failed to prove that the accident was caused or substantially contributed to by the 3<sup>rd</sup> respondent's negligence. Moreover, the 3<sup>rd</sup> respondent contends that the suit against it by the appellant was premature and as such was rightly dismissed. The 3<sup>rd</sup> respondent argues that pursuant to Section 10(1) of the *Insurance Motor Vehicle Third Party Risks) Act Cap 405*, a suit against the insurer can only be brought after judgment in a suit has been delivered since the insurer has a duty to satisfy judgments against insured persons. To support its contentions, the 3<sup>rd</sup> respondent relied on the case of *Joseph Mwangi Gitundu vs Gateway Insurance Co. Ltd* [2015] eKLR.
13. The 3<sup>rd</sup> respondent submits that their witness, Mr. Erastus Mbaka testified that the subject motor vehicle was comprehensively insured and after carrying out their investigations and finding out that appellant had breached the terms of the policy, the 3<sup>rd</sup> respondent repudiated the claim. Furthermore, the 3<sup>rd</sup> respondent submits that the cause of action between the appellant and the 1<sup>st</sup> & 2<sup>nd</sup> respondents in the lower court was tortious in nature and for it to be enjoined as a 3<sup>rd</sup> party was irregular. Thus the suit was not a declaratory suit and could not be enforced by dint of Section 10 of Cap 405 Laws of Kenya. To support its contentions, the 3<sup>rd</sup> respondent relies on the cases of *Lalchand Shah & Another vs Kenindia Assurance Company Ltd* [2005] eKLR and *Martin Mwangi Nyutho (the Administrator of the Estate of the late Benson Nyutho Mwangi) vs Alkason Transporters & Another; Metropolitan Cannon Insurance (Formerly Cannon Assurance (K) Limited (Third Party)* [2022] eKLR and submits that since the final judgment was yet to be delivered, it was premature to proceed with an action against the 3<sup>rd</sup> party for indemnity.
14. The 3<sup>rd</sup> respondent submits that it was improperly enjoined to the proceedings as it was neither the registered owner nor was it in possession of the subject motor vehicle involved in the accident. Further, the 3<sup>rd</sup> respondent states that it did not in any way contribute to the occurrence of the accident and that there was no final judgment encompassing both liability and quantum. Pursuant to Order 1 Rule 15 of



the Civil Procedure Rules, the 3<sup>rd</sup> respondent argues that for a third party to be enjoined in proceedings in a cause of action of negligence, the 3<sup>rd</sup> party comes in as a contributor to the accident and/or cause of the same. Consequently, the 3<sup>rd</sup> respondent argues that it does not fall in such a category as there is no nexus between the 1<sup>st</sup> & 2<sup>nd</sup> respondents, the cause of action and the 3<sup>rd</sup> respondent. It is submitted that the nexus between the 3<sup>rd</sup> respondent and the appellant was contractual while the cause of action was one of tort of negligence. This fact was confirmed by the appellant in her testimony as she testified that she enjoined the 3<sup>rd</sup> respondent as they insured her motor vehicle comprehensively. The appellant further testified that she was aware that the 3<sup>rd</sup> respondent's intention was to repudiate the contract and as such she did not sue the 3<sup>rd</sup> respondent to honour the judgment. The 3<sup>rd</sup> respondent thus submits that legally insurance companies are never enjoined as a third party in a tort suit and as such, it was improperly enjoined in the instant suit.

15. On the issue of damages, the 3<sup>rd</sup> respondent submits that the trial court erred in awarding Kshs. 123,422/- as special damages to the 1<sup>st</sup> respondent and yet in his plaint dated 5<sup>th</sup> August 2014, he pleaded for a sum of Kshs. 118,422/-.
16. Relying on the cases of *Mary Khayesi Awalo & Another vs Mwilu Malungu & Another* [1999] eKLR and *Eston Mwirigi Ndege & Another vs Damaris Kairiari* (Suing as the Legal Representative of the Estate of Felix Kibiti (Deceased) [2018] eKLR the 3<sup>rd</sup> respondent submits that the trial court erred in using the multiplier approach in awarding loss of dependency while it ought to have used the global sum approach. The 3<sup>rd</sup> respondent argues that the deceased was 73 years and although the 1<sup>st</sup> respondent testified that the deceased used to carry on businesses, he did not state what business the deceased was engaged in or even explain his earnings. It is evident that the plaintiff did not adduce evidence to show that the deceased supported any of his children during his lifetime. The 3<sup>rd</sup> respondent submits that taking into consideration the age of the deceased and those of his children, the 3<sup>rd</sup> respondent proposes the sum of Kshs. 250,000/- as sufficient compensation for loss of dependency.
17. The 3<sup>rd</sup> respondent submits that the sum of Kshs. 100,000/- as general damages awarded to the 2<sup>nd</sup> respondent was commensurate to the injuries she sustained and urges the court not to disturb the said award.

### **Issues for determination**

18. The main issues for determination are:-
  - a. Whether the appellant was vicariously liable for the accident in question;
  - b. Whether the court failed to consider the issue of liability between the 3<sup>rd</sup> respondent and the appellant;
  - c. Whether the trial court awarded an inordinately high award for loss of dependency;
  - d. Whether the special damages awarded were specifically pleaded and proved.

### **The Law**

19. Being a first Appeal, the court relies on a number of principles as set out in *Selle and Another vs Associated Motor Boat Company Ltd & Others* [1968] 1EA 123:

“.....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. In particular,, this court is not bound necessarily



to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

20. In *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR the Court of Appeal stated that:-

An appeal to this court from a trial by the High 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.

21. From the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a. That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b. That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c. That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

#### **Whether the appellant was vicariously liable for the accident in question.**

22. The principles guiding the appellate court's power to interfere with the trial court's finding on liability are well settled. In *Khambi & Another vs Mahithi & Another* [1968] EA 70 it was held that:-

It is well settled that where a trial Judge has apportioned liability according to the fault of the parties, his apportionment should not be interfered with on appeal, save in exceptional circumstances, as where there is some error in principle or the apportionment is manifestly erroneous and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge.

23. The appellant argues that the trial court erred by finding her vicariously liable for the subject accident for the activities of the driver notwithstanding the motor vehicle was being used for purposes in which she had no interest or concern when she gave out the car to the 2<sup>nd</sup> respondent's nephew. The appellant further argues that no evidence was adduced to prove any agency relationship between the driver and herself.

24. The appellant further argues that the accident was caused by a tyre burst and thus there was no evidence to show that prior to the loud bang, the driver of the motor vehicle was negligent or reckless.

25. It is trite law that he who alleges must prove. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides that:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



26. 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.

27. Vicarious liability imposes liability on employers for the wrongful acts of their employees whereas an employer will be held liable for torts committed while an employee is conducting the duties allocated by the employer. The Court of Appeal enunciated this principle in the case of *Selle vs Associated Motor Boat Co.* [1968] EA 123 as follows:-

The central issue that we think we must determine in this appeal is whether the facts before the judge allowed her to reach the conclusion that the appellant was vicariously liable for the acts of the owner or driver of the hired motor vehicle. It was not disputed by either party before the judge that the bus that was hired to transport students and staff to Mombasa did not belong to the appellant but belonged to a person who was not named in the suit...by the respondent. Although the driver of the bus was named in the witness statement filed by the respondent the driver was not sued and his name does not appear anywhere in the plaint.

Vicarious liability is defined in Black's Law Dictionary 10<sup>th</sup> Edition by Bryan A. Garner as "liability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) based on the relationship between the two parties – also termed as imputed liability.

28. The 2<sup>nd</sup> respondent testified as PW2 and stated that at the material time, she was travelling in motor vehicle registration number KBS 916N on 28/1/2013. The said motor vehicle lost control and overturned. PW2 further testified that the driver of the motor vehicle, Alex Ndungu was speeding and failed to control the motor vehicle. The appellant DW1 testified that she was the registered owner of motor vehicle registration number KBS 916N which was given out by her husband. She further testified on cross examination that the subject motor vehicle was not on hire and was given to a third party with her full authority. The 3<sup>rd</sup> respondent called Mr. Erastus Mbaka who testified that they carried out their investigations and realized that the subject motor vehicle was on hire which breached the terms of the insurance policy.
29. On evaluation of the evidence concerning causation of the accident, it is evident that PW2 was the only person who witnessed the accident. The witness attributed blame to the driver of the motor vehicle as he was said to be speeding and that the driver did not have control of the motor vehicle. The driver was given the subject motor vehicle by the husband of the appellant with her full authority. The evidence of the 3<sup>rd</sup> respondent was that their investigations revealed that the subject motor vehicle was hired at the time of the accident. From the court record, it is evident that no evidence was adduced to show that the cause of the accident was a tyre burst. Further from the evidence of PW2, it is clear that the driver was negligent as he was speeding and lost control of the said vehicle. The appellant admitted in her testimony that the said motor vehicle was given to the driver by her husband under her full authority. Thus it follows that the appellant was vicariously liable for the acts of negligence of the driver. Accordingly, it is my considered view that the appellant has failed to prove before the court that the accident was caused by a tyre burst as she alleged and that she was not vicariously liable for the acts



of the driver. I find no error on part of the lower court judgment on the cause of the accident and on vicarious liability on part of the appellant.

**Whether the trial court erred by failing to consider the issue of liability between the 3<sup>rd</sup> respondent and the appellant.**

30. The appellant argues that the trial court erred by failing to find the 3<sup>rd</sup> respondent negligent yet she produced a policy document between herself and the 3<sup>rd</sup> respondent for indemnity. The appellant further contends that the trial court failed to consider the issue of liability as between herself and the 3<sup>rd</sup> respondent yet the trial court made directions to the effect that the issue would be canvassed during trial.
31. The record shows that the appellant took out third party proceedings against the 3<sup>rd</sup> respondent. She testified that she took out a comprehensive cover from the 3<sup>rd</sup> respondent and therefore she expected the 3<sup>rd</sup> respondent to settle the claim. The 3<sup>rd</sup> respondent called its witness, Mr. Erastus Mbaka who confirmed that the appellant took out a comprehensive cover for the subject motor vehicle however she breached the policy terms and therefore they were unable to settle the claim. The 3<sup>rd</sup> respondent further testified that they had no relationship with the respondents and as such, it did not owe them any duty of care. The witness further stated that the 3<sup>rd</sup> respondent did not own the subject motor vehicle and that since the cause of action between the appellants and the respondents was tortious in nature, it was wrong for the appellant to enjoin it in the proceedings as a 3<sup>rd</sup> party.
32. Joinder of a third party is provided for under Order 1 Rule 15 of the Civil Procedure Rules as follows: -  
Where a defendant claims as against any other person not already to the suit (hereinafter called the third party)-
  - a. That he is entitled to contribution or indemnity; or
  - b. That he is entitled to any relief or remedy relating to or connected with the original subject matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
  - c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the court within fourteen days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
33. Order 1 Rule 15 therefore imposes an obligation on the appellant to show that the 3<sup>rd</sup> respondent as a 3<sup>rd</sup> party contributed to the accident or caused the said accident. From the evidence on record, the required to establish a link between the 1<sup>st</sup> & 2<sup>nd</sup> respondents and the 3<sup>rd</sup> respondent. The relationship between the appellant and the 3<sup>rd</sup> respondent was indeed a contractual one based on the insurance policy whereas the cause of action as between the 1<sup>st</sup> & 2<sup>nd</sup> respondents and the appellant was based on the tort of negligence. The cause of action in the third-party proceedings is not directly related to the main cause of action relating to the claim of the 1<sup>st</sup> & 2<sup>nd</sup> respondents. Thus, enjoining the 3<sup>rd</sup> respondent was wrong since it is not provided for under Order 1 Rule 15 of the Civil Procedure Rules. It is evident that the 3<sup>rd</sup> respondent did not contribute to or cause the accident and neither did it owe any duty of care to the 1<sup>st</sup> & 2<sup>nd</sup> respondents. The Magistrate considered the issue of liability as between the 3<sup>rd</sup> respondent and the appellant and found that no such liability existed. The appellant failed to



establish any nexus between the said parties and as such, the magistrate did not err in dismissing the 3<sup>rd</sup> party proceedings.

34. The appellant further argues that the 3<sup>rd</sup> respondent ought to indemnify her from the accident pursuant to Section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act. Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act provides:-

If after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of Section 5 (being a liability covered by terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid, or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability; including any amount payable in respect of costs and any sum payable in respect of interest or that sum by virtue of any enactment relating to interest on judgments.

35. The court in the case of *Lalchard Shah & Another vs Kenindia Insurance Company Limited* [2005] eKLR deliberated on this issue and stated:-

The insurance company according to law are never enjoined as a party in a tort suit. This is because the cause of action against an insurance company arises after liability and quantum has been determined by a court of law. All the party suing requires to do before trial is to issue a statutory notice to the insurance company to notify them that a suit will be filed against their insured where the tort case is finalized and there is no pending appeals, review application and any issues. The insurance company on behalf of its insured would be obliged to pay. If it fails to do so, the plaintiffs are to file a declaratory suit in the High Court seeking for the court to pronounce that they are owed the award.

36. It therefore follows that the 3<sup>rd</sup> respondent is only liable in respect of any insurance policy to pay specified sums to the persons entitled to the benefit of a judgment against the insured. In the instant case, final judgment on liability and quantum had not been delivered and thus the 3<sup>rd</sup> respondent was not under any obligation to pay any monies to indemnify the appellant.

#### **Whether the trial court erred in awarding an inordinately high award for loss of dependency.**

37. The Court of Appeal in *Catholic Diocese of Kisumu vs Sophia Achieng Tele* Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an Appellate court can interfere with an award of damages in the following terms:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”



38. The Court of Appeal in *Chunibhai J. Patel & Another vs P. F. Hayes & Others* [1957] EA 748, 749 stated the law on assessment of damages under the *Fatal Accidents Act* and held:-

The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

39. In the instant case, the appellant and the 3<sup>rd</sup> respondent fault the court below for awarding inordinately high damages of Kshs. 500,000/- for loss of dependency without taking into consideration that the deceased was aged 73 and that the 1<sup>st</sup> respondent did not prove any dependency in his favour. Dependency is a matter of fact and must be proved by evidence as was held in *Abdalla Rubeya Hemed vs Kayuma Mvurya & Another* [2017] eKLR as follows:-

Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent.

40. Further in *Rahab Wanjiru Nderitu vs Daniel Muteti & 4 Others* [2016] eKLR the court held that:-

The plaintiff must prove dependency. If a wife, she must prove marriage to the deceased either by customary marriage or by production of marriage certificate or by any other acceptable manner, by a letter from the Chief confirming that the plaintiff is a wife of the deceased and that the children are children of the deceased in the absence of birth certificates or any other documents to confirm the same.

41. The 1<sup>st</sup> respondent in this case did not adduce evidence to the effect that the deceased was married and that he had 7 save for his statement. The 1<sup>st</sup> respondent only produced a limited grant ad litem issued in Succession Petition No. 2491 of 2013. Furthermore, the 1<sup>st</sup> respondent testified that his siblings and himself as well as their mother depended on the deceased. The deceased's wife did not testify before the court to adduce evidence of her dependency. The deceased died at the age of 73 and all his children were adults by then. The 1<sup>st</sup> respondent had an obligation to satisfy the court on dependency on the deceased, which he failed to do. Dependency is a fact that must be proved by way of evidence as I have already stated. It is my considered view that the 1<sup>st</sup> respondent did not prove dependency. Therefore, the trial court erred in awarding the sum of Kshs. 500,000/- as loss of dependency without proof.

#### **Whether the special damages awarded were specifically pleaded and proved.**

42. It is trite law that special damages must be both pleaded and proved, before the award is made. This was stipulated in the Court of Appeal decision of *Hahn V. Singh* Civil Appeal No. 42 of 1983 [1985] KLR 716 where the court held:-

Special damages must not only be specifically claimed (pleaded) but also strictly proved..... for they are not direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.



43. The appellants and the 3<sup>rd</sup> respondent argue that the 1<sup>st</sup> respondent pleaded Kshs. 118,442/- as special damages in his plaint but the trial court awarded the sum of Kshs. 123,422/- which was neither pleaded no proved.
44. On perusal of the court record, the plaint dated 5<sup>th</sup> August 2014 was filed by the 1<sup>st</sup> respondent and it pleaded Kshs. 118,422/- as special damages. The trial court awarded Kshs. 123,422/- on the basis that the said sum is proved. It is trite law that special damages must be specifically pleaded and proved. In my considered view, the 1<sup>st</sup> respondent pleaded for a sum of Kshs. 118,422/- and it was therefore erroneous for the court to award a sum of Kshs. 123,422

### **Conclusion**

45. Consequently, I make the following orders:-
- a. The award for loss of dependency of KSh.500,000/= is hereby set aside.
  - b. The special damages of KSh.123,422 is hereby set aside and hereby substituted with an award of KShs.118,422.
46. This appeal is partly successful and is hereby allowed to that extent.
47. Each party to meet its own costs of this appeal.
48. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 25<sup>TH</sup> DAY OF JANUARY 2024.**

**F. MUCHEMI**

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**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

