



**Pack Ingredients East Africa v Ouma ((Widow Suing as the Legal Representative of the Estate of Michael Ouma Olony - Deceased)) (Civil Appeal E085 of 2023) [2024] KEHC 3556 (KLR) (21 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 3556 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
CIVIL APPEAL E085 OF 2023  
RE ABURILI, J  
MARCH 21, 2024**

**BETWEEN**

**PACK INGREDIENTS EAST AFRICA ..... APPELLANT**

**AND**

**DOROTHY ACHIENG OUMA ..... RESPONDENT**

**(WIDOW SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF  
MICHAEL OUMA OLONY - DECEASED)**

*(An appeal arising out of the Judgement of the Honourable S.O. Temu in the Senior Principal Magistrate’s Court at Nyando delivered on the 9th May 2023 in Nyando SPMCC No. 104 of 2022)*

**JUDGMENT**

**Introduction**

1. The appellant herein Pack Ingredients East Africa was sued by the respondent Dorothy Achieng Ouma (Widow suing as the Legal Representative of the Estate of Michael Ouma Olony-Deceased for general and special damages following a fatal accident that occurred on the 5<sup>th</sup> September 2021 when the deceased was knocked down while walking along Sondu – Nyabondo road by motor vehicle registration no. KCY 523W, a motor vehicle allegedly owned by the appellant. The respondent pleaded negligence on the part of the respondent and or its driver.
2. The trial magistrate in his judgement found the appellant 100% liable for causing the accident and proceeded to award the respondent damages as follows:
  - Pain & Suffering.....Kshs. 50,000
  - Loss of expectation of Life .....Kshs. 100,000



Loss of dependency .....Kshs. 936,000

Special damages ..... Kshs. 38,300

3. Aggrieved by the said Judgment and decree, the appellant filed a memorandum of appeal dated 5<sup>th</sup> May 2020 raising the following grounds of appeal:

1. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on liability before him superficially and consequently coming to a wrong conclusion on the same.
2. The learned trial magistrate did not in the alternative consider or sufficiently consider the demand for contributory negligence based on the evidence adduced and the submissions filed by the appellant.
3. The learned trial magistrate grossly misdirected herself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion on the same.
4. The learned trial magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant.
5. The learned trial magistrate erred in not sufficiently taking into account all the evidence presented before him in totality and in particular the evidence presented on behalf of the appellant.
6. The learned trial magistrate erred in failing to hold that the respondent has failed to prove negligence on the part of the appellant while the onus of proof lay with the respondent.
7. The learned trial magistrate proceeded on wrong principles (if any) when assessing the damages to be awarded to the respondent and failed to apply precedents and tenets of law applicable.
8. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstance that if represented an entirely erroneous estimate vis-à-vis the respondents' claim.
9. The learned trial magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law.

The appellant filed submissions as directed by the court but the respondent did not file any.

### **The Appellant's Submissions**

4. The appellant's counsel submitted that the deceased failed to exercise reasonable care and skill for his own safety by moving off the road and that he ought to have perceived the movement of the vehicle and from the evidence it was clear that the respondent failed to prove his case on a balance of probability.
5. It was submitted that the trial court misapprehended the evidence on record by the appellant and if the trial court had considered the said evidence it would have inevitably made a judicial finding that the respondent largely contributed to his own misfortune. The appellant thus submitted that the respondent was to blame to the extent of 50% percent contributory negligence.
6. On quantum the appellant submitted that for pain and suffering, the deceased died on the same day and as such the court should award Kshs. 10,000 as was held in the case of *Harjeet Singh Pandal v Helen Aketch Okudho* [2018] eKLR.



7. On loss of expectation of life, it was submitted that in cases where the deceased died on the spot and or the same day nominal awards are awarded as was held in the case of *Samuel Mwangi Wainaina & Another v Virginia Nungari Kimani* [2016] eKLR. The appellant proposed that the court ought to have awarded Kshs. 80,000 under this head. Reliance was placed in the cases of *Florence Awuor Owuoth v Paul Jackton Ombayo* [2020] eKLR and that of *Godana Guyo Halake & Another v Patrick Ndeli Ndolo & Another* [2017] eKLR.
8. On loss of dependency, the appellant submitted that as the deceased died aged 45 years, married with three children and not formally employed, a multiplier of 10 years ought to have been used.
9. On the multiplicand, it was submitted that as the respondent did not produce any document to prove that the deceased was earning Kshs. 1,000 per day, the court ought to have adopted a multiplicand of Kshs. 9,000 per month.
10. As for the dependency ratio, it was submitted that as the deceased was 45 years and was married with three children, the normal dependency ratio under this head was 2/3 and thus loss of dependency ought to be calculated as  $9,000 \times 12 \times 10 \times 2/3 = 720,000$
11. It was submitted that so that the estate of the deceased does not benefit twice from both the *Fatal Accidents Act* and the *Law Reform Act*, the award for pain and suffering and loss of expectation of life be deducted.

### **Analysis and Determination**

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-
 

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
13. In that regard, an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkubee v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-
 

“A Court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.”
14. Having considered the Appellant’s Grounds of Appeal and the written Submissions, I find the following issues for determination:
  - a. Whether or not the apportionment of liability was fair and reasonable in the circumstances of this case.
  - b. Whether or not the award of quantum was unjustified in the circumstances of this case so as to warrant interference by this court.
15. I shall proceed to deal with the issues under the separate heads shown herein below.



## Liability

16. On liability, in *Khambi and Another v Mahithi and 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 cases, 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.”
17. That was the position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mabendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was held that apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.
18. The law is clear that he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we speak of burden, we sometimes speak of onus.
19. Burden of Proof is used to mean an obligation to adduce evidence of a fact. According to Phipson on the Law of Evidence, the term ‘burden of proof’ has two distinct meanings:
1. Obligation on a party to convince the tribunal on a fact; here we are talking of the obligation of a party to persuade a tribunal to come into one’s way of thinking. The persuasion would be to get the tribunal to believe whatever proposition the party is making. That proposition of fact has to be a fact in issue. One that will be critical to the party with the obligation. The penalty that one suffers if they fail to prove their burden of proof is that they will fail, they will not get whatever judgment they require and if the plaintiff they will not sustain a conviction or claim and if defendant no relief. There will be a burden to persuade on each fact and maybe the matter that you failed to persuade on is not critical to the whole matter so you can still win.
  2. The obligation to adduce sufficient evidence of a particular fact. The reason that one seeks to adduce sufficient evidence of a fact is to justify a finding of a particular matter. This is the evidential burden of proof. The person that will have the legal burden of proof will almost always have the burden of adducing evidence.”
20. Section 107 of *Evidence Act* defines Burden of Proof as of essence, the burden of proof is proving the matter in court. subsection (2) Refers to the legal burden of proof.
21. Section 109 of the *Evidence Act* exemplifies the Rule in Section 107 on proof of a particular fact. It is to the effect that the burden of proof as to any particular fact lies on the person who wishes to rely on its existence.
22. Thus, whoever has the obligation to convince the court is the person said to bear the burden of proof. Thus, if one does not discharge the burden of proof then one will not succeed in as far as that fact is concerned.



23. The question therefore is whether the respondent herein discharged the burden of proving that the appellant was wholly liable in negligence for the occurrence of the accident leading to the deceased's demise.
24. Revisiting the evidence as adduced before the trial court on liability, and on whether the respondent proved negligence on the part of the appellant, PW2 Blasio Opere testified that he witnessed the accident and saw the appellant's motor vehicle hit the deceased who was a pedestrian. The vehicle was ahead of the witness. The deceased pedestrian was also ahead of the witness, wearing a reflective jacket. It was at about 6.00am. The pedestrian was walking on the left side of the road facing Naybondo direction. That abruptly, the driver of the motor vehicle swerved off his lane and knocked down the pedestrian using the left side mirror then the victim pedestrian fell off the road. The driver went far off about 100 meters before stopping and walking back to the scene of accident. The witness helped the driver carry the patient to hospital and . He testified that the vehicle stopped and he was able to read the lorry's number plate. In cross-examination, he admitted that he was not on the police abstract list and further stated that the deceased was not crossing the road. He also stated that there was no zebra crossing at the scene.
25. In defence, the appellant called one witness, the driver of the accident motor vehicle who adopted his witness statement dated 31.10.2021. He stated in cross examination that he had seen the pedestrian less than 100 meters away ahead of him and that indeed he knocked the pedestrian. He further stated that he was driving at 40-50km per hour, that the weather was clear and he could see clearly and that at that speed he was able to apply brakes.
26. I have considered the above evidence adduced before the trial court. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that:
- “When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his car at any time to avoid anything he sees after he has seen it... A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object.”
27. Further, in the case of *Mary Njeri Murigi v Peter Macharia & another* [2016] eKLR, this court expressed itself thus:
- “A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof.”
28. In *Khambi and Another v Mabithi and 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 cases, 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.”
29. That was the same position in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No 50 of 1981 [1983] KLR 142 and *Mabendra M Malde vs George M Angira* Civil Appeal No 12 of 1981, and *Rentco East Africa Limited v Dominic Mutua Ngonzi* [2021] eKLR where it was held that



apportionment of blame represents an exercise of a discretion with which the appellate court will interfere only when it is clearly wrong, or based on no evidence or on the application of a wrong principle.

30. The appellant did not adduce any evidence before the trial court to show that the deceased ought to shoulder some blame for the accident. Additionally, this court has not been shown any evidence that the trial magistrate wrongly exercised her discretion when apportioning liability or based her finding on liability on no evidence or the wrong principle.
31. The appellant in this case did not adduce evidence to demonstrate that the deceased ought to shoulder some blame, in view of the uncontroverted evidence of the plaintiff's eye witness on how the accident occurred, I find and hold that the plaintiff in the lower court proved her case on a balance of probabilities. A balance of probabilities was defined in the case of *William Kabogo Gitau v George Thuo & 2 Others* [2010] 1 KLE 526 as follows:

“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.”
32. Applying the foregoing principle to the facts of this case, I find that there was sufficient evidence that the appellant failed in his expectation as a reasonable driver and could not have been absolved from liability in the causation of the accident and fatal injury to the deceased.
33. In the circumstances, I hereby uphold the trial court's finding on liability and dismiss the grounds of appeal challenging the finding on liability against the appellant.

### **Quantum of damages**

34. Regarding the circumstances under which an appellate court will disturb a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”
35. In *Kemfro Africa Ltd T/A Meru Express Services, Gathogo Kanini v A M Lubia & Olive Lubia*, the Court of Appeal set the principles to be considered before disturbing an award of damages as follows:

“The principles to be observed by this appellate court, in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are, that it must be satisfied that either, the judge is assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately high that it must be wholly erroneous estimate of the damages.”



36. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

37. As regards the award under loss of dependency, the Court of Appeal in *Chunibhai J. Patel and Another v P. F. Hayes and Others* [1957] EA 748, 749, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

“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 dependants, 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 dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. (Emphasis added)”

38. In *Albert Odawa v Gichumu Githenji* Nku HCCA No.15 of 2003 [2007] eKLR, the court citing *Mwanzia v Ngalali Mutua Kenya Bus Ltd* made the following observation:

“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 altar of methodology, something a Court of Justice should never do.”

39. Similarly, in *Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased))* [2016] eKLR, it was held as follows:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case.”

40. 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 was dealing with a similar issue, it stated:

“[23]. In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, 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.

[24]. 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.”

41. From the above decisions, it is 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.

42. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:

“Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall , subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.”

43. The claim for loss of dependency constitutes the multiplicand, the dependency ratio and the multiplier. (See *Melbrimo Investment Company Limited v Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR).

44. In the instant case, PW1 testified that the deceased who was her husband worked as a businessman earning Kshs. 1,000 per day. She further testified in cross-examination that the deceased was 45 years at the time of death and had three children though she did not have their birth certificates. PW1 did not provide any evidence of the deceased’s business or the money he made.

45. The Court of Appeal in the case of *Isaack Kimani Kanyingi & another (Suing as the legal representative of the Estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga* [2020] eKLR held that a minimum wage ought to be adopted as a multiplicand where monthly income could not be ascertained. It stated: -

“We find that the learned judge misdirected herself and abdicated her responsibility in failing to assess the deceased’s net income as she was expected to assess the income as best as she could, using the little evidence available. The minimum wage of Kshs. 11,995/- was an appropriate place to begin...”

46. Similarly, in *Frankline Kimathi Maariu & Another vs Philip Akungu Mitu Mborothi (suing as Administrator and Personal Representative of Antony Mwiti Gakungu deceased)* (2020) eKLR where the court dealt with a similar issue stated:

“In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, 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. 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.”

47. On the question whether the trial Magistrate erred going the multiplicand way, in Kakamega H.C.C.A. 10/2017 *Cbitabbadhiya Enterprises & Another v Gladys Butali*, Njagi J stated as follows after analyzing the two methods:

“...A review of past High Court Judgments in Kenya indicated that there is no uniform method of assessing damages for estates of minors for loss of dependency. Some High Court Judges hold the view that both approaches are proper as exemplified by the following holding of Joel Ngugi J in *Kenya Power & Lighting Company Limited Vs E.K.O & Another*, Kiambu HCCA No. 169 of 2016 (2018) eKLR where he said that:“...It thus emerges that superior court are split on whether it is appropriate to use the multiplier method when assessing loss of dependency for a minor child. It was in my view therefore upon the discretion of the learned trial magistrate to use the multiplier method in this case. This court cannot review that decision merely because it would have used the global assessment method advocated by other High Court decisions. The learned trial magistrate did not proceed on wrong principles for merely choosing to use the multiplier method and then choosing the minimum wage as the multiplicand...”

48. Clearly therefore, the reasoning by the trial magistrate was on point. There is no one fixed and definitive method that must be applied. She made a choice of one of the formulae and cannot be faulted as she could choose to go either way. I also consider that indeed in making the choice, she in fact considered the submissions filed by the Appellant’s counsel.

49. In the making the choice of the multiplicand, the court was faced with a situation where there was no evidence before it of the deceased’s actual earnings. The deceased was 45 years old when he died. It is indeed correct that the deceased had no known income. In *Roger Dainty v Mwinyi Omar Haji & another* MSA CA Civil Appeal No. 59 of 2004 [2004] eKLR, the Court to Appeal observed that:

“...To ascertain the reasonable multiplier or multiplicand in each case, the court would have to consider such relevant factors as the income or prospective income of the deceased, the kind of work the deceased was engaged in, the prospects of promotion and his expectation of working life...”

50. As is evident in above case, the Court is permitted in deciding the appropriate multiplicand to even consider ‘income or prospective income of the deceased’ which means, it can be either use currently actual or futuristic (potential).

51. The deceased was not in formal employment. It was not said that he was of poor health. Without a doubt, visitatus of life and its uncertainty must be considered as necessary factors in arriving at a reasonable multiplier.

52. In self-employment business ventures, it is not uncommon that a person may work up to the 60’s, 70’s and even 80’s, depending on the type of venture. Indeed, Waweru J in *Mutuku Mbiti Vs. Coast Bus Safaris Ltd & another* (2012) e KLR applied 5 years for a 57-year-old deceased in 2012. The Court of Appeal in *Joyce Mumbi Mugi v The Co-operative Bank of Kenya Ltd & 2 Others*, the deceased was 51 years old. A multiplier of 11 years was found reasonable.



53. In *Beatrice Nyanchama Obuya v Hussein Dairy Ltd* (2010) eKLR, the court applied a multiplier of 15 years for a 45 years old deceased.
54. The trial court, in a clear demonstration that it considered the pleadings and submissions by the appellant adopted the appellant's minimum wage proposal of Kshs. 9,000 as a multiplicand. I find no reason to interfere with the same. The multiplicand of 2/3 is not contested.
55. On the multiplier, it is trite that no two cases can be similar, but only comparable. Upon my own evaluation of the evidence on record guided by the above cases and peculiar circumstances of this case, I hold and find that the multiplier of 13 years adopted by the trial court was comparable to other decisions.
56. In the end, I find no reason to interfere with the trial court's award on loss of dependency.
57. Turning to the awards under the *Law Reform Act*, it is true that the general rule is that the award for pain and suffering depends on whether after the accident, the deceased suffered any such pain. In *Suleimani Muwanga v Walji Bhimji Jiwani and Another* (1964) EA 171 that:

“No award would be made in regard to head for pain and suffering, because the court is satisfied that immediately after the accident, the deceased was unconscious. She was removed and taken to hospital in that state and died immediately on admission. There is no evidence that she was even able to speak to anybody after the accident, and that she could ever have been conscious of any pain.”

58. In this case, the investigating officer one CPL. Monicah Aoko testified that she visited the deceased at Nyabondo Hospital where he was taken after the accident and found him unconscious but that he later died when he was taken to JOOTRH. Accordingly, there is no basis upon which I can interfere with the award made under this head.
59. As regards loss of expectation of life, it was held in *Uganda Electricity Board v Musoke* [1990-1994] EA 581 that:

“Award for loss of expectation of life is made on the basis of loss of prospective happiness by the deceased and the following are the principles for making an award under this head of damages: -

1. Before any damages are awarded in respect of the shortened life, of a given individual, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.
2. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.



3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risk and uncertainties of childhood and having in some degree attained an established character and firmer hopes, his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.
4. Stripped of these technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in putting a money value on the prospective balance of happiness in years that the deceased might have lived, the Judge is attempting to equate incommensurables. Damages, which would be proper for a disabling injury, may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen.

In this case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed. There is no evidence that the deceased would have had an unhappy life. The deceased was aged fourteen and was still in primary.”

60. It is true that the deceased was 45 years old. The trial court awarded Kshs 100,000.00 for loss of expectation of life. In my view, considering comparable awards, from the decisions relied on by the respondent in the lower court, I am not 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 that she misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.
61. As to whether there was double award under the Law Reform Act and Fatal Accidents Act, I refer to the case of Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja (Deceased)) v Kiarie Shoe Stores Limited [2015] eKLR where the Court of Appeal explained on the issue of double compensation under the Law Reform Act and the Fatal Accident Act as follows: -

“Finally, on the third issue, learned counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law.”

This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issues of duplication does not arise.



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

62. From the above decision, I find that there is no legal requirement for the court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*. The argument by the advocates for the appellant on the issue therefore does not stand.
63. The upshot of the above is that I find the instant appeal devoid of any merit and is thus dismissed. As the respondent did not participate in these appeal proceedings, each party shall bear their own costs of the appeal.
64. The lower Court to be returned forthwith.
65. This file is closed.
66. I so order.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 21<sup>ST</sup> DAY OF MARCH, 2024.**

**R.E. ABURILI**

**JUDGE**

