Nation Media Group Limited v Thuo & another (Suing as the Administrators of the Estate of Josephat Nduati Kungu – Deceased) (Civil Appeal 157 of 2019) [2024] KEHC 4058 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4058 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 157 OF 2019

JRA WANANDA, J

APRIL 26, 2024

BETWEEN

NATION MEDIA GROUP LIMITED ..... APPELLANT

AND

MARY WANJIRU THUO ..... 1ST RESPONDENT

GLADYS WANJIRU KIMANI ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOSEPHAT NDUATI KUNGU – DECEASED

JUDGMENT

1. This Appeal arises from a suit seeking compensation for injuries suffered by a 29 years old male which arose as a result of a road accident. The Appeal is against the trial Court's assessment of quantum (damages) only. In the suit, the Appellant was the Defendant whereas the Respondents were the Plaintiffs.

2. The suit was instituted vide the Plaint filed through Messrs Keter Nyolei & Co. Advocates. Suing as the legal representatives of the deceased, the Respondents pleaded that the Appellant was the owner of the motor vehicle registration number KBZ 238J, Isuzu Pick-Up (hereinafter referred to as "the Appellant's vehicle"), that on 21/03/2017, the Appellant's driver, agent or employee so negligently and carelessly drove, managed and/or controlled the said motor vehicle along Nakuru-Eldoret Road at Mawe Tatu area causing it to collide with another motor vehicle thereby causing fatal injuries to the deceased who was a lawful passenger in the Appellant's said motor vehicle. The persons listed as dependents of the deceased were a widow aged 25 years, a son aged 1 year, the father and the mother. It was further pleaded that the deceased a businessman and a boda boda rider, that he was assisting his family as a father hence his estate and dependents have suffered loss of dependency and claim

damages. The Respondents therefore prayed for Judgment for general damages, special damages at Kshs 130,700/-, costs and interest against the Appellant.

3. Initially, Interlocutory Judgment was entered when the Appellant did not enter Appearance or file a defence. However, by the consent recorded on 2/09/2018, the Judgment was set aside and the Appellant allowed to defend the suit. Accordingly, in its Statement of Defence filed through Messrs Mose, Mose & Milimo Advocates, the Appellant denied any negligence, blame or liability for causing the accident.

4. On 7/05/2019, the parties recorded a consent on liability at the ratio of 80:20 in favour of the Respondents as against the Appellant. The suit then proceeded to hearing in which only the 2nd Respondent, as the 2nd Plaintiff testified as PW1. The Appellant (Defendant) did not call any witness.

5. In her evidence, PW1, (2nd Respondent) adopted her Witness Statement and stated that the deceased was his son and that she obtained a grant of Administration over the estate of the deceased which she filed for with the 1st Respondent. She stated further that pursuant to the said accident, the deceased died on the spot, that the deceased was 29 years old at the time of his death and left behind a wife (1st Respondent), 1 child, PW1 and also his father. She testified further that the deceased used to assist them financially, that the deceased was a businessman and that the Respondents spent money for food and other items during the funeral, at about Kshs 100,000/-. She also produced documents as exhibits.

6. After trial, the Court delivered its Judgment on 4/10/2019 whereof it assessed and awarded damages to the Respondents as follows:

a)	Pain & suffering	Kshs 20,000/-
b)	Loss of expectation of life	Kshs 100,000/-
c)	Loss of dependency	Kshs *2,425,680*/-
d)	Funeral expenses and ad Litem	Kshs 130,700/-
e)	Total	Kshs 2,675,680/-
f)	Less 20% contributory negligence	Kshs 660,600/-
g)	Net sum	Kshs 2,140,400/-
h)	Costs and interest	

7. The "loss of dependency", item (c) above at Kshs 2,425,680/-, was broken down as multiplicand of Kshs 10,107/-, multiplier of 30 years, and dependency ratio of 2/3, as follows:

   Kshs 10,107- x 30 x 12 x 2/3 = Kshs 2,425,680/-.

8. Aggrieved by the said award, the Appellant preferred this Appeal on 7 grounds as follows:

   i. That the learned trial Magistrate erred in law and fact in failing to appreciate the reasonable and sufficient evidence tendered in Court when assessing and awarding general damages.

ii. That the learned trial Magistrate erred in law and fact in awarding general damages that was excessive in the circumstances.

iii. That the learned trial Magistrate erred in law and fact in loss and expectation of life at Kshs 2,425,680/= ..... which assessment when viewed against the evidence adduced in Court and comparable claims is manifestly excessive and inordinately high as to amount to a miscarriage of justice.

iv. That the learned trial Magistrate erred in law and in fact in not sufficiently taking into account, in totality, all the reasonable and sufficient evidence on special damages, and consequently proceeded on wrong principles (if any) thus arriving at an erroneous award

v. That the learned trial Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the Appellant.

vi. That the learned trial Magistrate failed to exercise her discretion judiciously in awarding damages and failed to apply the settled principles of law.

vii. That the learned trial Magistrate failed to generally, judicially apply and to adequately evaluate the evidence tendered and thereby arrived at a decision unsustainable in law.

Hearing of the Appeal

9. It was then agreed and I directed that the Appeal be canvassed by way of written Submissions. Pursuant thereto, the Appellant filed its lengthy 23-page Submissions on 6/11/2023 while the Respondents filed on 28/11/2023.

Appellants' Submissions

10. On "loss of dependency", Counsel for the Appellant cited the case of Leonard O. Ekisa & Another vs Major K. Birgen [2005] eKLR to the effect that there has to be proof of dependents and evidence of dependency and submitted that the evidence tendered did not meet the threshold for adoption of the multiplier, multiplicand and dependency ratio method, that the Respondents were to demonstrate how the deceased used to support the listed dependents and to what extent they have lost such support, that the deceased's earnings were not pleaded nor was evidence tendered on the same, that the allegation that the deceased was a businessman was not supported by any cogent evidence, that the Respondents did not tender any evidence such as a log-book or driving licence to show that the deceased owned a boda boda motorcycle or that he was a qualified rider, that in the death certificate, the deceased's occupation is noted as "farming" only, that farming is a seasonal venture and not an all year round occupation, that no evidence was tendered to reveal the nature of the farming activity the deceased engaged in, and no evidence was tendered such as receipts for sale of any farm products or in proof of ownership of land by the deceased for the alleged farming purposes, that no evidence was adduced to prove that the minor noted in the Plaint was actually the deceased's biological son since no birth certificate or even notification of birth was tendered, that no proof of marriage such as a marriage certificate was tendered and that a Chief's letter is not sufficient proof of marriage or paternity.

11. In view of the above, Counsel submitted that the multiplier, multiplicand and dependency ratio method of assessing loss of dependency is inapplicable or not appropriate and he thus suggested the global /lump sum award approach. He cited the case of Mwanzia vs Ngalali Mutua Kenya Bus Ltd and quoted in Albert Odawa vs Gichumu Githenji, Nku HCCA No. 15 of 2003 (2007) KLR and also

Mary Khayesi Awalo & Another, Eld HCCC No. 19 of 1997 [1999] eKLR and submitted that the use of the multiplier approach contributed to the excessive award of damages.

12. Regarding "multiplicand", Counsel submitted that the Court adopted the minimum wage for an unskilled labourer as per the Regulation of Wage (General (Amendment) Order 2016 at the sum of Kshs 10,107/-, that however a perusal of the minimum wages statutes in Kenya reveals that the Regulation of Wage (General (Amendment) Order 2016 cited does not exist, that the trial Court therefore relied on a non-existent minimum wage in assessing the multiplicand, that the applicable minimum wage for the relevant period, being the period prior to the accident that occurred on 21/03/2017, was the one that came into effect on 1/05/2015, that if the trial Court had applied the correct statute, then the wage applicable would have been that of a general labourer in all other areas, that noting that the deceased was a resident of Burnt Forest as noted in the Death Certificate, the multiplicand would thus have been Kshs 5,844.20 per month, that the sum of Kshs 10,107/- applied as the income only for a general labourer residing in former municipalities, that the multiplicand adopted was excessive and without legal basis, that the same was even higher than the one the Respondents had proposed in their submissions, namely, Kshs 8,000/-.

13. Regarding the adoption of the "multiplier" of 30 years, Counsel submitted that the trial Court relied on authorities that were not comparable to the age of the deceased herein, that had the trial Court properly analyzed the authorities, it would have adopted a multiplier in the range of 21-23 years, and that the multiplier adopted was even higher than that proposed by the Respondents, namely, 25 years.

14. Regarding the adoption of the "dependency ratio" at 2/3, Counsel submitted that the trial Court adopted the same on the basis that the deceased was "unmarried and that his dependents were his parents", that there was no proof of dependency, that the Respondents did not furnish cogent evidence to prove that the deceased was a family man, that the alleged wife did not testify, that the mere allegation by PW1 that the 1st Respondent was her daughter-in-law is not sufficient proof of marriage to the deceased, that may be it is for this reasons that the trial Magistrate held that the deceased was unmarried, that having found that the deceased was unmarried, then the deceased's lawful dependents were his parents only, that however, the evidence fell short of proving dependency, that the burden of proving the claim was upon the Respondents, and that the trial Court ought to have adopted a dependency ratio of 1/3 owing to the paucity of the evidence tendered on the issue of dependency.

15. Regarding "special damages", Counsel submitted that in the Plaint, the same was particularized as funeral expenses as Kshs 100,000/-, post mortem and mortuary fees at Kshs 10,200/-, copy of records at Kshs 500/- and cost of obtaining a grant at Kshs 20,000/-, that special damages should be specifically pleaded and strictly proved, that the special damages that were pleaded and proved was to the tune of Kshs 15,200/-, that the pleaded costs of Kshs 20,000/- allegedly incurred in obtaining the Grant was not proven since the Respondents did not tender any proof of such Receipt for payment thereof, that in her witness statement, PW1 alleges that she spent Kshs 30,000/- which contradicts the amount pleaded in the Plaint. In respect to "funeral expenses" pleaded at Kshs 100,000/-, Counsel submitted that the same was not proven. He therefore submitted that the trial Court erred in claiming that the Respondents pleaded and proved special damages of Kshs 130,700/-. He submitted that in taking account the principle of reasonableness, a sum of Kshs 50,000/- would have sufficed to cover for the alleged funeral expenses, and that the said sum of Kshs 50,000/- plus the proven Kshs 15,200/- totalling Kshs 65,200/- would have sufficed as special damages.

Respondent's Submissions

16. On his part, Counsel for the Respondents submitted that determination of quantum of damages payable to a victim of a road traffic accident has been settled as that of discretion of the Court and

the peculiar circumstances of each case, and that such discretion is rarely disturbed by an appellate Court, that this is especially considering that the trial Court had the advantage of seeing and hearing directly from the witnesses. He added that unless it is shown that the award is manifestly low or high, the appellate Court ought to be slow in disturbing an award of damages, that the Appellant has raised no grounds to warrant disturbing of the awards, that it is not in dispute that the deceased was a businessman, was aged 29 years, was married and left behind wife, children and both parents, that the adoption of a multiplicand of Kshs 10,107/- is provided for under the Regulation of Wages General (Amendment) Order 2016, and that even looking at current realities of the economy, a sum of Kshs 10,107/- cannot be said to have resulted in an excessive award.

17. On "special damages", under the head of "funeral expenses", Counsel submitted that the Courts have relayed the rule on funeral expenses especially in African funerals and the same is awarded even without specific proof.

18. He then submitted that the Respondent prayed for damages for loss of consortium, that the evidence tendered confirms that the deceased left behind a young widow and the children also have had to bear loneliness and lack of love, and that this Cout should therefore review the evidence and award loss of consortium.

Determination

19. As reiterated in a plethora of cases, this being a first appellate Court, its role is to evaluate, re-assess and re-analyze the evidence before the trial Court and draw its own conclusion. In the case of Kenya Ports Authority vs Kuston (Kenya) Ltd. [2009] 2 EA 212, for instance, the following was stated:

> " On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

20. Before I dwell further into this matter, I observe that Counsel for the Respondents has urged this Court to make an award for loss of consortium which was pleaded before the trial Court but which the Court does not seem to have said anything about. My simple answer is that the Respondents not having filed a cross-Appeal of their own, this Appellate Court has not been moved to deal with that issue. As a result, the Appellant has not had an opportunity to respond thereto. I therefore decline the invitation to "stray" into the issue of loss of consortium.

21. In the circumstances, upon examination of the Record, including the Submissions presented, I find the issues that arise for determination in this Appeal to be the following:

    i. Whether the trial Court's award for "loss of dependency of life" was assessed on wrong principles thus resulting into an excessive award.

    ii. Whether the trial Court's award for "special damages and funeral expenses was proper and/or excessive.

22. As aforesaid, the Appellants' grievance is on the quantum of damages awarded which it "feels" is excessive. On this issue, in Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v A.M. Lubia and Olive Lubia [1985], Kneller J.A, guided as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in 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 low or so inordinately high that it must be a wholly erroneous estimate of the damage ....."

23. Similarly, in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, the Court of Appeal pronounced itself as follows:

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled ....."

24. An appellate Court will not therefore 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 trial Court proceeded on wrong principles, or that it misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The question is therefore whether there are justifiable grounds for this Court to interfere with the quantum of damages awarded by the trial Court.

25. I now proceed to determine the said issues.

i. Whether the trial Court's award on "loss of dependency" was excessive

26. Section 4 of the *Fatal Accidents Act* provides as follows:

> "(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
>
> ....."

27. Where the Court adopts the so-called multiplier method of assessing damages for "loss of dependency", the claim would constitute determination of the multiplicand (monthly earnings), multiplier (number of years remaining in earning life) and the dependency ratio. In this case however, the Respondents

fault the trial Magistrate for adopting the minimum wage-multiplier method rather than the alternative global award method.

28. The trial Magistrate opted for the minimum wage-multiplier approach upon finding that there was no sufficient material before it to ascertain the deceased's earnings. The trial Court adopted the monthly wage as Kshs 10,107/- on the basis that the same was the minimum monthly wage payable to an unskilled labourer in Kenya at the time under the Regulation of Wages (General) Amendment Order, 2016. I agree that indeed there was no concrete evidence on what the deceased used to earn. In the Plaint, it was stated that he was a businessman and a boda boda rider but no evidence was presented to prove this fact. In the Plaint, the earnings was not disclosed while in the Witness Statement, the earnings was alleged to be Kshs 30,000/- per month.

29. In the case of Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR, Mabeya J dealt with a similar issue and stated as follows:

> " (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.
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> 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."

30. In the case of Mary Khayesi Awalo & Another v Mwilu Mulungi & Another [1999] eKLR, Nambuye J (as she then was), stated the following:

> " 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."
>
> .....
>
> "As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the court's opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books".

31. In the case of Seremo Korir & Another vs SS (Suing as The Legal Representative of the Estate of MS, Deceased) [2019] eKLR, R. Sitati J held as follows:

> " 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.
>
> .....
>
> 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"

32. From the foregoing, the indication, and which I so find, is that that the choice of whether to adopt the multiplier-minimum wage method or the global-lump sum award method is entirely a matter of discretion of the trial Court. Of course, the adoption of either is dictated by the circumstances of the case and must be made judiciously. Personally, had I been the trial Court, I would have most probably adopted the global sum method rather than the minimum wage-multiplier-multiplicand one. However, now that I have made the finding that the choice of whether to adopt a multiplier or a global award approach is entirely a matter of discretion of the trial Court, I reject the Appellant's contention that the Court erred in failing to adopt a global lump sum figure.

33. It may well be true, as alleged by the Appellant, that the Court may have cited the wrong Regulation of Wages Order in force or prevailing at the material time, but in my view, the sum of Kshs 10,700/- was still a reasonable figure considering the state of the Kenyan economy and the effects of inflation. Relying on the minimum wage is simply an approximation made by a trial Court as a mere guide and it does not mean that the Court must at all times or always take the exact figure stipulated in the minimum wage Order when settling for a multiplicand. This ground therefore fails.

34. Regarding the "multiplier" of 30 years adopted by the trial Court, from the evidence adduced, it is clear that the deceased died at the age of 29 years. There was however no sufficient evidence to support the allegation that he was engaged in farming or in business hence the trial Court's choice of the minimum wage-multiplier approach. Despite the lack of sufficient material, it is only fair to presume that, being an adult who used to live on his own and who had to somehow survive, he used to make some earnings. There was no evidence to the effect that the deceased was of ill-health or was impaired in any manner. I have looked at comparable previous cases in terms of age and I have come across the following decisions:

    a. In 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, while dealing with an Appeal concerning a 35 years old deceased, Hon. Lady Justice J. Kamau upheld a multiplier of 20 years

    b. In Bash Hauliers v Dama Kalume Karisa & another [2020] eKLR, while dealing with an Appeal concerning a 32 years old deceased, Hon. Lady Justice Njoki Mwangi upheld a multiplier of 20 years.

    c. In Sidi Kazungu Gohu & another (Legal Representatives of the Estate of George Yongo Katana (Deceased) v Fatuma Abdi Mohamed & another [2021] eKLR, Hon. Justice R. Nyakundi while dealing with an Appeal concerning a 34 years old deceased, awarded a multiplier of 24 years.

d. In Kenya Power & Lighting Company Ltd v James Muli Kyalo & another [2020] eKLR, while dealing with an Appeal concerning a 29 years old deceased, Hon. Justice C. Mwita reduced the multiplier from 25 years to 20.

e. In Coast Bus (MSA) Ltd v Fatimabhai Osman Suleiman & another (suing at the Legal Representatives of the Estate of Aslam Jeferali Juma [2020] eKLR, while dealing with an Appeal concerning a 30 years old deceased, Hon. Justice G. Farah Amin upheld a multiplier of 25 years.

35. From the foregoing, I deduce that in comparable cases, where the deceased is around 30 years of age, the Courts have given multipliers of between 20-25 years. In the circumstances, and taking into account the vagaries, uncertainties and vicissitudes of life, I find the multiplier of 30 years adopted by the trial Court to be on the higher side and that therefore, the trial Court acted upon a wrong principle of law. I am therefore persuaded that I should interfere with the same, which I hereby do, and reduce the multiplier from 30 years to 25.

36. Regarding the trial Court's adoption of the "dependency ratio" of 2/3, I note that at the end of her Judgment, the trial Magistrate stated that the deceased was unmarried. Although this statement was strongly supported by the Appellant's Counsel, I have carefully gone through the body of the Judgment and I cannot find any explanation made anywhere therein by the Magistrate to shed light on how she arrived at this finding. I say so because in the Plaint, it was expressly pleaded that, apart from the parents, the deceased also left behind a wife and a son and that all these were his dependents. In fact, although she did not testify, the said wife was the 1st Respondent herein and the same one mentioned in the Letters of Administration as the joint legal representative, together with the 2nd Respondent, the mother to the deceased. There is also the letter from the Chief stating as much. In her oral evidence, the 2nd Respondent reiterated the above and the Appellant, having not called any witnesses, did not controvert the same.

37. In the absence of any explanation by the Magistrate, I am at a loss as to how she arrived at her concluding statement that the deceased was unmarried. To me, my independent review of the evidence leads me to the finding that sufficient evidence was presented to support a finding that, apart from his parents, the deceased also left behind a wife and a son and that all four qualified as his "dependents" within the meaning envisioned under Section 4 of the *Fatal Accidents Act* earlier cited. With due respect, and unless the Appellant's Counsel does not live in this very society, his submission that evidence of marriage was not proved simply because no marriage certificate was produced cannot be a serious one. The same goes to the allegation that paternity of the 1-year-old son was not proved simply because no birth certificate or notification of birth were produced. In any event, it must always be recalled that in civil cases, unlike in criminal proceedings, proof is not on a beyond reasonable doubt basis, but on the basis of balance of probabilities.

38. It is true that ordinarily, where a deceased dies unmarried, the dependency ratio would generally be awarded at 1/3, rather than 2/3. In this case however, despite stating that the deceased was unmarried, the Magistrate still went ahead and adopted the dependency ratio of 2/3 nevertheless. Again, there is no explanation in the body of the Judgment shedding light on this apparent contradiction

39. In the circumstances, I am satisfied that even though the evidence presented was not watertight, survivorship and dependency were sufficiently proved to an acceptable standard. The choice of the 2/3 dependency ratio by the Magistrate, though not explained, was therefore, nevertheless, still the correct one. I will also not therefore interfere with it.

40. The upshot of the above is therefore that regarding "loss of dependency", I have upheld the multiplicand of Kshs 10,107/- and the dependency ratio of 2/3. On multiplier however, I have reduced the same to 25 years. The substituted award under this head is therefore tabulated up as follows:

Kshs 10,107- x 25 x 12 x 2/3 = Kshs 2,021,400/-

ii. Whether the trial Court's award for special damages and funeral expenses was proper and/or excessive

41. In the Plaint, the special damages were pleaded as follows:

a)	Funeral expenses	Kshs 100,000/-
i)	Post mortem and mortuary fees	Kshs 10,200/-
b)	Copy of records	Kshs 500/-
k)	Costs of obtaining grant	Kshs 20,000/-
	Total	Kshs 130,700/-

42. The trial Court awarded the entire amount pleaded at Kshs 130,700/-. However, although several invoices were produced, and although the record does not very clearly capture the exhibits produced, I can decipher that the receipts produced were as follows:

a)	Funeral expenses	Nil
b)	Post mortem fees	Kshs 8,200/-
c)	Mortuary fees	Kshs 2,200/-
d)	Copy of records	Kshs 550/-
e)	Coffin	Kshs 14,500/-
	Total	Kshs 25,450/-

43. From the foregoing, it is evident that the Respondents did not necessarily strictly produce each item against its own specific receipt. The itemization or breakdown and the receipts did not necessarily align. For instance, while the Respondents pleaded expenses for obtaining the grant, they did not produce any receipt thereon. Instead, while they did not specifically plead the cost of the coffin, they produced a Receipt for the same. However, I believe that the "funeral expenses" pleaded would still also include or subsume some of these same items pleaded separately, such as cost of the coffin.

44. Looking at the figures pleaded, those proved and those awarded, I do not think that the discrepancy is so substantial to justify interference with the award made by the trial Magistrate. On the contrary, I find the discrepancy to be so minimal and insignificant and my view would be to leave the award undisturbed.

45. In any event, it is generally settled that "funeral expenses" will still be awarded even where proof by receipts has not been availed. On the matter of absence of Receipts for funeral expenses, the Court of Appeal in Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR stated as follows:

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/ = was pleaded in the plaint and witnesses who were the relatives of the deceased - testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs 150,000/= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

46. Again, the Court of Appeal in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] eKLR held as follows:

> " We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved. ... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc. ....."

47. Further, in JNK (suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] eKLR, Gikonyo J having made reference to the above case held as follows:

> " In spite of lack of receipts this court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased."

48. Although I agree that special damages must be pleaded and proved, a perusal of the above authorities reveals that that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses. In view of the foregoing, and despite the Respondents' failure to produce receipts totalling the pleaded figure of Kshs 100,000/-, there really is no dispute that there was a funeral following the deceased's death. This is evidenced by the copy of the burial permit on record. The Respondents are therefore entitled to a reasonable award in funeral expenses. The sum of Kshs 100,000/- pleaded and awarded under this item cannot by any means be termed as excessive. In fact, considering the realities on the ground and the state of the economy, the figure appears to be "a drop in the ocean". I am convinced that the family spent much more.

49. For the said reasons, I will not disturb the amounts awarded specifically under "funeral expenses" at Kshs 100,000/- or at Kshs 130,700/- awarded generally as "special damages".

Final Orders

50. In the end, the Appeal partially succeeds and only to the extent stated hereinbelow and upon which I order as follows:

    i. The trial Court's award on loss of dependency at the sum of Kshs 2,425,680/- is hereby set aside, reduced and substituted with an award of Kshs 2,021,400/-

ii. The rest of the awards made by the trial Court are left undisturbed.

iii. Each party shall bear its own costs of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF APRIL 2024

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WANANDA J.R. ANURO

JUDGE