



REPUBLIC OF KENYA



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**Gitu v Kariuki & another (Suing as the Administrators of the Estate of John Wanyoike Mucuca (Deceased)) (Civil Appeal 1 of 2022) [2024] KEHC 3983 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 3983 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL 1 OF 2022**

**FROO OLEL, J**

**APRIL 22, 2024**

**BETWEEN**

**GEOFFREY WAIHENYA GITU ..... APPELLANT**

**AND**

**DAVID MUCHUCHA KARIUKI ..... 1<sup>ST</sup> RESPONDENT**

**ANNA WACHUKA WANYOIKE ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF JOHN WANYOIKE  
MUCUCA (DECEASED)**

**JUDGMENT**

**A. Introduction**

1. This appeal arises from the judgment of Honourable Martha Opanga (SRM) dated 15<sup>th</sup> September 2020, delivered in Kangundo CMCC no. E0259 of 2018 where she awarded the Respondents a sum of Ksh.2,225,470/= made as follows:-
  - a. Pain and suffering Ksh. 100,000/-
  - b. Loss of expectation of life Ksh. 150,000/-
  - c. Loss of dependency Ksh. 1,900,000/-
  - d. Special damages Ksh.75,390/-
  - e. Plus cost and interest.

**B. The Pleadings**

2. The Respondents filed the primary suit as the legal beneficiaries of the estate of the late John Wanyoike Mucuca and claimed damages under the [Law Reform Act](#), Fatal Accident Act and Special damages as



against the appellant. It was pleaded that on 14.09.2017 the 'deceased' was a lawful passenger on Motor vehicle Registration no. KAJ 663R (hereinafter referred to as the suit motor vehicle), Which was being driven along Donyo Sabuk- Kenyatta road at Kanyata area, when the said suit motor vehicle was so negligently, carelessly and/or recklessly driven managed and/or controlled by the Appellant himself, his driver agent employee and /or servant that it was allowed to overrun the deceased while he was alighting from the motor vehicle and as a result he suffered fatal injuries. The Respondents particularized the negligence and/or carelessness alleged and sought for compensation as pleaded.

3. The appellant in response filed his statement of defence wherein he denied being liable for this accident either directly and/or vicariously and put the respondents to strict proof thereof. The appellant further denied owning the suit motor vehicle and/or the fact that an accident did occur on the material date as between the said suit motor vehicle and the deceased. In the alternative and without prejudice to the above the appellant did aver that if indeed an accident did occur then it was caused by the negligence of the deceased which negligence was particularized in the statement of defence. The appellant therefore prayed that this suit be dismissed with costs.

### **C. Evidence at trial**

4. PW1 Mr Daniel Muchucha Kariuki, testified that the deceased was his son, who had died as a result of injuries sustained in a road traffic accident, which occurred on 14.09.2017. He had been called by his other son PW2, who informed him of the obtaining position. The witness also relied on his witness statement, where he confirmed the incident and organized for the burial of his son at their Gatundu village/home. The deceased was 25 years old as the time of his death and worked as a casual labourer earning approximately Kshs 800/= daily, part of which he would use to support his parents. PW1 blamed the driver of the suit motor vehicle for being negligent. In cross examination he did confirm that the deceased used to help him and his mother but had no written proof of his earning. Further he testified that he had spent Ksh75,390/= as burial expenses, but had used more than that amount as not all expenditure was receipted. He further confirmed that he was told that his son had fell off from the suit motor vehicle, which overrun him. He visited the police station and found the suit motor vehicle at the station, but did not visit the scene of the accident.
5. PW2 John Ndichu testified that on 14.09.2017 he was with the deceased at the quarry, and after work, they got a lift on the suit motor vehicle. On reaching their destination, where they were to alight, the driver of the suit motor vehicle stopped/halted and as the deceased was alighting, the suit motor vehicle was suddenly set on motion and started reversing and in the process overran the deceased killing him instantly. He was seated next to the deceased in the cabin and saw the incident occur. According to PW2 the suit motor vehicle driver claimed his breaks had failed.
6. Thereafter he called PW1 and informed him of what had transpired. The accident happened as a result of the negligence of the suit motor vehicle driver, as he allowed the suit motor vehicle to reverse at full speed and in the process threw the deceased off balance as he alighted. In cross examination PW2 confirmed that the accident occurred in his presence and this incident was reported at Donyo Sabuk police station, who came to the scene and took the body to the mortuary.
7. PW2 confirmed that both him and the deceased engaged in casual work and earned a daily wage of Kshs 1000/= going down. The deceased was not married and used part of the wages earned to help his parents. The suit motor vehicle had stopped, but as the deceased was alighting the driver suddenly ignited the said vehicle and it suddenly reversed instantly crushing his brother. It was the front wheel of the suit motor vehicle that overrun the deceased and the deceased did not jump off a moving motor vehicle.



8. PW3 Sgt Paul Mwangi testified that he was not the investigating officer but the accident file was handed over to him by P.C Simiyu who had since been transferred. The accident did occur on 14.09.2017 along Donyo Sabuk- Kanyata road near Kanyata area, at noon, and it involved the suit motor vehicle and the deceased. One of the passengers in the said vehicle fell off from the moving lorry and was crashed by its rear tyres. The deceased had not jumped off a moving vehicle, but had fell off from the said motor vehicle. The scene was visited and the body taken to the mortuary. In cross examination, the witness stated that the matter was pending under investigation and the suit motor vehicle driver ought to have recorded his statement regarding the accident.
9. DW1 Geoffrey Wainaina Giru, relied on his witness statement, wherein he stated that on 14.09.2017, he was called by his driver David Karaya Gitu, and informed that one of his loaders had jumped off the suit motor vehicle, while it was in motion and was crashed by its wheels. He went Ol Donyo Sabuk police station, where he reported the incident and they proceeded to the scene of the accident, where he found his driver and the other loader named Joseph Karanja. The deceased body too was still lying on the road and was later taken by the police to Muring'a Nursing Home, while the suit motor vehicle was detained at Ol Donyo sabuk police station and was later released after inspection. From the account of his driver, he blamed the deceased for being negligent and jumping out of a moving motor vehicle. In cross examination, he confirmed that he did not witness the accident and had occasionally used the deceased to do casual jobs.
10. DW2 David Karai Githu, also testified and confirmed that he knew the deceased, who worked as his turnboy. He adopted his witness statement wherein he confirmed that indeed an accident did occur on 14.09. 2017, along Kayata road. As he was driving, heading to Kayata river to collect sand, he felt a sudden gush of wind from the left side and when he checked he saw the left door wide open and immediately saw the deceased jump off. He applied emergency breaks and stopped. When they alighted the realized that the deceased had been crashed by the left wheel. His upper torso was completely crushed and was beneath the wheels. He denied being negligent and blamed the deceased for jumping off a moving lorry, with a clear intention to end his life. In cross examination DW2 stated that DW3, told him to stop as he were not seeing the deceased. When they checked, they found that he had been run over, by the suit lorry and had died. DW2 denied knowing PW2 nor was PW2 version of events right. In reexamination, DW2 stated that he did not know, why the deceased alighted from the lorry nor did the deceased tell him he wanted to commit suicide.
11. DW3 Joseph Karanja Waithera did testify that on the material day he was with the deceased and DW2 and they were all seated on the front cabin of the suit motor vehicle. He was asleep and did not see the deceased fall off the suit motor vehicle. When he woke up he did not see him and told the driver to stop. DW3 further adopted his witness statement, where he confirmed that he felt a strong and sudden gush of wind from his left side and when he checked he saw the door wide open. He alerted DW2, who also had noticed the same and immediately stopped the suit motor vehicle. When they came out, they noticed that the deceased, had jumped out of the suit motor vehicle, while in motion and had been crashed. His upper body was completely crashed beneath the wheels, while his legs were on the outer left side. They contacted the owner of the lorry, who came and called the police.
12. DW3 further confirmed that, they were only the three of them in the cabin and there was no other person at the time of the accident. He blamed the deceased for jumping out of the moving motor vehicle with clear intention to end his life. In cross examination, DW3 confirmed that as at the time of the accident he was asleep and could not tell how the accident occurred. He confirmed the same fact in reexamination, that he was asleep, but added that the door of the lorry could not open by itself unless someone opened it.



13. DW4 CPL Eliud Ngare from Donyo Sabuk police station also testified and confirmed that on 14.09.2017, a report about a fatal accident was made at the police station by DW1. His driver had reported to him that he was driving and had two passengers' in the cabin. One of them jumped off, while the motor vehicle was moving and was crashed by the suit motor vehicle rear tyre and as a result died on the spot. He was not the investigating officer nor did he visit the scene of the accident, but had the police file with him and produced the accident sketch plan as an exhibit. The deceased body was in the middle of the road and the suit motor vehicle was found 24 feet away from the body. DW2 and DW3 were the ones in the suit motor vehicle as at the time of the accident. PW2 did not record a statement with the police.
14. The statement of DW1 and DW2 were contradictory as one alleged that the deceased jumped off from the cabin, while the other said the deceased opened the door of the suit motor vehicle and fell down. The accident occurred on a murrum road and the suit motor vehicle did not have a central lock system. Further the suit motor vehicle was found to be unroad worthy and it did not have an inspection ticker. Investigations into this accident were not concluded.
15. The trial magistrate did consider the entire evidence and found the Appellant to be 100% liable. She then proceeded to award damages to the respondents totaling to Kshs 2,225,470/=plus costs and Interest. Being wholly aggrieved and dissatisfied by the judgment/decree issued, the appellant did prefer this appeal and raised fifteen (15) grounds of Appeal namely;
  - a. That the Learned Magistrate erred in law and in fact in failing to give due regard and consideration to the Appellant's evidence and submissions on the circumstances of the accident and thereby reached a wrong finding on liability.
  - b. That the Learned Magistrate erred in law and in fact in making a finding that the Appellant's driver was 100% liable for the accident which finding was not supported by the pleadings and the evidence placed on record by the parties.
  - c. That the Learned Magistrate erred in law and in fact in disregarding the Appellant's evidence that PW3 was not aboard the motor vehicle or present at the scene of the accident and instead admitted and applied his evidence in determining the issue of liability.
  - d. That the Learned Magistrate erred in law and in fact in disregarding the evidence by PW1 Appellant's evidence that PW3 was not aboard the motor vehicle or present at the scene of the accident and instead admitted and applied his evidence in determining the issue of liability.
  - e. That the Learned Magistrate erred in law and in fact in failing to accord due weight and consideration to the documentary evidence on the findings of the police investigating officer on the accident as produced by DW4 and thereby reached a wrong finding on the circumstances and witnesses to the material accident.
  - f. That the Learned Magistrate erred in law and in fact in misapprehending the evidence of DW4 on the nature of the defect noted in the motor vehicle inspection report and thereby reached a wrong finding that the Appellant had allowed an unroadworthy vehicle to be driven on the road.
  - g. That the Learned Magistrate erred in law and in fact in placing a duty of care on the appellant's driver by making a finding that the driver was equally negligent for failing to realize that the deceased had fallen off when there was concurrent evidence that the deceased sat at the door and owed himself a greater duty of care to ensure that the door remained closed when the motor vehicle was in motion.



- h. That the Learned Magistrate erred in law and in fact in making a finding that the Appellant's driver fell asleep while driving in the absence of any evidence on record or circumstances that would support such a finding.
  - i. That the Learned Magistrate erred in law and in fact in failing to consider the defence that the Respondents had failed to prove the particulars of negligence as pleaded against the Appellant's driver which failure outrightly denied them judgement in their favour.
  - j. That the Learned Magistrate erred in law and in fact in failing to give due regard and consideration to the appellant's submissions on quantum of damages and thereby reached a wrong assessment of damages which were grossly excessive in the circumstances of the case.
  - k. That the Learned Magistrate erred in law and in fact in taking into consideration cost of living in distinguishing the judicial authorities cited by the Appellant and thereby made a grossly excessive award Kshs. 100,000/= for general damages for pain and suffering where it was proved that the deceased died instantly after the accident.
  - l. That the Learned Magistrate erred in law and in fact in applying a dependency ration of one third (1/3) whereas the Respondents had failed to prove the issue of dependency and the evidence on record did not support such a finding under the circumstances of the case.
  - m. That the Learned Magistrate erred in law and in fact in taking into account that the deceased's dependants under the *Fatal Accidents Act* are the same with the beneficiaries of his estate under the *Law Reform Act* and offset the award made under the *Law Reform Act* from the award for loss of dependency made under the *Fatal Accidents Act*.
  - n. That the Learned Magistrate erred in law and in fact in applying a grossly high multiplier of 35 years where the deceased was a casual labourer aged 25 years which finding was not supported by any evidence placed on record and against the Appellant's submissions.
  - o. That the Learned Magistrate erred in law and in fact in making a finding that the Respondents had proved their case on a balance of probabilities as against the Appellant when it was plainly clear that the Respondents had not discharged their burden of proof as set under the law.
16. The appellant prayed that this appeal be allowed, the finding of the trial magistrate with respect to liability and quantum to be set aside and this court be pleased to reassess the proper damages payable to the Respondent.

#### **D. Submissions**

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

17. The appellant filed his submission dated 14<sup>th</sup> February 2023 and submitted that it was not in dispute that an accident did occur on 14<sup>th</sup> September 2017 along Donyo Sabuk road involving the suit motor vehicle and the deceased, one John Wanyoike Mucuca, who died at the scene. The core issue in dispute was who was to blame for this accident as between the driver and the deceased. PW2 evidence was contradictory and that materially affected its credibility. First was the time of the accident (he stated that the accident occurred at 6pm), and also stated that the deceased was his elder brother, while PW1 referred to PW2 as "a friend to my son." The police records had confirmed that the accident occurred at night and at the scene of the accident only DW2 and DW3 were present. This again contradicted PW2 who had stated that "he had left the driver and other members of the public that had gathered at the scene."



18. In light of the material contradiction of PW2 evidence, as highlighted above, the trial magistrate erred in believing the said evidence and using it as a basis to hold the Appellant 100% liable, yet the said witness was not a credible witness. Further the trial magistrate was faulted for blaming the driver for “failing to realize that the deceased had fallen off the vehicle”, yet his duty of care was minimal considering that the deceased sat next to the door and DW2 did not in any manner contribute to the opposite cabin door being opened. In the circumstance, there is very little DW2 could have done as a driver to prevent this incident.
19. Further the appellant faulted the trial magistrate for making hypothetical assumptions that the driver must have been asleep, and that is why he did not see the appellant fall off as this did not come out in evidence. Finally no evidence had been adduced to support the particulars on negligence as pleaded in the plaint and the Appellant therefore urged the court to set aside the trial magistrates finding on liability.
20. As regards quantum, the appellant urged this court to find that the award of Ksh 2,225,740/= was inordinately high as the deceased income was not proved. It was therefore erroneous for the trial court to use minimum wage of Kshs 13,572/= and multiplier of 35 years to calculate loss of dependency. The court was urged to reconsider the same. Reliance was placed on Catholic Diocese of Kisumu Vs Sophia Achieng Tete (2004) 2 KLR 55.
21. The appellant thus prayed that his appeal be allowed both on quantum and liability and further that he be awarded costs of this Appeal.
22. The respondent did not file any submissions in opposition to this Appeal.

### **Analysis and Determination**

23. I have considered the entire proceedings of the trial court, the record of Appeal and the submissions of the appellant herein. I note that this is a first appeal and the court did not have the opportunity to see the witnesses and see their demeanor however the court will analyze the evidence before it and arrive at its own independent conclusion. I am guided by the case of *Selle & Another Vs Associated Motor Boat Company Limited & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270.”

24. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

“ Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully



weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

25. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as present in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

### **I. Whether the trial court erred in finding the Appellant 100%**

#### **Liability.**

26. On the question of proof of liability, the Court of Appeal in *Micheal Hubert Kloss & Another vs. David Seroney & 5 Others* [2009] eKLR did succinctly proffered that ;

“The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more graphically in *Stapley vs. Gypsum Mines Ltd (2)* (1953) A.C. 663 at p. 681 as follows:

“To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it... The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally...”.

27. The issue of apportionment of liability was also discussed in *Khambi and another Vs Mahithi and another* (1968) E.A 70 where 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.” Similar decisions have been reached in *Mahendra M Malde Vs George M Angira Civil Appeal No 12 of 1981*

28. That a fatal accident did occur on 14<sup>th</sup> September 2017, is not in doubt. What is in contention is how the accident occurred. PW2, who is a brother of the deceased testified that on the said date, they had been given a lift by DW2 and on reaching their destination, the suit lorry stopped, to allow them to



- alight, while in that process, the suit motor vehicle reversed at full speed and threw the deceased off balance as he alighted. In the process, the suit lorry running over the deceased and killing him instantly.
29. DW2 and DW3 on the other hand insisted that PW2 was not at the scene of the accident. They were with the deceased, and as DW2 was driving they suddenly felt a gush of wind from the left side and when they checked, they saw the door wide open. DW2 stopped the suit lorry and when they alighted, they saw that they had unfortunately crushed the deceased. They blamed the deceased for jumping off a moving lorry and suggested that he might have deliberately ended his life.
  30. The appellant tried to paint PW2 as a dishonest witness, but on a critical analysis of the evidence, it is most certain that DW2 and DW3 are the ones who were dishonest in their evidence. The time as to when the accident occurred whether 6pm or later cannot be in issue as it was DW1 who reported this incident at Ol Donyo Sabuk police station at 0.30hours. That is the time the OB entry was made. It should be noted that DW2 and DW3 both in their witness statement and evidence lead in court too did not testify as to the exact time of the accident and DW3 in his witness statement which he adopted was categorical that “we contacted the owner of the motor vehicle who came after some time to the scene with police officers in their vehicle.”
  31. Further the appellant pointed out what he termed as material contradiction in the evidence of PW1 and PW2 and doubted as to whether they had a father and son relationship, Both in their evidence in chief and adopted witness statement confirmed this fact, that indeed PW2 was a son of PW1 and even though PW1 in cross examination contradicted himself, when he said that PW2 was he was a friend of his son, that materially did not affect the veracity of the PW2 evidence and/or his character.
  32. To the contrary and without doubt the evidence of DW2 and DW3 at the very basic level was unbelievable. They both allege that the deceased opened the door and flung himself out, in what was termed as a deliberate attempt to end is life. Nothing can be further from the truth.DW3 evidence, if he were to be believed was that he was asleep. His evidence was that “I was sleeping. I didn’t see wanyoike fall off the motor vehicle. When I woke up, I didn’t see wanyoike. I told the driver to stop. I can’t tell if wanyoike told the driver to stop.” DW2 also confirmed in his evidence that, “Karanja told me to stop”. I stopped because I was not seeing John”
  33. From the evidence above, both DW2 and DW2 cannot in good conscience support what they alleged in their witness statement that “they suddenly felt a gush of wind from my left side and when I checked the left door was wide open and I saw the deceased immediately jump out. I immediately applied emergency brakes and stopped”.
  34. In the case of *Ndungu Kimanji v Republic* [1979] KLR 282 the Court said:-“The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the Court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.” This scenario should apply in all fours to the circumstances herein.
  35. DW2 and DW3 were openly and without doubt untruthful witnesses and the only inference that can be drawn is that they were being untruthful and shifty because they had something to cover up. Even for argument sake if PW2 was not at the scene of the accident, still it had been proved that indeed the deceased fell off a moving lorry which as DW4 describes was unroadworthy. The legal burden under section 107 and 109 of the *evidence Act* had been proved. Under Section 108 of the *Evidence Act*, the evidential burden shifted to them to explain what transpired. The explanation given by DW2 and DW3 is wanting.



36. I refer to The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17 at para 13 and 14 where it states that;

“The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.

{16} the legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”

37. In the case of *Evans Nyakwana Vs Cleophas Rwana Ongaro* (2015) eKLR it was held that

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

38. Based on the above analysis I do find that the trial magistrate was not wrong to find the Appellant 100% liable for the accident which occurred and therefore uphold the same.

#### **I. Whether Quantum Awarded was Excessive.**

39. The principles upon which the Appellate Court will interfere with an award of damages are set out in the case *Khambi & Another v Mahitu & Another* (supra). Further the Court of Appeal in the case *Coast Bus Service Ltd v Sisco E. Muranga Ndanyi & 2 Others* Civil Appeal Case No. 192 Of 1992 Stated:

“Those principles were well stated by Law, J.A in *Bashir Ahmed Butt vs. Uwais Ahmed Khan*, By M. Akmal Khan [1982-88] 1 KAR 1 at pg 5 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 “on 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 ...”



40. Similarly, in *Jane Chelagat Bor vs Andrew Otieno Oduor* [1988] – 92] eKLR 288[1990-1994] EA47 the Court of Appeal held that:-

“In effect, the court before it interferes with an award of damages, should be satisfied that the judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damages suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked, If the Appellate Court is to interfere, whether on the ground of excess or insufficiency.”

41. The Appellant faulted the trial Magistrates finding on quantum on the basis that no proof was presented to prove the deceased income and that the assessment based on minimum wage of Kshs 13,572/= for 35 years was erroneous. This resulted in the award being inordinately high thereby justifying the intervention of this court.

42. The Court of Appeal in *Chunibhai J. Patel and Another vs. 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)”.

43. Where no evidence is lead to prove multiplicand, the court can use the global award method in determining the level of dependency, 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. In the alternative where it is proved that the deceased was in gainful employment, recognized under the Minimum wage Act, then the court is also at liberty to use “The Regulations of wages citation, (General)(Amendment) Order” to determine the minimum wage applicable to the deceased depending on the kind of work he/she was engaged in.

44. While the respondent and his witnesses averred that the deceased worked in the quarry and did general work, which earned him Ksh1000/= or less daily, the Appellants admitted that he worked as their turnboy in the suit lorry. The trial magistrate, therefore cannot be faulted for using the Regulation of wages citation, (General), (Amendment) order, 2018, to ascertain the minimum wage applicable to the deceased. The dependency ration awarded too was correct, but given the restitutes of life and back breaking nature of work undertaken by the deceased a multiplier of 35 year was on the higher side. A more realistic and appropriate multiplier would have been 25 years. To that extent the same is interfered with by this court.

45. The respondents should thus have been awarded as sum of  $Ksh.13,572/= \times 1/3 \times 12 \times 25=$  Ksh.1,357,200/= for loss of dependency.

### **Disposition**

46. Having exhaustively analyzed all the issues raised in this appeal I find that it partially succeeds on the issue of quantum. I do set aside the finding by the trial court on loss of dependency in the judgment dated 15<sup>th</sup> September 2020 by Hon Martha Opanga (SRM) In KANGUNDO CMCC No E259



of 2018 and substitute the same with a finding that the respondent is entitle to an award of Kshs. 1,357,200/= .

47. The final award for this claim with therefore be as follows;

- a. Liability 100% as against the Appellant
  - b. Pain & suffering Kshs.100,000/=.
  - c. Loss of expectation of life Kshs.150,000/=
  - d. Loss of dependency Kshs. 1,357,200/=
  - e. Special Damages Kshs.75,390/=
- Total Kshs.1, 682,590/= plus costs and Interest.

48. Each party is to bear their own costs.

49. It is so ordered.

**JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

**DELIVERED ON THE VIRTUAL PLATFORM, TEAM THIS 22<sup>ND</sup> DAY OF APRIL, 2024.**

**In the presence of: -**

Ms Nyaboke for Appellant

No appearance for Respondent

Sam Court Assistant

