



Kenya Power and Lighting Company Limited v Awina (Suing as the Personal Representative and Administrators of the Estate of Jeremy Adrian) (Civil Appeal E015 of 2023) [2024] KEHC 6242 (KLR) (27 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6242 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E015 OF 2023
RE ABURILI, J
MAY 27, 2024**

BETWEEN

KENYA POWER AND LIGHTING COMPANY LIMITED APPELLANT

AND

CAROLINE QUINO AWINA (SUING AS THE PERSONAL REPRESENTATIVE AND ADMINISTRATORS OF THE ESTATE OF JEREMY ADRIAN) RESPONDENT

(An appeal arising out of the Judgement of the Honourable Beryl M.A. Omolo in the Chief Magistrate's Court at Kisumu delivered on the 21st December 2022 in Kisumu CMCC No. 140 of 2018)

JUDGMENT

Introduction

1. The appellant herein was sued by the respondent for general damages following a fire accident that was alleged to have occurred due to the appellant's negligence on or about the 3rd March 2018 at the appellant's house in Ogango village.
2. It was the respondent's case that the deceased was asleep when the said house caught fire and was burnt down due to electric fault emanating from the electric pole and meter and that as a result of the fire accident, the minor suffered serious burns and injuries which he succumbed to.
3. The respondent particularized the appellant's negligence at paragraph 4 of the plaint dated 28th March, 2018 as follows:
 - i. Failing to keep electric wire at a height Negligently failing to keep the electric wires at a height sufficiently safe to eliminate danger to the innocent public,



- ii. Failing to keep live electric wires insulated to avoid fire accidents.
 - iii. Failing to maintain electricity wires so that the electric transmission wires do not sag or lie on the ground as would be a danger to the public and more specifically the deceased herein
 - iv. Failing to control the degree of voltage when switching power on and off
 - v. Generally breaching its monopolized statutory duty to distribute electricity to consumers safely and without posing danger to the public.
4. The appellant filed a defense dated 21st May 2018 denying the respondent's allegations particularly the particulars of negligence pleaded by the appellant.
 5. At the trial, the respondent called one witness in support of her case while the appellant opted to close their case without calling any witnesses.
 6. The trial magistrate in her judgement found liability in favour of the respondent fully against the appellant. The trial magistrate proceeded to award the respondent damages as follows:
 - Pain & Suffering.....Kshs. 30,000
 - Loss of expectation of LifeKshs. 100,000
 - Loss of dependencyKshs.3,257,496
 7. The trial magistrate further awarded the respondent costs of the suit and interest on general damages from the date of the judgement till payment in full.
 8. Aggrieved by the said judgment and decree, the appellant filed a memorandum of appeal dated 24th January 2023 raising twelve grounds of appeal that can be summarised into the following, as some of the grounds are repetitive:
 - a. The learned trial magistrate erred in law and in fact in failing to find that neither the pleaded negligence nor the pleaded particulars thereof had been proved by any evidence and thus her decision that the respondent had proved negligence on a balance of probability is unsupportable.
 - b. The learned trial erred in departing from the global award approach after approving the same, and using the multiplier approach without assigning any reason for not following the global approach.
 - c. The learned trial magistrate erred in law and in fact in assessing damages for loss of dependency while that approach was inappropriate where the deceased was an 8-year-old minor with an uncertain future and no known or knowable income.
 - d. The learned trial magistrate erred in law and in fact in making awards for pain and suffering and for loss of life expectation, both under the *Law Reform Act* when the plaintiff had not obtained any letters of administration before the filing of th suit.
 - e. The learned trial magistrate award on damages for loss of dependency, loss of life expectation and pain and suffering were made without any regard to the principles applicable to the award of such damages as established by law and precedents.
 9. The parties filed written submissions to canvass the appeal.



The Appellant's Submissions

10. The appellant submitted that the trial court failed to consider the evidence adduced as required and made no findings on negligence and reached the wrong decision without any findings on the facts. It was submitted that it was the respondent's onus and burden to prove the alleged negligence and that the respondent failed to prove the particulars of negligence/breach of duty alleged in the plaint. Reliance was placed on the High Court case of Charles Abet v South Nyanza Sugar Company Limited [2011] eKLR and the Court of Appeal case of M'Iruanji Muchai v Broadways Bakery 7 Another.
11. The appellant further relied on the Court of Appeal case of Margaret Wanjiru Ndirangu & Others v Attorney General [2020] eKLR where it was stated that even where the defence calls no evidence, the plaintiff must prove his claim on a balance of probabilities.
12. It was submitted that the awards made under the Law Reform Act were improper and could not be made as they were not pleaded or prayed for as the respondent only sought damages under the Fatal Accidents Act and further that the respondent did not have any letters of administration so as to enable her be granted damages under the Law Reform Act. Reliance was placed on the Court of Appeal case of James Mukolo Elisha & Another v Thomas M. Kibisu [2014] eKLR. The appellant thus submitted that the awards for pain and suffering and loss of expectation of life made under the Law Reform Act be set aside.
13. The appellant submitted that the award for loss of dependency was based on the wrong approach as the deceased was aged 8 years old, was a pupil in school with no income and whose future was uncertain. It was submitted that there was no evidence adduced of what the deceased could have become in future and what his earnings would possibly be. Reliance was placed on the cases of Kitale Industries Ltd & Another v Zakayo Nyende & Another [2018] eKLR, Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others [2014] eKLR & Bash Hauliers Company Limited v Julius Mwololo Mulu & Another [2020] eKLR.
14. The appellant urged the court to find that a global sum of Kshs. 600,000 for loss of dependency is appropriate in the circumstances. Reliance was placed on the cases of:
 - i. Kitale Industries Ltd & Another v Zakayo Nyende & Another [2018] eKLR where the deceased was a 12-year-old child and average student in school and the High Court awarded a global award of Kshs. 600,000
 - ii. Rosemary Onyango & Another v Mohamed Jenjewa Ndoyo & Another [2019] eKLR where the deceased was aged 7 years 8 months old in good health and performing well in school, the court awarded a global award of Kshs. 500,000.
 - iii. Seremo Korir & Another v SS (suing as the legal representative of the estate of MS, Deceased) [2019] eKLR where the deceased was a pupil aged 12 years old and the court gave a global award of Kshs. 500,000.
 - iv. Daniel Nderitu v Rachael Njeri Kimani & Another [2019] eKLR where the deceased was aged 7 years at the time of death and the High Court awarded a global figure of Kshs. 600,000.
 - v. David Mwaniki Waithera & Another v Jemimah Mwikali Moto [2020] eKLR where the deceased was aged 8 years old and the court assessed general damages at the global award of Kshs. 600,000.



The Respondent's Submissions.

15. It was submitted that the respondent satisfactorily discharged the burden of proof by leading sufficient evidence to demonstrate that indeed her child lost his life following the actions or inactions of the Appellant to maintain the electric poles and meter in safe conditions in strength of duty of care, which the Appellant does not only owe to the Respondent but to the entire nation consuming its product. The Respondent submitted that the appellant has the monopoly of managing and distributing electricity in the entire nation with utmost duty of care as was held in the case of Kenya Power & Lighting Company Ltd v E K O & Another [2018] eKLR and accordingly, its inactions or actions regarding supplying and management of electricity makes it wholly liable as it is in the instant case.
16. It was further submitted that the testimony and documents produced by the Respondent as exhibits in support of her case were never challenged, thus, they remain uncontroverted and thus the Appellant cannot purport to controvert the evidence adduced at trial court through submissions at the Appellate court level. The respondent submitted that such attempts are afterthought meant to delay the Respondent from enjoying the fruits of her judgment.
17. On the damages awarded, it was submitted that it is trite law that the award of damages is a discretionary exercise that can only be disturbed by an appellate court if it is established that the trial court misdirected itself, or took into consideration irrelevant facts or omitted to take into consideration facts which it ought to and as a result ended up in a wrong conclusion as was held in the case of Nzuki Isaac Muveke v Francis Njogu Njehia [2021] eKLR.
18. The respondent submitted that the Appellant has failed to demonstrate that the trial magistrate while exercising her discretion misdirected herself, or took into consideration irrelevant facts or omitted to take into consideration facts which she ought to and as a result she ended up with a wrong conclusion and thus she submits that this Honourable Court should turn down the invitation to interfere with the discretionary powers of the trial court and uphold the award on damages. It was submitted that it was upto the Appellant to show that the estimate is so tinged with errors as to make it incumbent on the appellate court to interfere.

Analysis and Determination

19. This being a first appeal, this court is under a duty to re-evaluate and re-assess the evidence and make its own conclusions. The court must, however, bear in mind that a trial court, unlike the appellate court, had the advantage of hearing and seeing witnesses as they testified and 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.”



20. 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.”

21. Having considered the Appellant’s Grounds of Appeal and the parties’ written submissions, it appears to this court that the issues for its determination are:

- i. Whether or not the finding on liability was fair and reasonable in the circumstances of this case.
- ii. Whether or not the award of quantum of damages was unjustified in the circumstances of this case so as to warrant interference by this court.
- iii. What orders should this court make?

22. This court therefore dealt with the issues under the separate heads shown herein below while re-evaluating the evidence on record.

Liability

23. 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.”

24. That was the holding in *Isabella Wanjiru Karangu v Washington Malele* Civil Appeal No. 50 of 1981 [1983] KLR 142 and *Mahendra M Malde v George M Angira* Civil Appeal No. 12 of 1981, where it was stated 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.

25. Under section 107 of the *Evidence Act*, he who alleges must prove. The term burden of proof draws from the Latin Phrase *Onus Probandi* and when we talk of burden we sometimes talk of onus.

26. 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.
27. 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.
28. 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. 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.
29. The question therefore is whether the respondent herein discharged the burden of proof that the respondent was liable in negligence for the occurrence of the accident leading to the deceased's passing.
30. As stated above, the respondent pleaded the following acts of negligence and therefore it was expected that she proves any one of them on a balance of probabilities:
 - vi. Failing to keep electric wire at a height Negligently failing to keep the electric wires at a height sufficiently safe to eliminate danger to the innocent public,
 - vii. Failing to keep live electric wires insulated to avoid fire accidents.
 - viii. Failing to maintain electricity wires so that the electric transmission wires do not sag or lie on the ground as would be a danger to the public and more specifically the deceased herein
 - ix. Failing to control the degree of voltage when switching power on and off
 - x. Generally breaching its monopolized statutory duty to distribute electricity to consumers safely and without posing danger to the public.
31. On whether the respondent proved negligence on the part of the appellant, it is noteworthy that the respondent was the only witness who testified in this case. She adopted her witness statement filed on the 28.3.2018. From her testimony, she was in Homabay on the material day of 3rd March, 2018 at around midnight when she received a call from her younger brother Willis Obura that her son J.E who lived with her parents at Ogango village in Kisumu had died of burns after her parent's house in which he slept caught fire and burnt down. She then went to view the body at Jaramogi Oginga Odinga Teaching and Referral Hospital, identified his body and went home and organized for his burial at her matrimonial home in Kabondo, Homabay County. That she lost a child who had a bright future and blamed the appellant herein, KPLC for ensuring that the power line does not cause fire.
32. From the above brief statement adopted as her testimony, it was clear that the respondent did not witness the material accident but rather that she received a call from her brother informing her that her parent's house had caught fire resulting in her son receiving burns and he eventually succumbed. She reiterated her testimony in cross-examination and further stated that her child was 8 years old.
33. The respondent did not call any witness in defence.
34. It is trite that where a plaintiff gives evidence in support of her case, but the defendant fails to call any witness in support of its allegations then the plaintiff's evidence is uncontroverted and the statement of defence remains mere allegations. In Janet Kaphiphe Ouma & Another v Marie Stopes International



(Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

35. However, the fact that a defence is held as mere allegations in no way lessens the burden on the plaintiff to prove her case. The court in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR the court stated:

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.

(See Kirugi and Another v Kabiya and Others [1983] e KLR).

36. Therefore, the respondent, despite the absence of evidence from the appellant, was obligated to prove her case on a balance of probabilities.

37. The evidence on record points to only one version of story of how the accident leading to the deceased's death occurred. The question is whether that evidence proved negligence on the part of the appellant on a balance of probabilities.

38. The testimony by the respondent was that of what she was told by her brother as to what caused the accident. There were other people who were present when the fire incident took place and they recorded their statements as witnesses in this case. They are Scott H. Awinda whose statement says how he even tried to rescue the child in vain and he reported to Kondele Police Station who went to the scene and removed the deceased body to the mortuary. This person also went and reported to Kenya Power, the appellant herein of what had happened.

39. There was then Willis Obura Awinda who was also at the scene and tried to put out the fire to rescue the child but in vain This witness is the one who called and informed the respondent herein who was at that time in Homa Bay and informed her of what had happened to her son.

40. Curiously, these two people who are close relatives of the respondent were never called as witnesses. They are the persons who witnessed the accident first hand and only informed the respondent who was away. They are the persons who were also living with the deceased child in that home and house.

41. It follows that what the respondent told the court was purely hearsay because she never witnessed the accident and she could therefore not tell what exactly transpired leading to the death of her son.

42. Had these witnesses testified, they would have shed light on how negligent the appellant was, going by the pleaded acts of negligence which the respondent never attempted to prove even slightly.

43. That is not the kind of evidence that can be said to have been uncontroverted as it was no evidence at all capable of proving any of the particulars of negligence pleaded and attributed to the appellant. In the submissions, the respondent's counsel has attempted to establish the cause of the accident but there is absolutely no evidence that the accident which unfortunately took away the young life, was due to



the negligence of the appellant. Submissions cannot substitute evidence and neither can pleadings be evidence without proof unless admitted by the defendant.

44. The fact that there was an explosion or that there was electric fault cannot prima facie be attributed to the appellant supplier of electricity. Maintaining electric cables inside the house is the duty of the consumer who would then get an electrician from time to time to check on any faults and in the even that it is established that the fault is attributed to the external cable, then a report would be made to the appellant herein who would then proceed to the house and establish if that is the case. There was no evidence that the electric cables connecting to the house where the deceased child lived were exposed or that they posed any risk or danger to the occupants or the child. There was no evidence of the appellant failing to maintain the said power lines or leaving them hanging precariously.
45. There was no evidence of a report made to the appellant of any prior electric fault associated with the negligent acts of the appellant as pleaded. There is no evidence that the respondent made a report to the appellant and or that the respondent sought and obtained a technician or electrician's opinion on the possible cause of the accident for causation to be attributed to the appellant. No investigation report was produced as an exhibit on the cause of the fire. If the internal electrical wiring of the house was defective, no one can tell as no evidence of the wiring certificate or the person who did the wiring to confirm that the fire was caused by negligence of the appellant.
46. The deceased, according to the postmortem report produced in evidence as an exhibit, indeed suffered severe 4th degree burns which charred his body 100% such that the internal examination could not be opened. However, it is in such serious cases where a party suing must have evidence and adduce that evidence of negligence in order to warrant a finding of liability in their favour. This is not a case of res ipsa loquitur since the accident was not caused by an exposed or fallen electric cable installed by the appellant. It is also not a case where there is evidence of an electrical equipment being found to be damaged due to power surge. In my view, there must have been an underlying problem with the internal wiring system which the adult occupants of that house were living on, a time bomb, oblivious of the dangers posed.
47. It follows that all the cases relied on to establish negligence on the part of the appellant were not applicable because in those cases, there was evidence of exactly how the injured or dead persons suffered the injuries and the courts were able to make findings of negligence based on that evidence. That is not the case here, where not even an expert's report on the cause of the accident was produced in evidence and even those who were present when the fire broke out also kept off the court.
48. In the circumstances I find that the respondent did not prove her case against the appellant on a balance of probabilities. For that reason, the trial court's finding on liability is found to be erroneous as it is not supported by evidence.

Quantum

49. 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.



50. 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.”

51. 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.”

52. 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)”

53. In *Mwanzia v Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa v Gichumu Githenji Nku Hcca No.15 of 2003 [2007] eKLR*, the court made the following observations:

“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.”

54. 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 that:

“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.”

55. 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.”
56. From the above judicial pronouncements, 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 each.
57. In the instant case, PW1 testified that the deceased who was an 8-year-old child in class 2 at Tido Primary School. A letter from the class teacher, dated 19/3/2018 was filed in court and produced in evidence. A school progress report and birth certificate too were produced as exhibits hence his age and class performance are not in doubt. It is indeed true as submitted by the appellant that it would be impossible to ascertain the deceased’s future prospects at this stage.
58. It is my view that in adopting the multiplier approach to loss of dependency for a deceased who was 8 years old, the trial court erred in law and fact. Taking into consideration the aforementioned, I am satisfied that this is a case where it would be more appropriate to adopt the global award approach and thus proceed to do so.
59. In the case of *Matunda (Fruits) Bus Services Limited v Owino & another (Suing as Representatives of the Estate of the Late John Ottieno Odol) (Civil Appeal 94 of 2019)* [2023] KEHC 2179 (KLR) (23 March 2023) (Judgment) the High Court upheld an award of Kshs. 800,000 where the deceased was 2 years old.
60. In *Chen Wembo & 2 others v I K K & another* (suing as the legal representatives and administrators of the estate of C R K (Deceased) [2017] eKLR, in which the deceased minor died at the age of 12 years, an amount of Kshs. 600,000/= was awarded pursuant to the global sum approach.
61. In *Fredrick Kimokoti Imbali & 2 others v AKW & another* (Suing as Legal administrators of the Estate of the late AK (Deceased) [2019] eKLR, the High Court upheld an award of Kshs. 880,000/= for loss of dependency in respect of a deceased 11-year-old minor.
62. I have cited the two authorities above as a comparison. The appellant submitted relying on 5 cases in support of an award if any, to be made to the respondent. I find that the last two cases; Daniel Nderitu supra, where the deceased was 7 years old and the court awarded Kshs. 600,000 as a global award and the case of David Mwaniki Waithera supra, where the deceased was 8 years old and the court awarded a global award of Kshs. 600,000 for loss of dependency to be comparable to the circumstances of the instant case.



63. In the circumstances, taking into account the factors of inflation, it is my opinion that a global award of Kshs. 800,000 would be sufficient for loss of dependency. I thus find that the trial court's award on loss of dependency was inordinately high and I proceed to set it aside and substitute it with a global award of Kshs. 800,000.
64. As regards the awards under the Law Reform Act, it is the appellants case that the same ought not to have been made in favour of the respondent as the respondent failed to demonstrate that she had acquired Letters of Administration over the deceased's estate and further that the same was not pleaded.
65. I have perused the pleadings on record and I do note that the respondent failed to plead that she was seeking damages under the Law Reform Act. At paragraph 6 of the respondent's plaint, there is a title:
Particulars Pursuant To Statute Law (The Fatal Accident's Act and Law Reform Miscellaneous Provision] Act) Are As Follows:-
66. The respondent then proceeds to set out particulars of the deceased and his state as at the time of death. From her plaint dated 28th March, the respondent is clear that she is seeking damages under the Fatal Accident Act. Further to this, as noted by the appellant, the respondent failed to attach any grant of letters of administration over the deceased's estate, not even a limited
67. Section 2(1) of the Law Reform Act, provides as here under:
"Subject to the provisions of this section, on the death of any person after the commencement of this Act, all the causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of, his estate....." (emphasis added).
68. Section 2(3) of the Law Reform Act makes it abundantly clear that proceedings under the said Act must be brought by a personal representative of the deceased's estate. The provisions state that: -
"No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person unless either:
(a) Proceedings against him in respect of that cause of action were pending at the date of his death; or
(b) Proceedings are taken in respect thereof not later than six months after his executor or administrator took out representation." (emphasis added).
69. In the present case, it is apparent that the respondent had no letters of administration over the deceased's estate and further even the manner the plaint is couched indicates that she was well aware of this as she proceeds to seek damages only under the Fatal Accident's Act. Accordingly, any award under this the Law Reform Act was not called for and must be set aside.
70. In the circumstances, I thus find that the trial magistrate erred in making an award for pain and suffering and loss of expectation of life under the Law Reform Act. I proceed to set aside the awards.
71. In the end, I allow this appeal and make the following orders:
a. The finding of liability against the appellant at 100% is hereby set aside and substituted with an order dismissing the respondent's suit.
b. The awards made under the Law Reform Act are set aside as a whole.
c. General damages under the Fatal Accidents Act is nil as there was no proof of liability.



d. Each party to bear their own costs of this appeal and of the suit in the court below as dismissed.

72. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF MAY, 2024

R.E. ABURILI

JUDGE

