



Bomet Water & Sanitation Company v Langat (Suing as the legal representative of the Estate of Walter Cheruiyot Langat (Deceased) (Civil Appeal E044 of 2023) [2024] KEHC 11268 (KLR) (25 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11268 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E044 OF 2023
RL KORIR, J
SEPTEMBER 25, 2024**

BETWEEN

BOMET WATER & SANITATION COMPANY APPELLANT

AND

SHARON CHELAGAT LANGAT (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WALTER CHERUIYOT LANGAT (DECEASED) RESPONDENT

(Being an Appeal from the Judgment of Chief Magistrate, Boke E. at the Chief Magistrate's Court at Bomet, Civil Suit Number E009 of 2021)

JUDGMENT

1. The Respondent (then Plaintiff) as the legal representative of the deceased Walter Cheruiyot Langat, sued the Appellant (then 1st Defendant) for general and special damages that arose when the deceased was allegedly involved in a fatal road traffic accident on 12th December 2019 along Silibwet-Bomet road.
2. The Respondent called three witnesses before closing her case while the Appellant called two witnesses during the trial and closed its case.
3. In its Judgment delivered on 22nd August 2023, the trial court awarded the Respondent Kshs 4,980,640/= subject to 20% contribution.
4. Being aggrieved with the Judgment of the trial court, the Appellant filed its Memorandum of Appeal dated 28th August 2023 appealing against the whole Judgement. It relied on the following grounds:-



- I. That the learned trial Magistrate erred in law by disregarding the issue of jurisdiction under the *Limitation of Actions Act*, the *Public Authorities Limitation Act* which issue was raised at paragraph 12 of the Statement of Defence and submissions of the Appellant.
 - II. That the learned trial Magistrate erred in law and fact in disregarding the Appellant's defence, the evidence of the Appellant's witness who was the only eye witness in the matter and/or attach due weight to the Appellant's submissions, the issue raised therein and the authorities attached thereto.
 - III. That the learned trial Magistrate erred in law and fact in basing her findings on contradictory evidence of the Plaintiff and her witnesses and irrelevant issues not supported by any evidence adduced or applicable in law thereby arriving at a Judgement that was wholly against the weight of the evidence and applicable in law.
 - IV. That the learned trial Magistrate erred in law and fact in finding that the Appellant was vicariously liable for the accident at 80% when there is no evidence tendered to prove the same.
 - V. That the learned trial Magistrate erred in law and in fact by failing to consider and appreciate the applicable principles and law in assessment of damages and thereby arriving at an excessive and unjustified award.
 - VI. That the learned trial Magistrate erred in law and fact in awarding Kshs 121,000/= as funeral expenses and Kshs 15,000/= under special damages and they were not specifically pleaded and/or proved by documentary evidence.
 - VII. That the learned trial Magistrate erred in law and in fact in awarding Kshs 100,000/= as damages for pain and suffering which was inordinately high given that the deceased died on the spot.
 - VIII. That the learned trial Magistrate erred in law and in fact in awarding Kshs 200,000/= as damages for loss of expectation of life which award was inordinately high taking into account the circumstances of the case.
 - IX. That the learned trial Magistrate erred in law and in fact in awarding Kshs 4,544,640/= as damages for loss of dependency which was inordinately high given that there is no evidence that the deceased had a valid driving licence or was a licensed boda boda operator who earned Kshs 1,000/= daily from the boda boda business.
 - X. That the learned trial Magistrate erred in law and in fact by failing to discount the award of loss of expectation of life from the final award thus making a double award to the Plaintiff.
5. My duty as the 1st appellate court is to re-evaluate and re-examine the evidence in the trial court and come to my own findings and conclusions.

The Plaintiff's/Respondent's case.

6. Through her Amended Plaint dated 14th June 2021, the Appellant stated that the deceased Walter Cheruiyot Langat was involved in a road traffic accident on 12th December 2019. That he was aboard motorcycle registration number KMEN 823R when the motor vehicle registration number KBB 522S veered off its lane and hit him causing fatal injuries. It was her case that the Appellant was the beneficial owner of motor vehicle registration number KBB 522S Vehicle
7. It was the Respondent's case that the Appellant was negligent in causing the accident. The particulars of the negligence were listed in paragraph 7 of the Plaint.



8. The Respondent stated that the deceased was her husband and they had two daughters, Lina Chebet and Shantel Cheptoo. She further stated that the deceased died aged 25 years and used to earn Kshs 1,000 daily from his boda boda business. That the deceased's estate had suffered great loss and damage.
9. The Respondent prayed for special and general damages against the Appellant under the Fatal Accidents Act and the Law Reform Act.

The Defendant's/Appellant's case

10. Through its amended Statement of Defence dated 24th January 2022, the Appellant denied the occurrence of the accident and further denied that it was the beneficial owner of motor vehicle registration number KBB 522S.
11. It was the Appellant's case that it relied on the contents of the Occurrence Book at Bomet Police Station which stated that the deceased was wholly liable for the cause of the accident. That the deceased was negligent in causing the said accident and the particulars of the negligence were listed in paragraph 7 of the Amended Defence.
12. The Appellant stated that the Respondent was not entitled to the reliefs she sought in her Amended Pleint. That the figures pleaded as special damages were exaggerated and the list of documents were doctored.
13. On 23rd November 2023, I directed that this Appeal be canvassed by way of written submissions.

The Appellant's submissions.

14. Through its submissions dated 11th December 2023, the Appellant submitted that the Respondent did not witness the accident therefore the relevant evidence was that of the police officer and its driver (DW1). That the deceased and the Appellant's lorry were headed in the same direction and the deceased tried to overtake another motor cycle carrying a metal door when it hit the metal door causing it to skid to the opposite side of the road and collided with an oncoming vehicle. The Appellant further submitted that if the deceased had not been over speeding, he could have avoided the accident.
15. It was the Appellant's submission that the deceased owed its driver a higher duty of care as he was the one overtaking another motorcycle. That he had a duty to ensure that the road was clear before doing so.
16. The Appellant submitted that the deceased did not have a driving license and that the particulars of the motorcycle that was being overtaken were not provided and this cast doubt on the police officer's (PW3) testimony as to how the accident occurred. It relied on PAS vs George Onyango Orodia (2020) eKLR, Hussein Omar Farah vs Lento Agencies (2006) eKLR and Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another.
17. It was the Appellant's further submission that the trial court erred when it apportioned liability in the ratio of 80:20. That the negligence of the deceased should not be visited upon its driver. It was its further submission that this court should apportion liability in the ratio of 50:50.
18. Under the heading of pain and suffering, the Appellant submitted that the award of Kshs 100,000/= was excessive as the deceased died on the spot. That the same should be substituted with an award of Kshs 10,000/= and it relied on Moses Koome Mithika & another vs Doreen Gatwiri & another (suing as the legal representative and administrator of the estate of Phineas Murithi (deceased) (2020) eKLR, Sukari Industries Ltd vs Clyde Machimbo Juma (2016) eKLR and Mercy Muriuki & another



- vs Samuel Mwangi Nduati & another (suing as the legal administrator of the estate of the late Robert Mwangi) (2019) eKLR.
19. On loss of expectation of life, the Appellant submitted that the award of Kshs 200,000/= was excessive and should be substituted with an award of Kshs 80,000/=. It relied on *Easy Coach Bus Services & another vs Henry Charles Tsuma & another* (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma (Deceased) (2019) eKLR.
 20. On loss of expectation of life, the Appellant submitted that the trial court erred in using Kshs 18,936/= as the multiplicand. That according to the Regulation of Wages (General) (Amendment) Order 2018, the multiplicand to be used should be Kshs 7,240.95/=. The Appellant further submitted that this court should use the multiplier of 20 years as there was no retirement age for a boda boda rider or a general labourer. On the dependency ratio, the Appellant urged this court to use 1/3 and not 2/3 used by the trial court.
 21. It was the Appellant's submission that the claim for funeral expenses was not supported by any evidence. That the award of Kshs 121,000/= should be substituted with an award of Kshs 50,000/= as it was a reasonable amount for a funeral.
 22. The Appellant submitted that the trial court made a double award under the *Law Reform Act*. That the award of loss of expectation of life (Kshs 200,000/=) was deductible from the award of loss of dependency (Kshs 4,544,640/=). It relied on *Kenya Power & Lighting Company Ltd vs James Muli Kyalo & another* (2020) eKLR and *Hellen Waruguru Waweru* (suing as the legal representative of Peter Waweru Mwenja (Deceased) vs Kiarie Shoe Stores Ltd (2015) eKLR.

The Respondent's submissions

23. Through her submissions dated 16th March 2024, the Respondent submitted that the Appellant's driver hit the deceased from behind. That the Appellant's driver confirmed during cross examination that he was drunk and was in a hurry to reach his home. She further submitted that the Appellant's driver had the opportunity to avoid the accident by either swerving or stopping his vehicle. She relied on *Masembe vs Sugar Corporation, another* (2002) 2 EA 434 and *Multiple Hauliers (E.A) Ltd vs Justus Mutua Malundu & 2 others* (2017) eKLR and *Hay or Bourhill vs Young* (1942) 2 ALL ER 396.
24. It was the Respondent's submission that the testimony of the police officer who testified that the deceased was to be blamed for the accident based on the entry in the Occurrence Book was hearsay evidence and was therefore inadmissible. She relied on *PAS vs George Onyango* (supra). It was her further submission that the allegation that the deceased was not a licensed boda boda rider was unproven. That the Appellant did not discharge that burden of proof.
25. The Respondent urged this court to uphold the finding of 100% liability against the Appellant.
26. On the multiplicand, the Respondent submitted that the trial court was correct in adopting Kshs 18,936/= as the minimum wage for car/light drivers. She relied on *Nyamira Tea Farmers Sacco vs Wilfred Nyambati Keraita* (suing as the personal representative of Mary Nyaboke Keraita (Deceased) (2011) eKLR and *Ondigo Gilbert vs Joab Jonah Olunyama* (2018) eKLR.
27. On the multiplier, the Respondent submitted that the 30 years adopted by the trial court was reasonable as the deceased was not subjected to the mandatory retirement age of 60 years. She relied on *Joseph kingori Wandurwa & another vs Loise Karimi Nyaga & another* (2021) eKLR and *Janet Kathambi vs Charity Kanja Njiiru* (2021) eKLR.



28. On the dependency ratio, the Respondent submitted that the deceased had two children and that the trial court was correct in adopting the ratio of 2/3. She relied on *Monica Kakiki vs Wasufe Shire Abdo & 2 others* (1990) eKLR.
29. On pain and suffering, the Respondent urged the court to review the award of Kshs 30,000/= to Kshs 100,000/= considering the current rates of inflation. She relied on *Kenya Red Cross vs IDS* (suing as the legal representative of the estate of MDR (Deceased) (2020) eKLR. She further submitted that the award of Kshs 200,000/= for loss of expectation of life was reasonable and she relied on *West Kenya Sugar Co. Ltd vs Philip Sumba Julaya* (suing as the administrator and personal representative of the estate of James Julaya Sumba) (2019) eKLR.
30. It was the Respondent's submission that the trial court did not err when it awarded Kshs 121,000/= as funeral expenses. She relied on *Premier Dairy Ltd vs Amarjit Singh Sacoo & another* (2013) eKLR. On the other special damages, she submitted that the court upholds the award of Kshs 15,000/=
31. I have gone through and carefully considered the Record of Appeal dated 16th October 2023, the Appellant's written submissions dated 11th December 2023 and the Respondent's written submissions dated 16th March 2024. The following issues arise for my determination:-
 - i. Whether the suit was filed out of the statutory period.
 - ii. Liability.
 - iii. Quantum.

Whether the suit was filed out of the statutory period

32. It was a ground of the Appeal that the trial Magistrate disregarded the issue of jurisdiction under the *Limitation of Actions Act* and the *Public Authorities Limitation Act*.
33. Section 4(2) of the Limitation of Actions provides:-
An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.....
34. Section 29 of the *Limitation of Actions Act* provides:-
 - (1) In relation to an action to which section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the *Law Reform Act* (Cap. 26), section 27 of this Act and section 28 of this Act shall have effect subject to subsections (4) and (5) of this section.
 - (2) Subsections (1), (2) and (3) of section 27 of this Act and section 28 of this Act shall have effect, subject to subsections (4) and (6) of this section, in relation to an action brought under the *Fatal Accidents Act* (Cap. 32) for damages in respect of a person's death, as they have effect in relation to an action to which section 27 of this Act applies.
 - (3) In the following provisions of this section, and in sections 27 and 28 as modified by those provisions, "the deceased" means the person referred to in subsection (1) or subsection (2), as the case may be.
 - (4) Section 27(1) of this Act shall not have effect in relation to an action falling within subsection (1) or subsection (2) of this Act, unless the action is brought before the end of twelve months from the date on which the deceased died.....



35. Section 27(1) of the *Limitation of Actions Act* provides:-

Section 4(2) does not afford a defence to an action founded on tort where—

- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
- (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
- (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
- (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.....

36. In *Kiarie (Suing as the legal representatives and administrator of the Estate of Kelvin Kamau Karanja (Deceased) v Stephen & another (Civil Suit 202 of 2012) [2023] KEHC 2749 (KLR) (Civ) (23 March 2023) (Judgment), Meoli J. held:-*

“.....There appears to be a conflict between the provisions of Section 29(4) and the above provision. It seems that whereas section 27 and 28 of the Act provide for extension of limitation periods in respect of actions founded on tort for damages in respect of personal injuries beyond 3 years, Section 29(4) prescribes the additional condition that for section 27(1) to apply in regard to an action founded on tort brought for damages in respect of death, and not merely personal injuries, the action must have been brought within 12 months of death.

Thus, seemingly introducing a problematic distinction with regard to extension of time in respect of actions founded on tort relating to personal injuries vis-à-vis similar actions relating to death. In my humble view, if it was the intention of Parliament to bar tortious actions arising from death from being brought after the expiry of twelve months after death, or to deny extension of time in respect of such actions, nothing prevented the inclusion of an express provision to that effect.

This court concurs with the observation of Okwengu, J. (as she then was in) *Jane Muthoni Njiru & Another v Muritu Kinyanjui & Another [2011] eKLR* to the effect that:

“Nevertheless I do note that Section 29(4) of the *Limitation of Actions Act* is inconsistent with Section 4(2) of the Limitation Act which provides for causes of action founded on tort to be statute barred after 3 years. In this case, the deceased’s cause of action arose on 13th March 2007 when he was involved in the road accident, and this is the same day the deceased died. Under Section 4(2) the claim being founded on tort, limitation would only set in 3 years later.....”

37. Similarly in *David Mwangi Kibogo (Suing as the Administrator of the estate of the late Scholastica Wamuhu Mwangi) v Benson Ndegwa Waweru & 2 others (2017) eKLR, Sergon J. held:-*

“The death certificate attached shows that the deceased died on 26th September 2011. Under Section 29(4) of the *Limitation of Actions Act*, the application for extension of time is only applicable where the suit is an action for damages in respect of a deceased person’s death, if the action is brought before the end of 12 months from date on which deceased died.



Thus the claim would be statute barred after one year from the deceased's death i.e on 27th September 2012.

Going as by the provisions of Section 29 of the *Limitation of Actions Act*, an application for extension of time could only be entertained if the suit had been filed after 27th September 2012. The suit herein was filed on 26th June 2013 after the deceased's death. However Section 4(2) of the *Limitation of Actions Act*, provides for causes of action founded on tort to be statute barred after 3 years. Consequently, limitation set in on 27th September 2014.....

.....Under Section 29(4) of the Limitations of Actions Act gives 12 Months for a claim to be statute barred i.e 27th September 2012. By virtue of the nature of tort under which the plaintiff claim is brought limitation runs for three years i.e from 26th September 2011 to 27th September 2014.....”

38. I am persuaded by the above authorities in relation to the application of section 4 (2) of the *Limitation of Actions Act* vis a vis section 29 (4) of the *Limitation of Actions Act*. As elaborated in the authorities above, if the intention of Parliament was to bar tortious actions arising from death from being brought after the expiry of twelve months after death, it would have included an express provision to that effect. Barring that, it is my view that a claim resulting in death was a tort and it fell under the ambit of the provisions of section 4 (2) of the *Limitation of Actions Act*.

39. Flowing from the above, it is clear that the accident occurred on 12th December 2019 and the suit in the trial court was filed on 16th February 2021. It is my finding that the Appellant filed his claim within the statutory period of three years and that the suit was properly before the trial court under the *Limitation of Actions Act*.

40. Regarding the issue of time limitation under the *Public Authorities Limitation Act*, section 3(1) provides:-

No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.

41. I find concurrence with Mativo J. (as he then was) in YH Wholsalers Limited vs Kenya Revenue Authority (2021) eKLR, where he stated:-

“Section 3(1) of the *Public Authorities Limitation Act* provides that no proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued. Also relevant is section 5 of *Public Authorities Limitation Act* which provides:-

5. Extension of limitation period in case of disability

Notwithstanding the provisions of section 4 of this Act, if, on the date when a right of action accrues for which a period of limitation is prescribed by this Act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under a disability: Provided that—

i. this section does not apply in respect of proceedings where the right of action first accrues to a person who is not under a disability and through whom the person under a disability claims;



- ii. this section does not apply to an action to recover a penalty or forfeiture or a sum by way of penalty or forfeiture recoverable by virtue of a written law.....

.....It is also important to establish the link between the Public Authorities Limitation Act and the Limitation of Actions Act. In this regard, section 6 of the Public Authorities Limitation Act provides for application of the Limitation of Actions Act in matters governed by the Act. It provides as follows: -

6. Application of Cap. 22

Notwithstanding the provisions of section 31 of the Limitation of Actions Act, section 22 of that Act shall not apply in respect of the provisions of this Act; and in section 27 of the Limitation of Actions Act the reference to section 4(2) of that Act shall be read and construed as a reference to section 3(1) of this Act, but subject thereto and notwithstanding section 42 of the Limitation of Actions Act, Part III of that Act shall apply to this Act.

Section 27 of the Limitation of Actions Act provides for extension of limitation period in case of ignorance of material facts in actions for negligence, etc. It reads: -

- (1) Section 4(2) does not afford a defence to an action founded on tort where—
- (a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
 - (b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
 - (c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
 - (d) the requirements of subsection (2) are fulfilled in relation to the cause of action.
- (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and



- (b) in either case, was a date not earlier than one year before the date on which the action was brought.
- (3) This section does not exclude or otherwise affect—
 - (a) any defence which, in an action to which this section applies, may be available by virtue of any written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or
 - (b) the operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued.

Section 27 provides that section 4(2) does not afford a defence to an action founded on tort as provided in the said section. Section 4(2) provides that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. In accordance with section 6 of the *Public Authorities Limitation Act* cited above, reference to section 4(2) of the *Limitation of Actions Act* means reference to section 3(1) of the *Public Authorities Limitation Act* which provides that actions founded on tort must be brought within 12 months.....”

- 42. From the pleadings, Lake Victoria South Water Services Board (2nd Respondent) was described as the registered owner of the subject motor vehicle registration number KBB 522S. I have carefully gone through the trial court proceedings and there was no contestation as to the ownership of the subject motor vehicle.
- 43. Lake Victoria South Water Services Board is described as a state corporation under the Ministry of Water and Irrigation. That it was established under the *Water Act* 2002 through Gazette Notice No. 1714 of 12th March 2004 with the mandate of ensuring efficient and economic provision of Water and Sanitation Services in its area of jurisdiction.
- 44. The *State Corporations Act* Cap 446 describes state corporations as:-
 - (a) a state corporation established under section 3;
 - (b) a body corporate established before or after the commencement of this Act by or under an Act of Parliament or other written law but not—
 - (i) the Principal Secretary to the National Treasury incorporated under the Cabinet Secretary to the Treasury (Incorporation) Act (Cap. 101);
 - SUBPARA (ii)
spent;
 - (iii) a co-operative society established under the *Co-operative Societies Act* (Cap. 490);
 - (iv) a building society established in accordance with the *Building Societies Act* (Cap. 489);



- (v) a company incorporated under the *Companies Act* (Cap. 486) which is not wholly owned or controlled by the Government or by a state corporation;
 - (vi) the Central Bank of Kenya established under the *Central Bank of Kenya Act* (Cap. 491);
 - (vii) deleted by *Act No. 2 of 2002*, Sch.;
 - (viii) the Financial Reporting Centre established under the *Proceeds of Crime and Anti-Money Laundering Act* (Cap. 59A).
- (c) a bank or a financial institution licensed under the *Banking Act* or other company incorporated under the *Companies Act* (Cap. 486), the whole or the controlling majority of the shares or stock of which is owned by the Government or by another state corporation;
 - (d) a subsidiary of a state corporation.
45. As already stated above, Lake Victoria South Water Services Board is a state corporation and does not fall under the ambit of section 3(1) of the *Public Authorities Limitation Act* which covers tortious and contractual claims against the government or local authorities. The *Public Authorities Limitation Act* defines local authority to mean a municipal council, county council, town council, urban or area council. On the other hand, the Government refers to the National or County Governments. It follows therefore that the provisions of the *Public Authorities Limitation Act* do not apply in the present case.
46. Flowing from the above, it is my finding therefore that the suit was properly before the trial court as it was filed before the expiry of the statutory period of 3 years. I consequently dismiss this ground of appeal.

Liability

47. From the pleadings, there was no eye witness to the accident. No. 85540 PC Mathias Chacha (PW2) confirmed the occurrence of the accident. When he was cross examined, he stated that the deceased who was carrying a pillion passenger attempted to overtake a motor cycle which was ahead of him and which had carried a metal door. That in the process of overtaking, the deceased hit the metal door and skidded to the opposite lane and collided with the oncoming exhauster (Appellant's motor vehicle registration number KBB 522S). PW2 further stated that he was not the investigating officer and that according to the Occurrence Book, the deceased, Walter Cheruiyot was to blame for the accident.
48. The deceased's cousin, Kenneth Rotich (PW3) testified that he arrived at the scene after the accident had already occurred. That the deceased was headed to Bomet and his motorcycle was on the left lane. PW3 further testified that he found the deceased dead on the road and the vehicle registration number KBB 522S behind him. When PW3 was cross examined, he stated that the deceased was hit from behind as both the motor vehicle and the deceased were heading to Bomet.
49. Benard Kipngetch Cheruiyot (PW4) who was a boda boda rider testified that he arrived at the scene after the occurrence of the accident. That the motor vehicle and motorcycle were both headed to Bomet.
50. The driver of the motor vehicle (exhauster lorry) Joseph Korir (DW2) testified that on the material day, he was driving the said vehicle from Silibwet to Bomet. That when he was almost reaching Bomet town, he met two boda bodas, the one ahead was carrying a metal door and the one behind had a pillion passenger. DW2 testified that the deceased tried to overtake the motor cycle that had the metal door and in the process hit the metal door and the motor cycles collided. That he swerved to the left and



the pillion passenger fell on the road and rolled to his motor vehicle. It was DW2's testimony that his motor vehicle did not touch the deceased and that the riders caused the accident themselves.

51. From the evidence above, it is clear that there are conflicting testimonies as to the circumstances of the accident and as such the court is at a loss when determining the extent of liability. For one, the investigating officer's testimony would have helped in shedding light as to how the accident occurred. No. 85540 PC Mathias Chacha's (PW2) testimony was hearsay as he was not the investigating officer. His testimony on liability was reliant on the Occurrence Book and not on proper investigations.
52. Kenneth Rotich (PW3) who arrived at the scene moments after the accident had happened stated that the deceased was hit from behind as he found the deceased's body, his motor cycle and the lorry on the same lane and that the lorry was behind the deceased. On the other hand, the lorry's driver, Joseph Korir (DW2) stated that the accident was caused by two motor cycles and the resultant collision threw the deceased to his lane. He denied causing the accident.
53. It was more probable than not that the deceased was hit from behind going by the account of the witnesses. PW3 and PW4 who arrived at the scene moments after the accident occurred testified to seeing one motor cycle at the scene of the accident and this was contrary to the driver's (DW2) testimony that two motor cycles collided. Given the uncertainty surrounding the circumstances of the accident, I would apportion liability in the ratio of 70:30 in favour of the Respondent.

Quantum

54. With regard to the award on damages, the trial court awarded damages as follows:-
 - Pain and suffering Kshs 100,000/=
 - Loss of expectation of life Kshs 200,000/=
 - Loss of dependency Kshs 4,544,640/=
55. The principles upon which an appellate court may interfere with an award by the trial court have been long settled. In the case of Johnson Evan Gicheru vs Andrew Morton & another (2005) eKLR, the Court of Appeal stated that:-

“In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.
56. It is also a principle of law that awards must be reasonable and comparable to awards in similar cases. The Court in Odinga Jactone Ouma vs Moureen Achieng Odera (2016) eKLR held:-

“.....In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR thus:

The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”
57. In regard to the pain and suffering, the Appellant submitted that the deceased died on the same day and that the award of Kshs 100,000/= was excessive. It proposed an award of Kshs 10,000/=. On the other



hand, the Respondent submitted that considering the rate of inflation, the award of Kshs 100,000/= was sufficient.

58. From the Respondent's (PW1) and Kenneth Rotich's (PW3) testimonies, the deceased died on the spot. In the circumstances thereof, I am convinced that the deceased suffered some little pain when the impact occurred. I find the award of Kshs 100,000/= by the trial court for pain and suffering as excessive. In light of the current inflation rates, I substitute the award of Kshs 100,000/= with Kshs 20,000/= as the award for pain and suffering.
59. On the loss of expectation of life, the Appellant submitted that the award of Kshs 200,000/= was inordinately high. It proposed an award of Kshs 80,000/= due to the uncertainties and vicissitudes of life. On the other hand, the Respondent submitted that the award of Kshs 200,000/= was fair and reasonable.
60. It has been judicial practice that courts have awarded an amount between Kshs 10,000/= and Kshs 100,000/= for loss of expectation of life. In the present case therefore, I do find the award of Kshs 200,000/= to be excessive and I substitute it with the award of Kshs 100,000/=.
61. On the issue of loss of dependency, Section 4 of the *Fatal Accidents Act* provides as follows:-
Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct.
62. The Appellant submitted that the award of Kshs 4,544,640/= by the trial court was manifestly excessive. It proposed that this court uses the multiplicand Kshs 7,240.95/= as per the Regulation of Wages (Amendment) Order, 2018. It further proposed that this court uses the dependency ratio of 1/3 and a multiplier of 20 years which would bring the award to a total of Kshs 579,276/=. On the other hand, the Respondent submitted that the trial court was correct in using the multiplicand of Kshs 18,936/= being the minimum wage at that time for light van drivers within Bomet Municipality. She further proposed that this court adopts a multiplier of 30 years and a dependency ratio of 2/3 which would bring the award to a total of Kshs 3,257,280/=
63. I have considered the pleadings and it was stated by the Respondent that the deceased was a boda boda rider and his approximate income was Kshs 1,000/= per day. The same was pleaded in the Amended Pleint. I have found no evidence from the Respondent that the deceased earned Kshs 1,000/= per day from his boda boda business.
64. Courts normally use two systems in determining loss of dependency, one is the multiplier approach where a party has presented evidence of income and the other is the global sum approach where there is no evidence of income. In the case of *Mwanzia vs Ngalali Mutua Kenya Bus Ltd* cited in *Albert Odawa vs Gichumu Githenji* (2007) eKLR, Ringera J. (as he then was) made the following observation:-

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on



the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

65. Similarly in the case of *Moses Mairua Muchiri v Cyrus Maina Macharia* (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) (2016) eKLR, Ngaah J. held as follows-

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

66. In determining an award under this head, I have considered the parties’ proposals under this head, the fact that the deceased died aged 25 years old and the fact that the deceased was survived by a widow (PW1) and two children, all of whom would be reasonably assumed were school going children. Having considered the above, it is my finding that an award of Kshs 3,000,000/= would be reasonable compensation under this head.

67. The Appellant submitted that the trial court erred when it failed to subtract Kshs 200,000/= (loss of expectation of life) from the final award. That it amounted to double compensation. It has been this court’s position that there exists no issue of double entitlement as the Respondent being the legal representative of the estate of the deceased, have the right to claim under the [Law Reform Act](#) and the [Fatal Accidents Act](#). The same was succinctly explained by the Court of Appeal in *Hellen Waruguru Waweru* (suing as the legal representative of peter Waweru Mwenja (deceased))vs *Kiarie shoe stores limited* (2015) eKLR, where it stated:-

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

The confusion appears to have arisen because of different reporting of the *Kenfro* case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another* (No. 2) and the ratio decidendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

- “6. An award under the [Law Reform Act](#) is not one of the benefits excluded from being taken into account when assessing damages under the [Fatal Accidents Act](#); it appears the legislation intended that it should be considered.
7. The [Law Reform Act](#) (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the



deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death

68. It is my finding therefore that the trial court was correct by not subtracting the award of loss of expectation of life from the final award.
69. Regarding special damages, the Respondent pleaded the following:-
- i. Funeral expenses Kshs 121,000/=
 - ii. Letters of Administration Kshs 15,000/=
70. The Respondent produced the receipt for obtaining Letters of Administration as P.Exh 7b. The receipt shows that she incurred Kshs 15,000/=. I find this expense pleaded and proved.
71. Regarding funeral expenses, there were no receipts produced showing such an expenditure. However, the law allows for provision of funeral expenses without the necessity of providing receipts. Section 6 of the Fatal Accidents Act makes provision for funeral expenses as follows:-
- In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.
72. In *Capital Fish Kenya Limited vs. The Kenya Power & Lighting Company Limited* (2016) eKLR, the Court of Appeal stated that:-
- “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....”
73. Flowing from the above, it is my finding that the trial court’s award of Kshs 121,000/= as funeral expenses to be reasonable.
74. In light of the foregoing, the amount awarded to the Respondent is as follows:-
- i. Pain and Suffering Kshs 20,000/=
 - ii. Loss of expectation of life Kshs 100,000/=
 - iii. Loss of dependency Kshs 3,000,000/=
- Kshs 3,120,000/=
- Less 30% contribution Kshs 936,000/=
- Kshs 2,184,000/=
- Add Special Damages Kshs 136,000/=
- Kshs 2,320,000/=



75. In the end, the Appeal dated 28th August 2023 partially succeeds as the Respondent's award is reduced from Kshs 3,984,512/= to Kshs 2,320,000/=.
76. Each party shall bear their costs of this Appeal. Costs of the suit shall remain as awarded by the trial court.

Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED THIS 25TH DAY OF SEPTEMBER, 2024.

.....

R. LAGAT-KORIR

JUDGE

Judgement delivered in the absence of the parties. And in the presence of Siele (Court Assistant).

