



**Sing'oei v Wakhungu (Suing as Widow and Personal Representative
of the Estate of the Late Job Natwati) & 2 others (Civil Appeal
E019 of 2022) [2024] KEHC 13500 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E019 OF 2022
E OMINDE, J
OCTOBER 30, 2024**

BETWEEN

DAVID KIMELI SING'OEI APPELLANT

AND

**MATHEW MARUTI WAKHUNGU (SUING AS WIDOW AND
PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOB
NATWATI) 1ST RESPONDENT**

RUTH NYATHIRA MWANGI 2ND RESPONDENT

SAMMY KIMEMIA 3RD RESPONDENT

JUDGMENT

1. The appeal is on both quantum and liability. By a Plaint dated 17/8/2018, the 1st Respondent sued the Appellant, the 2nd and 3rd Respondents for general damages under both the Law Reform Act and the Fatal Accidents Act, special damages of Kshs.77, 142/= and costs of the suit plus interest.
2. The accident was stated to have occurred on or about the 11/11/2017 along the Eldoret Nakuru road at 7:00 pm. The deceased is stated to have been travelling as a passenger aboard motor vehicle registration number KBP 068W Toyota Voxy when the said motor vehicle collided with tractor registration number KTCA 498B Fiat. According to the 1st Respondent the said road traffic accident was occasioned due to the recklessness, carelessness and negligent manner in which the Appellant, the 2nd and 3rd Respondents, either by themselves and/or their agents, servants, drivers and/or employees drove and/or controlled the said motor vehicle and tractor thus causing them to collide with each other thereby occasioning the deceased fatal injuries and/or death instantly.



3. The Appellant filed his Statement of Defence on 19/9/2018, denying the occurrence of the accident. Alternatively, he blamed the deceased and the driver of motor vehicle registration number KBP 068 for causing and or contributing to the said accident. The 2nd and 3rd Respondents also filed their Statement of Defence on 14/12/2018 denying the occurrence of the accident and alternatively blaming the deceased and the Appellant and or the driver of tractor registration number KTCA 498B.
4. After trial Judgment was delivered on 28/1/2022 and the Appellants together was found 100% liable and damages assessed as hereunder: -
 - a. Pain and SufferingKshs. 50,000/=
 - b. Loss of expectation of lifeKshs. 100,000/=
 - c. Loss of dependencyKshs. 2,916,000/=
 - d. Special damages and Ad LitemKshs. 77,142/=
 - e. TotalKshs. 3,093,142/=
 - f. Plus costs of the suit.
5. The claim against the 2nd and 3rd Respondents was dismissed by the trial Court.
6. Aggrieved by the said decision, the Appellant on 23/2/2022 filed a Memorandum of Appeal dated 22/2/2022 citing the following grounds:
 1. The learned trial Magistrate erred by arriving at a finding on liability at 100% against the Appellant which was not supported by evidence adduced at the hearing.
 2. The learned trial Magistrate erred both in law and fact in failing to note from the evidence tendered that the 2nd and 3rd Respondents were fully liable for occurrence of the accident.
 3. The learned trial Magistrate erred both in law and fact in failing to apportion a reasonable percentage of liability on the deceased Plaintiff despite the said Plaintiff having boarded and overloaded motor vehicle.
 4. The learned trial Magistrate erred in law and in fact in failing to appreciate or take into account the Appellant's submissions if at all.
 5. The learned trial Magistrate erred in law and in fact in adopting 10 years as multiplier while the deceased was 50 years old and therefore failed to consider the various vagaries of life.
 6. The learned trial Magistrate erred in law and in fact in adopting Kshs.72,000/= as the deceased's salary despite the purported pay slip only having been marked for identification and never produced as evidence.
 7. The Respondent's case was not proved on a balance of probability as is required by law.
 8. The learned trial Magistrate erred in both in law and fact basing her finding on irrelevant matters.
 9. The learned trial Magistrate erred in all points of fact and law in as far as both liability and quantum are concerned.

The Submissions

7. The appeal was canvassed vide written submissions. Parties filed their respective submissions



The Appellant's Submissions

8. On the issue of liability, Counsel for the Appellant submitted that the trial Magistrate erred in finding the Appellants 100% liable as the Respondents' case was not supported by any evidence neither was it proved on a balance of probability as required by law. Counsel urged that as was stated in the case of *Securicor Security Services-vs-Joyce Kwamboka Ongonga & Another Kisii HCCC No.230 of 2005* "Courts act on evidence in arriving at a decision. They do not act on suppositions, speculation or assumptions...."
9. Counsel contended that the Respondent in her testimony failed to show how the Appellant was negligent and how his negligence caused the accident. Counsel maintained that the burden of proof is always on whoever alleges and that the trial Court was never at the scene of the accident hence it ought to be guided by the evidence adduced before it. According to Counsel the Respondent's testimony was insufficient to hold the Appellant liable and the trial Court only misdirected itself.
10. Counsel urged that there can never be liability without fault, the Respondent ought to have shown the trial Court how the Appellant was at fault, the trial Court, in return, ought to have relied on the evidence adduced to inform its decision and there being no sufficient evidence by the Respondent, the trial Court ought to have dismissed their case. Counsel relied on the case of *Kiema Mutuku-v-Kenya Cargo Hauling Services Ltd 1991* cited in *Morris Njagi & another v Beatrice Wanjiku Kiura [2019] eKLR* with regard to his averment that there can never be liability without fault.
11. Counsel further submitted that the Respondents did not also call any eye witness to testify in support of their case and narrate to the trial Court how the accident did occur, neither did they call the investigating officer to explain to the trial Court the results of their investigation, nonetheless, the trial Court still went ahead to hold the appellants liable without any cogent evidence by the Respondent. Counsel urged the Court to be guided by the case of *Mary Wambui Kabugu V Kenya Bus Service Limited [1997] eKLR* where the Court stated that: - "The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case."
12. Counsel further submitted that the learned trial Magistrate failed to take into consideration the fact that PW2, a police officer, who testified, was not the investigating officer and did not produce before the trial Court any sketch maps that could have assisted the trial Court have the vivid picture of the scene of the accident, know the point of impact and get to ascertain who was at fault. Counsel maintained that it was the police officer's testimony that the 3rd Respondent herein was to blame for the accident for driving at a high speed under the circumstances and he further confirmed that the 3rd Respondent herein had in fact been charged with the offence of causing death by careless driving. Counsel relied on the holding in the case of *Evans Mogire Omwansa Vs. Benard Otieno Omolo & Another [2016] eKLR* where Court observed that

"...He however did not prove by way of sketch plans of drawings the possible come to a well-informed conclusion. He did not tell the Court where on the road junction he had stopped when he alleges to have been knocked down... In the premises, it is my considered view that statements in police abstract unless corroborated by evidence by the investigating officer is not sufficient and conclusive..."



this Court comes to the conclusion that the appellant fell short of proving negligence against the Respondents to the required standards. The appeal is therefore dismissed with costs"

13. Counsel urged that in line with the above the Court holds that the trial Court erred in holding the Appellant liable without any proper evidence by the Respondents and not taking into consideration the Appellant's evidence and submission.
14. With regard to quantum, Counsel submitted that the learned trial Magistrate erred in awarding damages given the circumstances of the case. Counsel contended that he ought to have dismissed the Respondents' claim with costs, for lack of sufficient evidence to hold the Appellant responsible for the injuries. In the alternative and without prejudice, Counsel submitted that the trial Magistrate's award of damages was inordinately high and manifestly excessive. Counsel maintained that the Respondents did not prove their case on a balance of probability to warrant being compensated and that in the event that the same was done, then the trial Court's award on quantum is excessively high.
15. Counsel relied on the case of *Kemfro Africa Limited & Another-vs-Lubia & Another (No. 2)* [1987] KLR 30 quoted in *Sokoro Saw Mills Limited v Grace Nduta Ndungu*[2006] eKLR where the Court stated that:- "...an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge must be satisfied that either the judge in assessing the damages took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is ... so inordinately high, that it must be a wholly erroneous estimate of damages."
16. Counsel urged that the trial Court in assessing the damages left out relevant facts and thus ended up awarding an inordinately high amount in damages. Counsel urged the Court to re-evaluate the quantum of damages awarded by the trial Court taking into account the circumstances of the case. Counsel proposed that in re-evaluating the quantum, this Court considers the following:
17. On General damages, Counsel submitted that the 1st Respondent brought this suit under the *Law Reform Act* and *Fatal Accidents Act*.
18. Under the *Law Reform Act*, Counsel submitted that the deceased sustained injuries to which he died instantly. Even though PW1 tried to testify that the deceased was treated at Moi teaching and referral hospital prior to his death but he could not produce any treatment documents or the post-mortem report. Counsel therefore proposed a figure of Kshs.10, 000/=under this head.
19. On the issue of loss of expectation of life, Counsel submitted that the deceased was 50 years old at the time of his demise as per the Death Certificate. Counsel proposed a figure of Kshs.50, 000/= under this head.
20. Under the *Fatal Accidents Act*, counsel submitted that the deceased at the time of death was 50 years old. According to Counsel the deceased can be said to have begun living his bonus years and an award of Kshs.60, 000/= would therefore be sufficient under his head. Counsel relied on the case of *Mohammed Abdi Ali-vs- Paul Muturi Mwangi* [2019] eKLR where the High Court on appeal awarded Kshs.60,000/-. Counsel also cited the case of *Mwanzia -Vs- Ngalali Mutua Kenya Bus Ltd And Quoted In Albert Odawa -Vs-Gichumu Githenji NKU HCCA NO.15 OF 2003 (2007)*, eKLR, where Justice Ringera was of the following view;

"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."

21. Counsel also cited case of David Mbuba & another v Victoria Mwangeli Kimwalu & another [2018] eKLR where the Court was of the opinion that:

"Having considered the foregoing, I find that there is no dispute that the deceased operated a business upon his demise. However, no evidence has been availed to prove the sums stated as his earning. Being duly guided by the above referenced authorities, I opine that it would be prudent to opt for the principle of granting a lump sum award as it is evident that the deceased operated a business....."

22. With regard to Special Damages, Counsel submitted that the 1st Respondent prayed for special damages amounting to Kshs.77, 142/=. Counsel urged that it is trite law that special damages must not only be pleaded but also be proved. Counsel contended that the 1st Respondent, however, did not produce any receipts in his name to prove that he ought to have declined this award for lack of proof. Counsel relied on the case of Kenya the estate of Desmond Tutu Likobele deceased) [2018] eKLR where the learned Judge stated that: "On special damages, the appellant is unhappy that the Court awarded damages for items that were not supported by any documentation... The cardinal legal principle is that special damages must not only be specifically pleaded, they must also be specifically proved."
23. In conclusion, Counsel submitted that the trial Magistrate erred on all points of law and facts in as far as both liability and assessment of quantum is concerned since he left out relevant facts and or failed to properly apply the laws applicable to the facts presented before her

The 1st Respondent's Submissions

24. With regard to liability, Counsel for the 1st Respondent submitted that the accident in question occurred on 11/11/2017, involving motor tractor registration number KTCA 498B owned by the Appellant and motor vehicle registration number KBP 068W owned by the 2nd Respondent and driven by the 3rd Respondent on the fateful day. This accident happened at 7:30 pm it was dark and raining thus visibility was poor.
25. Counsel maintained that that it was the evidence of the Appellant's witness-the motor vehicle investigator Mr. Joel Muniyiri Kabui (DW-4) that the accident occurred wherein the motor vehicle registration number KBP 068W which was being driven heading towards Eldoret from Nakuru general direction collided onto the trailer of the appellant's motor tractor registration number KTCA 498B which was being driven on the opposite direction, when the tractor driver turned right on to the direction of the oncoming vehicles so as to join a feeder road. Counsel added that the said witness did confirm to Court that the driver of the tractor ought to have turned was clear considering he had a trailer. The driver of motor vehicle KBP 068W had right of way.
26. Counsel further maintained that the Appellant's driver, one Stephen Kimeli Kogo (DW-2) testified and confirmed that the accident occurred on the rear of the trailer and the impact on KBP 068W was on the left as the driver tried to avoid hitting the oncoming motor vehicles and that he further confirmed that he ran away from the scene and was charged with the traffic offence of failing to report an accident. Counsel added that the driver of KBP 068W one Sammy Kimemia Mwangi (DW-1 at page 84-86 of the offence of causing death by dangerous driving in ELDORET CMCC TRAFFIC CASE NO.350



OF 2018 in which he was acquitted and as such, the 2nd and 3rd Respondents are not to blame for the accident.

27. Counsel submitted that the police officer (PW3) testified and stated that the motor vehicle KBP 068W was being driven on its rightful and/or lawful lane. The tractor KTCA 498B turned right on the side of the oncoming motor vehicle KBP 068W in order to join a feeder road, he further stated that the tractor which turned right was supposed to give way to the oncoming vehicles and it was raining and visibility was poor and so he had to be more careful.
28. Counsel maintained that there is no report as to the speed the motor vehicle KBP 068W was being driven other than the report on the state of the damage and that the speed limit of the area was also not ascertained so as to determine whether the KBP 068W driver was speeding. Counsel added that while acquitting the 3rd Respondent in the traffic case, the trial Court rightly observed that;

“The accused’ person’s version is that the driver of the tractor suddenly turned to the right from behind another vehicle without ascertaining whether the road was clear. This is supported by the inspection report which shows that the impact was on the left rear of the trailer which was almost off the road...

It is apparent the tractor driver suddenly turned to the right without checking the oncoming lane yet the accused’ person’s vehicle was close. The accused swerved to the right but it was inevitable and the accident occurred. It is not the accused who caused the dangerous situation.”
29. From the foregoing, Counsel contended that it is apparent that the 3rd Respondent was properly on his lane as the driver of motor vehicle registration number KBP 068W when the tractor registration number KTCA 498B made an abrupt turn by encroaching on his lane to join a feeder road on the left facing Eldoret thereby forcing him to swerve right oblivious of the trailer it was pulling hence the resultant accident and that this accident happened at 7:30pm it was dark and raining thus diminishing visibility.
30. According to Counsel had the driver of the tractor stopped to allow oncoming traffic to clear before taking the right turn, the accident in question could not have occurred at all. Counsel added that the deceased herein was a passenger in motor vehicle registration number KBP 068W which had the capacity to carry 8 (eight) passengers including the driver and was thus not overloaded as the appellant claims, that the deceased herein met his death whilst seated wherein he was crushed to death by the impact between the motor vehicle registration number KBP 068W and the trailer in motor tractor registration number KTCA 498B and it therefore goes without saying that the deceased did not in any way contribute to the occurrence of the accident herein and as such no contributory negligence as against him.
31. Counsel urged that the eye witnesses in this matter, the driver of the tractor-KTCA 498B Mr. Stephen Kimeli Kogo, the driver of KBP 068W Mr. Sammy Kimemia Mwangi, the investigating officer instructed by the appellant’s insurer-DW 4 Mr. Joel Munyiri Kabui and the police officer PC Edwin Chirchir all confirm and agree that if the tractor (the Appellant) had given way and/or had he been more vigilant and careful, the accident would not have occurred. Thus the appellant is entirely to blame for the occurrence of this accident
32. With regard to quantum, Counsel submitted that the appellant's proposal on quantum is unimaginable considering the current economic times, that it is not supported in law and they pray that the same be disregarded for being unrealistic and illogical.



33. Counsel further submitted that principles which ought to guide a Court in awarding damages were set out by the Court of Appeal in *Southern Engineering Company Ltd Vs. Musingi Mutia* [1985] KLR 730 where it was held that:

“It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated...The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment...It is inevitable in any system of law that there will be disparity in awards made by different Courts for similar injuries since no two cases are precisely the same, either in the nature of the injury most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award...”

34. Awarding damages in fatal accident claims under the head of loss of dependency was dealt with by Ringera, J (as he then was) in *Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989* where it was held that:

“The Court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a Court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the dependant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected.”

35. Counsel submitted that as at the time of his death, the Deceased herein was 50 years old, he was an energetic man living a robust life, he enjoyed good health and lived a happy life and worked as an accountant at Flamingo Horticulture Limited earning a gross monthly pay of Kshs.123,762.85/=per month.

36. In regard to pain and suffering, Counsel submitted that after the accident, the deceased was taken to the Moi Teaching and Referral Hospital where he was pronounced dead while receiving treatment. The deceased must have been in excruciating pain before he ultimately met his death. Counsel cited



the case of *Sukari Industries v Clyde Machimbo Jume HB HCCA No. 68 of 2015 [2016] eKLR* the Court held as follows:

“On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000/- to Kshs 100,000/- over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable.”

37. Counsel contended that the Appellant has not indicated how by law the award of Kshs. 50,000/= under this heading by the trial Court is excessive, no authority has been referred to. Counsel maintained that the trial Court’s award is fair, reasonable and within the limits of precedent and this Honourable Court ought not to interfere with it.
38. As regards loss of expectation of life, Counsel cited the case of *Uganda Electricity Board vs. Musoke [1990-1994] EA 581*
 1. Before any damages are awarded in respect of the shortened life, of a given individual, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, a positive measure of happiness of which the victim has been deprived by the defendant’s negligence. If the character or habits of the Individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.
 2. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.
 3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty can be made. When an individual has reached an age to have settled prospects, having passed the risk and uncertainties of childhood and having future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.
 4. Stripped of these technicalities, the compensation is not being given to the truth is that in putting a money value on the prospective balance of happiness incommensurables. Damages, which would be proper for a disabling injury, may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen. In this case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed.”
39. Counsel therefore submitted that the trial Court’s award of Kshs.100, 000/= for loss of expectation of life is fair, reasonable, within the law and precedent under this heading.
40. With respect to loss of dependency, Counsel submitted that the Deceased was working as an accountant under permanent and pensionable terms. His nature of work did not involve a lot of risk



and he would have worked till his retirement age of 60 years. The Deceased was earning a monthly pay of Kshs. 123,762.85/= with a net pay of Kshs. 72,900/= and had a father who was dependant on him amongst others and was not married as at the time of the accident thus a dependency ratio of 1/3 will suffice. Therefore, damages under this heading will apply as hereunder:

$Kshs.72,900/= \times 10 \text{ years} \times 12 \times 1/3 = Kshs.2,916,000/=$

41. Counsel relied on the case of *Monica Nduti Mwanangi & Another V Christopher Mwaniki Kiragu HCCC 2844 of 1998* where a multiplier of 18 years was used for a deceased person who was aged 48 years.
42. Counsel contended that deceased person's nature of work was less risky and having been a professional that the deceased even having attained 50 years of age was not suffering from any ailment, the trial Court's award on this heading as being within the law and should not be interfered with.
43. With regard to burial expenses, Counsel submitted that death occurred as a result of the accident and the body must have been interred hence an award of nominal special damages of Kshs.150,000/= is reasonable in the circumstances. Counsel maintained that it is a fact that somebody died and from general practice by Kenyans, there must have been a burial ceremony which naturally attracts mortuary expenses, coffin, dressing, transport and other attendant costs. Counsel urged the Court to award the same relying on the case of *Chania Shuttle Bus v Rebecca Mbogho (Suing As The Legal Representative of the Estate of Joseph Mwanyikia Mbogho [2021] eKLR* where the Court at paragraph 36 of the judgement observed that:

“Courts have time and again held that a Court can award reasonable legitimate burial expenses even without production of specific expenditure. A judge can make an award on necessary burial expenditure without necessarily proving each single item. See Court of appeal holding in *Jacob Ayiga Maruja and Another -vs-Simeon Obayo in Kisumu Civil Appeal No 167/2020*”.

44. Counsel associated himself with the said sentiments and prays that this Honourable Court finds it wise to award Kshs.150, 000/= as nominal damages for burial expenses herein.
45. With regard to Special Damages, Counsel submitted that the Plaintiff prayed for and proved special damages of Kshs. 27,142/= plus Kshs. 50,000/= making a total of Kshs. 77,142/= being the cost of obtaining a grant of letters of administration. Counsel deemed the same awardable herein. Counsel further invited the Court to consider the submissions as filed by the 1st Respondent before the trial Court and the authorities thereunder.
46. In the end, Counsel urged that the Appellant's appeal is without merit and prayed that the same be dismissed with costs and the trial Court's decision be upheld. In buttressing his submissions Counsel relied on the case of *Richard Macharia Nderitu -vs-Phillemon Rotich Langas [2013] eKLR*.

The 2nd and 3rd Respondent's Submissions

47. Counsel for the 2nd and 3rd Respondents submitted that from the evidence on record, it is evident that the 2nd Respondent's motor vehicle registration number KBP 068 W under control and management of the 3rd Respondent was heading to Eldoret from Nakuru while tractor registration number KTCA 498B belonging to the Appellant was coming from the opposite direction, that the scene of the accident, tractor registration number KTCA 498B made an abrupt right turn facing Nakuru to join a feeder road thereby encroaching into the motoring lane of motor vehicle registration number KBP 06W.



48. Counsel further submitted that the 3rd Respondent testified as DW1 and confirmed occurrence of the accident. It was his evidence that he was from Nakuru heading to Eldoret at around 7:30 pm at 60 Kmph when tractor registration number KTCA 498B coming from opposite direction made an abrupt turn to join a feeder road on the left facing Eldoret without indication and further, it was his evidence that he swerved to the right facing Eldoret/left facing Nakuru to avoid hitting the tractor, unbeknown to him, the tractor had a trailer without reflectors which hit the passenger side of the vehicle hence the resultant accident. It was also his evidence that he was not to blame at all for the accident a fact apparent from the judgment in Eldoret Chief Magistrate's Traffic Case No. 350 of 2018 which was produced by consent as evident at page 88 of the record of appeal.
49. Counsel maintained that the Appellant's driver testified as DW2, that he confirmed the occurrence of the accident and on cross examination at page 89 of the record, he admitted that he ran away after accident and only resurfaced after 2 days when he was charged with offence of not stopping after accident to which he pleaded guilty. Counsel added that he also confirmed that if he had stopped for motor vehicle registration number KBP 06W to pass, the accident in question would not have occurred at all.
50. According to Counsel, based on the foregoing, the trial Magistrate came to the inescapable conclusion at page 119 of the record that;

“ 1. .it is apparent from the outcome that be miscalculated the speed at which the vehicle was travelling and that by his own admission, he did not stop to give way to the vehicle driven by 2nd Defendant. It is also apparent that the 2nd Defendant did not see the trailer since DW2 admitted it was dark and that the trailer was not visible since it does not have reflectors on the side. In the circumstances I would make a finding that the 3rd Defendant being the owner of tractor registration number KTCA 498B is vicariously liable for the actions of his driver DW2 and therefore 100% liable for the accident.

51. Counsel maintained that this is a sound decision that cannot be impeached. Regard should be had to the decision of Justice E.M. Githinji as he then was in the case of Lydia Chao y Dhanjal Brothers Ltd & 3 others [1990] eKLR where while dealing with facts that are *pari materia* with this he rightly held that;

“Even assuming that the fourth defendant had a duty to look out for vehicles in the carriageway to Mombasa; that he was driving in the right lane and that he could have brought his vehicle to a halt a few feet from the point of impact, I would still conclude in the circumstances of this case that the fourth defendant was thrown into an emergency and had no time to react as a reasonable matatu driver.

For those reasons, I find that the fourth defendant was not negligent. I also find that the accident was solely due to the negligence of the first and second defendants.”

52. Counsel also urged the Court to be guided by the decision Newbold J.A. in *Zarina A. Shariff v Noshir P. Settna* [1963] E.A. 239 at page 252 where it was held that;

“It is the duty of every driver to guard against the possibility of any danger which is reasonably apparent, but it is not his duty to proceed in such a way that he could avoid an accident no matter how reckless the other part may be. “Cited in *Lydia Chao v Dhanjal Brothers Ltd & 3others* (Supra).



53. In view of the forgoing decisions and taking into account the circumstances that led to the accident in question, Counsel submitted that the Court properly analyzed evidence and came to the correct conclusion given the admission by the driver of the Appellant at page 89-90 of the record that; "If I had stopped to wait for the motor vehicle to pass, the accident would not have occurred."
54. Counsel urged the Court to uphold the decision of the trial Magistrate and dismiss the instant appeal with costs to the Respondents.

Determination

55. I have considered this appeal, submissions and the decisions relied on. I have also perused the trial Court's record and considered the impugned judgment.
56. This being a first appeal, it is the duty of this Court as the first appellate Court, to reassess, re-evaluate and reconsider the evidence afresh and come to its own conclusion on it. The Court should however bear in mind that it did not see witnesses testify and give due allowance for that.
57. In the case of *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal stated;

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and re-analyze 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”

Liability:

58. The liability was apportioned in the ratio of 100% against the Appellant.
59. In *Stapley –v- Gypsum Mines Limited (2) (1953) A.C 663* at P. 681 Lord Reid reasoned that: “To determine what cause 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 fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone 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 cause the accident. I doubt whether any test can apply generally.”

Analysis And Determination

60. From the evidence as above summarised, It is common ground that an accident indeed occurred on 11/11/2017, involving motor vehicle registration number KBP 068W, KBC 539C and tractor registration number KCTA 498B and as result of which the deceased lost his life.

Issues for determination

61. The issue that the Court for the determination of the court is whether based on the said evidence, the Trial Magistrate misdirected herself and reached the wrong conclusions on both liability and quantum which would warrant the Court to disturb the lower court's findings on both.



The Evidence on liability

62. On the one hand, the Appellant blames the Respondents for the accident, whilst on the other hand, the Respondents blame the Appellant. In this instance to determine where liability lies, the Court will draw upon the evidence at the trial Court.
63. PW1 Mathew Mavuti Wakuhungu, testified that on 11/11/2017, the deceased Job Natwati Wakuhungu was travelling to Eldoret when he learnt that he had been involved in an accident and that he recorded his statement on 24/5/2017 which was adopted as his evidence in chief. He told the Court that he filed an ad litem application which was allowed 16/2/2018 and produced a copy of the said grant as PExh 1 and stated that he paid Kshs.50,000/= for the application and that he was issued with a death certificate which he produced and was marked as Pexh 3, that after the accident he recorded a statement at Tarakwa police station and police station and a police abstract was issued marked as PExh 4 after the accident, that he did a search for notice and he paid for search for KBP 068W and was issued with a copy of the search which he produced as PExh 5a and an invoice as Pexh 5b and he paid Kshs.550/= for the search and that he also did a search for motor vehicle registration number KTCA 498B which he produced as PExh 6 a and Pexh 6 b.
64. He also told the Court that he went to an Advocate who issued him with a demand letter in January, 2018 which he produced as Pexh 7 and a statutory notice was sent to the insurance on Pexh 8 and that he sent letters by registered post receipts for registered post-dated 1/3/2018 which he produced as Pexh 9 a and b.
65. He further told the Court that his brother who was a trained ICT Technician worked with Flamingo Horticulture in Nanyuki as a middle level manager and was earning a gross pay of Kshs. 123,762/= . He produced a copy of the payslip as Pexh 10 and the Chief's letter as Pexh 11. He asked the Court to order compensation for them since the deceased was the breadwinner in their family and because he did not contribute to the accident, the owners of the motor vehicles should pay for damages.
66. On cross-examination, PW1 stated that the witness stated that he is an accountant and that he did not witness the accident. The witness stated that the deceased did not have a wife and children and that their father is sickly. The witness admitted that the Chief's letter he had produced did not mention the names of their parents and that he used to depend on the deceased although he is an accountant and can manage himself.
67. On further cross examination, the witness admitted that he had not produced any receipts for mortuary fees, funeral expenses and an appointment letter for the deceased. The witness also admitted that he did not have a post mortem report to show that the deceased died while undergoing treatment and the cause of death neither did he have the burial permit. The witness further stated that he was not aware if the deceased had paid fare.
68. PW2 Eunice Wanjiku Moses, testified that she works at Flamingo Horticulture as a HR Assistant and produced her work ID which was marked as Pexh 12. She told the Court that she knew Job Natwati, he was a workmate at Flamingo and worked as a System Network Admin for 7 years, 6 months and 19 days and he used to be paid a gross salary of 123,782.85. She then produced his payslip which was marked as Pexh 10.
69. On cross-examination PW2 reiterated that the deceased was employed by Flamingo Horticulture in his employment letter which she conceded that she did not produce it in Court. She told the Court that the deceased's nett salary was Kshs.72,800/=.



70. PW3 No. 99706 PC Edwin Chirchir from Tarakwa Police Station testified that he is in Court in relation to the matter relating to an accident on 11/1/2017 along Eldoret-Nakuru Road at Sportsman, that it was reported by the driver of motor vehicle registration number KBP, Sammy Kimemia Mwangi. He told the Court that an Officer from Tarakwa Police Station visited the scene and found out that an accident had occurred involving a motor vehicle and a tractor KTCA 498B driven by Stanley Kogo who was at the scene, that the Officers carried out investigation and towed the motor vehicle to Tarakwa Police Station awaiting inspection and the following day the driver of the motor vehicle recorded a statement while the driver of the tractor was at large.
71. He told the Court that on 13/11/2017, the driver of the tractor and the owner of the tractor came to the station and their statements were recorded, the tractor was then towed to Tarakawa Police Station to await inspection and that an officer from NTSA came and carried out investigations and found the motor vehicle registration number KBP 068 W Toyota Voxy was extensively damaged while the tractor was damaged at the rear left side as indicated in the inspection report.
72. He further testified that the officers charged the driver of motor vehicle registration number KBP 068W with the offence of causing death and the driver of the tractor was charged with failing to stop after the accident. He then produced the police abstract which was marked as Pexh 14.
73. He stated that they found that the driver of the motor vehicle KBP 068 was over speeding and the driver of the tractor did not look carefully at oncoming traffic before turning into the road.
74. On cross examination, he conceded that he was not the investigating officer in the matter, that it was Cpl Dalit. He told the Court that the 2 drivers were charged, Sammy Kimemia the driver of KBP 068W was charged with the offence of causing death in TR No. 350/2018, that the accused was acquitted under section 215 of the CPC and he did not know if an appeal was lodged. He stated that motor vehicle registration number KBP 068W was been driven from Nakuru heading towards Eldoret while the tractor was being driven from Eldoret heading towards Nakuru. He told the Court that the accident occurred on the left lane as one faces Eldoret and of the two motor vehicles the Toyota Voxy was on the rightful lane and the tractor was turning towards the right side of the road as one faces Nakuru.
75. He told the Court that of the two motor vehicles, the one turning right was supposed to give way and that both drivers were to blame for the accident. He told the Court that he blames the driver of the tractor as he didn't check on the traffic, that he was supposed to stop and ensure the road was clear and he didn't do that, that the driver of KBP was to blame because according to the inspection report, the motor vehicle was damaged extensively on the left side.
76. He told the Court that there is nothing about the speed in the report and that he didn't visit the scene and that the extent of the damages tell him that the motor vehicle was being driven at a high speed and that he did not know the speed limit of area. He conceded that when he says the motor vehicle was being driven at a high speed it is an assumption. He stated that if the tractor had given way the accident would not have occurred and that the conclusion of the judgment was that Samuel Kimemia was not to blame for the accident.
77. DW1 Sammy Kimemia Mwangi testified that he was driving motor vehicle KBP 068W at a speed of about 60KPH heading to Eldoret from Nakuru on the 11/11/2017 at about 7:30 pm when a tractor which was coming from the opposite direction made an abrupt turn to join a feeder road on the left side of the road facing Eldoret without indicating. The witness stated that he swerved to the right to avoid hitting the tractor but since it had a trailer which had no reflectors, it hit the vehicle on the passenger side.



78. On cross-examination DW1 stated that the Plaintiff was sitting on the back left side of the motor vehicle at the door and that he was driving at 60 Km per hour and he was not able to avoid the accident. He told the Court that the Voxy was about 20 meters from the tractor and admitted to seeing the inspection report and stated that he was not over speeding.
79. On further cross-examination he confirmed that there was an oncoming motor vehicle which had full lights, he told the Court that he wears spectacles and could see the road properly, he saw the tractor 20 meters away and that when the lights were full he reduced his speed. He told the Court that the motor vehicle Voxy was towed to Eldoret and that it was written off. He further stated that he did not lie about driving at 60 Km per hour and that there were 8 people in the motor vehicle which had a capacity of carrying 7 passengers and 1 driver.
80. He told the Court that the police charged him with causing death and that the driver of the tractor was a witness in the traffic case. He also stated that he had tried to serve and brake to avoid the accident and conceded to not having his driving licence in Court and that he had driven the motor vehicle for the about 2 years before the accident which occurred at 7:30 pm.
81. DW2 Stephen Kimeli Kogo, adopted his witness statement as his examination in Chief. He stated that on the 11/11/2017 he was driving tractor registration number KTCA 498B and after the accident his vehicle was inspected and he produced a certificate of inspection. The witness also produced the tractors log book, and a copy of his driving licence and stated that he blamed the 2nd defendant for the accident since he had already turned and his indicator was on.
82. On cross examination, the witness stated that it was dark when the accident occurred but the road was visible and that the vehicle he saw was far. The witness further stated that he was on the path of the 2nd defendant's vehicle and that the tractor trailer has reflectors on the back and none on the side. He admitted that he fled the scene of the accident and that he reported to the police after 2 days when he was charged for failing to stop after the accident.
83. On further cross examination, he stated that if he had stopped to wait for the vehicle to pass the accident would not have occurred. The witness further stated he testified in the traffic case and that he agreed with the Courts' decision although he did not know the outcome of the Court case.
84. DW3 Joel Munyiri Kabui, testified that he is a licensed Insurance Investigator trading as Rema Assessors, that he received instructions to investigate from UAP on 19/12/2017, in relation to an accident that occurred on 11/11/2017, investigating KBP 068W Toyota and tractor KCTA 498B and he proceeded to carry out investigations and prepared a report having interviewed witnesses including the driver of the subject motor vehicle. He the produced his report in Court as exhibit D3.
85. On cross-examination, he stated that the finding of my investigation were that the driver of motor vehicle KBP 086W was driving at very high speed and on reaching the scene, he was blinded by an oncoming motor vehicle and when it passed he realized there was at a tractor that had turned to the left to join a feeder road and the motor vehicle hit the rear of the trailer which damaged the motor vehicle extensively and there were fatalities. He stated that the deceased is captured in his report was a passenger in the motor vehicle registration No. KBP 068W.
86. He told the Court that the trailer was hit on the left rear side and he saw the trailer at Tarakwa Police station but he did not confirm if it had any reflectors. He stated that he has 20 years' experience in carrying out investigation of insurance claims. He confirmed the tractor had its head light on and if the trailer had reflectors on the side or rear it would not have assisted the driver of the motor vehicle see. He further stated that he did not record the statement of the tractor driver and did not interview



him because at the time of my investigation he was not available for interview. He told the Court that he is a driver.

87. He also told the Court that KBP was driving from Nairobi to Eldoret, direction, the tractor was being driven from Eldoret direction when the driver of the tractor turned to his right to join a feeder road. He stated that vehicles in Kenya drive on the left, the motor vehicle KBP was oncoming and the tractor was crossing the road when it turned right, that the motor vehicle KBP had right of way.
88. He stated that before one turns they are supposed to indicate their intention, check on the distance of the oncoming motor vehicle before making a decision to turn and if one turns having given giving ample time to an oncoming motor vehicle then an accident need not occur as it will depend on the decision of the oncoming motor vehicle whether to slow down or not.
89. He told the Court that according to traffic rule, every driver has a duty to respect the other and give way and there is also need to consider the speed and in his opinion, he blames the driver of KBP because he stated that his vision was burned by an oncoming motor vehicle and he had a problem with his eye sight therefore whatever decision he was making he had a challenge. He stated that he interviewed a passenger in the motor vehicle as an eye witness one Esther Wambui Mbugua and stated now that he did not interview the driver of the tractor his report is complete.
90. On further cross-examination he stated that he later learnt that the driver of the tractor had fled the scene of the accident and was not aware if scene of the accident was compromised.
91. He stated that according to the report he indicated where he got the information and came to the conclusion that KBP was moving at a high speed. He stated that having viewed the motor vehicle and looking at the NTSA inspection report and that of the insurance assessor, the motor vehicle was extensively damaged from the left side towards the rear.
92. He however conceded that he did not avail a medical report to show that the driver of KBP had poor vision as he says so in his report. He also had nothing to show that he could not drive at night.
93. I have considered the evidence as above summarised and to enable the Court reach a determination on the issue of liability, the Court shall closely consider and examine the evidence of the various witnesses' version of how the accident occurred
94. In this regard, the relevant excerpt of Respondent's witness DW1 Sammy Kimemia Mwangi who maintained that he was driving motor vehicle KBP 068W at a speed of about 60KPH is as hereunder;

“a tractor which was coming from the opposite direction made an abrupt turn to join a feeder road on the left side of the road facing Eldoret without indicating. The witness stated that he swerved to the right to avoid hitting the tractor but since it had a trailer which had no reflectors, it hit the vehicle on the passenger side..... he told the court the Voxy was about 20 meters from the tractor ...and stated that he was not over speeding...”

95. Further this witness testified as follows:

“he told the Court that he wears spectacles and could see the road properly.... He also stated that he had tried to serve and brake to avoid the accident.....”



96. The evidence in cross examination of the Appellant witness DW2 Stephen Kimeli Kogo, who was the driver of the tractor as reproduced here below is as follows;

“.....it was dark when the accident occurred but the road was visible and that the vehicle he saw was far. The witness further stated that he was on the path of the 2nd defendant’s vehicle and that the tractor trailer has reflectors on the back and none on the side....”

97. The evidence of the Appellant’s DW3 Joel Munyiri Kabui who was hired to conduct the investigations by the Appellants in my well-considered opinion, will be particularly instructive and relevant in assisting the Court on the issue of liability firstly because it is the evidence of the Appellants who have disputed the findings of the lower court.

98. Additionally, I find that it faithfully mirrors the version of both drivers on how the accident occurred. I also find the said evidence to be sufficiently neutral and objective and that the court can safely rely on it in reaching a reasonable conclusion.

99. In summary, the relevant excerpts of his evidence in cross examination is as follows;

“...the driver of motor vehicle KBP 086W was driving at very high speed and on reaching the scene, he was blinded by an oncoming motor vehicle and when it passed he realized there was at a tractor that had turned to the left to join a feeder road and the motor vehicle hit the rear of the trailer...”

“.....he blames the driver of KBP because he stated that his vision was burned by an oncoming motor vehicle and he had a problem with his eye sight therefore whatever decision he was making he had a challenge....”

“...He confirmed the tractor had its head light on and if the trailer had reflectors on the side or rear it would not have assisted the driver of the motor vehicle see.....He told the Court that the trailer was hit on the left rear side and he saw the trailer at Tarakwa Police station but he did not confirm if it had any reflectors.

“...He stated that vehicles in Kenya drive on the left, the motor vehicle KBP was oncoming and the tractor was crossing the road when it turned right, that the motor vehicle KBP had right of way...”

“...He stated that before one turns they are supposed to indicate their intention, check on the distance of the oncoming motor vehicle before making a decision to turn and if one turns having given giving ample time to an oncoming motor vehicle then an accident need not occur...”

100. Having considered and carefully addressed my mind to the above relevant excerpts of the evidence, in light of the fact that there is no evidence to confirm the speed at which the driver of the Toyota Voxy was driving at to support the allegation that he was speeding, it is quite apparent to the Court that Private Investigator, particularly in his evidence in cross examination, apportioned culpability to the driver of the tractor.

101. It has been testified that the fact of the extent of the damage occasioned to the motor vehicle which was written off as a result of the accident led to the conclusion that it was at high speed even though its driver maintained that he was at a speed of 60KPH.



102. Whereas the above may be a relevant consideration, it is my considered opinion that the sizes of the vehicles relative to the other should also be taken into consideration in determining what damage would have been occasioned to each as a result of the collision.
103. In this case, the motor vehicle KBP 086W was a Toyota Voxy, whose relative size the Court takes cognisance of as a matter of public notoriety that rammed into a tractor trailer. A Toyota Voxy being smaller and lighter would suffer considerable damage as a result of an impact with a tractor trailer and so the fact that the damage the one the subject matter of this case suffered was sufficiently extensive to warrant its being written off is not necessarily evidence of speeding.
104. It has been alleged that the plaintiff brought the accident upon himself because he was an excess passenger in the motor vehicle. However, no evidence was adduced to support this allegation. The Private Investigator also alleged that the driver of the Toyota Voxy had a bad eyesight and so could not see well at night but again did not avail any evidence in support.
105. Having carefully addressed my mind to the evidence as above summarised and particularly the relevant excerpts of the same as above reproduced, and further taking into account the fact that the Lower Court Acquitted the driver of the motor vehicle KBP 086W in the Traffic case, it is my well-considered opinion that the Trial Magistrate properly directed herself in holding the driver of the tractor 100% liable to compensate the plaintiff. I therefore see no reason to disturb this finding and I now hereby uphold the same.

The Evidence on Quantum:

106. The Court of Appeal in *Kemfro Africa Ltd v A. M. Lubia & Another* (1988)1 KAR 727 (Supra) discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus: -
- The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.
107. As assessment of damages is at the discretion of the trial Court, this Court cannot interfere with the exercise of discretion thereof except where the trial Court committed an error in principle or made an award that was inordinately high or low as to be wholly erroneous estimate of damages.
108. In *Ezekiel Barngetuny –vs-Beatrice Thairu* HCC No. 1638 of 1988 where Justice Ringera (as he then was) held thus; -

“The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the Court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents’ and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature.”



109. In its assessment of damages under *Law Reform Act* and *Fatal Accidents Act*, the trial Court, based on the evidence presented, awarded Kshs.50,000/- for pain and suffering. As regards loss of expectation of life, the Court awarded an agreed sum of Kshs.100, 000/-.
110. With regard to pain and suffering, in *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba)* [2019] eKLR the Court observed that-
- “The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition, a Plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident.”
111. Also in the persuasive case of *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR, the Court observed: -
- “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh.100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”
112. On loss of expectation of life, in *Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019)* [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the Court observed as follows:
- “44...I note that in *Benedeta Wanjiku Kimani v Changwon Cheboi & Another* [2013] eKLR, Hon Emukule J, reasoned that:...In common law jurisprudence of which Kenya is part, the Courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death....” 45. That was in 2013. Thereafter, in the case of *Citi Hoppa Bus Limited & Another v Maria Clara Rota* [2021] eKLR an award of Kshs 200,000/= was made for loss of expectation of life where the deceased was aged 33 years old.”
113. In the case of *Mosonik (supra)* and *Citi Hoppa Bus Limited (supra)* the deceased persons were 27 and 33 years respectively and this would explain the award of Kshs.200,000/-. In this case, the deceased was 50 years old and in my well-considered opinion a conventional award of Kshs.100, 000/- for loss of expectation of life is reasonable. I therefore uphold the decision of the lower court under this head.



114. However, given that the deceased was pronounced dead on arrival at the hospital immediately after the accident, I will disturb the sum of Ks. 50,000/- awarded under pain and suffering and replace the same with an award of Ks. 20,000/-
115. The trial Court then assessed loss of dependency based on Section 4 of the *Fatal Accidents Act*. It utilized the multiplicand approach as opposed to the global/lumpsum approach. 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.
116. In the case of Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR the Court 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.”
117. There was material on record to corroborate the 1st Respondent’s claim. On the loss of dependency, it is generally settled in law that global/lumpsum damages are awarded in instances where the Court is left with no choice since there is absolutely no proof of the deceased’s monthly earnings, the Regulation of Wages (General) Amendment) Orders is not applicable and that the use of the multiplier approach would be tantamount to the Court engaging in speculation. The trial Court was thus right in settling for the multiplier approach. The claim for loss of dependency constitutes the multiplicand, the dependency ratio and the multiplier.
118. On the multiplicand, PW2 a Human Resource Assistant at Flamingo Horticulture testified that she worked with the deceased who was a System Network Administrator for 7 years, 6 months and 19 days and that the deceased was earning a salary of Ks. 123,782.85 and a net pay of Kshs.72,800/=.
119. Contrary to the assertion by the Appellants, the record of the Lower Court states that PW1 identified the deceased payslip and the same was marked as PMFI-10 and this witness produced it as Pexh 10. It is also part of the Appellant’s Record of Appeal at page 22.
120. However, the Court notes that the lower court used an amount of Ks. 72,900/- instead of Ks. 72, 800/- as testified by PW2 to determine the deceased earning. Having perused the copy of the deceased payslip, I note that it indicates the deceased net pay as being Ks. 72, 900/- This then explains the reason why the lower court used this amount as opposed to the amount stated by PW2.



121. Given the above, I am very well satisfied that the deceased payslip was indeed produced and the lower court properly relied on available evidence to make its determination. I therefore see no reason to disturb the award under this head and I accordingly uphold the same.
122. On the multiplier, the deceased was aged 50 years old. The retirement age in Kenya is at 60 years. The deceased had around 10 years of his active working life. The trial Court settled for a multiplier of 10 years. In this regard, given the fact that the deceased was gainfully employed, he would have retired at the age of 60 years. I therefore find no fault with the multiplier of 10 years and I accordingly uphold the same.
123. With regard to the dependency ratio the Court adopted a dependency ratio of 1/3 since the deceased was not married and had no children. I also find no fault with this finding and I uphold the same
124. In light of the above the lower court's award of damages under this head are upheld.
125. Special damages are those damages which are ascertainable and quantifiable at the date of the action. The distinction between general and special damages was explained by the Court of Appeal in *Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd* [1992] KLR 177 where it was stated that:
- “The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”
126. In this case, a perusal of the plaint indicates that the Special Damages sought are as follow;
- a. Legal fees
 - b. Motor vehicle copy of records search
 - c. Funeral expenses itemized as post mortem fee, medical expenses and mortuary fees totalling Ks. 77,142/-
127. Having itemized them as Special Damages with specific amounts attached to them, the Respondent was legally required to avail all the relevant receipts in support of the stated expenditure. I have perused the Record and the only receipts I have seen are for Ks. 550/- for the Motor Vehicle Search and for Ks. 50,000/- for the ad litem application totalling Ks. 50,550/-
128. In this regard I set aside the sum of Ks. 77,142/- awarded by the lower court as Special Damages and substitute the same with a sum of Ks. 50,550/-
129. In conclusion, the Appellant's appeal is allowed as to the following extent;
- a. The Lower Court's finding on liability at 100% against the Appellant is now hereby upheld.
 - b. The Lower Court's award of Ks. 50,000/- for Pain and Suffering is now hereby set aside and substituted with an award of Ks. 20,000/-
 - c. The Lower Court's award of Ks. 100,000/- for loss of expectation of life is upheld
 - d. The Lower Court's award of Ks. 2, 916,000/- for Loss of Dependency is upheld



- e. The Lower Court's award of Ks. 77,142/- for Special Damages is now hereby set aside and the same is substituted with an award of Ks. 50,550/-
- f. The Appellant is to bear the costs of the Appeal.

READ DATED AND SIGNED AT ELDORET ON 30TH OCTOBER 2024

E. OMINDE

JUDGE

