Michieka & another (Suing as the legal representatives of the Estate of the Late Samuel Mose Gioma Michieka) v Ainley (Civil Suit 119 of 2011) [2023] KEHC 473 (KLR) (Civ) (24 January 2023) (Judgment)

Neutral citation: [2023] KEHC 473 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 119 OF 2011

CW MEOLI, J

JANUARY 24, 2023

BETWEEN

MARY DORIS GOIMA MICHIEKA ..... 1ST PLAINTIFF

DAVID OMBOGO ..... 2ND PLAINTIFF

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE SAMUEL MOSE GIOMA MICHIEKA

AND

RICHARD HAROLD AINLEY ..... DEFENDANT

JUDGMENT

1. Mary Doris Goima Michieka and David Ombogo, (hereafter the Plaintiffs) sued Richard Harold Ainley (hereafter the Defendant) in their capacity as the legal representatives of the estate of the Samuel Gioma Michieka alias Samuel Mose Gioma Michieka, hereafter the deceased) seeking damages under the *Law Reform Act* and *Fatal Accidents Act*. The suit arose from a road traffic accident that occurred on the night of April 4, 2008 and April 5, 2008.

2. They Plaintiffs aver that the Defendant was at all material times the owner and or driver of motor vehicle registration number KAR 897Q Subaru; that on the material night the deceased was lawfully driving motor vehicle KAK 469D Nissan Sunny B12 Saloon. And that at the intersection or junction of Nyerere Road and Processional Way Nairobi, the Defendant so negligently and carelessly drove, managed and or controlled motor vehicle registration number KAR 897Q that it violently collided onto motor vehicle KAK 469D from the driver's side, as a result of which the deceased sustained fatal injuries. That by reason of the matters the estate of the deceased has suffered loss and damage. The Plaintiffs also claim damages for lost dependency.

3. On May 28, 2014 the Defendant filed a statement of defence denying the key averments in the plaint and liability and asserted that the subject accident was solely or substantially contributed to by the negligence of the deceased. The Plaintiffs vide their reply to defence denied the key averments in the statement of defence and reiterated the contents of the plaint.

4. The matter thus proceeded for hearing during which Mary Doris Goima Michieka testified as PW1. She adopted her witness statement dated on March 31, 2011 as her evidence- in -chief and produced a bundle of documents attached to the list of documents of even date as PExh 1 – 26, 28-34, and in the course of her evidence drew a sketch of the scene of the accident which was marked PExh 35. The gist of her evidence was that on April 5, 2008 she received a phone call informing her about the occurrence of the accident and accompanied by her husband immediately left for the scene but instead proceeded to the Nairobi Hospital upon learning that the deceased had been taken there.

5. That on arrival, the couple found that the deceased had died on the way to the hospital and therefore removed the body to the mortuary before proceeding to the scene where they had photographs taken and thereafter made a report at the Kilimani Police Station. It was her further evidence that at the scene she noted that the motor vehicle KAK 469D (hereafter the deceased's vehicle) had "been pushed" off the road, gone over the fence of and into Serena Hotel area, while the Defendant's motor vehicle registration number KAR 897Q (hereafter the Defendant's vehicle) was on Nyerere Road facing Serena Hotel direction at the intersection of Processional Way and Kenyatta Avenue. She stated that the impact on motor vehicle registration number KAK 469D was on the driver's side and blamed the Defendant for the accident.

6. She went on to state that the deceased was in his final year of medical school at the University of Nairobi. That the death of her son devastated the entire family as he was their only son who would have supported them in their old age. She thus sought compensation as pleaded in the plaint.

7. Under cross-examination by defence counsel, it was her evidence that in her view Processional Way which was unmarked was the main road though it was a new road then. It was her evidence further that Nyerere Road bore a continuous yellow line and reiterated that she noted that the deceased vehicle had hit a concrete pillar, broke it and proceeded to go through the metal fence surrounding the Serena Hotel. That the front of the Defendant's vehicle was severely damages on the front right side. In re-examination she asserted that in relation to Nyerere Road, Processional Way was the main road.

8. Stanley Enonda Mudangasi (PW2) testified that he was a security guard employed by Bob Morgan Security Services and on the material, night was on duty at CFC Life Building which is opposite the Serena Hotel. He was in the control room in the building when at about 1.00 a.m. he heard a loud bang and on getting out of the building realized that an accident had occurred between the two vehicles herein. It was his evidence that the scene of the accident was well lit and that he noted that the driver's door of the deceased's motor vehicle and surmised it had been rammed into by the Defendant's vehicle and been "pushed" onto a flower bed next to Serena Hotel.

9. He confirmed during cross-examination that he did not witness the accident and asserted that there two vehicles rested 10 metres apart after the accident and claimed that the impact had pushed the deceased's motor vehicle into the fence of Serena Hotel while the Defendant's motor vehicle was on Nyerere Road. That the Deceased upon being extracted from his motor vehicle was alive but bleeding profusely. On Re-examination he reiterated the location of damage to the deceased's vehicle and stated that Nyerere road was not marked while the Processional Way descended on an incline towards Nyerere road.

10. Dr Charles Mwangi Waruingi (PW3) introduced himself as a medical officer at the Nairobi Hospital and a former classmate of the deceased at the University of Nairobi, Medical School. He tendered his Internship Appointment Letter dated January 22, 2009 with the Ministry of Medical Services as PExh 27, stating that he was initially offered an intern's salary of Kshs 30,000/- which sum as subsequently raised to Kshs 60,000/- on appointment as a medical officer. He admitted during cross-examination that he did not produce a pay slip in respect of his earnings as an intern or medical officer.

11. The final witness for the Plaintiffs was No 83054 PC Wycliff Mugo testified as PW4. That gist of his evidence was that the accident occurred on April 5, 2008 and upon report was booked under Occurrence Book (OB) No 2/05/04/2008; that the accident occurred along the junction of Nyerere Road and Processional Way at around 02.00Hrs and involved motor vehicle KAR 897Q and KAK 469D being driven by the Defendant and deceased respectively. He stated that police attended to the scene of the accident and the accident investigated by IP Nyakundi; that the entry in the OB showed that the deceased's motor vehicle was being driven along Processional Way while the Defendant's motor vehicle was along Nyerere Road. That the deceased was blamed for the accident and an inquest opened at Kibera Law Courts. The witness indicating that he had with him the original occurrence book and proceeded to produce copies of the Police Abstract as PExh3, the OB extract as PExh 35 and the accident register as PExh 36. He stated that while he did not know whether the Defendant was charged for causing the accident, the OB extract confirmed that the deceased was to blame for the accident and.

12. In cross-examination he reiterated the contents of the O.B entry and affirming that Nyerere Road was the main road stated that the Defendant had the right of way but the deceased failed to give way hence collided with the Defendant's motor vehicle.

13. The Defendant testified as the sole witness for the defence. He adopted his witness statement dated June 25, 2015 as his evidence in chief, the gist of which was that he was driving along Nyerere Road when the deceased emerged driving at high speed, without giving way onto his path and that although he applied brakes, a collision happened nevertheless.

14. Under cross-examination the Defendant stated that the impact in respect of the two motor vehicles was frontal, that he was not speeding as he had just taken a left turn from Kenyatta Avenue and had slowed down while approaching the intersection between Nyerere Road and Processional Way as required. That the deceased who was driving on Processional Way was required to slow down before joining Nyerere Road but was instead speeding while approaching the junction. Hence, he was blamed for causing the accident. Upon re-examination he reiterated that he had the right of way whereas the deceased joined Nyerere Road at high speed without yielding and that he (Defendant) has not been charged with an offence related to the accident.

15. Submissions were filed by the respective parties after the close of the hearing. The Plaintiffs' submissions were centered on two issues, namely liability and quantum. Restating the evidence by the Plaintiffs, counsel contended that the Defendant was wholly to blame for the accident on grounds that he was driving at a high speed as evidenced by the impact to the deceased's motor vehicle, and that he failed to exercise caution and or give way at an intersection.

16. Regarding the Plaintiffs' evidence adduced through the police officer PW4, counsel called to aid the decisions in *The Estate of SAO (Deceased) v Amollo Stephen* [2019] eKLR and *PAS v George Onyango Orodi* [2020] eKLR to assert that the police documents exhibited at the trial are not sufficient proof of which party is to blame for the accident as investigations and the inquest at Kibera Court had not been concluded. Asserting on the strength of dicta in this cases of *Welch v Standard Bank Limited* [1970] EA 115, *Lakhamshi v Attorney General* [1971] EA 118, that this was not a proper case for equal attribution of liability and invoking the doctrine of *res ipsa loquitur* as affirmed in *Barkway v*

South Wales Transport Company Limited [1956] 1 ALL ER 392 & 393 as cited in *Nandwa v Kenya Kazi Limited* [1988] eKLR, counsel asserted that the Defendant herein was on the proven facts wholly liable for the accident. Because, he was speeding and failed to exercise proper judgment, as evidenced by the severity of the deceased's injuries, impact on the vehicles as captured in photographs tendered in evidence and that the deceased's vehicle was pushed 10 metres from the likely point of impact.

17. Addressing the quantum of damages under the *Law Reform Act*, counsel urged an award of Kshs 100,000/- for pain and suffering. On loss of expectation of life it was contended that the deceased who died at the age of 26 years, had enjoyed good health and was in his prime being a final year student at the University of Nairobi, School of Medicine. Hence an award of Kshs 100,000/- was poposed. Counsel called to aid the decision in *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR in that regard.

18. On the award under the Fatal Accident Act it was reiterated that the deceased was in his final year of medicine school and with prospects of being employed as a doctor earning a minimum monthly salary of Kshs 70,000/- as demonstrated in evidence. That in light of the evidence tendered the court ought to adopt a multiplier approach based on a multiplier of 30 years and dependency ratio of 2/3. A raft of decisions was called to aid including *Tipper Hauliers Limited & Salim Jalala Mwaita v Mercy Chepngeno Towet & another* [2021] eKLR, *Jane Karimi & Lois Wawira Kinyua (Suing as the legal representatives of Boniface Kinyua Mugane) v David Waigwa & 2 others* [2019] eKLR and *Irene Moses v Peter Mutugi Muthike (Suing as the legal representatives of mary Njeri Muthike)* [2019] eKLR to support the submissions. The court was urged to award a sum of 16,800,000/- calculated thus; 2/3 x 70,000 x 30 x 12 = Kshs 16,800,000. In addition, the court was urged to award special damages in the sum of Kshs 572,702/- hence make a total award of Kshs 17,572,702/- with costs and interest.

19. Counsel for the Defendant in addressing the issue of liability equally restated the evidence at the trial court to submit that the occurrence of the accident and the resultant tragedy is not disputed; that what is in contention is the cause of the accident and the culpable party. Counsel heavily relied on principles in physics particularly Newton's Laws of Motion to argue that from the evidence tendered before court, the deceased's motor vehicle relatively remained in the same course of direction after the accident which is suggestive of the fact that the deceased's vehicle continued to travel at a higher speed despite colliding with the Defendant's motor vehicle. Further it was pointed out that Nyerere Road is the main road and not Processional Way and applying the Highway code, it was the Defendant's motor vehicle that had the right of way and the deceased ought to have exercised greater caution while joining the intersection.

20. Responding to the Plaintiff' submissions regarding Pw4's evidence, counsel asserted that it was irregular for the Plaintiffs to attempt to distance themselves from their own witness who upon cross-examination relying on the OB extract blamed the deceased for causing the accident by failing to give way at the intersection. That his evidence was non-partisan and independent therefore credible. It was pointed out that the Plaintiff having failed to call any eye witness, the Defendant's evidence remained the sole witness account in respect of the accident. That the Plaintiff therefore failed to discharge the burden of proof of negligence against the Defendant and the entire suit ought to be dismissed or in the alternative the deceased be found wholly liable for the accident.

21. Concerning damages, it was submitted that the deceased had not graduated and evidence on his probable future earnings was speculative and that the Plaintiff failed to demonstrate evidence of dependency on the deceased. Hence the Plaintiffs' claim under the Fatal Accidents Act cannot succeed. And if the court were otherwise persuaded, it ought to apply a dependency ratio of 1/3. The court was urged to dismiss the suit with costs.

22. The court has considered the pleadings, evidence as well as the submissions of the respective parties. There is no dispute that a collision occurred on the material night between the Defendant's and the deceased's vehicle, that the accident occurred at the junction of Processional Way and Nyerere Road adjacent to the Serena Hotel, and that the deceased sustained severe injuries to which he succumbed on the same night.

23. The twin issues for this court's determination are whether Plaintiffs have established negligence against the Defendant on a balance of probabilities and if so, what quantum of damages is to be awarded. Pertinent to the determination of the issues are the pleadings, which form the basis of the parties' respective cases before this court.

24. In *Wareham t/a AF Wareham & 2 others Kenya Post Office Savings Ban*k [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

25. By their plaint, the Plaintiffs averred inter alia that the Defendant was negligent in that he drove at an excessive speed, failed to keep a proper lookout especially while approaching an intersection, drove without due care and attention, and failed to stop, brake, slow down, swerve or to take other avoiding action to prevent the occurrence of a collision. The Defendant denied these averments and others in his defence statement and pleaded inter alia that the any accident that might be proved was solely or substantially due to the negligence of the deceased in driving at an excessive speed, without proper lookout and regard for other vehicles on the road and junction, emerging into the junction without ascertaining it was safe to do so, or to give precedence to the vehicle on the main road, and failing to stop, slow down, swerve or take other avoiding action.

26. The applicable law as to the burden of proof is found in section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
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> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists."

The above provision provides for the legal burden of proof. However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & others v Blue Shield Insurance Company Limited -Civil Appeal No 101 of 2000 [2005] 1 EA 280 where it was held that:

> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

See also Karugi & another v Kabiya & 3 others [1987] KLR 347 where the same Court stated inter alia that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case ....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim." (Emphasis added)

27. In *Gideon Ndungu Nguribu & another v Michael Njagi Karimi* [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in *Stapley v Gypsum Mines Ltd (2)* [1953] AC 663 at p 681 as follows:

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

28. The Defendant was the sole eye witness to the accident. While both PW1 and PW2 attempted in their evidence to assert matters adverting to the manner in which the accident occurred by claiming inter alia that the Defendant's vehicle hit and "pushed" the deceased's vehicle over the perimeter fence of the Serena Hotel, none of these persons had witnessed the accident. Having arrived at the scene of the accident after the fact, they could only properly describe the resting positions and their observations regarding the condition of the two vehicles. Unfortunately, the police sketch plan of the accident scene was not tendered in evidence, making it difficult to verify claims by PW2 that the resting place of the deceased's vehicle was 10 meters from the "point of impact". The point of impact in relation to

a collision is a technical matter to be assessed and proved by evidence of professionals trained and experienced in such matters.

29. Equally, the photographs tendered by the Plaintiff were of little help as they were not accompanied by a legend and the person who took them did not testify. It is not useful for a party to tender such pictures without as much as an explanation and to leave it to the court to make sense of them.

30. The gist of the admissible part of the testimony of PW2, the earliest responder to the accident scene was that after the collision the Defendant's vehicle remained on Nyerere Road while the deceased's vehicle was in a ditch beyond the flower bed next to Serena Hotel and had damage to the driver's door. PW1 also confirmed the positions of the two vehicles after the accident and stated that the deceased's vehicle which bore damage on the driver's door appeared to have knocked down a concrete pillar in its path, and gone over a metallic perimeter fence around the Serena Hotel, before landing where it did. She also stated, like the Defendant, that the front of side of motor Defendant's vehicle sustained damage particularly on the front right side.

31. The Plaintiff's case was that the deceased's vehicle, then being driven on processional Way towards Nyerere Road met with the Defendant's vehicle at the junction of the two roads and collided, a fact confirmed by the Defendant, the sole eye witness and materially corroborated by the testimony of PW1, 2 and 4. As to the blameworthiness of the drivers, the Plaintiffs asserted that the Defendant drove at an excessive speed hence the severity of the collision and injuries to the deceased. On his part, the Defendant placed the blame on the deceased for driving at a high speed and proceeding from a minor road onto the intersection in the path of the Defendant's oncoming vehicle which was on a major road.

32. Apparently basing their conclusion on the latter version, the traffic police had concluded that the deceased was solely to blame for the accident. The Plaintiff's advocate expended a good deal of energy in discounting this conclusion as contained in the copy of the O.B extract and went as far as disowning the evidence of his own witness PW4 as hearsay. With respect, the Plaintiffs could not benefit from their own omissions; the record of the testimony by PW4 indicates that the witness stated that he had brought with him to court the original O.B but counsel for the Plaintiff elected to have the extract copy produced as PExh.35, instead of the original O.B. bearing the material entry. Besides, under our laws, criminal culpability as involved in traffic offences calls for a much higher threshold of proof and the fact that evidence collected in traffic case falls below the criminal threshold does not necessarily negate civil liability for the person under investigation.

33. That said, it is beyond disputing that the Defendant who was driving on Nyerere Road had the right of way and the deceased who was coming down Processional Way, a minor road, towards the intersection of the two roads was required to slow down or stop altogether, and to ensure that the main road was clear and that it was safe to enter the junction. The positions of and damage to the two vehicles as described by PW1 and PW2 tends to support the assertion by the Defendant that the deceased entered the junction in the face of the Defendant's oncoming vehicle.

34. And while the Plaintiffs have claimed that the damage and resting position of the deceased's vehicle attests to the alleged high speed of the Defendant, it must be recalled that the Defendant's vehicle remained more or less in the same general direction and course on Nyerere road after the collision and had only sustained frontal damage.

35. On the other hand, the deceased's vehicle seemingly lost control, knocked down a concrete pillar by the roadside, and a metallic perimeter fence before stopping. This suggests that the deceased's vehicle was at a high speed while approaching the junction or had probably accelerated in a bid to quickly evade the Defendant's vehicle that was getting closer. The Defendant stated that his vehicle's damage was confined to the front near the engine, and he sustained minor injuries, the latter fact confirmed

by PW2. If the kind of smash-up suggested by the Plaintiffs had occurred, the result would have been different for the Defendant and his vehicle. Equally, it is unlikely that his vehicle would have rested in the position it did and without possibly overturning or losing control.

36. The court upon reviewing the facts of the case agrees with the Plaintiff's submission that this is not a case where there exist such conflicting versions of the collision as to render it impossible to determine blameworthiness and degree thereof, on the part of any of the drivers, and where liability ought then to be found against each driver equally. See *Lakhamshi v Attorney General* [1971] EA 118; *Abbay Abubakar Haji & Fatuma Ali Abdulla v Marair Freight Agencies* [1984] eKLR ; and *Anne Wambui Nderitu v Joseph Kiprono* [2004] eKLR .

37. In *Lakhamshi's* case , the Court of Appeal for East Africa stated as follows:

> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. (Emphasis added).

38. Rather, in this case, the evidence tendered demonstrates that the deceased was clearly the party at most fault by not only driving at a high speed on the minor road but also entering a major road without stopping or slowing down to ensure that it was safe to enter the road, and seemingly without regard for other traffic that was expected to be on the road. The present case compares well with the case of John Wainaina Kagwe v Hussein Dairy Limited [2010] eKLR where the appellant / plaintiff sustained serious injuries after his vehicle collided into the defendant/ respondents' vehicle. In that case, the respondent's lorry had been left on the road, at night and without any illumination or warning, with a large portion of it protruding into the plaintiff's way. The appellant/ plaintiff's vehicle violently rammed into the rear of the respondent's lorry. The Court of Appeal, in setting aside the decision of the High Court stated that while the respondent was largely to blame (70%) for obstructing the road, the appellant was also negligent, but to a lesser degree (30%) for failing to take evasive action.

39. In this case, the deceased must bear the higher degree of liability in light of his highly negligent driving. However, for the collision to have occurred as it did, one must infer either that, despite the road being admittedly well-lit, the Defendant was not keeping a proper look out and failed to see the approaching vehicle of the deceased in good time and to take evasive action. Or that while the deceased was speeding down Processional way towards the junction, the Defendant himself did not approach the junction at the reasonable speed that the circumstances required. Or both. Else, the Defendant should have seen the approaching and speeding vehicle of the deceased in good time and in anticipation, been able to stop or swerve or take other evasive action to avoid a collision. The court will therefore apportion liability at 70:30 against the deceased and the Defendant respectively.

40. Moving on to the issue of quantum, the Plaintiffs urged an award of Kshs 100,000/- for pain and suffering and Shs 100,000/= for loss of expectation of life. The Defendant for his part did not address the court on the issue of quantum under the *Law Reform Act*. The authority relied on by the Plaintiff under the said header was the decision in *Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* [2019] eKLR.

41. Considering inflation trends over the years and the fact that the deceased appears to have died within an hour of the accident, I would award the sum of Kshs 50,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life (See Sitati, J in *Eshapaya Olumasayi & another v Minial H Lalji Koyedia & another* [2008] eKLR).

42. On lost dependency, the deceased was a final year medical student with prospects of good health and long life. He was 26 years old the time of his untimely demise but had he lived, would probably have qualified to work as medical doctor. Based on this and evidence by PW3, the Plaintiffs proposed an award pegged on a salary of Kshs 70,000/- per month . The deceased was a in his final year as a medical student at the University of Nairobi at the time of his demise and though not employed had good prospects of working as a doctor. PW3 did not avail any material evidence in support of his oral evidence that his pay as a qualified doctor had been enhanced from Kshs. 30,000/- to 60,000/- per month.

43. The assessment of damages for lost dependency is not based on a precise scientific formular but on applicable principles and sensible estimates derived from evidence tendered. The Court of Appeal in *Sheikh Mushtag Hassan v Nathan Mwangi Kamau Transporters & 5 others* [1985] eKLR cited with approval the decision in *Gammel v Wilson* [1981] 1 ALL ER where it was held that;-

> " ..... if sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probability which matters...."

44. It is the court's considered view that in the instant matter, an income of Kshs. 50,000/- per month appears more reasonable especially in the early years of the deceased's medical career. Regarding the multiplier, the Plaintiffs propose 30 years. Lost dependency in this case was sought by the two Plaintiffs who were aged 64 and 68 years respectively as of 2011. The multiplier could not therefore be based on the deceased's possible expected life of gainful employment but on the possible years in which his parents could have depended on him. Thus, in the court's view a multiplier of 20 years is the more appropriate.

45. Although the deceased was unmarried at the time of death, he would most likely have married within a few years of graduating from medical school or even earlier, and therefore assuming greater responsibility for his own family. A dependency ratio of 2/3 appears unrealistic in the circumstances and in the court's view a 1/3 dependency ratio suffices for this case. Thus, general damages under the *Fatal Accidents Act* would work out as follows: - 20 years x 12 x Kshs 50,000.00 x 1/3 = Kshs 4,000,000/ =. Special damages pleaded and proved via P Exh 11 – 25 amounted to Kshs 572,702/=.

46. In the result, Judgment will be entered for the Plaintiffs against the Defendant as follows:

    General damages under the *Law Reform Act*

    a. pain and suffering- Shs 50,000/-.

b. loss of expectation of life - Shs 100,000/-.

Damages under *Fatal Accidents Act*

c. Lost dependency – Kshs 4000,000/-.

d. Special damages – 572,702/-.-

Total - 4,722,702/=

Less 70% contribution

Net award- Kshs 1,416,810.60.

Similarly, the Plaintiffs are awarded 30% of the costs of the suit with interest.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF JANUARY, 2023.

C MEOLI

JUDGE

In the presence of:

For the Plaintiffs: Mr. Kimani

For the Defendant: N/A.

C/A: Carol