FOO & another (Suing as the legal representatives in the estate of LAO a minor aged 5 months) v Mathias (Civil Appeal E015 of 2022) [2022] KEHC 14642 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E015 OF 2022

RE ABURILI, J

OCTOBER 31, 2022

BETWEEN

FOO ..... 1ST APPELLANT

CAO ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES IN THE ESTATE OF LAO A MINOR AGED 5 MONTHS

AND

JOBITA ODUOR MATHIAS ..... RESPONDENT

(An appeal arising from the judgement and decree of the Honourable S.W. Mathenge in the Principal Magistrate's Court at Bondo delivered on the 20th April 2022 in Bondo PMCC No. 84 of 2019)

JUDGMENT

Introduction

1. The appellants in this case filed suit in the Magistrate's court seeking damages under the *Fatal Accidents Act*. The second appellant herein Carolyne Atieno Otieno is also the appellant in Siaya HCCA No E014 of 2022. The suit was brought on behalf of the estate of LAO (deceased), a minor aged 5 months old who died after sustaining fatal injuries as a result of a road traffic accident that occurred along Aram – Gobei road where the deceased's mother, the second appellant herein, was walking on the right side of the road when she was hit by a motor vehicle Registration No xxxx owned by the respondent.

2. The respondent herein who was the defendant filed a defence denying the accident's occurrence and further denying liability and put the plaintiffs to strict proof of their claim and further blamed the appellants for negligence that led to the material accident.

3. In her judgement, the trial magistrate found and held that the appellants failed to prove negligence on the part of the respondent's driver on a balance of probabilities and she proceeded to dismiss the appellant's case.

4. Aggrieved by that judgment, the Appellants filed their Memorandum of appeal dated April 22, 2022 on the April 27, 2022 and relied on 9 grounds reproduced as follows:

    a. The learned trial magistrate erred in fact and in law in finding and holding that the appellants failed to prove their case on a balance of probabilities despite the appellants having tendered evidence of the eye witness (PW1) who testified to the circumstances of how the accident occurred as she was present when the accident occurred.

    b. The learned trial magistrate erred in law and in fact by basing her decision on a wrong presumption that when evidence adduced by opposing parties in a civil matter contradict each other then it means that the plaintiffs failed to prove their case on a balance of probability.

    c. The learned trial magistrate erred in law and in fact by relying on the evidence of DW1 who completely failed to identify himself before the trial court. The honourable trial magistrate instead shifted the onus of identifying DW1 to the appellants whose case had long closed by the time DW1 was testifying.

    d. The learned trial magistrate erred in law and in fact by ignoring the appellants' evidence and version of the circumstances leading to the accident and basing her decision only on the respondent's witnesses' evidence.

    e. The learned trial magistrate erred in law and in fact by failing to appreciate the law as regards liability of minors of tender age such as the deceased herein who was only 5 months old at the time of the suit accident.

    f. The learned trial magistrate erred in law and in fact by failing to award the appellants damages as recommended under the *Law Reform Act* Cap 26 of the Laws of Kenya and the *Fatal Accidents Act* Cap 32 of the Laws of Kenya which were claimed and proved by the appellants.

    g. The learned trial magistrate erred in law and in fact by awarding the appellants damages which were inordinately low in the circumstances as to represent an erroneous estimate of the damages suffered by the deceased's estate and dependants.

    h. The learned trial magistrate erred in law by failing to critically analyze the evidence and submissions on liability and quantum together with the authorities submitted by the parties consequently coming to a wrong conclusion on the same.

    i. The learned trial magistrate erred in law and fact in writing a judgement that was at variance with the pleadings, against the weight of evidence and contrary to the principle as established by precedent.

5. The appeal was disposed by way of written submissions. Only the appellant filed submissions.

The Appellants' Submissions

6. It was submitted on behalf of the appellants that the trial magistrate erred in finding and holding that the appellants did not prove their case on a balance of probabilities whereas the appellants adduced evidence of PW1 who was involved in the accident on how the accident occurred which testimony was corroborated by DW1 who confirmed that indeed it was raining on the material day, that the road was muddy and slippery and that he was driving at 50kph.

7. The appellants' counsel submitted that the trial court ought to have evaluated the evidence on record and made an inference on liability based on the said testimonies.

8. It was further submitted that the trial magistrate misdirected herself by holding that as there was contradicting evidence by the two antagonizing parties, then it meant that the appellants had not proved their case on a balance of probabilities whereas the trial magistrate ought to have apportioned liability as was held in the cases of *Mt Longonot Medical Services Limited & Another v Andason Kitonyo Kinyenze [2017] eKLR*, *Hussein Omar Farah v Lento Agencies [2006] eKLR*, *Kisumu HCCA No 42 of 2013 Augustine Dula Sunday v Johannes Okoth Obonyo*, *Nairobi HCCC No 521 of 2007 Commercial Transporters Ltd v Registered Trustees of Catholic Archdiocese of Mombasa* & *Kisumu HCCA No 88 of 2017 Timmy Elphas Ochieng v Hashi Hauliers Limited*.

9. The appellants' counsel further submitted that the deceased having been a minor of 5 months, liability ought not to be apportioned as the deceased did not have any knowledge on road safety rules whereas the respondent's driver being an adult, had such knowledge and was in full control of the motor vehicle. Reliance was placed on the case of *Savannah Hardware v EOO (Suing as representative of SO (deceased) [2019] eKLR* where the court cited the case of *Gough c Thorne (1966) 1 WLR 1389* stated inter alia that a very young child cannot be guilty of contributory negligence unless the said child is of such an age as to be expected to take precautions for his or her own safety. The appellant also relied on the case of *M M (Suing thro' the next of kin CMN) v Boniface Ngaruya Kagiri & Another [2018] eKLR* where it was also held inter alia that the test for contributory negligence on the part of a young child is whether the child was of such age as to be expected to take precautions for his or her own safety.

10. It was further submitted that the respondent's driver's liability was compounded by the fact that the accident occurred near a junction where the respondent's driver was expected to be moving at a minimal speed and keeping a proper look out for other road users.

11. It was further submitted that the respondent's witness DW1 failed to positively identify himself as the person he purported to be and thus the trial court erred by proceeding to rely on his evidence instead of treating his testimony with caution as was held in the case of *Luka John Maende v Joseph Kivisha [2021] eKLR*.

12. The appellants further submitted that the trial magistrate erred when she proposed a global sum award in respect of the deceased minor as opposed to awarding damages under the *Law Reform Act* and the *Fatal Accidents Act* which the appellants made their claim under. The appellants further submitted that the trial magistrate's award was inordinately low so as to warrant interference with by this court.

13. On pain and suffering, the appellants proposed an award of Kshs 40,000 relying on the case of *Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR* where the court upheld an award of Kshs 50,000 under the same heading.

14. On loss of expectation of life, the appellants proposed an award of Kshs 140,000 relying on the cases of *Moses Akumba & Another v Hellen Karisa Thoya [2017] eKLR* and that of Anthony Angwenyi Okoba v Thomas Kipkurui Langat & Another [2021] eKLR where an award of Kshs 150,000 was upheld for a deceased minor.

15. On damages for lost years, the appellants proposed an award of Kshs 1,000,000 owing to the deceased's tender age and also guided by the following precedents;

    i. *Daniel Mwangi Kimemi & 2 Others v J G M & Another (the personal representatives of the estate of N K (DCD) [2016] eKLR* where an award of Kshs 1,000,000 was made for a deceased minor.

ii. *SMK V Josephat Nkari Makaga Civil Appeal No 66 of 2011* where an award of Kshs 800,000 was given on appeal for loss of dependency.

iii. Anthony Angwenyi Okoba v Thomas Kipkurui Langat & Another [2021] eKLR where the High Court reduced an award of Kshs 2,400,000 to Kshs 1,400,000 under the head loss of dependency in respect of a deceased minor.

16. The appellants further submitted that they sought special damages of Kshs 31, 300 which were proven by a bundle of receipts that they produced as PEx 7a and b.

17. As earlier stated, the Respondent did not file any submissions in this appeal.

Analysis and Determination

18. I have considered this appeal, submissions and the decisions relied on by the appellant's counsel. I have also perused the trial court record and considered the impugned judgment. 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 as was held in the locus classicus case of Selle v Associated Motor Boat Co [1968] EA 123 that:

> ' The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

19. Therefore, for this court to adhere to the principles settled in the above case and as applied in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] e KLR* by the Court of Appeal, among other cases, I must delve into the factual details and revisit the facts as presented before the trial Court, analyse the same, re-evaluate it and arrive at my own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties first hand.

The evidence before the trial court was as follows:

20. PW1 Caroline Atieno adopted her witness statement in which she stated that on the April 29, 2018 at about 3.00pm, she was walking home from the River Grace Church off the Aram-Gobei marrum road on the right side of the road with her now deceased child wrapped on her back and on reaching at Wangarot market, facing Gobei direction, when a motor vehicle Registration number xxxx Lorry which was being driven from Aram direction suddenly lost control, veered off the road onto the opposite lane to where PW1 was walking and at a very high speed and that although she tried to run away from the said motor vehicle, the lorry knocked her and she fell down with her baby while the lorry ploughed into the bushes nearby and stopped and the driver jumped off the vehicle and fled from the scene of the accident. Her daughter succumbed to the injuries sustained and her body was taken to Bondo Hospital Mortuary. She blamed the driver of the motor vehicle for driving dangerously in the opposite direction/wrong lane and for over speeding and losing control of the said motor vehicle

and driving in a zigzag manner as the driver veered off the road to where she was walking, hitting her and knocking her down.

21. According to PW1, it was raining on the day of the accident although it was not slippery. She further stated that she was walking on the left side of the road and not crossing the road.

22. PW3 Inspector Maloba testified and stated that he was not the investigating officer and that an accident involving the second appellant herein pedestrian and a child who died in the accident was reported at Bondo. That Inspector Cheror was the investigating officer but had been transferred to Mau Summit. The witness produced Police Abstract Report as PEx5 which shows that the case was still pending under investigations.

23. The respondent called DW1, George Onyango, who testified that he was the driver of the motor vehicle registration xxxx that caused the accident. It was his testimony that on April 29, 2018, he was driving the material motor vehicle xxxx on the left side at 50kmp/hr and that the road was slippery and on reaching Wangarot junction, suddenly, a woman carrying a child crossed the road while running. That he tried to slow down by applying emergency breaks. That no police officer visited the scene of the accident. That the woman did not even look left or right. He blamed the woman for the accident and urged the court to dismiss her case.In cross examination, he could not identify himself and neither did he have on him any driving licence. He stated that he was the driver for the respondent as an employee and that it was an earth road. He stated that the road was a bit muddy and slippery. That he was not carrying any weight and that after the accident, he ran to the police station to report the accident. He stated that after the accident, the child was in the grass and the mother was in front of the lorry on the ground.

24. From the grounds of appeal, the evidence on record and the submissions by the appellants' counsel, I find the issues arising for determination are whether the trial court was wrong on liability and subsequently whether the trial court erred in failing to award damages.

Liability

25. On liability, I have considered the appellant's counsel's arguments in this appeal. There is no contestation that an accident occurred on April 29, 2018 at about 3pm involving the second appellant herein, her now deceased child aged 5 months and the respondent's motor vehicle registration Number xxxx Lorry at Wangarot market. It is also not in dispute that it was raining and that it was on a murram road. Although PW1 testified that it was not slippery, DW1 testified that it was slippery. PW1 testified that she was hit near a market whereas DW1 stated that it was at a junction and that he was driving at a speed of 50kmp/h, it was raining and that he slowed down by applying emergency breaks but that he could not avoid hitting PW1 and her child now deceased. DW1 further testified that PW1 came out of nowhere but proceeds to state that she did not even look left or right before crossing.

26. DW1 in his testimony claims that it was raining and slippery and that he was approaching a junction and that he was doing 50kmp/h a speed which in my view is too high when approaching a junction on a wet and slippery road. At junctions, or market places, it is always expected that other road users would be there or joining in the junction hence the need to be careful and to slow down to allow human traffic, not just to slow down by applying emergency breaks to avoid hitting other road users.

27. On the other hand, at junctions, it is dangerous to drive through without caring whether there would be any other vehicle or persons joining the junction. The respondent's driver did not state that he swerved to avoid hitting the second appellant. He simply stated that he slowed down but could not avoid hitting PW1. He does not state at what distance he saw the second appellant herein before applying emergency breaks and failing to avoid her.

28. DW1 further stated that PW1 came out of nowhere but then proceeds to state that PW1 did not even look left or right. The question is, at what time did DW1 get to ascertain that PW1 failed to check left and right whereas according to him she jumped on the road out of nowhere? From the evidence of DW1, he saw the appellant although he does not state at what distance he saw her cross the road.

29. Having seen PW1 before knocking her, the question is, knowing that the road was slippery, why did DW1 not swerve to avoid hitting her?

30. The second appellant herein was consistent in her testimony that she was knocked while walking off the road and that the lorry lost control, at high speed and knocked her in the opposite direction. In my view, although no sketch plan was produced to show the exact point at which PW1 was hit, (point of impact), as DW1 stated that the police did not go to the accident site, from the evidence of DW1, it appears that he knocked PW1 whom he says emerged from nowhere without looking left or right, after he lost control of the lorry, on a slippery road, due to high speed.

31. Being found on a road is in itself not being negligent. Equally, the respondent's driver being on a road is not being negligent. It is the act of failing to drive with due care and attention and failing to pay due regard to one's own or other person's safety and failing to take an avoiding act that would make the road user or motorist negligent. In negligence, one has a duty of care to self and to others and only when that duty is breached and damages are suffered as a result of the said breach(causation) that the tort of negligence is complete.

32. In *Mary Wambui Kabugu vs Kenya Bus Services Ltd Civil Appeal No 195 of 1995* Bosire, JA expressed himself as hereunder:

> ' The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to the negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. 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. On that ground alone the appeal would be dismissed.'

33. This position was mirrored in *Treadsetters Tyres Ltd vs John Wekesa Wepukhulu (2010) eKLR*, Ibrahim, J (as he then was) cited Charlesworth & Percy on Negligence, 9th Edition at page 387 and stated that:

> ' In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, 1) whether on that evidence, negligence may be reasonably inferred and 2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.'

34. Further in *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute (2016) eKLR*, Nyamweya, J quoted Halsbury's Laws of England, 4th Edition at paragraph 662 at page 476 where it is stated that:

> ' The burden of proof in an action for damages for negligence rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This involves the prove of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of a causal connection must be established.'

35. In *Nandwa v Kenya Kazi Ltd (1988) KLR, 488* as cited by Koome, J (as she then was) in *Regina Wangechi vs Eldoret Express Company Ltd (2008) eKLR* it was held that:

> ' In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by the negligence on the part of the Defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference.'

36. Comparing the evidence of PW1 against that of DW1, on a balance of probabilities, I find that the testimony of DW1 was fraught with inconsistencies.

37. The trial court found that the appellant failed to call an independent witness to prove how the accident occurred or even present a sketch map or OB extract of the accident and for that reason, she dismissed the appellants' claim.

38. In my view, this was a misdirection on the part of the trial court. The testimony of PW1 was given on oath. It was primary evidence of a victim of the accident and which was not impugned by the testimony of DW1 which as set out herein was full of inconsistencies. Although the Court took issue with the fact that PW1 did not call an eye witness to the accident, that omission in the absence of any evidence or inference that there were eye witnesses to the accident who were not called as witnesses does not necessarily render the plaintiff's evidence given on oath worthless. DW1 himself testified that no police went to the scene even after he ran to the police station and reported the accident.

39. In other words, whereas a party who alleges is under a duty to prove his or her allegations to the required standard which in this case is on a balance of probabilities, the plaintiff having been an adult and the person who was found on the road and who was knocked by the respondent's motor vehicle, to state that she should have called an independent eye witness to prove how the accident occurred is to call on her to prove her case beyond reasonable doubt.

40. I agree that the appellant should have called a police officer to present a sketch plan of the accident scene but noting that it was raining and the road was according to DW1 slippery and muddy, the police officers whom DW1 stated that they did not go to the scene, not being eye witnesses could not have given the primary evidence. I also note that the plaintiff who was seriously injured following the accident was rushed to the nearest Matangwe Community Health and Development Programme Centre by a good Samaritan lending credence to her testimony that the driver ran away after knocking her, instead of taking her to hospital to save her life.

41. From the treatment notes produced in court, the second appellant was unconscious by the time she reached the first hospital where she only received first aid before being referring her to Jaramogi Oginga Odinga Teaching and Referral Hospital. Therefore, in my humble view, only DW1 could have taken

the police to the scene of accident and explain to them how the accident occurred while the scene was still fresh, for them to draw the sketch plan of the scene. In my view, the police could not have given any better evidence than PW1 who was knocked and the fact that the Police abstract produced as exhibit shows that the accident was still pending investigations, many years after the accident that took away a life of a five month old child and seriously injured the second appellant herein.

42. There was also no evidence that the plaintiffs deliberately avoided to call material evidence which this court can infer that had they called that evidence, then it would have been adverse to their case. There is further no evidence that apart from the deceased child aged 5 months whom the plaintiff was carrying on her back, and who lost her life following the accident, there was any other witness known to the appellant who could have given the narration on exactly how the material accident occurred, different from what the plaintiff and the defendant's driver gave, for it to be independent evidence. The court is therefore left with the testimonies of the injured and the driver of the motor vehicle that caused the accident. In such cases, it is the word of the injured versus that of the driver. However, as I have stated above, the driver's testimony was very inconsistent thereby casting doubts as to whether he was telling the truth on how the accident in question took place.

43. Addressing the question of whether in every case there must be an eye witness, the Court of Appeal in *Abbay Abubakar Haji v Marain Agencies Company &Another[1984]4 KCA 53* dealt with the matter where all parties to a motor accident were killed leaving no witnesses. The Court stated:

> ' It is the clear duty of the court to arrive at a finding on the facts, however difficult the circumstances may be, if that is at all possible, although that duty does not extend to supplying a theory as to what happens when the inferences from the primary facts do not inevitable point that way.'

44. It follows therefore, that a case cannot collapse merely on the basis that there were no eye witnesses. The court, on the basis of circumstantial evidence or evidence adduced by the defendant that tends to prove his involvement in the alleged act can infer culpability on the part of the defendant even where the victim in the material accident dies on impact. (see this court's decision in *EWO (suing as the next friend of a minor COW) v Chairman Board of Governors-Agoro Yombe Secondary School [2018] eKLR*).

45. In *Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No 50 of 1981 [1983] KLR 142*, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa.

46. In *Zarina Akbarali Shariff and Another vs Noshir Pirosesha Sethna and Others [1963] EA 239*, it was held that:

> ' A driver on the main road is bound to exercise the right of being on the main road in a reasonable way. He has to watch and conform to the movement of other traffic which is in the offing, and he must take due care to avoid collision with it. The answer as to whether the court is entitled to think that the driver, despite his prima facie right of way, should surrender that right in anticipation of possible failure on the part of the driver on the side road to note the safe course, must turn on the conduct of the driver on the side road and on the opportunities which the driver on the main road has of observing it. There must be something in the conduct of the driver on the side road which the driver on the main road ought to have seen and which would have certiorated him, had he been taking proper care, that the driver on the side road was not going to pass behind but was going to try to pass in front of the driver on the main road. There is no doubt that anyone driving on the main road

is entitled to keep his proper place on the road, and to do so in reliance on the side traffic heaving itself as the rules of the road desires, until it may be the very last moment observation of a gross infringement by others calls for a special attempt to deal with it If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. A driver is never entitled to assume that people will not do what experience and common sense teach him that they are, in fact, likely to do. It is not correct that drivers are entitled to drive on the assumption that other road users whether drivers or pedestrians, would behave with reasonable care. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all forms, but he is not entitled to put out of consideration the teachings of experience as to the form those follies commonly take. He cannot be expected to cope with every form of recklessness or outrageous conduct on the part of other road users, but ordinary prudence would require him to approach at a speed which, combined with a proper look-out, would leave him able to take reasonable avoiding action if the need became apparent. What is reasonable is a question of degree depending on the particular circumstances. If he did not do so, or deprived himself of his opportunity to take avoiding action by not keeping a proper lookout, that could be negligence contributing to an accident...This does not mean that the driver on the major road can disregard the existence of the cross-roads: it is his duty to keep a proper look-out of all the vehicles or pedestrians who are using or may come upon the road from any direction and if he fails to do so and as a result an accident happens, then he is negligent even though there has been greater negligence on the other party. 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 party may be.'

47. Similarly, in *Masembe vs Sugar Corporation and Another [2002] 2 EA 434* it was held that:

> ' When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it. There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct. Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently.'

48. In *Merali & 2 Others v Pattani [1986] KLR 735*, Aganyanya, J (as he then was) stated, apportioning blame to the victim of the accident:

> ' That one is driving on major road does not mean that she is entitled to ignore traffic approaching the junction from the minor road and assume, which the plaintiff here did, that such traffic would always conform to the 'yield' sign. The plaintiff was thus negligent in failing to slow down. The possibility of danger emerging at that junction on either side of the minor road was reasonably apparent in view of the fact that visibility was obstructed

by high hedges and it was incumbent upon the plaintiff to take extra precautions. This was not a case where the plaintiff should have taken that it was a mere possibility that danger would emerge, which would never occur to the mind of a reasonable man. Anyone driving on a major road is entitled to go on that road in a proper position and is entitled to keep his proper place on that road and to do so in reliance on side road traffic behaving himself as the rules of the road desires until it may be at the very last moment some observations of a gross – infringement by other calls for special attempt to deal with it. The driver on a major road as the plaintiff was is not expected, say, to slow down to a pace of 15 miles an hour in broad daylight, when approaching a side road or otherwise share the blame for any collision, which may occur. But here the plaintiff omitted to take due care for the safety of the defendant and as a prudent driver, she ought to have guarded against possible negligence of drivers on the minor road, defendant included, as experience shows negligence to be common. Though therefore the defendant was mainly to blame for the accident and ought to compensate the plaintiff therefor; the plaintiff contributed in some measure to it and her contributory negligence put at 30%.'

49. In *Mwanza v Matheka [1982] KLR 258*, it was stated that:

> ' Speed Itself is not necessarily negligence. But it is probable that the driver of the bus took no action at all, according to the evidence, to avoid this violent meeting. He did not ease further to his near side or slow down. He was not, of course, required to steer his bus with its passengers over to his near side straight into the culvert. He must have seen the tanker approaching long enough to rule out any decision having to be made in the agony of the moment. On the evidence, the plaintiffs have proved the defendants were negligent, but it is not possible to apportion the blame and so the defendants are equally to blame.'

50. What emerges from the above decisions is that there is no hard and fast rule when it comes to apportionment of liability where one driver is prima facie on the right. In other words, a driver on the road must always keep at the back of his mind that some road users are likely to be negligent and give allowance for that and ought not to adopt an attitude that as long as he is driving properly on the road, he ought not to take action which a reasonable driver is expected to take when there appears to a possibility of danger posed by other road users. If he fails to do so, he could be liable in negligence if not wholly to a certain extent. (See *John Wambua v Mathew Makau Mwololo & another [2020] eKLR*) from where I have extracted most of the decisions above.

51. In the instant case, the second appellant who was carrying the deceased baby on her back was consistent that she was walking off the road and that the vehicle approached her from the road after losing control and knocked her. DW1 did not offer any credible evidence as to how PW1 caused the said accident.

52. The fact that DW1 was driving at 50kmp/h when approaching a junction, when it was raining and as he admitted that it was muddy and slippery points at negligence on DW1's part. In my humble view, a motorist who finds himself in such an environment and under such weather conditions bears the greater responsibility of driving, managing or controlling his vehicle in such a manner as to avoid any sort of collision with any member of the public.

53. For the aforementioned reasons it is my view that the second appellant proved on a balance of probabilities that DW1 was to blame for the accident. I find no reason why the trial court dismissed the claim. I however will not go into the question of a child aged 5 months contributing to the accident as it was her mother who was carrying her and therefore if there could have been any contributory negligence, it could only be attributed to the second appellant and not to the child.

54. In the end, I find that the trial court erred in finding that the appellants herein had not proved their case on liability against the respondent's driver and in dismissing the appellants' case. I find that the respondent's driver was liable in negligence at 100% and that the respondent is vicariously liable for the negligent acts of his driver/ agent who had his authority to drive the accident motor vehicle at the material time.

Quantum of Damage

55. Having found that the respondents' driver was to blame for the material accident at 100% and therefore the respondent is vicariously liable for the negligent acts of his driver, agent, the next question is whether the trial court erred in law and fact in awarding a global figure of Kshs 400,00 general damages and leaving out other heads as pleaded. In a fatal accident claim.

56. In *Tayab v Kinanu[1983] eKLR*, Law, Potter & Hancox JJA) had this to say concerning award of damages in accident claims and which principles I find useful in assessment of damages:

> ' I now turn to the matter of the assessment of damages. In the field of personal injury insurance, whether it be of road accidents or of factory accidents, or whatever, it is of the highest importance that the maximum possible proportion of claims should be settled out of court, hopefully to the satisfaction of all the parties. This is only possible if the courts are reasonably consistent in their awards, and if the insurers and advocates involved in the delicate art of settlement have sufficient case law to guide them. I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of West (H) & Son Ltd v Shephard [1964] AC 326 at 345:
>
> 'But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional.'
>
> The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Poh Choo v Camden and Islington Area Health Authority [1979] 1 All ER 332 at 339*:
>
> 'In considering damages in personal injury cases, it is often said: 'The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration.' That is a tendentious way of putting the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay. It is worth recording the wise words of Parke B over a century ago.
>
> 'Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life, You are not to consider the value of existence as if you were bargaining with an annuity office. I advise you to take a reasonable view of the case and give what you consider fair compensation'.

Later in his judgment, at 341, Lord Denning had this to say about extravagant awards:

'I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the tax payers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.' It seems to me that we should keep in the forefront of our minds the wise directions of Baron Parke, Lords Morris and Denning, and not overlooking the words of caution expressed by Law JA in Kimothia v Bhamra Tyre Retreaders [1971] EA 81, that awards of damages by foreign courts must be viewed with caution, having regard to comparative standards of living, levels of earnings and many other factors. Having pointed myself, I hope, in the right direction, I am content to follow the reasoning of Law JA in adapting Burke's case and Jones v Griffith [1969] 2 All ER 1015, in the light of the conditions (including inflation) of Kenya. My own estimate of fair compensation leads to the same award for general damages (before reduction for contributory negligence) of Kshs 300,000 and for the same reasons.

In arriving at this figure, I wish to say that I agree entirely with the view of Hancox JA that when comparing awards of damages in England and in Kenya, the comparative financial position of the patient requiring regular medical supervision and a regular supply of drugs, must be kept well in mind. For the reasons I have given, I agree with the orders proposed by Law JA.

57. On the quantum of damages, the trial court stated that had the appellant's proven their case on a balance of probabilities it would have awarded a global sum of Kshs 400,000. The appellants have challenged this award.

58. In the case of *Southern Engineering Co Ltd v Musungi Mutia [1985] KLR 730*, the court held that:

> ' It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual judge or magistrate, 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.'

59. Regarding the award under loss of dependency, the Court of Appeal in *Chunibhai J Patel and Another vs PF Hayes and Others [1957] EA 748, 749*, stated the law on assessment of damages under the *Fatal Accidents Act* and held as follows:

> ' The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (ie his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase.

60. The appellants submitted that the proposed amount of Kshs 400,000 for loss of dependency by the court had they proved their case was inordinately low and further that the trial court erred in awarding

a global sum whereas the appellants had pleaded damages both under the Law Reforms Act and the *Fatal Accidents Act*.

61. Section 4 of the *Fatal Accidents Act*, provides that:

> ' Every action brought by virtue of the provisions of this act shall be for the benefit of the wife, husband, parents and the child if the person, whose death so caused and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased, and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the cost not recovered from the defendant shall be divided amongst those persons in such shares as the court by its judgment shall find and direct'.

62. In *Kenya Breweries Limited v Saro (1991) Mombasa Civil Appeal No 441 OF 1990 eKLR* the court of appeal pronounced itself on the assessment of damages for loss of dependency as follows:

> ' We would respectfully agree with Mr Pandya that in the assessment of damages to be awarded in this sort of action, the age of the deceased child is a relevant factor to be taken into account so that in the case of say a thirteen year old boy already in school and doing well in his studies, the damages to be awarded would be naturally higher than those awardable in the case of a four year old one who has not been to school and whose abilities are not yet ascertained. That, we think, is a question of common sense rather than law. But the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for young followers, and once the children become adults they are expected to and do invariably take care of their aged parents. That must be why we still do not have homes for the 'aged' ; we think an African son or daughter may well find it offensive to have his/her parents cared for by strangers in a 'home' while he or she is still able to look after them.'

63. In the persuasive authority of the matter of *Chabhadiya Enterprise Limited & Another v Gladys Mutenyo Bitali (suing as the Administrator and Personal Representative of the estate of Linet Simiyu now deceased) 2018 eKLR* the High Court stated that:

> ' I take the view that the multiplier method where it involves minors is merely speculative. In this appeal, the minor died at the age of 12 years. The court cannot know what the minor would have turned out to be in life. There was no basis for the trial magistrate holding that the deceased would have earned anything less than Kshs 10,000. Though he adopted the multiplier of 30 years he did not consider the age of the dependant (the mother to the deceased) so as to determine the proper multiplier. The multiplier and the multiplicand were therefore speculative.'

64. An examination of various case law on the award of damages for loss of dependency indicate that awards in respect of deceased minors are granted based on the global sum approach. For example, the case of *Emmanuel Wasike Wabuke suing for BWW a Minor Deceased v Munena Ndiwa Durman [2019] e KLR* where the High court set aside an award of loss of dependency which had been made by the trial

court using a multiplier where the deceased was 1½ years old where an award of KShs 1, 260,000 was substituted with a global award of Kshs 200,000.

65. In *Kwamboka Grace v Mary Mose [2017] e KLR*, the Court awarded a global sum of KShs 300, 000 for loss of dependency under the *Fatal Accidents Act* in respect of the death of a child aged 4 years. Further in the case of *Transpares Kenya Limited & Another v S M M (suing as legal representatives for and on behalf of the estate of E M M (Deceased) 2015 eKLR* the court awarded Kshs 500,000 to the estate of a 5-year-old child for loss of dependency.

66. In the circumstances, it is my opinion that a global sum of Kshs 400,000 was sufficient for loss of dependency.

67. As regards damages awarded under the *Law Reform Act*, 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.

68. In *Josephine Kiragu v Vyas Hauliers Ltd (2017) eKLR* where the deceased had died instantly, Njoki Mwangi, J held that an award of Kshs 10,000/= for pain and suffering was on the lower side and increased it to Kshs 30,000/=.

69. In the case of Sukari Industries Limited supra where the deceased had died immediately after the accident and the trial court had awarded Kshs 50,000/= for pain and suffering, Majanja J held that:

> ' [5] 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 the sum of Kshs 50,000 awarded under this head is unreasonable.'

70. In the case of *Simon Bogonko v Alfred Mongare Mecha & Another (Suing as the Legal Representatives of the Estate of Akama Mong'are (Deceased) [2019] eKLR* and *Omanga Fish Limited v CKB & JM (Suing as the Legal Representatives of The Estate of JMM (Deceased) [2019] eKLR* Maina J reduced awards of Kshs 100,000/= to Kshs 20,000/= for pain and suffering where the deceased persons in the cases had died on the spot.

71. The appellants herein proposed an award of Kshs 40,000. In my view an award of Kshs 20,000/= for pain and suffering is not manifestly excessive as there are many High Court authorities to support it.

72. On the claim for loss of expectation of life, the appellants proposed an award of Kshs 140,000. In *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 that:

> ' 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 Kshs 100,000/- while for pain and

suffering the awards range from Kshs 10,000/= to Kshs 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.'

73. In the case of Moses Akumba & Another supra Chitembwe J held that an award of Kshs 200,000/= for loss of expectation of life for a deceased who was a fisherman was not inordinately high. In the case of *Patrick Kariuki Muiruri & 3 Others V Attorney General [2018] eKLR* Sergon J made an award of Kshs 200,000/= under this heading.

74. In the circumstances I am persuaded that an award of Kshs 140,000 proposed by the appellants would suffice under this heading.

75. On whether the appellants were entitled to an award of special damages of Kshs 31,300, the law is clear that special damages must not only be specifically pleaded but that they must be strictly proved. The appellant pleaded and produced receipts to prove the special damages claimed. I find the claim merited. It is hereby awarded.

76. On the whole, I find this appeal merited I allow it. I set aside the findings of the trial magistrate dismissing the appellant's suit on liability and substitute the same with an order that the respondent herein was wholly to blame for the material accident which was caused by his driver/agent or servant who testified as DW1. I further proceed to quantify the appellants' claim in full.

77. Accordingly, I enter judgment for the appellants herein against the respondent as follows, both on liability and quantum:

    Liability- 100% against the respondent

    Loss of expectation of life – Kshs 140,000

    Pain & Suffering – Kshs 20,000

    Loss of dependency – Kshs 400,000 as awarded by the trial court

    Special Damages - Kshs 31,300

    Total Kshs 591,300

78. I award costs of this appeal and costs of the trial court to the appellants. Costs of this appeal which has been fast tracked by this court shall be Kshs 40,000. The appellants shall also have interest on the awarded sums. Interest on general damages shall be at court rates from the date of judgment in the lower court until payment in full while interest on special damages shall accrue from the date of filing suit until payment in full.

79. This file is hereby closed. I so order.

Dated, Signed and Delivered at Siaya this 31st Day of October, 2022

R.E. ABURILI

JUDGE