



REPUBLIC OF KENYA



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**Tsusho Capital Kenya Limited v Ngechu (Civil Appeal 12 of 2019)  
[2022] KEHC 15445 (KLR) (18 November 2022) (Judgment)**

Neutral citation: [2022] KEHC 15445 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL 12 OF 2019  
RL KORIR, J  
NOVEMBER 18, 2022**

**BETWEEN**

**TSUSHO CAPITAL KENYA LIMITED ..... APPELLANT**

**AND**

**ESTHER WANJIRU NGECHU ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. B. Omwansa Principal Magistrate  
in Civil Suit Number 23 of 2018 - Sotik delivered on 25th April 2019))*

**JUDGMENT**

1. The respondent (then plaintiff) sued the appellant (then defendant) as the legal representative of the estate of James Ngechu for general and special damages that arose from a fatal accident which occurred on December 31, 2015 along the Kaplong Litein Road and involved motor vehicle registration number GKB 371 E said to be owned by the appellant
2. On April 25, 2019, the trial court delivered judgment in favour of the respondent and ordered that appellant pay her Kshs 4,675,580/= being the combined award for special and general damages.
3. Being dissatisfied and/or aggrieved by the decision of the trial court, the appellant appealed the judgment of the trial court vide its memorandum of appeal dated May 22, 2019. He relied on the following grounds:-
  - I. That the learned trial magistrate erred in law and in fact by arriving at his decision based on the wrong principle of law in that he failed to consider the pertinent issues of law and facts raised by the appellant's counsel in their submissions dated April 2, 2019.
  - II. That the learned trial magistrate erred in law and in fact by dismissing the appellant's third party application dated May 22, 2018 without considering the facts presented by the appellant.



- III. That the learned trial Magistrate erred in law and in fact by ignoring/disregarding binding precedents and decisions of superior courts (High Court and Court of Appeal) submitted by the appellant on the question of interpretation of contracts.
  - IV. That the learned trial magistrate erred in law and in fact by finding that the respondent successfully proved her claim on the probability of success in the main suit in spite of the evidence on record.
4. The appellant prayed that the Judgment of the trial court be set aside and for any other relief that this court may find necessary.

#### **The Plaintiff's/Respondent's Case.**

5. Through her pleadings and evidence in the trial court, the respondent stated that she was the wife of the deceased, James Ngechu Kinari who was fatally injured when the motor vehicle registration number GKB 371 E he was aboard was negligently driven and veered off the road causing it to roll several times. Particulars of the negligence were listed in paragraph 4 of the pleadings.
6. It was the respondent's case that on the material day (December 31, 2015) the deceased was on official duty escorting remadees to Sotik Law Courts aboard motor vehicle registration number GKB 371 E. That the aforementioned motor vehicle belonged to the appellant.
7. The respondent stated that the deceased was survived by herself and three sons and that his regular salary was Kshs 44,800/= at the time of his death. That the deceased died aged 45 years thus his working career had been shortened by 15 years.
8. It was her case that she had spent Kshs 22,500/= on funeral expenses and Kshs 25,000/= on letters of administration. She therefore prayed for compensation from the appellant.

#### **The Respondent's Submissions.**

9. It was the respondent's submission that the appellant was too general when it stated that the trial court did not consider the pertinent issues raised in their submissions. That the said submissions were on liability and that the trial court was categorical that the appellant was wholly liable as it failed to take out 3<sup>rd</sup> party proceedings against the Attorney General. It was her further submission that the trial court dealt with the issues that were drawn and submitted upon by the parties.
10. The respondent submitted that the appellant's application dated May 22, 2018 seeking to enjoin the Attorney General had been dismissed for want of prosecution and that the appellant had not applied for the application to be reinstated or appealed the dismissal order.
11. It was the respondent's submission that ground 2 of the appeal was against the ruling dated October 24, 2018 while the present appeal was against the judgment of the trial court dated April 25, 2019. That ground 2 of the appeal therefore ought to be struck out.
12. The respondent submitted that the appellant was the registered and insured owner of the motor vehicle registration number GKB 371 E. That it was the duty of the appellant to ensure that the motor vehicle was comprehensively covered. It was her further submission being the registered owner, the appellant was properly held liable for the death of the deceased.
13. It was the respondent's submission that the authorities relied on by the appellant in the trial court were not relevant as the situations were related to the vehicles were registered in the joint names of the



financier and the borrower the whole in the present case, the relationship was that between a lessor and a lessee.

14. It was the respondent's submission that the trial court was categorical that the appellant would seek indemnity from the Government of Kenya if it had pursued third party proceedings against the Government. That this finding was in conformity with the lease agreement.
15. The respondent submitted that the doctrine of *res ipsa loquitor* presumed negligence on the part of the driver of motor vehicle registration number GKB 371 E. That the appellant never tendered any evidence to explain how the accident occurred to discharge the burden of presumed negligence.
16. It was the respondent's submission that the appellant should settle the decree of the trial court first and thereafter invoke the provision of section 10 (d) of the lease agreement since it abandoned its civil right to take out 3<sup>rd</sup> party proceedings.

### **The Defendant's/Appellant's Case**

17. Through its statement of defence and evidence in the trial court, the appellant admitted that it was the registered owner of motor vehicle registration number GKB 371 E. That pursuant to a master operating lease dated November 4, 2013, it leased the said motor vehicle to the National Treasury on behalf of the National Police Service.
18. The appellant stated that the mere fact that it was the registered owner of motor vehicle registration number GKB 371 E, did not invite risk or liability during the term of then agreement. The appellant further denied the particulars of negligence as listed in paragraph 4 of the plaint.
19. It was the appellant's case that it could not be held liable for the accident yet the motor vehicle at the time of the accident was not being driven at the appellant's request or instruction. That the appellant neither had any interest, concern or control over the motor vehicle registration number GKB 371 E. It was the appellant's further case that the vehicle was in the possession and use of the National Police Service.
20. It was their final submission that if the Insurance Company failed to honour the claim then the National Treasury would indemnify them.

### **The Appellant's Submissions**

21. The appellant submitted that it leased the motor vehicle registration number GKB 371 E to a Government Agency which ought to have been enjoined because the risk in the motor vehicle passed to the user once the motor vehicle was delivered. That the driver of the motor vehicle at the time of the accident was not a servant, agent or employee of the appellant hence it could not be vicariously liable for the actions of a law enforcement officer in his line of duty. It relied on order 1 rule 10 (2) of the *Civil Procedure Rules* and in the case of *Beatrice Adhiambo Ngeila & Another vs Mebuel Kishorchand Shah & Another* (2012) eKLR to support this submission.
22. It was the appellant's submission that the participation of the National Police Service through the Attorney General's office would have been pivotal and instrumental to assist the trial court adjudicate on issues raised in a just and effective manner. It was the appellant's further submission that the respondent's claim should be directed to the National Police Service.
23. The appellant submitted that the trial magistrate erred when it found that the public was not made aware of the lease agreement. That the onus rested with the Respondent to ensure that the right parties



were enjoined in the suit. It relied on the case of *Teresia Nduta Kamau vs Tusbo Capital (K) Limited*, Thika CMCC No 149 of 2018 to support this submission.

24. It was the appellant's submission that there was no requirement in law that required public notification of contracts that the Government enters into with private entities. That it was not the responsibility of the appellant to make known to the public the existence of an agreement with the Government. It was the appellant's further submission that the onus of proving a case against it lay with the respondent.
25. The appellant submitted that at the time of the accident, it did not have use or possession of motor vehicle registration number GKB 371 E thus they could not be held vicariously liable for any accident involving the said motor vehicle.
26. The duty of the 1<sup>st</sup> appellate court is to re-evaluate and re-examine the evidence in the trial court and come to its own findings and conclusions, but in doing so, to have in mind that it neither heard nor saw the witnesses testify. This principle was espoused in the Court of Appeal case of *Kiilu & Another vs Republic* (2005)1 KLR 174
27. I have read through and considered the record of appeal dated February 26, 2021, the memorandum of appeal dated May 22, 2019, the appellant's written submissions filed on September 27, 2022, and the respondent's written submissions dated September 26, 2022. I find that the appeal raises two issues for my determination:-
  - i. Whether there was a cause of action against the appellant.
  - ii. If the answer in (i) is in the affirmative, what damages are payable to the respondent.
28. It is trite law that the burden of proof in civil cases is on a balance of probabilities. Section 107 of the *Evidence Act* describes the burden of proof as follows:-
  - (1) 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 exist.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person
29. In the majority decision in the case of *Raila Amolo Odinga & another vs IEBC & 2 others* (2017) eKLR, the Supreme Court held that:-

“Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

(See also the Court of Appeal case of *Mbutia Macharia vs Annah Mutua & Another* (2017) eKLR and High Court case of *Abmed Mohammed Noor vs Abdi Aziz Osman* (2019) eKLR
30. The plaintiff/respondent testified and called one other witness. No 65597 CPL Daniel Ndegwa (PW2) testified that motor vehicle registration number GKB 371 E was involved in a fatal accident on December 31, 2015 along Litein-Kericho Road and that James Ngechu Kinaro was one of the



police officers who died on the spot. He produced a police abstract that was marked as PExh 2 which confirmed the same details.

31. Esther Wanjiru (PW1) who was the wife to the deceased testified that her husband died as a result of the accident. She produced a death certificate dated January 22, 2016 that was marked as PExh 1. The veracity of the death certificate and police abstract were not challenged by the respondent.
32. With respect to the ownership of the accident motor vehicle PW1 produced a copy of motor vehicle records from NTSA as at January 19, 2016 marked as PExh 14 which showed that the appellant was the registered owner as at the date of the search. The appellant admitted to being its registered owner. She however disputed having possession and control of the vehicle at the material time.
33. In my view, to this point, the respondent had discharged her burden of proof in regards to the occurrence of the accident, the death involved and the ownership of motor vehicle registration number GKB 371 E.
34. Section 112 of the *Evidence Act* allows a party to the suit to disprove those findings if he/she has any facts within their knowledge to support their disapproval. This would then mean that the disapproving party had to discharge its evidential burden of proof.
35. Section 112 of the *Evidence Act* states that:-

“(112) In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

36. The defendant/appellant called one witness. Florence Njogu (DW1) testified that she was the lease administrator for the appellant. That the motor vehicle registration number GKB 371 E was one of the motor vehicles which were leased out on February 14, 2014 to the National Treasury on behalf of the National Police Service. She further testified that at the time of the accident, the said motor vehicle was in the possession and use of the National Police Service. DW1 produced a Master Operating Lease Agreement (hereinafter referred to as the agreement) Ref No TNT/004/2013-14 that was marked as DExh 1.
37. In terms of ownership of a motor vehicle, Section 8 of the *Traffic Act* states that:-

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”
38. In the case of *Jared Magwaro Bundi & another vs Primarosa Flowers Limited* (2018) eKLR, the Court of Appeal held that:-

“It was therefore held in Muhambi Kojia (*supra*) that Section 8 of the Traffic Act recognizes registration book or the Registrar’s extract of the record as prima facie evidence of title to a vehicle and the persons in whose name the vehicle is registered is presumed to be the owner thereof unless the contrary is proved. The burden is discharged if, on a balance of probabilities, it is shown that as a matter of fact the vehicle had been transferred but not yet registered, to a de facto owner, a beneficial owner or a possessory owner. Such an owner though not registered for practical purposes may be more relevant than that in whose name the vehicle is registered.”

See also *David Musafiri Kulova vs Chhabhadiya Enterprises Ltd* (2020) eKLR



39. On the same issue Ojwang J (as he then was) in *Nancy Ayemba Ngaira Vs Abdi Ali* (2010) eKLR held that:-

“There is no doubt that the registration certificate obtained from the registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership, possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership.”

40. Further in the persuasive case of *Benard Muia Kilovoo vs Kenya Fresh Produce Exporters* (2020) eKLR, Gitari J stated as follows:-

“The Court of Appeal in these binding decisions is clearly stating:-

- (i) That the presumption that the person registered as owner of the motor vehicle in the logbook is the actual owner is rebuttable.
- (ii) Where there exists other compelling evidence to prove otherwise then the court can make a finding of ownership that is different from that contained in the logbook.”

41. The question then becomes who was liable for the accident that occurred on December 31, 2015. The agreement produced was between the appellant as the lessor and the National Treasury as the lessee and the same was dated November 4, 2013. The lease period was for 4 years which meant the earliest the agreement could terminate was sometime in November 2017 though DW1 testified that the lease was to expire in February 2018. This means that the accident occurred when the agreement was still in force.

42. DW1 produced an executed motor vehicle delivery sheet that was marked as D Exh 2. The delivery sheet indicated that the motor vehicle registration number GKB 371 E had been delivered to the National Treasury sometime in February 2014. Though the copy of motor vehicle records indicated that the appellant was the registered owner, the appellant has been able to sufficiently demonstrate through the agreement and the motor vehicle delivery sheet that it was not in possession and use of motor vehicle registration number GKB 371 E as the same was being used and was in the possession of the National Police Service at the time of the accident.

43. The respondent’s witness, PW2 testified that at the time of issuing the police abstract, their investigations were still ongoing. That investigations were completed thereafter and they concluded that the driver of motor vehicle registration number GKB 371 E would be arraigned in court and charged with causing death by dangerous driving. PW2 further testified that the police were using the said Motor Vehicle through a Lease.

44. It is therefore evident that at the time of the accident, motor vehicle registration number GKB 371 E was in possession and use by the police, who were using it to ferry remadees to Sotik Law Courts. The



driver of the said motor vehicle was not an employee or under instructions of the appellant. It is salient to note that the said driver did not give testimony in the trial court.

45. The National Police Service was not a party in the trial court. The respondent submitted that the appellant neglected to institute third party proceedings against the National Police Service. From the record, the appellant filed a chamber summons application dated May 22, 2018 where she sought leave to issue a third party notice against the Attorney General. The application was dismissed on October 24, 2018 for want of prosecution. The record shows no attempt by the respondent to reinstate the application and pursue it to its logical conclusion. Clause 8 (h) of the lease agreement stated:-

As an obligation surviving termination of this Agreement, the lessee would indemnify the lessor in respect of any claims made against the lessor and all damages, costs and expenses suffered or incurred by the lessor as a result of any third party claim arising out of the state, condition or use of the vehicles or in any way arising out of the vehicles being let under this agreement.

Clause 18 (d) of the Lease Agreement stated:-

The lessor shall not be liable (in contract, tort or otherwise) for any claim, damage, liability, loss (including consequential loss) or expense of any kind arising directly or indirectly in connection with the vehicles nor from any delay in delivery of, or failure to deliver, the vehicles, any defect or deficiency in, or inadequacy or unsuitability of, the vehicles or their installation, use, performance, servicing or repair of from any action or omission of the lessor, its servants or agents.

46. Two issues flow from my analysis above. The first is whether the failure to enjoin the Government through National Treasury or National Police Service was fatal to the plaintiff/respondent's claim. Order 1 rule 9 of the Civil procedure Rules state that:-

"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

47. The Court of Appeal in William Kiprono Towett & 1597 others vs Farmland Aviation Ltd & 2 others (2016) eKLR held that:-

"...Most critically order 1 rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

48. The court in Zephir Holdings Ltd Vs Mimosa Plantations Ltd, Jeremiah Maztagaro And Ezekiel Misango Mutisya (2014) eKLR, also held that:-

"A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually



and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

49. It is my finding that the respondent’s claim could not fall because of the appellant’s failure to take out third party proceedings or the trial court’s failure to enjoin the relevant party to the suit.
50. The respondent submitted that ground 2 of the memorandum of appeal ought to be struck out as the present appeal was not against the ruling or order of the trial court which dismissed the appellant’s application to take out 3<sup>rd</sup> party proceedings or enjoin the Attorney General.
51. I agree with the respondent that indeed the appellant ought to have appealed the order. however, the issue raised in that ground of appeal is at the core of the present appeal.
52. As the proceedings unfolded before the trial court it became clear that the two departments of Government being the National Treasury and the National Police Service were a necessary party to the suit. Notwithstanding the dismissal of the Appellant/Defendant’s ought application, the trial court ought to have, of its own motion ordered the Government to be enjoined in the suit to enable the court effectually determine where liability would attach. It is my finding that the trial court erred when it failed to appreciate that the Government was in possessory ownership of the accident motor vehicle through its Police Department at the material time.
53. The second issue is whether the possessory ownership found above would shift liability from the registered owner to the National Police Service and the National Treasury. The answer is to be found in the vehicle lease agreement between the appellant and the Government already outlined at paragraph 45 above.
54. The respondent submitted that it was not liable as the vehicle was under the control of the Government. A look at the defendant’s exhibit 1 shows that the agreement contained clauses on insurance and liability. Clause 10 of the Agreement states:-
  - a. The lessor shall at the lessee’s cost comprehensively insure and shall keep the vehicles insured for the duration of this agreement.
  - b. The lessee must notify the lessor immediately in writing of any loss of or damage to the vehicles and will have the vehicles repaired by the lessor’s appointed service agents.
  - c. In relation to all the insurances referred to in sub-clause (a), such insurances shall:
    - i. Provide that the lessor’s and any other additional insured’s interests shall not be invalidated by any act or omission or breach of warranty or misrepresentation of the lessee or its servants or agents; and
    - ii. Provide a waiver by the insurers of any right of subrogation against the lessor and of any right of contribution from any other insurance carried by the lessor.
  - d. The lessee shall not do anything whereby such insurance may be voided or vitiated and in the event of payment of any excess the lessor shall recover any such excess paid from the lessee. in the event that the insurer declines to pay any claim lodged in respect of the vehicles the lessee shall on demand pay and or indemnify the lessor for such claim.

Total loss

If there is a total loss of a vehicle, the leasing of such vehicle shall be deemed to be terminated on the date of such total loss. The lessee shall be liable to pay the rentals due under the rental addendum up to the date of such total loss.



55. It is clear from the clauses above that both the appellant and the Government Agencies to whom they leased the subject vehicle had prepared for possible circumstances occasioning loss and damage by providing for insurance. The insurance according to the agreement, was to be taken out by the appellant at the cost of the Government and where a claim was made against the lessor they would be indemnified by the lessee.
56. In the peculiar circumstances of this case therefore, it is my conclusion that the failure of the plaintiff to sue both the respondent/defendant and the Attorney General jointly, or of the defendant to take out 3<sup>rd</sup> party proceedings against the Attorney General or the omission of the trial court to enjoin the Attorney General, did not extinguish the respondent/plaintiff's claim. The appellant, though not in possession of the vehicle and for the reasons already set out in this judgment, was still liable. In view of the agreement between the appellant and the National Treasury which clearly provides how the claim is to be settled, the justice of the case demands that the plaintiff/respondent's claim is met by the appellant and who according to the agreement, may seek indemnity from the Government. It would offend the sense of justice for this court to tell the claimant 'sorry, you sued the wrong party.'
57. The trial court partly reasoned in its judgment that the parties to the agreement ought to have made the agreement public. I agree with the submission by the appellant that there was no basis for such reasoning. Indeed I must point out that the same was a misdirection on the part of the court. Whether or not the agreement was public was not an issue in this case calling for determination by the court.
58. I now turn to the issue of damages. I am guided by the case of *Johnson Evan Gicheru Vs Andrew Morton & another* (2005) eKLR, where the Court of Appeal stated that:-
- “In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the court of appeal should be convinced that either the judge acted upon some wrong principle of law or, that the amount awarded was so extremely high or so very small as to make it, in the judgement of the court, an entirely erroneous estimate of the damage to which the appellant was entitled”.
59. In the case of *Tayab vs Kinanu*(1983) eKLR, the Court of Appeal commented as follows:-
- “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.”
60. In regard to the pain and suffering, the trial court awarded Kshs 30,000. The trial court stated that the basis of the award was that the deceased had died on the spot. In the case of *Sukari Industries Limited vs Clyde Machimbo Jumba* (2016) eKLR Majanja J stated:-
- “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 after 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.....”

61. PW2 testified that the deceased was one of the officers who died on the spot. PW1 produced a certificate of death that was marked as PExh 2 which indicated that the deceased died on December 31, 2015, the same day the accident occurred. The appellant did not controvert the evidence tendered by PW1. It is therefore my finding that the deceased died on the spot and the award of Kshs 30,000/= was reasonable.
62. In regards to loss of expectation of life, I am persuaded by the case of *Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (Suing as the Legal Administrator of the Estate of the Late Robert Mwangi)* (2019) eKLR where Muchemi J stated:-

“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”.

See also *Lucy Wambui Kohoro vs Elizabeth Njeri Obuong* (2015) eKLR and in *Makano Makonye Monyanche vs Hellen Nyangena* (2014) eKLR
63. The courts have overtime adopted the figure of Kshs 100,000/= for loss of expectation of life and I see no reason why this court would interfere with the trial court’s award of Kshs 100,000/=. It is my finding that the said award was reasonable.
64. 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”.
65. The claim for loss of dependence constitutes the multiplicand, the dependency ratio and the multiplier. See *Melbrimo Investment Company Limited vs Dinah Kemunto & Francis Sese (Suing as Personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased))* [2022] eKLR.
66. The trial court awarded Kshs 4,498,080 as loss of dependency. It broke down the award as follows; that the deceased earned Kshs 44,880 per month. That since the deceased died at the age of 45 years, the trial court used the multiplicand of 15 years as the years that the deceased would have been actively productive. It also used the dependency ratio of two thirds.
67. The Respondent produced the deceased’s monthly payslip marked as PExh 6 which indicated that the deceased earned a gross monthly salary of Kshs 44,880. The same was not challenged upon cross examination. I agree with the trial court’s use of Kshs 44,880 as the base monthly income.
68. On the issue of multiplier, it was uncontested that the deceased died aged 45 years. PW1 produced a death certificate proving the same. As earlier stated, the trial court used the multiplier of 15 years. I



- agree with the trial court's use of 15 years as the multiplier. The deceased was employed by the National Police Service and was therefore a public officer. His employment was governed by the [Public Service Commission Act](#), No 10 of 2017. According to Rule 70 of the [Public Service Regulations, 2020](#), the mandatory retirement age of public officers is 60 years.
69. It is trite law that dependency is a question of fact to be established in each case. See [Rodgers Kinoti vs Linus Bundi Murithi & another](#) (2022) eKLR
70. The Respondent stated that the deceased had four dependants being herself and her three sons ie Charles Kinaro Ngechu, Victor Murage Ngechu and Kennedy Njora Ngechu. PW1 produced Birth Certificates that were marked as PExh 9, PExh 10 and PExh 11 that indicated that Charles Kinaro Ngechu was aged 15 years at the time of the accident, Victor Murage Ngechu was aged 11 years at the time of the accident and Kennedy Njora Ngechu was aged 4 years at the time of the accident. All the Birth Certificates showed that the Respondent was their mother.
71. I agree with the trial court's use of the ratio of 2/3. It was a fact that all his children were under the age of 18 years and it is assumed that the deceased used to spend 2/3 of his income on his family. I therefore see no reason to disturb the ratio of 2/3 as the dependency ratio.
72. I however find fault with the trial court's use of Kshs 37,484 as the deceased's base monthly salary. The payslips produced by the PW1 as PExh 5 and PExh 6 showed that the deceased used to earn Kshs 44,880 per month. After deducting the statutory deductions i.e. PAYE and NHIF, the net salary of the deceased came to Kshs 36,484.
73. On the issue of liability, I agree with the trial court when it apportioned 100% liability to the Appellant. The deceased was a passenger in the subject Motor Vehicle and had no control of it. In the case of [West Kenya Sugar Co Limited Vs Lilian Auma Saya](#) (2020) eKLR, Njagi J held that:-
- “A passenger cannot be held liable when a vehicle he/she is travelling in is involved in accident.”
- (See also [PAS v George Onyango Orodia](#) [2020] eKLR)
74. With regard to special damages, Section 6 of the [Fatal Accidents Act](#) makes provision for funeral expenses as follows:-
- In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought.
75. The respondent pleaded for Kshs 47,500 as special damages. PW1 produced a receipt from Kinyua Kiama & Co Advocates for Kshs 25,000 as payment for legal fee for the letters of administration. The same was marked as PExh 4. She also produced receipts from Umoja Self Help Group and Josca Sounds for Kshs 15,000 and Kshs 7,500 respectively as payment for hiring of a 100 seater tent, seats and Public Address System and the same were marked as P Exh 7 and PExh 8 respectively.
76. It is salient to note that the veracity of the aforementioned receipts was not challenged or tested in cross examination. I therefore find it proven that the Respondent incurred Kshs 7,500 to hire the public address system, Kshs 15,000 to hire a tent and seats and Kshs 25,000 as legal fee for the letters of administration.



## **Conclusion**

77. The appeal dated May 22, 2019 fails and is dismissed with costs to the respondent. The respondent is also awarded costs of the suit in the trial court.
78. The amount awarded to the respondent is revised as follows:-
- a. Pain and suffering Kshs 30,000
  - b. Loss of expectation of life Kshs 100,000
  - c. Loss of dependency Kshs 4,378,080
- Kshs 4,508,080
- Add special damages Kshs 47,500
- Total Kshs 4,555,580
79. Orders accordingly.

**JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 18TH DAY OF NOVEMBER, 2022**

.....

**R. LAGAT-KORIR**

**JUDGE**

**Judgement delivered virtually to parties @**

[Particulars Withheld].com for the Appellant,

[Particulars Withheld].com for the Respondent.

