



Waudu (for and on behalf of the Late Blastus Browns Waudu) v Nyakuru (Civil Suit 859 of 1998) [2022] KEHC 16801 (KLR) (23 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16801 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 859 OF 1998
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

AGNES WAUDO (FOR AND ON BEHALF OF THE LATE BLASTUS BROWNS WAUDO) PLAINTIFF

AND

MICHAEL ONKOBA NYAKURU DEFENDANT

JUDGMENT

Introduction

1. Agnes Waudu, the Plaintiff herein instituted this suit by way of a Plaint dated October 30, 1998 which Plaint was later amended on March 2, 1999. In the amended Plaint of March 2, 1999, the Plaintiff seeks the following orders: -
 - a. Special damages – Kshs 397,146/=
 - b. General damages under the *Law Reform Act* and the *Fatal Accidents Act*.
 - c. Damages for loss of consortium.
 - d. Costs and Interest.
2. The Defendant, Michael Onkoba Nyankuru opposed the suit by way of a Defence dated February 26, 1999, in which he denied all the contents of the Plaint as well as being the owner of motor vehicle registration number KAG 128A Peugeot 505 Station Wagon being the (suit motor vehicle)

Background.

3. The Plaintiff's claim is that on or about the April 6, 1998, along Eldoret- Kapsabet road near Eldoret International Airport, Samuel Omenyi Okemwa (Deceased) was travelling as a lawful fare paying passenger in the Defendant's motor vehicle registration number KAG 128A Peugeot 505 Station



Wagon which was being driven by the Defendant's authorized driver. That the Defendant's driver drove the said motor vehicle so negligently that he caused it to crush and as a result the deceased suffered fatal injuries.

The evidence

4. A total of six (6) witnesses testified in favour of the Plaintiff including herself.
5. PW1 Agnes Nanjala Waudu, the Plaintiff testified that the deceased was her husband, who died on April 9, 1988 following a road accident that occurred on April 6, 1998. PW1 told the Court that the deceased had died as a result of the injuries which he sustained in the accident. She told the Court that she did not have the original copy of the death certificate but had a copy of the same which she produced in evidence. She further told the Court that when the accident occurred, the deceased was travelling in a Peugeot car registration number KAG 128 A. PW1 told the Court that at time of his death the deceased was (50) years old.
6. PW1 testified that she had obtained the grant of letters of administration with respect to the deceased estate in Eldoret Succession Cause No. 104 of 1998. The Plaintiff told the Court that at the time of his death, the deceased was working at Maseno University in the Catering and Housing Department as the head and was earning a basic salary of Kshs 24,245/= and a house allowance of Kshs 12,330/=. The PW1 produced a copy of the deceased's payslip.
7. The Plaintiff told the Court that their union was blessed with (4) children; Dustan Soida Waudu (deceased), Edwin Wangwe Waudu, Bradley Karakacha Waudu and Maureen Nawire Waudu. The PW1 told the Court that her late son her left son has left behind a (4) year old daughter called Fayne Nawire Soida who was under her care. She told the Court that Edwin Waudu was an Advocate and therefore not a dependant in the circumstance. She told the Court that only her last (2) children were in college and depended on her for upkeep. She told the Court that her father and mother-in-law were no longer her dependants as they had since passed on.
8. PW1 testified that the deceased was the one responsible for paying school fees, house rent, provided clothes and food from his earnings. PW1 told the Court that on the material date of the accident the deceased was admitted at the Moi Teaching and Referral Hospital but was later transferred to the Intensive Care Unit (ICU) where he later died. She told the Court the Eldoret Hospital bill was Kshs 104,450/= which was paid the deceased's employer whereas the Moi Teaching and Referral Hospital was paid by her employer.
9. PW1 told the Court that she incurred funeral expenses which include post mortem expenses which were Kshs 4,000/=, mortuary expenses which were Kshs 5,4000/=, coffin Kshs 15,000/=, funeral announcement on KBC Kshs 2,400/=, a further announcement Kshs 3,600/=, the ceremony was video taped at Kshs,15,000/=, wreath Kshs 3,000/=, travel tickets for her two children who were studying in India at the cost of Kshs 72,633/=, fuel expenses plus the deceased's clothes and clothes for the family at Kshs 381,956/=, photographs at Kshs 4,000/= and tent at Kshs 12,000/=.
10. PW1 further told the Court that preparation of the grave cost them 12,000/=, dressing materials Kshs 10,300/= and Kshs 9,000/= for two pairs of shoes and two shirts. PW1 told the Court that she seeks compensation for the loss of her husband and all the hardship she had endured bringing up the children were it not for the accident, she would not have incurred the aforesaid expenses.
11. On cross-examination, PW1 told the Court that she did not have anything to show that the deceased worked at Maseno University at the time of his death. She also told the Court that the payslip she had submitted was for February 1998. She further told the Court that she did not know the retirement age



for the non-academic staff members. She also told the Court that she did not establish the ownership of the suit motor vehicle but the owner had admitted ownership of the subject car during the hearing in the traffic case where the abstract shows that owner of the said car was the Defendant. PW1 further told the Court that name on the police abstract must have been misspelt as the abstract shows the name "Michael Ontoba". PW1 also conceded that the name on the copy of search conducted on April 6, 1998 indicates the registered owner of the suit motor vehicle as Richard Kipkemboi Tarus.

12. PW1 also confirmed that at the time when the case was being filed her father-in-law had already passed on. She further confirmed that her son Edwin was no longer a dependant and that she did not have birth certificates for her children. She also told the Court that the grant of letters of administration with respect to the deceased's estate had not be confirmed and that her claim for Kshs 397.146/= did not include funds that had been paid by her employer and the university. She also admitted that she was not present at the time of the accident.
13. PW2 PC Abdalla Mwarora, testified that he is currently stationed at the Records office, Eldoret Police Base. He told the Court that he is in charge of records and that the said office was required to avail records of an accident which occurred in 1998 involving motor vehicle registration number KAG 128A 505 Peugeot Station Wagon which occurred along Eldoret-Kapsbet road near Eldoret Airport.
14. PW2 told the Court that he did not investigate the matter and that late Corporal Koibil was the one who had investigated the matter but had died in 2003. PW2 told the Court that the Senior most officer who had attended the scene had retired and his whereabouts were unknown. PW2 told the Court that the purpose for being in Court was to produce the said records which were in his custody.
15. PW2 produce a report in Court which showed that on April 6, 1998 an accident occurred and that the deceased had died as a result of the said accident. PW2 told the Court that from the file, the investigating officer's conclusion was that the cause of the accident was excessive speed as a result of which the vehicle lost control and rolled five times before landing on its wheels on the right side of the road, as one faces the Kapsabet side, 36 meters off the road. He further told the Court that vehicle rolled for 92 meters to land on its final position and that no other vehicle was involved in the said accident save for motor vehicle registration number KAG 128A, Peugeot 505 station wagon matatu. PW2 told the Court that the vehicle was being driven by one Samuel Ntabo Omenyi who also died as a result of the said accident.
16. PW2 testified that the matter was investigated and the file forwarded to the Chief Magistrate's Court Eldoret for Inquest and the same was later closed 24/4/2002. The Court found that the driver the subject car was to blame for the accident.
17. PW2 further testified that his record indicate that the vehicle belonged to one Michael N. Ontoba.
18. On cross-examination PW2 told the Court that that he did not have the abstract report in his file.
19. PW3 John Rotich, testified that he is the Executive Officer in charge of the High Court Eldoret and his duties include keeping custody of the Court files and records. PW3 told the Court that he has with him HCCC No.159 of 1998 in which parties are Michael Nyanguro V Lakestar Insurance Company Limited and Morris Onyango. PW3 told the Court that Plaintiff in the file shows that owner of motor vehicle registration number KAG 128A Peugeot 505 is the plaintiff.
20. On cross-examination PW3 conceded that he was not read the entire file and that the exhibit marked as (DMFI-1) shows the owner as at April 6, 1998 as Richard Kipkemboi Tarus.
21. PW4 Edwin Wagwe Waudo, testified that he is a Senior State Counsel and that the deceased was his father. He told the Court that the deceased had died as a result of the injuries sustained during a road accident that occurred on 9th April, 1998. He told the Court that PW1 his mother had obtained



- the grant of letters of representation prior to instituting this suit. He further told the Court that the deceased was employed at Maseno University as the hostels and catering manager and used to earn a gross salary of Kshs 36,575/= as at February, 1998. He told the Court that at the time of his death the deceased was 50 years old and that he was buried on 18/4/1998.
22. PW4 told the Court that there were expenses incurred by the family which included video expenses at Kshs 15,000/=, food stuffs at Kshs 17,750/=, 2,660/= and Kshs 5,330/= respectively. PW4 further testified that at the time of his father's death he was pursuing further studies in India and incurred travel expenses at Kshs 72,636/=. PW4 told the Court that he also travelled with his younger brother Bradley Karakacha Waudu and that the said tickets were only one way.
 23. PW4 produced certified copies their birth certificates. He told the Court that as at 1998, Bradley and him were both law students in India. His sister Maureen Waudu was a student in Hill School Eldoret and that their brother Dunstan had finished school but was not working. PW4 told the Court that they all depended on their late father for school fees and upkeep and that upon his demise, their mother paid their fees and was also helped by relatives.
 24. On cross-examination, PW4 told the Court that currently he is not a dependant as he works as a state Counsel. He also told the Court that the deceased's net pay was Kshs 14,424/=.
 25. PW5 Joash Lubanga Andayi, testified that he works as a driver for Agricultural Corporation in Eldoret. PW5 told the Court that on April 6, 1998 he was involved in a road accident. PW5 told the Court that he was travelling in motor vehicle registration number KAG 128A, a Peugeot 506 Station Wagon, on his way to Kisumu. He told the Court that the vehicle was full of passengers. He told the Court that immediately after Eldoret International Airport there is a sharp corner and that their driver was following a motor vehicle ahead of them and as he attempted to overtake, he suddenly saw another motor vehicle from the opposite side and when he applied emergency brakes, he lost control of the motor vehicle.
 26. PW5 told the Court that their driver was travelling at a high speed and the motor vehicle rolled several times. PW5 testified that he managed to get out of the vehicle, passengers were lying on the road and a good Samaritan took them hospital. He told the Court that the matter was investigated. He told the Court that he did not know the driver the motor vehicle as he had died in the accident and he also did not know the owner of the motor vehicle.
 27. PW6 James Oduor Owino, testified that he works at Maseno University, as an Assistant Registrar in charge of personnel. He told the Court he knew the deceased who worked as a catering and hostess officer. He told the Court that the deceased appointed on permanent and pensionable basis. He told the Court that on November 12, 1993, the deceased was promoted to Assistant Catering Hostess Manager. PW6 produced minutes confirming the said promotion. He told the Court that the deceased used to earn Kshs 24,245/=, a house allowance of Kshs 12,330/= which totalled to Kshs 36,575/=.
 28. PW7 Maureen Nawire Waudu, testified that she an Administration Officer in charge of hospitality at Kenya School of Law. She told the Court that the deceased was her father and that she was born on 8/11/1981. She told the Court that at the time when the deceased died, she was a Form (3) student at Hill School Eldoret and was depending on her father.
 29. DW1 Micheal Onkoba Nyankuru, testified that he is a businessman who lives in Kisii. He denied ever being the owner of motor vehicle registration number KAG 128A Peugeot 505 Station Wagon He also told the Court that Samuel Omenyi Okemwa has never been his driver or employee. He stated that he not aware of the particulars of negligence attributed to him and the driver of the suit motor vehicle as the said Samuel was never his employee and that the suit motor vehicle has never been his.



30. DW1 told the Court that PW1 has never conducted a search on the said motor vehicle and to establish the owner. DW1 told the Court that the only reason why he is being associated with the suit motor vehicle was because Samuel was his good friend whom they lived with in the same compound and shortly before the accident, the said Samuel used to park the suit motor vehicle in the said compound.
31. DW1 told the Court that he had lodged a complaint with the police regarding his name being inserted as the alleged owner of the suit motor vehicle but nothing more was done by the police after the complaint was lodged. He however conceded that he had nothing to show that a complaint had been lodged.
32. On cross-examination, DW1 told the Court that although he previously owned several motor vehicles, the suit motor vehicle never belonged to him. DW1 reiterated that the said Samuel was neither his employee nor his driver. DW1 confirmed that he knew of Lakestar Insurance because there was a time that he had paid for an Insurance cover from them on behalf of Samuel. DW1 told the Court that he did so because the said Samuel had requested him to assist him pay for the same as he did not have money for insurance. He told the Court that he had sued Lakestar Insurance because their agent had put his particulars in the insurance cover, rather than putting those of Samuel.

At the close of the case both parties filed written submissions.

Submissions

33. The Plaintiff filed submission dated April 5, 2022, which she raised the following issues for determination; -
 - a. Whether or not there was an accident on April 6, 1998 involving motor vehicle registration number KAG 128A along Eldoret-Kapsabet road.
 - b. Was the late Blastus Brown Waundo a lawful passenger in the said vehicle and did he sustain fatal injuries as a result of the accident?
 - c. Was the accident occasioned by the negligence of the driver of the said motor vehicle registration number KAG 128A?
 - d. Was the Defendant the owner of the ill-fated motor vehicle registration number KAG 128A and hence vicariously liable for the damages occasioned to the Plaintiff?
34. On the first issue, the Plaintiff submitted that she together with other six witnesses submitted in favour of her case. The Plaintiff maintains that the deceased was her husband and that he died on April 6, 1998 while traveling in motor vehicle registration number KAG 128A Peugeot 505 Station Wagon matatu. The Plaintiff further submitted that her list of documents filed in Court on 13th July, 2004 further support her case. The Plaintiff submitted that PW2's testimony further supports her case and confirms that indeed on April 6, 1998 an accident occurred involving motor vehicle registration number KAG 128A.
35. On the second issue, the Plaintiff submitted that her testimony and that of PW2 and PW5 all confirm that the deceased was indeed a lawful passenger in in motor vehicle registration number KAG 128A Peugeot 505 Station Wagon matatu and had died as a result of the injuries he sustained during the said accident.
36. On the third issue, the Plaintiff submitted that both PW2's and PW5's testimonies confirm that the cause of the accident was excessive speed and as a result of which the vehicle lost control and rolled



- several times. The driver of the suit motor vehicle was driving at very high speed when the accident occurred.
37. Regarding the ownership of the suit motor vehicle, the Plaintiff submitted that PW3 had told the Court that in Eldoret HCCC No. 159 of 1998, the Defendant herein was the Plaintiff in that and he was cited as the owner of the suit motor vehicle in the present case. The Plaintiff argued that the contents of the said judgment confirm that that the Defendant herein was the owner of the suit motor vehicle. The Plaintiff argued that the Defendant had the burden of disapproving her claim that he was the owner of the suit motor vehicle but he failed to do so. The Plaintiff relied on the decision in *Jonathan Mugalo v Telkom (K) Ltd*, Kisumu HCCC No. 166 of 2001. The Plaintiff argued that proof ownership of the suit motor vehicle cannot simply be based on the production of a search document as claimed by the Defendant. The Plaintiff relied on the findings in *Nancy Ayiemba Ngaira v Abdi Ali* CA 107/2008 [2010] eKLR to support her argument.
 38. The Plaintiff further submitted that the police abstract produced in Court proves that the Defendant is the owner of the suit motor vehicle. The Plaintiff argued that the police abstract also shows that the insurance company and policy number of the suit motor vehicle as Lakestar Insurance Company Ltd and the policy number being 08-081-51849-98-3. The Plaintiff contends that the aforementioned details are the same as those in Eldoret HCCC No. 159 of 1998. The Plaintiff submitted that although the Defendant had testified that he was not the owner of the suit motor vehicle and had only purchased the said insurance cover on behalf of the late Samuel, he did not have anything to prove the said assertion. The Plaintiff further argued that if the Defendant was not the owner of the suit motor vehicle then, he would have not instituted the Civil claim against Lakestar Insurance Company Limited and Maurice O. Onyango.
 39. The Plaintiff urged the Court to find Defendant 100% liable for the said accident.
 40. On quantum, the Plaintiff prayed for damages under the *Fatal Accident Act* and the *Law Reform Act*.
 41. The Plaintiff prayed for Kshs 100,000/= for pain and suffering. The Plaintiff cited the following cases; *Alice Mboga v Samuel Mbuti Njorogo*, *Nancy Wanyoyi Maina v Stephen Thungu & Another*.
 42. On loss of expectation of life, the Plaintiff prayed for Kshs 100,000/=. The Plaintiff relied on the finding in; *Kimunya Abednego alias Abednego Munyao v Zipporah S Musyoka & Another* [2019] eKLR, *Makario Makonye Monyancha v Hellen Nyagena* [2014] eKLR and *Lucy Wambui Kiboro V Elizabeth Njeri Obuong* [2015].
 43. On loss of dependency, the Plaintiff submitted that the deceased was (50) years old at the time of his death and would have worked up to the age of (65). The plaintiff submitted that the deceased used to earn a basic pay of Kshs 24,245/= and a house allowance of Kshs 12,330/= totalling to Kshs 36,575/=. The Plaintiff urged the Court to adopt a multiplier of 15 years. On the dependency ratio, Plaintiff submitted that the deceased had dependants whom he catered for. The deceased children depended on him for school fees and upkeep. The Plaintiff urged the Court to adopt a dependency ratio of 2/3. The Plaintiff submitted that the loss of dependency would thus be calculated as follows;

$$\text{Kshs } 36,575 \times 15 \times 12 \times \frac{2}{3} = \text{Kshs } 4,389,000/=$$
 44. Plaintiff also prayed for loss of consortium. The Plaintiff submitted that she lost companionship, love and affection of her husband and that her children lost the love and care of their father. The Plaintiff urged the Court to award her Kshs 100,000/= for loss of consortium.
- The Defendant also filed submission dated 4/2/2022.



45. On liability, the Defendant submitted that the Plaintiff did not establish the ownership of the suit motor vehicle. The Defendant submitted that during the hearing, he denied being the owner of motor vehicle registration number KAG 128 A Peugeot 505 Station wagon and further denied having employed the said Samuel Omenyi Okemwa. The Defendant submitted that the copy of search showed that the registered owner was one Richard Kipkemboi Tarus. The Defendant denied being liable for the accident herein.
46. On quantum, the Defendant submitted that the Plaintiff had pleaded special damages to the tune of Kshs 397,146/= but only proved special damages to the tune of Kshs 136,8880/=.
47. On loss of expectation of life, the Defendant submitted that in view of the deceased being (50) years old at the time of his death and in light of the vagaries and vicissitudes of life, the Court should award Kshs 50,000/=. The Defendant cited the case of *Ainu Shamsi Haulier Limited v Moses Sakwa & Another (suing as the administrators of the estate of Ben Siguda Okach (Deceased))* [2021] eKLR.
48. Regarding pain and suffering, the Defendant submitted that the deceased herein was involved in a road on April 6, 1998 and died on April 9, 1998 and such he died (3) days after the accident and thus the Court should award Kshs 40,000/= in the circumstances. The Defendant cited the case of *DMM suing as Administrator and legal representative of the estate of LKM v Stephen J. Njue & Amother* [2016] eKLR.
49. For damages under the Fatal Accident Act, the Defendant submitted that the multiplicand to be used would be Kshs 36,575/= in view of the deceased's earnings. The multiplier to be used would be (3) years in as the deceased was (50) years at the time of his death and would have retired at the age of (55) at the time. The Defendant also argued that considering the vagaries and vicissitudes of life, there is no way that the deceased would have worked up to the age of (55).
50. On the dependency ratio to be adopted, the Defendant submitted that from the list of the seven dependants that were listed in the amended Plaint, only Maureen Nawire Waudu depended on the deceased at the time as she was a still a student. The Defendant urged the Court to apply a dependency ratio of 1/3. The Defendant submitted that in view of the foregoing the general damages to be awarded would thus be calculated as follows;

$$\text{Kshs } 36,375 \times 12 \times 3 \times 1/3 = \text{Kshs } 438,900/=$$

Determination

51. I have considered the pleadings, submissions and various authorities cited in support thereof. I have also examined both the pleadings and evidence tendered. From the pleadings and evidence, the issues for determination are liability and quantum under the *Law Reform Act* and the *Fatal Accidents Act*.

Liability:

52. On liability, it undisputed that the deceased herein died as a result of a road accident that on April 6, 1998 involving motor vehicle registration number KAG 128A Peugeot 505 Station Wagon that occurred along Eldoret/Kapsabet road near Eldoret International Airport. At the time of the accident the suit motor vehicle was being driven by one Samuel Omenyi Okemwa (Deceased)
53. The only bone of contention in this matter, is who is the owner of the suit motor vehicle. The Plaintiff on one hand claims that the motor vehicle belongs to the Defendant herein whereas the Defendant denies ever owning the suit motor vehicle and further denies that the said Samuel Omenyi Okemwa was his employee and or driver.



54. The Defendant's case is that the suit motor vehicle belonged one Richard Kipkemboi Tarus being name on the search as at April 6, 1998. The Defendant denies liability. PW2 PC Abdalla Mwavora, however in his testimony told the Court that according to the record held at the Record office, Eldoret the suit motor vehicle belonged to the Defendant herein. PW3 an Executive Officer at Eldoret High Court also testified that in Eldoret HCCC No.159 of 1998 the Defendant herein was listed as the Plaintiff and the owner of the suit motor vehicle. I have keenly perused a copy of the judgment dated May 23, 2003 and I note that at the very first paragraph the Defendant herein is listed as the owner of the suit motor vehicle. What really caught my eyes is "that on or about the 6th day of March, 1998 the Plaintiff signed a contract of insurance form for one year" It is also worth noting that at the very end of the said judgment the Court notes that the "Plaintiff is entitled to be indemnified by the first defendant in respect of claims arising from the road accident involving his motor vehicle registration number KAG 128A which occurred on April 6, 1998 subject of these proceeding".
55. The Defendant has argued that in aforementioned case he had sued Lakestar Insurance Company Ltd for using his name instead of the name Samuel in the said cover. A cursory perusal of the said judgement will reveal that the averments by the Defendant are not true. The case was never about Defendant's name being used in the cover instead of Samuel's but solely touched on issues of the insurance policy between the Defendant herein, Lakestar Insurance Company Ltd and its agent Maurice O. Onyango. Surprisingly a reading of the said judgment will also reveal the said Samuel being the Defendant's driver died while on his way to Kisumu to collect a certificate of Insurance on behalf of the Defendant herein. What are the chances that the said Samuel was only a friend to the Defendant herein and not his employee? The Defendant also conceded that he had nothing to show that he had report the matter regarding him being mentioned as the owner of the suit motor vehicle to the police.
56. In the circumstances the balance of probabilities tilts in favour of the Plaintiff and thus the Court hereby finds that the Defendant is 100% liable for the said accident.

Quantum:

57. The Plaintiff has sought for reliefs under the *Fatal Accident Act* and the *Law Reform Act*.

a. Award under the *Law Reform Act*:

58. In the case of *Hyder Nthenya Musili & Another v China Wu Yi Limited & Another* [2017] eKLR, the Court stated as follows-

"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.... 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."

Pain and Suffering

59. The Plaintiff prayed that the Court awards Kshs 100,000/= for pain and suffering whereas the Defendant submitted that Kshs 40,000/= would be sufficient in the circumstance. As per the certificate of death on record, the deceased herein died on April 9, 1998. The accident herein occurred on April 6, 1998. The deceased did not die on the spot. He was taken to Moi Teaching and Referral Hospital



and later to the Intensive Care Unit (ICU) at Eldoret Hospital where he later passed on. It without doubt that the deceased endured excruciating pain between April 6, 1998 and April 9, 1998 when he died. Having said the Court therefore awards Kshs 1000,000/= to the Plaintiff for pain and suffering.

Loss of Expectation of Life

60. The Plaintiff has asked the Court to award Kshs 100,000/= under this heading. The Defendant on the other hands wants the Plaintiff to be awarded Kshs 50,000/=. In the case of *Citi Hoppa Bus Limited & another v Maria Clara Rota* [2021] eKLR where the Court held that the award for loss of expectation of life is not determined by the level of happiness the deceased was expecting to enjoy during his life or on how poor the deceased was. This court further stated that being a nominal award it takes into consideration the fact that a life had been cut short. From the record, the Death Certificate indicate that the deceased was 24 years old at the time of death therefore I find that the deceased's age was proved. I do award the plaintiff Kshs 100,000 for loss of expectation of life.

SUBDIVISION - b. Damages under The Fatal Accident Act

Loss of Dependency

61. Evidence on record clearly indicates that the deceased was married to the Plaintiff and that their union was blessed with four issues namely; Dustan Soida Waudu (deceased), Edwin Wangwe Waudu, Bradley Karacha Waudu and Maureen Nawire Waudu. At the hearing PW1 told the Court it was only her last two (2) who were still in college and depended on her for education and upkeep.
62. Section 4(1) and Section 8 of the *Fatal Accident Act* defines who qualifies to be a beneficiary of a deceased estate. Section 4(1) states: -

“Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was 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 costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:...

63. To my mind the fact that a child has attained the age of (18) years does not preclude him or her from being classified as a dependant. Being (18) years old in my view is only a legal standard for determining maturity in Kenya but does not necessary exclude one from being a dependant. From the record it is clear that at the time when the deceased was dying his children were still save for the first-born were still in school and depended on him to provide for their upkeep. Having said so, the Court will therefore adopt a dependency ratio of 2/3.
64. On the multiplicand. It not disputed that the deceased herein was employed at Maseno University as an Assistant Manager Catering and Hostess. The deceased used to earn a salary of Kshs 36,575/=. The deceased basic salary was Kshs 24,245/= and a house allowance of Kshs 12,330/=. The multiplicand to be adopted therefore is Kshs 24,245/= being the deceased's basic salary.
65. On the multiplier to be adopted. From the death certificate, the deceased was 50 years old at the time of his death. The deceased PW6 told the Court was employed on permanent and pensionable terms at the time would have retired at the age of 55 years being the applicable retirement age at the time. There



is no evidence that the deceased herein was in bad health. In light of the above I will adopt a multiplier of (5) years. The computation for loss of dependency would therefore be as follows: -

Kshs 24,245 x 12 x 5 x 2/3= 969,800/=

66. The Plaintiff also prayed for loss on consortium. The Plaintiff submitted that as a result of the said accident she and her children were deprived of love and affection. On the loss of consortium, the Respondent submitted that the same should not be awarded. Damages under this head is categorized as general damages. In the case of *Innocent Keti Makaya Denge vs Peter Kipkore Cheserek & Anor* [2015] eKLR; the Court therein found that there was no basis to make such an award when assessing damages in a fatal accident matter; the Court held that a claim for loss of consortium applied only in situations where the victim of the accident was still alive but unable to enjoy consortium with their spouse due to injuries sustained from the accident. Having said so, I shall not make an award under this heading.

67. In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in *Hahn v. Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

68. In the Amended Complaint, the Plaintiff pleaded Kshs 397,146/=. The Plaintiff only produced the following receipts to support her claim; post mortem Kshs 4,000/=, mortuary fees Kshs 5,400/=, coffin Kshs 12,000/=, radio announcement Kshs 6,000/=, video recording Kshs 15,000/=, wreaths Kshs 3,000/=, family dressing expenses Kshs 19,300/=, food expenses Kshs 25,540/= and grave preparation Kshs 12,000/=. The total amount that was pleaded and proved was Kshs 139,880/=.

69. In the end, judgment is entered in favour of the Plaintiff as against the Defendant in the following term;

Liability 100% as against the Defendant

Pain and Suffering – Kshs 100,000/=

Loss of expectation of Life – Kshs 100,000/=

Loss of dependency – Kshs 969,800/=

Special damages – Kshs 139,880/=

Total - Kshs 1,309,680/=

70. It is established that costs follow the event. In the present case, the Plaintiff has proved her case and is therefore entitled to costs and interest.

Costs and Interests shall be for the Plaintiff.

It is ordered so.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 23RD DAY OF DECEMBER, 2022.

R. NYAKUNDI

JUDGE

