Komoni v Jefunea & another (Suing as the Administrators of the Estate of Mercyline Chepkorir) (Civil Appeal 146 of 2019) [2025] KEHC 2767 (KLR) (12 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2767 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 146 OF 2019

E OMINDE, J

MARCH 12, 2025

BETWEEN

HARUN MENYWA KOMONI ..... APPELLANT

AND

JANET MMBONE JEFUNEA ..... 1ST RESPONDENT

BOSCO KIPROTICH KEMBOI ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF MERCYLINE CHEPKORIR

(Being an appeal against the judgment of Hon. C. Obulutsa (CM) in Eldoret CMCC No.808 of 2017, delivered on 20/09/2019)

JUDGMENT

1. The Appellant filed an appeal against the judgment of Hon. C. Obulusta (CM) in Eldoret CMCC No. 808 of 2017. The appeal is on both liability and quantum.

2. The Respondents' claim against the Appellant in the trial court was for General Damages Special Damages, under the *Law Reform Act*, Cap 26 and the Fatal Accident Act, Cap 32, costs of the suit and interest, arising from a road accident that occurred on 23/05/2017 where the deceased sustained fatal injuries.

3. The Appellant filed a Statement of defence wherein he denied liability and prayed that the suit be dismissed with costs. Upon considering the evidence, the learned trial Magistrate and he proceeded to pronounce his Judgement in favour of the Respondents as follows: -

    a. Liability – 100%

    b. Pain and suffering Kshs. 100,000/=

c. Loss of expectation of life Kshs. 200,000/=

d. Loss of Dependency Kshs. 1,628,640/=

e. Special damages Kshs. 77,650/=

TOTAL Kshs. 2,006,290/=

f. Costs of the suit and Interest.

4. Aggrieved by the trial Court's decision on both liability and quantum, the Appellant filed his Memorandum of appeal on 18/10/2019 setting out the following grounds:

1. That the learned trial Magistrate erred in law and fact in holding the Appellant herein 100% liable in negligence without considering the evidence and the legal concept of negligence.

2. That the learned trial Magistrate erred in law and fact in holding that the Respondents had established a case against the Appellant contrary to the evidence on record.

3. That the learned trial Magistrate erred in law and fact in failing to make a finding as to whether or not the issue of liability was adequately proved.

4. That the learned trial Magistrate erred in law and fact in failing to evaluate, consider and determine all the issues in the pleadings and in evidence especially as to how the accident occurred hence and erroneous judgment.

5. That the learned trial Magistrate erred in law and in fact in failing to dismiss the Respondent's claim with costs for want of proof.

6. That the learned trial Magistrate erred in law and in fact in holding that the Respondent was wholly liable and/or substantially liable for the accident considering that there were two versions presented before the Court of how the accident occurred.

7. That the learned trial Magistrate erred in law in failing to appreciate the applicable principles in assessment of damages under the *Fatal Accidents Act*, Cap 32, Laws of Kenya and the *Law Reform Act*, Cap 26, Laws of Kenya thereby arriving at an erroneous decision.

8. That the learned trial Magistrate erred in law and in fact in failing to properly/adequately evaluate the evidence and exhibits tendered on quantum thereby arriving at an erroneous decision.

9. That the learned trial Magistrate erred in law and in fact by relying on insufficient evidence in awarding damages.

10. That the learned trial Magistrate erred in law and in fact in entering judgment in favour of the Respondents for loss of dependency when no such dependency was proved as required by the law.

11. That the learned trial Magistrate erred in law and in fact for using a multiplier of 30 years without taking into account comparable authorities and the Appellant's Submissions on record.

12. That the learned trial Magistrate erred in law and in fact in using a multiplier of Kshs. 13,572/= without any basis.

13. That the learned trial Magistrate erred in law and in fact in making an award of damages of Kshs. 1,628.640/= as loss of dependency when no proof/or evidence of deceased's income was tendered.

14. That the learned trial Magistrate erred in law and in fact in failing to deduct the amount awarded under the *Law Reform Act*, Cap 26, Laws of Kenya from that awarded under the *Fatal Accidents Act*, Cap 32, Laws of Kenya which award amounted to double compensation.

15. That the learned trial Magistrate erred in law and in fact in awarding special damages in the sum of Kshs. 77,650/= which amount was not specifically proved.

16. That the learned trial Magistrate erred in law and in fact in awarding the Respondent Kshs. 1,928,640/= as general damages which amount is manifestly high in the circumstances as the amount is an erroneous estimate of the loss/damage recoverable by the Respondent.

17. That the learned trial Magistrate erred in law in failing to consider the Appellant's submissions and authorities cited hence arriving at an erroneous decision.

Hearing of the Appeal

5. The appeal was canvassed by way of written submissions. The Appellant filed his submissions on 30/07/2024 whereas the Respondents filed on 28/01/2025.

Appellant's Submissions

6. On the Hon Magistrate's finding on liability, Counsel for the Appellant submitted that the Respondents in their pleadings averred that on or about the 23/05/2017, the Defendant so negligently and carelessly drove, managed and/or controlled motor vehicle registration number KCK 779S Toyota Probox, along Eldoret-Kitale Road at Kona Mbaya Junction area causing it to hit the deceased and thereby causing her fatal injuries. That the Respondent denied any negligence on his part and testified that he was driving from Nairobi heading to Kitale and on n reaching Kona Mbaya in Matunda a girl jumped on the road without any warning and was hit.

7. While submitting that the burden was therefore on the Respondents to prove their claim, Counsel submitted that the Respondents did not discharge this burden because both the Respondents' eye witness, Godfrey Mukolwe and the Appellant acknowledged that the deceased was crossing the road when she was hit which only goes to show that she may have not exercised a proper look out before attempting to cross the road. Counsel urged that the trial Court therefore erred in holding the Appellant 100% liable yet the minor contributed to the accident by failing to ensure that the road was clear before attempting to cross the road. Counsel further submitted that one of the arguments raised by the Respondents was that the police found the Appellant culpable hence the traffic charge instituted against him which can only imply that the Appellant was liable.

8. Counsel submits that this argument does not hold any water considering that even where a person is convicted of a traffic offence, he still has an opportunity in a civil claim to raise the issue of contribution as was held in the case of Kennedy Muteti Musyoka v Abedinego Mbole [2021] eKLR. The Court therein held as follows:

> " Even where the traffic proceedings are complete and decision made thereon, save for the fact that a person may be found liable therein, it does not necessarily follow that the person

found culpable is the person solely liable for the occurrence of the accident. Nor does an acquittal automatically exonerate the person charged in those proceedings.

9. That the Court in the above case cited with approval the decision in Masembe vs. Sugar Corporation and Another [2002] 2 EA 434, where it was held that:

> " It is trite and rudimentary that proceedings in a criminal case cannot be used to prove a cause of action in a civil suit although the record can be used for certain purposes, for instance, to contradict a witness by facing him with what the witness had stated in the trial.

10. Counsel reiterated that in the instant case, the Appellant was categorical that the deceased jumped on the road hence the accident and he therefore was not at fault. Counsel contended that the proceedings before the traffic Court were never availed to this Court to interrogate what led to the conviction. That however, it appears that the court shut its eyes to the evidence tendered and failed to critically analyse the evidence tendered before it and instead focused only on the Appellant's conviction. Counsel submitted that considering that no evidence was led by the Respondents to prove any of the particulars of negligence enumerated therein and in particular evidence to show that the Appellant was over speeding, the motor vehicle was defective or that it was overtaking, it is their submission that the trial Court erred in holding the Appellant 100% liable simply on the basis of conviction in a traffic case arising from the accident.

11. He submitted that the Respondents' claim was fit for dismissal for want of proof and therefore urged that the Court to so find. Counsel relied on the case of Alfred Kioko Muteti v Timothy Miheso & another [2015] eKLR where the Court held as follows:

> " It was therefore, in my view, not sufficient for the plaintiff to merely assert that since the 1st defendant did not file any defence or controvert the pleadings or rebut the statement that the plaintiff was lawfully crossing Ngong Road when the 1st defendant violently knocked him, then he needed not prove how the accident happened and hence the liability of the 1st defendant. Madan JA in CMC Aviation Ltd V Cruis Air Ltd (1) [1978] KLR 103 observed:
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> > "Pleadings contain the averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the parties they are not evidence and no decision could be founded upon them. Proof is the foundation if evidence."
>
> Averments are matters the truth of which is submitted for investigation until their truth has been established or otherwise they remain unproven. Averments in a plaint in no way satisfy for example, the definition of Evidence under Section 3 of the *Evidence Act*. Since those averments as to the particulars of negligence against the 1st defendant were not admitted, which admission would have become evidence and as evidence is normally given on oath or by affirmation, averments depend on evidence for proof of their contents (see Cassells English Dictionary page 394).
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> In view of the above, the plaintiff ought to have testified on how the accident occurred and proved each or any of the acts of negligence attributed to the 1st defendant. He failed to do so. Consequently, there is no material before this Court upon which liability on the part of the 1st defendant can be founded. Furthermore, the plaintiff did not rely on the doctrine of res ipsa loquitor."

12. Counsel urged that the trial Court's finding on liability ought to be overturned and the lower Court case dismissed and, in the alternative, and without prejudice to the submissions above, in the absence of any clear-cut evidence pinning liability against the Appellant then liability ought to be apportioned equally particularly keeping in mind the fact that the deceased owed a duty to herself to check that the road was clear before attempting to cross the road. Counsel further relied on the holding in the case of Hussein Omar Farah v Lento Agencies [2006] eKLR.

13. On quantum, Counsel submitted that the Respondents did not prove their claim and were therefore not entitled to any award. That there was no basis for the trial Court to award the exact sum of 1,628,640/=which the Respondents had proposed in their submissions and especially when the minimum wage for a general labourer within Matunda where the deceased resided and which is categorised as all other areas as per the Regulations of Wages (General) Amendment) Order, 2017 was Kshs. 6,896.15. That in this regard, there was therefore no basis for applying a multiplier of Kshs. 13,572/= by the Court.

14. Counsel further submitted under this limb that from the evidence adduced, the deceased aged 20 years old was allegedly a form 2 student at St. Peters Kapkoren Secondary School. Counsel submitted that it is common ground that at the age of 18 years most students ought to ordinarily have completed their secondary education and progressed either to tertiary learning institutions or engaged in other means to earn a living. That the fact that there were absolutely no records of the deceased's academic performance produced coupled with the fact that she was 20 years old and still in form two could only mean one thing, that the deceased was a poor student who may very well have dropped out of school.

15. That this is a possibility that could be gleaned from the letter by the Principal St. Peters Kapkoren Secondary School, who indicated that the deceased had not reported back to the said school and he was therefore not certain that the deceased would have had a bright future and that she would have assisted her parents in any way. That this is a fact that even her own mother who testified as PW2 conceded to. Counsel added that no evidence was led at all to prove that the deceased was actually fending for herself and had any source of livelihood. Counsel maintained that dependency was not proved and as such the claim under this head ought to have automatically fail or at the very least a global approach ought to have been applied in determining dependency. Counsel relied on the holding in George Nderitu Ndumia & Another v Nyambura Gitonga [2006] eKLR where the Court held as follows:

> "As concerns the evidence regarding quantum, it is evident that there was no tangible evidence produced regarding the deceased's income or evidence of his alleged farming. There was need for more evidence to support the allegations particularly since the death certificate indicated He had no occupation. There was even no basis for the figure of 3,000/-which was given either as a daily income or a monthly income. Moreover, no evidence was adduced regarding the assistance that the deceased used to give the alleged dependants
>
> PW.1 's evidence that her husband used to get 200/=per month was not support by anything. Three of three of the deceased's brothers said to be his dependants were all much older than him having their families. Why would they depend on the deceased a young unmarried man who did not appear to have any income.
>
> No evidence was adduced with regard to what the younger brother Nderitu Ndegwa was doing and what kind of support that He received from the deceased. I find that the trial magistrate did not exercise her discretion properly in awarding damages for loss of dependency when there was clearly no evidence before her to justify such a claim. I would accordingly set aside the award."

16. Counsel also relied on the holding in the case of Civiscope Limited v Gilbert Kimatare Nairi &Lilian Napudoi Nairi (suing as personal representatives of the estate of Gilbert Nairi Lemayian (deceased) Civil Appeal E4 of 2020.

17. With regard to the claim under the *Law Reform Act*, Counsel submitted that under this Act the damages awardable are for pain and suffering and loss of expectation of life. On pain and suffering, Counsel urged that no amount was payable for pain and suffering the deceased having died on the spot and that the trial Court thus erred in awarding a colossal figure of Kshs. 100,000/= which award is not supported by any judicial precedents which were binding upon the Court. Counsel relied on the holding in the case of James Mukolo Elisha & another v Thomas Martin Kibisu [2014] eKLR where the Court of Appeal held as follows:

> With respect, the learned trial Judge, therefore, clearly misdirected herself in making an award under the *Law Reform Act*, in the absence of the grant of Letters of Administration. We further note that the learned judge made an award for pain and suffering, yet the deceased died instantly. This was clearly a misdirection and accordingly, that award must be. Set aside."

18. On loss of expectation of life, Counsel submitted that the Court erred in awarding a figure of Kshs. 200,000/=. According to Counsel a figure of Kshs. 80,000/=would have sufficed being the conventional award by Courts under this head if the Respondents had succeeded in proving this claim. Counsel relied on the case of James Galina and Another versus Perminus Kariuki Githinji (Nairobi HCC No. 91 of 2014).

19. On Special Damages, Counsel submitted that the trial Court while interrogating this claim conceded that there was no evidence tendered by the Respondents supporting the funeral expenses but still went on to make an award under this head going against the well beaten path that special damages ought to be pleaded and strictly proved. Counsel contended that whereas the Court indicate that it would only allow a sum of Kshs. 50,000/= as special damages in the final computation it awarded Kshs. 77,650/=. Counsel maintained that the Respondent did not prove her claim under this head hence she is not entitled to any award on Special Damages. Counsel relied on the holding in the case of Equity Bank Limited Vs Gerald Wang'omhe Thuni [2015] eKLR in which the Court held that

> " Special damages must be specifically pleaded and proved; they cannot be awarded on the basis of speculation and conjecture."

Respondents' Submissions

20. On liability, Counsel for the Respondents submitted that the Respondents discharged their burden of proof on liability against the Appellant on balance of probability and that the trial Magistrate agreed with this and made a finding at 100% as against the Appellant.

21. Counsel invited the Court to re-evaluate evidence of PW1 who blamed the Appellant for the accident, the evidence of the traffic officer which further confirmed that the driver was charged in a criminal case for causing death by dangerous driving and he was among the witnesses that testified in the criminal case. That the same position was corroborated by the testimony of eye witness PW3 who also blamed the Appellant for causing the said accident by driving in an excessive speed and in a reckless manner. Further. Counsel observed that in the case of school going children courts have taken judicial notice that they cannot be held liable in negligence.

22. Counsel added that the Appellant in his own testimony confirmed the criminal charges and that they resulted in conviction wherein he was fined Kshs. 50,000/=. In the Counsel's view the trial Magistrate made a just determination basing on all the documentary evidence that was placed before by the Respondent. That the Appellant offered no documentary proof to controvert the evidence adduced by the Respondents. Counsel relied on the Court of Appeal decision in Ephantus Mwangi & Another- vs Duncan Mwangi Wambugu (1982- 88) I KLR 278, where it was stated that the Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

23. Counsel contended that the Appellant has not stated in what manner the trial Court may have misapprehended the evidence or in what way he faults the said Court. Counsel relied on the decision in Machakos HCCA No. 101 Of 2018, Catherine Mbithe Ngena Vs Sacker Agencies Ltd, where Justice Odunga analysed in detail the parameters of burden of proof in civil cases relating to road accidents. In the view of Counsel, the Respondents met the test as therein established. Counsel urged that the trial Court's decision on liability be upheld and that further, a reading of the decision shows that it complies with the provisions of Order 2, Rule 4 of the Civil Procedure Rules.

24. On whether the awards by the trial Courts are inordinately high to warrant interference by this honourable Court interference, Counsel submitted that the Appellant's grounds 7, 8, 9, 10,11, 12, 13, 15 & 16 can be summarized to mean that the trial Magistrate erred in awarding sums which are inordinately high and failing to properly evaluate the evidence and thus arriving at an erroneous decision, which position is contested by the Respondents. Counsel maintained that the Appellant has not demonstrated any error and no application of wrong principles has been pointed out to warrant interference by this honourable Court. Counsel cited the decision Court of appeal in Catholic Diocese of Kisumu vs Sophia Achieng, Civil Appeal No. 284 of 2001 /2004) & KLR SS wherein the circumstances under which an appellate Court can interfere with an award of damages set out in the following terms;

> " It is trite law that the assessment of general damages is at the discretion of the trial Court and an Appellate Court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The Appellate Court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the wrong principles, as by taking into account some irrelevant factor or leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate"

25. On the multiplier, Counsel submitted that the Appellant faulted the multiplier of 30 years at ground 11 of the Memorandum of Appeal. Counsel urged that discretion to either adopt the multiplier method or the global assessment method is entirely that of a judicial officer and it is dictated by the circumstances of the case and must be made judiciously. Counsel added that this was enunciated in the case of Seremo Korir & Another v SS (suing as the legal representative of the Estate of MS Deceased) (2019) eKLR. Counsel also cited the case of Board of Governors of Kangubiri Girls High School & Another- Jane Wanjiku &Another (2014) eKLR where it was held that:

> " The choice of a multiplier is a matter of Court's discretion which discretion has to be exercised judiciously with reason".

26. The deceased therein was 27 years old and a multiplier of 25 years was applied. Counsel further submitted that in the case of Xh White Water Ltd v Joseph Kimani Kamau & Another (2017) eKLR,

the deceased was a nurse who died at 21 years and the court adopted a multiplier of 30 years upon considering the vagaries of life and also the case of Ruth Wangechi Gichuhi -vs- Nairobi City County (2013) eKLR, where the Court applied a multiplier of 30 years for the deceased aged 22 years at time of death.

27. Counsel urged that based on the above cited cases among others, it appears that a multiplier of 30 years is applied across the board for deceased persons of the age 20 to 22 years old at time of death. He submitted that the Deceased herein was only 20 years of age, had a full of life ahead of her and there was no evidence of ill health or any impairment of any manner and so she could have lived well beyond 60 years.

28. Counsel therefore submitted that for the trial Court's decision to use a multiplier of 30 is well reasoned and reasonable and it ought not be faulted. Counsel submitted that having ascertained there were no debilitating health concerns the honourable Court indeed then considered the vagaries and vicissitudes of life and it is the reason why it reduced the multiplier by 10 years.

29. On the multiplicand, Counsel submitted that the trial Court deemed it proper to use an amount of Kshs. 13,572/= which the appellant terms as being without basis at ground 12 of their Memorandum of Appeal. He submitted that the application of a 1/3 dependency ratio is not challenged. Counsel added that trial magistrate was guided by the Statutory Regulation on Basic Minimum Wage at the time and that the said sum was not excessive in the circumstances also taking into account the state of the Kenyan economy and the effects of inflation. Counsel submitted that the assessment is therefore fair and just and this Court ought not disturb the same. He continued that generally, minimum wage is adopted when the means of the deceased cannot be ascertained and that this was the proposition in Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 (2011]eKLR where Asike-Makhandia J., stated,

> " In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005..."

30. Regarding Special Damages, Counsel submitted that even as the legal requirement is that the same should be specifically pleaded and proved, it is generally settled that funeral expenses will still be awarded even where proof of receipt has not been availed. Counsel further submitted that the Respondents pleaded for Kshs 70,000/= as funeral expenses, the trial Court upon consideration awarded Kshs. 50, 000/= as being just and reasonable under this limb. That this sum cannot be termed as being excessive or has not been specifically proved. Counsel added that this position is attributed to the to the hardships and difficulties faced by the mourning families deceased persons and as a consequence it has now become necessary and it is trite to allow, without strict proof, reasonable funeral expenses.

31. Counsel cited the decision of the Court of Appeal in Jacob Ayiga Maruja & another v Simeon Obayo (2005) eKLR, where the Court in proceeding to allow an expense of Sh.60,000/=towards funeral expenses in the case. held that;

> " We agreed and the Courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses".

32. Counsel further submitted that the trial magistrate also awarded Kshs. 7,650/= and Kshs. 20,000/= being post mortem and mortuary fees as well as costs incurred in obtaining the necessary grant and that receipts were produced to prove the pleaded sums. That in this regard, the trial Magistrate correctly exercised his discretion.

33. On whether the award under the *Law Reform Act* should be deducted from the award under the *Fatal Accidents Act* as raised in his ground 14 of the Memorandum of Appeal because to award both amounts to double compensation Counsel in vehemently opposing this submission relied on the decision of Justice J. N Mulwa in Nakuru HCCA No. 96 of 2017 Crown Petroleum Co. Ltd & Another Vs James Kinyanji Mwangi wherein the Hon Judge cited the binding decision of the Court of Appeal in Hellen Wangu Waweru vs Kiarie Scores Ltd (2015/eKLR when it rendered itself thus;

> " Under Section 2(5) of the *Law Reform Act* a party entitled to sue under the *Fatal Accidents Act* has the right to sue also under the *Law Reform Act* in respect of the same death and that the words "to be taken into account and to be deducted are two different things-"
>
> And further,
>
> > "It is sufficient if the judgment of the lower Court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial Judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. That there is no requirement in law or otherwise for him to engage in a mathematical deduction."

34. Counsel maintained that the import of the holding of the court is therefore that there is no requirement nor is it mandatory that an award under the *Law Reform Act* be deducted from the award under Fatal Accident Act. The same cannot then be considered as double compensation as submitted by the Appellants.

35. In the end, Counsel urged the appeal herein be dismissed with costs and interests as from 20/9/2019.

Determination

36. Being a first appeal the Court relies on a number of principles as set out in Selle and Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123:

> " ...this 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, this 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 into account of particular circumstances or probabilities materially to estimate the evidence."

Liability:

37. As can be gleaned from the summary above, the submission by both Counsel were quite lengthy and mostly centred on the facts adduced in support of the respondents claim. This being the case, I will not rehash the facts of the case because the same have already been very well captured in my summary of the submissions of Counsel. From these facts, what is undisputed is the fact that the accident did occur as averred by the plaintiff and the deceased sustained fatal injuries.

38. The only evidence on record of the persons that witnessed the accident is that of PW3 and DW1 who was the driver of the accident motor vehicle. I note from the submissions by the Counsel for the appellant that he states that the evidence of the eye witness who testified as PW3 and the testimony of the DW1 are similar in that both testified that it is the deceased who jumped onto the road and therefore onto the path of the appellant thereby causing the accident and this is indeed the appellant's version

on how the accident occurred. That in this regard, the Hon Magistrate ought not to have apportioned liability at 100%

39. I have gone through the proceedings of the lower court and considered the evidence of each of the parties on how the accident occurred in its totality. Of particular relevance and significance is that having perused the evidence of the two witnesses viz PW3 and DW1, it is abundantly clear that the submission by Counsel for the appellant is off the mark. Whereas the evidence of DW1 remains the same, the evidence of PW3, contrary to the testimony of DW1, was that the deceased and another child were walking several meters off the road and on the left side facing Kitale. That the accident motor vehicle was being driven from Eldoret towards Kitale at a very high speed.

40. With this explanation, the only reasonable inference the court can make is that the motor vehicle came from behind the deceased and her companion who were walking off the road. The witness went on to testify that the vehicle swerved off the road and knocked down the deceased who sustained fatal injuries and the other child too was injured. The witness also testified that the driver was unable to control the vehicle, was driving without due care for other road users by failing to observe the required speed limit at a trading centre thereby putting the lives of pedestrians including the deceased at risk.

41. The court notes that as far as the record of the proceedings of the lower court shows, this evidence of the eye witness was not at all rebutted, controverted and/or challenged in any way by the defence either in cross examination or at all. This aside, the court has also taken note of the fact that as stated above, the appellant attempted to associate the evidence of their only witness with the evidence of the eye witness. This in my considered opinion only goes to show that the appellant's too consider this witness to be a credible witness and the court sees no plausible reason to fault this view.

42. Further to the above, the court has taken into consideration the submission by Counsel that the fact of the conviction of the appellant in the Traffic Case should not have informed the lower court's finding of liability at 100% without the said lower court interrogating the finding of the Traffic Court. That this because of the fact that the issue of contributory negligence plays a major role in claims for compensation in civil cases as opposed to prosecutions in criminal cases. Counsel cited authorities in support of this submission.

43. In this instance however, I do not think that the court needs to delve much into this issue because as I have already herein above indicated, the eye witnesses account remains unchallenged. All that I need to add is that the conviction coupled with the uncontroverted evidence of the eye witness only leads to the conclusion that the appellant is wholly to blame for causing the accident. With this finding, I find no reason to fault the Hon magistrates finding on liability and the same is upheld at 100%.

Quantum

44. On quantum, the question is whether this Court should interfere with the damages awarded by the trial Court. The discretion in assessing General Damages payable will only be disturbed if the trial Court took into account an irrelevant fact or failed to take into account a relevant factor or that the award is so inordinately high that it must be wholly erroneous estimate of the damages or that it was inordinately low. In its assessment of damages under *Fatal Accidents Act* the trial Court, based on the evidence presented, awarded Kshs.100,000/- for Pain and Suffering and a sum of Kshs.200,000/- for Loss of expectation of life under the *Law Reform Act* On what an appropriate award ought to be on Pain and Suffering, the evidence on when the deceased died following the accident is that which would guide the court.

45. Counsel for the appellant submits that because the deceased died on the spot, no amount should be payable under this head and so the trial court's award of Ks. 100,000/= is not only very grossly

exaggerated but ought not to have been awarded at all. From my perusal of the lower court record the testimony of the eye witness PW3 is that the deceased did not die on the spot as has been submitted by Counsel for the Appellant.

46. This aspect of this witnesses' evidence is supported by the Medical Report (Patient Record Book from Matunda Sub-County Hospital) marked as PExh7 produced by the Respondent. It records what transpired at 1610hours when they received the deceased. The bottom line is that she was still alive and after some action was taken and she was referred to the MTRH for ICU. At 1620hours, the record shows that the patient was certified dead. From this testimony, it is clear that the deceased did not die on the spot but died while undergoing treatment. I therefore find this award to be merited and the same is upheld.

47. On whether the award of Ks. 100,000/= is inordinately high, the holding in West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR is reledvant. Therein, the Court held as follows;

> " 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."

48. In this case, the deceased did not die on the spot but died immediately after the accident in hospital. She did undergo pain and suffering bu not for a prolonged period of time to warrant an award of Ks. 100,000/-. As was held in the case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019]eKLR,

> " The 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."

49. For this reason, I find the amount of Ks. 100,000/= to be inordinately high in the circumstances of the deceased death and I now hereby reduce the same to an award of Ks. 40,000/-

50. On the award under Loss of Expectation of Life, in the case of Mosonik & another v Cheruiyot (Suing as the Legal Administrator of the Estate of Stanley Kipchumba Kemboi, Deceased) (Civil Appeal 113 of 2019) [2022] KEHC 11823 (KLR) (29 July 2022) (Judgment) the Court observed as follows:

> " .....In common law jurisprudence of which Kenya is part, the Courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering.....what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Kshs.100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if death followed immediately

after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death...."

51. In line with the above two decisions, much as the evidence is that the deceased was young at the age of 20years was school going, healthy and therefore expected to have a long life ahead of her, I am of the finding that these factors notwithstanding, the award of Ks. 200,000/- under this head is inordinately excessive. I therefore set aside the same and substitute it with an amount of Ks. 100,000/=

52. On the head under Loss of Dependency, the trial Court in assessing damages based his finding on the multiplicand approach as opposed to the global/lump sum approach. In reaching his award, he based his calculations on the applicable minimum wage. Whereas I agree that the issue of determining what damages to award is at the discretion of the court, it is also my considered opinion that this award ought to be based on what can be termed to be appropriate in the eyes of that reasonable man sitting in an omnibus. The deceased in this case was school going and still in her early formative years in so far as her future and more particularly career progression is concerned. Even as a court opts to use the minimum wage, it must indicate under which category it has placed a claimant so as to justify the wage used as a multiplier. The question that arises then is what category of a labourer did the court place the deceased student under to warrant and/or justify the amount awarded?

53. In my considered opinion, the most appropriate method that the court ought to have used is the Global Sum method because the parameters under which the multiplicand method apply had not yet been attained by the deceased given the fact that she was still a student her age notwithstanding. The case of Frankline Kimathi Maariu & another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR is relevant in this regard ant the court therein stated as follows;

> " In the present case, there was no satisfactory proof of the monthly income. Where there is no salary proved or employment, the Court should be wary into subscribing to a figure so as to come up with a probable sum to be used as a multiplicand. In such circumstances, it is advisable to apply the global sum approach as the appropriate mode of assessing the loss of dependency. The global sum would be an estimate informed by the special circumstances of each case. It will differ from case to case but should not be arbitrary. It should be seen to be a suitable replacement that correctly fits the gap."

54. For this reason, I am in agreement with Counsel for the appellant in his submission that the trial Magistrate misdirected himself on his determination on the multiplicand, the multiplier and loss of dependency by dint of the fact that in my considered opinion he applied the wrong principles in reaching this award. In this regard, the award of Kshs. 1, 628, 640/= under this head is now hereby set aside and all factors considered including the award as revised under the *Law Reform Act*, I now hereby award the plaintiff a global sum of Ks. 1,000,000/= under the head of Loss of Dependency

55. Special damages are those damages which are ascertainable and quantifiable at the date of the action. They must be specifically pleaded and proved. I this case the amount of Ks. 7650/- is pleaded under particulars of Special Damages as Post Mortem and Mortuary Fees. A receipt to that effect was availed. Counsel submits that whereas an amount of Ks. 70,000/= is pleaded as Funeral Expenses under this head, no receipts were availed to warrant this award. On this submission, several decisions of the courts as hereunder are relevant and I wholly associate myself with them.

56. The case of Muthike Muciimi Nyaga (Suing as Administrator of the Estate of James Githinji Muthike (Deceased)) vs. Dubai Superhardware [2021] eKLR wherein the High Court (J. N. Mulwa) took judicial notice on the issue of funeral expenses and held as follows:

> This expense is a special damage. It is trite that special damages must not only be pleaded but also strictly proved. A sum of Kshs. 50,000/= was pleaded in the plaint as funeral expenses. There is a long list of authorities to that effect. 22. However, with hardships and difficulties faced by deceased's mourning families, it has now become necessary and trite to allow, without strict prove, reasonable funeral expenses.

57. The Court of Appeal decision in the case of Jacob Ayiga Maruja & another vs. Simeon Obayo [2005] eKLR (Supra) where the court rendered itself thus:

> We agreed and the Courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses" and proceeded to allow an expense of Sh.60, 000/= towards funeral expenses in the case.

58. Lastly the case of Premier Dairy Limited vs. Amrit Singh Sago & Another C.A No. 312/2009 where the Court of Appeal took judicial notice of the fact that:

> It would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern of the bereaved family is that a close relative has died and the body needs to be interred according to the custom of a particular community involved. 24. Guided by the above pronouncements, I set aside the trial Court's Nil award on funeral expenses, and substitute the same with an award of Kshs. 50,000/= as funeral expenses.

59. Going by the above authorities, I am satisfied that notwithstanding the non-availability of receipts, the trial Magistrate correctly rendered himself in making an award for funeral expenses. Further, in light of the awards in the said decisions, I do not find the Hon magistrate's award of Ks. 70,000/= to be high. I therefore uphold the same. The upshot of my findings as herein above on the appellant's Appeal then is as follows;

1. The Appeal against liability as awarded at 100% against the defendant is now hereby dismissed and the award at 100% is upheld
2. The Appeal against the award of Ks. 100,000/= for Pain and Suffering in favour of the plaintiff is now hereby allowed. The said amount is set aside and substituted with an award of Ks. 40,000/=
3. The Appeal against the award of Ks. 200,000/= for Loss of Expectation of Life is now hereby allowed. The said amount is set aside and substituted with an award of Ks. 100,000/=
4. The Appeal against the award of Ks. 1, 628, 640/= for loss of dependency is now hereby allowed. The said amount is set aside and substituted with an award of Ks, 1,000,000/=
5. The Appeal against the award for Special damages is now hereby dismissed.
6. Total Ks. 1,140,000/=
7. Costs of the suit and interest at court rates

READ DATED AND SIGNED AT ELDORET ON 12TH MARCH 2025

E. OMINDE

JUDGE