Maingi & another v Musangi (Suing as the Legal Representative of the Estate of Peter Kilungua Nzivo DCD) (Civil Appeal E017 of 2023) [2025] KEHC 9404 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEHC 9404 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CIVIL APPEAL E017 OF 2023

TM MATHEKA, J

JUNE 20, 2025

BETWEEN

PIUS KILONZO MAINGI ..... 1ST APPELLANT

NUNGUNI FSA COMMUNITY BASED ORGANIZATION ..... 2ND APPELLANT

AND

NZILANI NZIVO MUSANGI ..... RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER KILUNGUA NZIVO DCD

(Being an Appeal from the Judgment of Hon. F.Makoyo (PM) in the Principal Magistrate's Court at Kilungu, Civil Case No.E191 of 2021, delivered on 30th January 2023)

JUDGMENT

1. The Respondent Nzilani Nzivo Musangi (Suing as the personal representative of the estate of) Peter Kiungua Nzivo filed a suit in the lower Court seeking general damages, special damages, costs of the suit and interest under the *Law Reform Act* (LRA) and the *Fatal Accidents Act* (FAA) on behalf of the Estate of Peter Kiungua Nzivo pursuant to a fatal road accident on 03/11/2020 along the Salama-Nunguni road. She averred that the deceased was walking along the pedestrian path when Appellants' motor cycle KMDX veered off the road and knocked him causing him fatal injuries. The Appellants Pius Kilonzo Maingi and Nunguni Fsa Community Based Organisation filed a joint statement of defence, denied each allegation of fact in the plaint and called and put the plaintiff /respondent to strict proof thereof. They averred that if at all an accident happened in the manner pleaded on the material date, then it was wholly or partially due to the negligence of the deceased.

2. After the preliminaries; the matter was heard judgment was delivered wherein the learned trial magistrate found the Appellants 100% liable and awarded damages as follows;

   Loss of expectation of life... kshs 100,000/=

   Loss of dependency... kshs 323,424/=

   Pain & suffering... kshs 50,000/=

   Special damages... kshs 55,000/=

   Total... kshs 528,424/=

3. Aggrieved by the award, the Appellants filed this appeal on the following 8 grounds;

   a. That the learned trial magistrate erred in law in finding the Appellants at fault and granting the Respondents damages given that the Appellant gave sufficient proof of negligence on the part of the deceased.

   b. That the learned trial magistrate erred in law in holding that the Appellants were 100% liable in the absence of any concrete evidence on the Respondents part to demonstrate the same.

   c. That the learned trial magistrate erred in law and fact in ignoring the fact that the Respondent had failed to produce proof of the true earnings of the deceased herein hence the amount arrived at by the Principal Magistrate is baseless.

   d. That the learned trial magistrate erred in law and fact in failing to appreciate the impeccable defence of the Appellants and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess general and special damages without concrete proof.

   e. That the learned trial magistrate erred in law and fact in drawing conclusive adverse inferences against the Appellants without paying keen attention to the rules governing the principle of negligence in that it is evidently clear that the deceased did not take reasonable caution whilst attempting to cross the road as he was drunk and staggering.

   f. That the learned trial magistrate erred in law and fact in making conclusive findings on the issue of duty of care contrary to the rules governing the principle of negligence on the part of the deceased given that the 1st Appellant who was on the motor cycles lawful lane in fact veered off his lane in an attempt to refrain from injuring the deceased. The Appellant indeed gave sufficient evidence to prove that he sustained injuries in his attempt to entirely avoid knocking down the deceased.

   g. That the learned trial magistrate otherwise exercised his discretion based on fundamental misapprehensions of the applicable law ignoring relevant factors and gave primacy to irrelevant factors thereby making the wrong decision.

   h. That the learned trial magistrate erred in law and in fact in that he delivered a judgment that was wholly against the weight of evidence and the applicable law and in the circumstances the said judgment should not be allowed to and should be set aside.

4. Directions were given that the appeal be canvassed through written submissions and only the Appellant's submissions are on record.

The Appellants' Submissions

5. The Appellants identified the issues for determination as follows;

a. Whether the Respondent proved liability on a balance of probability at 100% as against the Appellants as awarded by the Trial Court?

b. Whether the trial Magistrate erred in awarding the Respondent quantum of damages?

c. Who shall bear the Costs of the suit at both the appellate and trial level?

6. On liability, it was submitted that according to the Respondent, the accident was in itself proof enough that the 1st Appellant's sole negligence is what allegedly led to the death of the deceased. That this is equated to the Doctrine of Res Ipsa Loquitor which literally translates to "the thing speaks for itself." That in fact, the Respondent did not delve into the elements of the tort of negligence which are; duty of care, breach of duty of care, reasonable foreseeable harm as a result of the 1st Appellant's conduct, actual damage/loss incurred and the causal link/proximate cause. Reliance was placed on Nandwa -vs- Kenya Kazi Limited [1988] eKLR, where the Court of Appeal cited with approval, a portion in Barkway -vs- South Wales Transport Company Limited [1956] 1 ALLER 392, 393 B on the nature and application of the doctrine of res ipsa loquitur as follows:

> "The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the Respondents to give an adequate explanation, if the facts were sufficiently known, the question reached would be one where facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be confirmed."

7. It was submitted that pleading the doctrine of Res Ipsa Loquitor presupposes that the burden of proof has been discharged and in order to escape liability, a Respondent is required to demonstrate that there was either no negligence on his part, or that there was contributory negligence.

8. It was submitted that the Appellants pleaded and sufficiently proved contributory negligence on the part of the deceased. That although it is trite for road users including vehicles and motorists to provide a reasonable amount of care to ensure safety of themselves and others; the Appellants wholly dispute that the 1st Appellant was negligent in any way considering the fact that the accident occurred on the part of a road that was a sharp bend and the deceased's own negligence and lack of caution led to the occurrence of the accident.

9. It was submitted that the 1st Appellant was driving at a normal speed especially because he had just dropped off a passenger, coupled with the fact that the road was old and ridden with pot holes and the scene of the accident was at a point the road came to a sharp bend. That the 1st Appellant was on his lawful lane and rode his motorcycle while exercising a reasonable amount of caution and he only veered of his lane in an attempt to refrain from injuring the deceased. Reliance was placed on Jamal Ramadhan Yusuf & Another –vs- Ruth Achieng Onditi & Another [2010] eKLR where the Court stated;

> "... it is always necessary that the Appellant proves negligence with cogent and credible evidence since the mere fact that an accident occurs does not follow that a particular person has driven negligently."

10. It was submitted that the death is not disputed but its cause was not established. That the Respondent did not produce any evidence and documentation as to the actual cause of death or a link between the

death, cause of death and the 2nd Appellant. That a Post Mortem Form, Referral Summary Form and CT Scan Report were not produced before court hence the death was not conclusively proven.

11. It was submitted that the Investigative Officer admitted that he did not conduct the investigations, that he did not populate the abstract and did not do the scene sketch map. That the abstract produced has no mention of the 2nd Appellant. That no reasonable explanation was tendered as to why the actual Investigating Officer who did the investigations was not called as a witness.

12. It was submitted that the Respondent failed to establish four key elements in a negligence claim to wit; a duty of care, a breach of that duty, causation, and damage. Reliance was placed Bahari Parents Academy -vs- LBZ (Minor Suing Through His Father and Next Friend) BNZ [2020] eKLR where the Court stated that;

> " The following position is the Law on proof of negligence in Kenya. In Kiema v Kenya Cargo Hauling Services {1991} KLR 464 the court held interalia:
>
> "That the onus of proof is on he who alleges and where negligence, is alleged, the position is that there is as yet no liability without fault and an Appellant must prove some acts of negligence against the claim is based on negligence."
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> In reviewing the applicable Law Salmond and Heuston on the Law of Torts 9th Edition noted: "Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something that a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."

13. The Appellants acknowledged that the 1st Appellant owed a duty of care to other road users and submitted that he observed this duty despite the difficult circumstances that were beyond his control. That he was driving at a normal speed especially because he had just dropped off a passenger and the fact that the road was old and ridden with pot holes and that the scene of the accident was at a point the road came to a sharp bend. That despite all of the above, the 1st Appellant rode at a low speed being 30 km/h. That the 1st Appellant was on his lawful lane and rode his motorcycle while exercising a reasonable amount of caution.

14. It was submitted that in order to breach his duty of care, the 1st Appellant would have to have been driving so recklessly and at a high speed which was not the case at all.

15. With regard to causation, it was submitted that the Respondent failed to produce or rather call a witness to produce and tender evidence that would be proof of cause of death of the deceased hence the circumstances leading to death remain to be in speculation. That the Police Abstract indicated that the result of the investigation was bad road condition which was corroborated by the 1st Appellant. That the deceased was drunk and staggering on to the road, which is what actually led to his demise.

16. With regard to damage, it was submitted that the Respondent failed to prove the deceased's earnings of kshs 20,000/=. And that there was no evidence of the funeral or medical expenses. Reliance was placed on Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited -vs Janevams Limited [2015] eKLR where the court stated;

> " We turn next to the issue of special damages, and whether the learned judge was right to award special damages on the basis of the proforma invoices produced before the trial Court. This Court has consistently held that it is trite law that special damages must be specifically

pleaded and proved. In the case of Hahn vs Singh 1985 Kenya Law Reports 716, this Court stated thus: - "...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves"

17. Further reliance was placed on Bid Insurance Brokers Limited -vs- British United Provident Fund [2016] eKLR where the court stated that;

> " In the case of "Kenya Breweries Limited Kiambu Vs. General Transport Agency Limited [2000] eKLR, the court said –
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> "It is the duty of the Appellant to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in Bonham Carters Hyde Park Hotel Limited [1948] 64TR 177 –
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> The Appellant must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, "this is what I have lost, I ask you to give me these damages." They have to prove it."

18. It was submitted that the 2nd Appellant denied being the owner of the motor cycle and that the search document produced corroborates that position. The Search alone was conclusive proof to establish ownership.

19. With regard to quantum, it was submitted that the trial Magistrate erred in awarding the Respondent damages given that the Appellants sufficiently proved that they committed no negligent conduct or breach their duty of care, while the Respondents failed to provide concrete evidence in support of their claims and allegations. That the trial Magistrate further erred for awarding an aggregate sum of Kshs. 528,424/= without any evidentially backing whatsoever as to the earnings of the deceased or the funeral and medical expenses. Reliance was placed on Gichuhi Mwaura Githinji - vs- Greensteds School & Another [2009] eKLR where the court stated that;

> " Under the loss of expectation of life, it is indicated in the death certificate that the deceased was aged 36 years taking all the vicissitudes of life; I would award a multiplier of 15 years. No evidence was adduced regarding the deceased's salary; I would go for the minimum salary in labour market which is about Kshs.6000/- per month. Considering that the deceased was not married had no child and his parents were long deceased, nothing would have been awarded under the Fatal Accident Act. Similarly, no award would make under special damages because none were proved. If the Appellant were successful in this case, the award would have been computed as above. For now, I dismiss the Appellant's case with costs to the Respondents."

20. As to whether the entire judgment and decree of the trial court should be set aside, it was submitted that the Respondent relied on the police abstract which does not prove that the accident was caused by the 1st Appellant's negligence. Relying on sections 35 and 63 of the *Evidence Act*, it was submitted that no reasonable explanation was tendered as to why the actual Investigating Officer who did the investigations was not called as a witness. It was contended that the Investigative Officer brought to court gave hearsay evidence which is not admissible.

21. Referring to section 36 of the *Evidence Act*, it was submitted that the trial magistrate attached undue weight on the evidence given by the Respondent's witnesses and specifically the Investigating Officer and the uncorroborated testimony of Shadrack Mutuku Malinda. Reliance was placed on Benjamin Mwenda Muketha (suing as the legal representative of Mercy Nkirote) -vs- Abdikadir Sheik & 2 others [2018] eKLR where the court stated that;

> [12]. "As the Court of Appeal explained, once the Appellant establishes a prima facie case, the Respondent must discharge the burden by showing that it was not negligent or that the accident was fortuitous and occurred without any negligence on their part. Apart from the fact that the accident took place, the testimony of PW 1 and PW 2 as to how the accident could have occurred was not direct testimony as required by section 63 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). In other words, it was hearsay evidence. It matters not that the deceased was pushed or jumped. In either case, the testimony of both witnesses on this issue was inadmissible and not based on any fact. Since, there was no evidence on how the accident occurred, I find and hold that the appellant failed to prove negligence against the respondents on the balance of probabilities. I would, like the trial magistrate, dismiss the suit for want of proof."

22. It was submitted that the trial magistrate took into account incredible and inadmissible evidence and attached undue weight to the same in arriving at his impugned judgment and as such, the entire judgment ought to be set aside in line with the rule of law and principals of natural justice.

23. With regard to costs, reliance was placed on *Cecilia Karuru Ngayu -vs- Barclays Bank of Kenya & another [2016] eKLR; Civil Case No 17 of 2014* where the court stated;

> " In Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co- operative Society Ltd [2] this court held as follows: -
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> "The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event. It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case. [3]

Thus, it is imperative to bear in mind the various steps taken by the parties in the case so as to appreciate the trouble taken by both parties since the suit was filed. I have already outlined the various steps above; I need not repeat the same here. I find useful guidance in the following passage from the Halsbury's Laws of England; [4] "The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice

Respondent's submissions

24. The respondent relied on Donoghue vs Stevenson (1932) AC 562 on the concept of duty of care. The court was urged for the respondent to uphold the judgment of the subordinate court as negligence, cause of death were established together with the nexus between the appellants and the same.

Duty of Court

25. As a first appellate Court my duty is to analyze and re-evaluate the evidence on record in order to reach my own conclusions bearing in mind that I neither saw nor heard the witnesses testify

26. Having considered the grounds of appeal, the Appellant's submissions and entire record, it is my considered view that the following issues arise for determination;

    a. Who was to blame for the accident and to what extent?

    b. Should the quantum of damages be disturbed?

Evidence on Liability

27. PW1 was Shadrack Mutuku Malinda and he adopted his statement filed on 04/02/2022 as his evidence in chief. He stated that on 03/11/2020, about 7.15PM he was with Peter Kiungua Nzivo and they were walking from Nunguni Town towards Kilome Town on the Nunguni Kilome road on the right-hand side of the road. Suddenly, a motor cycle appeared from the opposite direction on a bend ahead of them. The motor cycle veered off the road and hit Peter Kiungua Nzivo from the front. Peter fell down as well as the rider and his passenger. A little later, the rider got up and ran away leaving his motor cycle and passenger behind. Peter was pronounced dead on arrival at Kilungu Sub- County Hospital. The registration number of the motor cycle which hit Peter was KMDX 364D.

28. On cross-examination, he said that the deceased was his very good friend and lived at Kyale village. The road was not busy. There were no other vehicles on the road at the time except the motor cycle. The state of the road was okay. It was a smooth tarmac. When referred to the defendant's abstract indicating that there was a bad road condition, he stated that between Kilome and Nunguni has always been tarmacked.

29. PW1 proceeded to testify that it was not raining or cloudy or misty, it was not dark as there was moonlight. There are no streetlights on the road. He was two feet apart from the deceased and they were walking on the right-hand side of the road. They were walking on the pavement and not crossing it. There are no traffic lights. He could not tell the speed of the vehicle but it was speeding. The deceased was in a very good physical condition and was sober. The passenger was a man but PW1 did not get his name. He did not know whether the passenger was hurt but he stood up. The deceased fell and lost consciousness. He could not recall the number plate of the vehicle that took the deceased to hospital or its driver. The deceased had no problem with his eyesight.

30. PW2 was P.C Evans Kipkemboi of Nunguni Traffic Base. He produced the abstract dated 10/12/2020 as P.Ex9 and testified that on 03/01/2020, there was an accident along Nunguni-Salama road involving motor cycle KMDX 364D and a pedestrian at 2000hrs whereby Pius Kilonzo Maingi the rider of the motor cycle hit Peter Kiungua a pedestrian. The pedestrian succumbed to the injuries. The scene was visited and subjected to inspection. He blamed the rider and charged him with causing death by dangerous driving.

31. On cross-examination, he said that he was not the initial investigating officer. From Nunguni to Salama there is a place with a big ditch where the road was under construction. The motor cycle was inspected.

32. PW3 was the deceased's mother, Nzilani Nzivo. She confirmed that she was not present at the scene. She said that the weather was good and there was no rain. The road was good. She produced the documents in her list as P. Ex 1-10.

33. DW1 was Pius Kilonzo Maingi and he adopted his statement dated 06/10/2021 as his evidence-in-chief. He stated that he is a licensed driver since 2014 and was an employee of the 2nd Appellant. He recalled that on 03/11/2020, he was riding motor cycle KMDX 364D along the Nunguni -Salama Broad together with a colleague whom he dropped along the way before proceeding to Nunguni. The

Nunguni-Salama road is known for having very huge potholes and is generally in a bad condition and due to that, he was riding at a low speed while carefully veering and maneuvering to avoid the potholes.

34. Just before reaching Kilungu Boys High school, he got to a sharp bend and made sure that he was keeping a proper look and was riding slowly. He spotted the deceased who was on his way home from Nunguni town heading towards Kilungu area. The deceased suddenly jumped onto the road without checking in an attempt to cross and on getting to the middle, the driver of a motor vehicle that was heading towards Salama center and which vehicle was on the road hooted at him because he was even staggering.

35. Out of the confusion, the deceased tried to run back in an instant and unfortunately collided with the motor bike. That it was totally unforeseen because the deceased had already embarked on crossing the road only to run back and ram into the motor bike. He lost control and fell off the bike and sustained serious injuries. He was taken to the hospital where he received multiple stitches on the head while the deceased was pronounced dead on arrival. He produced the documents in his list dated 17/09/2021 as D. Ex 1 & 2.

36. On cross -examination, he said that the deceased landed on his motor bike when he was riding. That he leaned on the moving bike and was pushed by the bike. That he had dropped off a passenger a few meters before the accident. That the deceased was drunk and was staggering. He confirmed that he had no medical results to prove that he was drunk. That he took the deceased to the hospital. That a friend ferried them to the hospital. That the deceased was on DW1's lane almost at the center of the road. That the motor cycle stopped at the side of the road which was outside the road.

37. In re-examination, he said that the deceased was on his (DW1) lane when the collision happened and the motor cycle landed off the road due to the impact.

Analysis Liability

38. PW2 produced a police abstract (P. Ex 9) showing that on 03/11/2020, there was a road accident along Nunguni-Salama road involving KMDX 364D and pedestrian Peter Kiungua who sustained fatal injuries. The Appellants submitted extensively on why the trial court should not have relied on the abstract and insisted that it was inadmissible hearsay evidence as it was produced by a police officer who was not an investigating officer. On the other hand, they produced their own abstract whose contents are similar to the Respondent's abstract save for paragraph No. 7 which is; 'Result of investigation or prosecution (if known)'. In answer to that paragraph, the Respondent's abstract indicates; 'P.B.C' which literally means pending before court whereas the Appellants' abstract indicates; 'bad road condition.'

39. It is noteworthy that the Respondent's abstract is dated 10/12/2020 whereas the Appellants' abstract is dated 09/12/2020. It therefore means that the Respondent picked her abstract a day after the Appellants picked theirs yet the results of investigations are differing in the two abstracts. If the results of investigations were known on 09/12/ 2020, they were most certainly known a day later. In my view, the most probable reason why the outcome of investigations was indicated in the Appellants' abstract was so as to enable them have a smooth dealing with their insurance company when claiming compensation for the motor cycle.

40. Be that as it may, the two abstracts corroborate each other save for that minor difference. Additionally, PW1 testified to the fact of the accident on the material night as well as DW1 who confirmed that he was involved in an accident on the material night with a pedestrian who was pronounced dead on arrival at the hospital. Consequently, the fact that an accident occurred on the material night between the deceased and motor cycle KMDX 364D was established to the required standard.

41. The Appellants submitted that the copy of records produced by the Respondent does not show that the 2nd Appellant was the registered owner of the motor cycle. While that is indeed true, the two abstracts indicate the owner as 'Nunguni Financial Services Association'. Additionally, the 1st Appellant testified in his evidence-in-chief, that he was an employee of the 2nd Appellant. Considering the standard of proof in civil cases, the Respondent managed to establish the ownership of the motor cycle and as such, the incidence of proof shifted to the Appellants to rebut the evidence and they failed to do so.

42. The Appellants also submitted that the cause of death was never established but the Respondent produced a post mortem form and a death certificate indicating the cause of death as; 'Massive Hemorrhage secondary to grade V splenic rapture.' Consequently, the cause of death was sufficiently established.

43. As to how the accident occurred, PW1 said that he was in the company of the deceased and they were walking from Nunguni towards Kilome town on the right-hand side. On his part, DW1 said that he was riding towards Nunguni and he saw the deceased who was walking from Nunguni towards Kilungu area. Consequently, it is a fact that both the deceased and DW1 were on the same side but on opposite directions.

44. PW1 testified that the motor cycle appeared suddenly from a bend ahead of them, veered off the road and hit the deceased from the front. On the other hand, DWI testified that the deceased attempted to cross the road but when he got to the middle of the road, a motor vehicle heading towards Salama hooted at him and in his attempt to run back to where he had crossed from, he collided with the motor cycle.

45. I have carefully analyzed the two versions of how the accident occurred and I have also looked at all the materials placed before the court. The cause of death on the post mortem and the injuries sustained by the deceased are consistent with impact on the left side of the body and considering that the deceased was walking on the opposite side of the motor cycle, the latter would most probably hit him on the left side upon veering off the road.

46. Upon cross-examination, PW1 maintained that there were no other vehicles on the road and that they were walking on the pavement and not crossing the road. The evidence shows that DW1 was approaching a corner when the accident happened hence it is most probable that he lost control at the corner, veered off the road and hit the deceased. The Appellants submitted that the deceased was drunk and staggering but they agreed that they had no evidence to prove that the deceased was drunk.

47. The Appellants contended that DW1 was riding carefully and at a low speed but clearly the impact resulted in rapture of the deceased's spleen and he was pronounced dead on arrival. In all common sense, a slow speed of 30km/hr could not have resulted in a fatality. DW1 must have been speeding and considering that it was night time, he was careless and negligent as he failed to keep a proper look out for other road users.

48. Be that as it may, it is trite that a pedestrian has a duty to take care of his own safety while crossing or walking on a road and to have due regard for other road users including motor vehicles and regard of the Highway Code. Paragraph 186 of Charlesworth on Negligence, Third Edition states that: "A pedestrian owes a duty to other highway users to move with due care."

49. In Isabella Wanjiru Karangu -vs- Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142, Potter, JA held that:

> " There can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. There is no reason for a pedestrian's complete failure to see a motorist and vice versa.... The doctrine of last opportunity is obsolete as no distinction can be drawn between negligence after seeing danger and negligence in not seeing it beforehand. The two causes of the accident cannot be severed and so the trial Judge was right to find both were at fault."

50. Consequently, it is my view that the Respondent had a duty of taking care of his own safety just like his friend PW1 did especially because it was night time and visibility may have been poor. In that regard, the trial court erred in finding the Appellants 100% liable. The 1st Appellant was the one in possession of a lethal machine but the deceased was also on the same road with others and did not keep a safe outlook. The appellant also described how the RTA happened and the two versions stand side to side. Consequently, I would apportion liability at 80:20 in favour of the respondents

Whether the quantum of damages should be disturbed.

52. Awarding damages is largely an exercise of judicial discretion and the instances that would make an appellate Court interfere with that discretion are well established. In Butt –vs Khan (1977)1KAR it was held that;

> " An appellate Court will not disturb an award for damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low.

Award under *Law Reform Act*

53. On pain and suffering, the evidence of PW1, PW2 and DW1 is that the deceased was pronounced dead on arrival at the hospital. The death certificate (P.Ex 7) confirms that indeed the deceased died on the same day. It is trite that the consideration to be borne in mind while awarding damages under this head is the length of time that a person suffers before succumbing to injuries.

54. I find relevance in the words of Majanja J. in Sukari Industries Limited –vs- Clyde Machimbo Juma; Homa Bay HCCA NO. 68 of 2015 [2016] eKLR where he stated that;

> " (5) On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years... "

55. Further, in Retco East Africa Limited -vs- Josephine Kwamboka Nyachaki & Anor [2021] eKLR the court stated that;

> " In this case where the deceased died 30 minutes after the accident an award of Kshs. 100,000/ = for pain and suffering is not only fair but reasonable as the court is also enjoined to consider passage of time and inflation. Kshs. 10,000/= proposed by the appellant is what was awarded in the eighties and the nineties. The award under that head is upheld."

56. Accordingly, the award of kshs 50,000/= is within an acceptable range and I find no reason to interfere with the trial courts discretion.

57. With regard to the award for loss of expectation of life, we have a myriad of cases where ksh 100,000/ = has been awarded as a conventional figure. In Hyder Nthenya Musili & Another –vs- China Wu Yi Limited & Another [2017] eKLR, the learned Judge observed that 'The conventional award for loss of expectation of life is Kshs. 100,000/='

58. Similarly, in 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 the court upheld an award of Kshs 100,000/=.

59. Accordingly, my view is that the award of kshs 100,000/= is reasonable.

Award under the *Fatal Accidents Act*

60. The trial court used the multiplier approach in assessing damages under this head and one of the grounds of appeal is that the amount arrived at by the trial court is baseless as the Respondent failed to produce proof of earnings.

61. The deceased's earnings, profession or business were not pleaded but the deceased's mother, PW3, testified that the deceased was a mechanic and used to make around kshs 20,000/= per month. It is trite that parties are not allowed to travel outside their pleadings on matters of fact. In Independent Electoral and Boundaries Commission & Anor. -vs- Stephen Mutinda Mule & 3 others (2014) eKLR, the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) -vs- Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> "... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded... In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

62. Further, in the persuasive case of Daniel Otieno Migore -vs- South Nyanza Sugar Co. Ltd [2018] eKLR, the court stated that;

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in

consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded."

63. The judgment shows that the trial court used the minimum wage of kshs 10,107/= as the multiplicand.

64. In persuasive authorities such as; Moses Mairua Muchiri –vs- Cyrus Maina Macharia (Suing as the Personal representative of the estate of Mercy Nzula Maina (Deceased) [2016] eKLR and Eston Mwirigi Ndege –vs- Patrick Gitonga [2018] eKLR the common thread was that where the earnings of a deceased person were unknown, a global award/sum ought to be adopted.

65. In other persuasive authorities such as 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 and Caleb Juma Nyabuto –vs- Evance Otieno Magaka & another [2021] eKLR the honorable Judges upheld the use of a minimum wage as a multiplicand where monthly income could not be ascertained.

66. Evidently, we have two schools of thought from the High Court on how dependency should be assessed in cases where earnings cannot be ascertained. Since the assessment of damages is an exercise of discretion, the trial magistrate cannot be faulted for preferring the multiplier approach over global award approach.

67. The was no pleading as to the deceased's profession, and even though the death certificate indicated his occupation as 'mechanic' it was not supported by any evidence. The trial magistrate adopted a minimum wage of Kshs 10,107/=

68. As for dependency, it was pleaded that the deceased's dependants were his mother, brother and sister. The evidence shows that he was not married and according to section 4(1) of the FAA, an action under the Act is for the benefit of wife, husband, parent and child of the deceased. In this case therefore, the only dependent recognized by law is the deceased's mother.

69. As for the multiplier, the trial magistrate used 4 years and opined that the deceased would have provided for his family up to the retirement age of 60 years. The age of his mother was not known to estimate the period of expected dependency.; However, I find no reason to disturb the award of the trial court

70. As for special damages, the amount pleaded is kshs 55,000/= made up as follows; cost of limited grant; 10,000, coffin; 15,000 and funeral service; 30,000/=. I did not find any supporting receipts on record but in my view, judicial notice is taken that the money is incurred in funerals. The pleaded amount is modest and I would allow it. This position is supported by Capital Fish Kenya Limited -vs- The Kenya Power & Lighting Company Limited [2016] eKLR, the Court of Appeal observed as follows;

> "We do not discern from our reading of this decision a departure from the time-tested principle that special damages should not only be specifically pleaded but must also be strictly proved... We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc....." (emphasis mine)

71. The total award is therefore;

Liability 80:20

Loss of expectation of life... kshs 100,000/=

Loss of dependency... Kshs 323, 424

Pain & suffering... Kshs 50,000/=

Special damages... Kshs 55,000/=

Total Ksh 528,4242

Net award Less 20%. Ksh 422,739.20

In the end the appeal succeeds only to the extent of contribution by the deceased as above. The appellant will have half the costs of the appeal

DATED, SIGNED AND DELIVERED VIA CTS THIS 20TH JUNE 2025

MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Ms Naazi for Kithi for appellant Mwaura for respondent

Appellants' Advocates Kithi & Co. Advocates

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Respondent's Advocates

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SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2025-06-21 00:21:29