Wainaina v Lesalulunga (Suing as the Administrator of the Estate of Loitenu Lesalulunga (Deceased)) (Civil Appeal E029 of 2024) [2025] KEHC 8518 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8518 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CIVIL APPEAL E029 OF 2024

AK NDUNG'U, J

JUNE 18, 2025

BETWEEN

CHARLES KAMAU WAINAINA .... APPELLANT

AND

EMMANUEL LETAIP LESALULUNGA .... RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF LOITENU LESALULUNGA (DECEASED)

(Appeal from the judgment passed on 13/08/2024 in Rumuruti SPM Civil Case No. E031 of 2023-E. Kithinji (RM)

JUDGMENT

1. By a plaint dated 25/10/2023, the Respondent sued the Appellant seeking general damages under the *Law Reform Act* and the *Fatal Accidents Act*, special damages and interest. It was averred that the deceased was riding his motorcycle registration no. KMEG 547U along Maralal Rumuruti road when motor vehicle registration no. KCV 080K coming from the opposite direction was negligently, carelessly or recklessly operated by the Appellant causing it to veer off the road and hit the deceased. It was averred that the accident was wholly occasioned by the negligence of the Appellant.

2. The Appellant filed a defence dated 10/01/2024 and denied the occurrence of the accident and particulars of negligence and averred that if the alleged accident occurred, the same was caused by the sole and or contributory negligence of the rider of the alleged motor cycle. It was averred that the motor cycle was headed on opposite direction but suddenly encroached onto his lawful lane and in an attempt to flee the armed pillion passenger, steered the motor vehicle onto the right lane and the deceased rider swerved the motor cycle onto the right lane and crushed onto the motor vehicle. He also denied the particulars of damages and dependency as was highlighted in the plaint.

3. The matter proceeded for hearing and the trial court blamed the Appellant wholly for the accident and awarded the Respondent a sum of Kshs.1,100,000/- in general damages and Kshs.150,000/- as special damages.

4. Being aggrieved by the trial court judgement, the Appellant appealed to this court vide a memorandum of appeal dated 12/09/2024 and filed on 18/09/2024 raising the following grounds of appeal;

    i. That the honourable court erred in failing to consider the evidence tendered by the Appellant and during cross examination of the Respondent's witnesses.

    ii. That the trial court erred when arriving at a decision that the Appellant was 100% liable despite there being evidence to the contrary.

    iii. The Hounarable trial court erred by awarding Kshs.100,000/- as funeral expenses.

5. In rejoinder, the Respondent's counsel filed a cross appeal dated 08/10/2024 and filed on 14/10/2024 and raised the following grounds of appeal;

    i. The learned magistrate erred awarding Kshs.1,100,000/- as general damages for loss of dependency which was excessively low in the circumstances of this case.

    ii. The learned magistrate erred in disregarding the letter of employment dated 06/07/2023 and the testimony of PW3 when no sufficient grounds existed for doing so.

    iii. The learned magistrate fell into grave error in finding that there was no proof of earning and/or income from employment when there was sufficient evidence produced to prove the same.

    iv. The learned magistrate erred and occasioned a miscarriage of justice by adopting a global method in calculating loss of dependency when the deceased's income was ascertainable.

6. The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that there was no eye witness but PW1 blamed the Appellant for the accident by stating that the Appellant had failed to keep to his proper lane and hit the motorcycle KMEG 457U Boxer and relied on the case of Kimani (suing as the administratix of the Estate of Amos Kanina Kimani-deceased) v Mwangi (Civil Appeal No. 120 of 2021) (2024) KEHC 2434 (KLR) where the court dismissed the appeal for lack of eye witness. Further, the trial court proceeded to make a determination on the point of impact from which the accident occurred in complete disregard of the fact that PW1 failed to produce legends, sketch plans or photos of the scene an omission she acknowledged during cross examination and counsel relied on the case of Postal Corporation of Kenya & another vs Dickens Munayi (2014)eKLR where court observed that lack of such crucial evidence led the court to doubt the entire evidence.

7. He submitted that the trial court completely disregarded Appellant's defence and established legal principles governing the admissibility of hearsay evidence. That the trial court wholly shifted the burden of proof to the Appellant without due regard to the principles governing the law on burden of proof. The learned magistrate also disregarded the evidence and submissions by the Appellant which demonstrated that the deceased rider was in blatant violation of the traffic regulations and materially contributed to the occurrence of the accident as was outlined in the defence. That had the rider not blocked him, the accident would not have occurred. That the recovery of the firearm at the scene of the accident was proof enough that the Appellant's life was in danger, a fact the court failed to appreciate.

8. Further, the rider of the motor cycle was a juvenile and had no license in contravention of Section 6 of the National Transport and Safety Authority (Operation of Motorcycles) Regulations, 2015 and Section 103B (3) and 103B (5) of the *Traffic Act* that requires the rider to have a valid driving

license and every motorcycle to be insured. Therefore, it was not reasonable to apportion 100% liability to the Appellant as the Respondent did not discharge the burden of proof having left a lot of critical elements to speculation. As to whether the award of Kshs.100,000/- as funeral expenses was appropriate, he submitted that the same was disproportionately excessive and he relied on the case of Jacob Ayiga Maruja & another v Simeon Obayo (2005)eKLR where the court reduced the amount of Kshs.117,325/- awarded as funeral expenses to Kshs.60,000/- and urged this court to adopt the same.

9. The Appellant's counsel further filed supplementary submissions and argued that the Respondent's cross appeal was not properly on record having been filed on 09/10/2024 which was beyond the prescribed 30 days commencing from the date of the judgment, 13/08/2024. Reliance was placed on the case of Bulsho Trading Company Ltd v Rosemary Likholo Mutakha & another (2020) eKLR. On the issue of loss of dependency raised in the cross appeal, they referred the court to the earlier filed submissions before the trial court.

10. The Respondent counsel filed written submissions and argued that the occurrence of the accident and who hit the deceased was not disputed by defence as DW1 admitted that he was the one who hit the deceased persons with his vehicle. As to liability, she submitted that PW1 testified that it was the Appellant who failed to keep on his lane and encroached on the right lane where the deceased were rightfully riding their motorcycle and the defence did not dispute the fact that the point of impact was on the right lane of the motor vehicle. That DW1 testified that he hit them on their lane and later returned to his lane which corroborated PW1's evidence that it was the Appellant who encroached onto the right lane. That the deceased died on the spot which shows that the Appellant was driving at a high speed. That having admitted to these set of facts, the burden shifted to him to demonstrate that the deceased persons contributed to their own misfortune which he failed to.

11. She submitted that the narration by the Appellant that the deceased tried to shoot him did not make sense. That his testimony that the pillion passenger got off the motor cycle and removed the gun to shoot him whereof he tried to move to the other lane and they collided head on raised serious doubts as PW1 testified that the gun recovered at the scene was wrapped with a shuka which was confirmed by DW1 hence, not possible that the deceased was raising the same gun. That he argued that there was another gun at the scene which was stolen but as per PW1 and the Appellant's evidence, there was no other person at the scene and the deceased persons died on the spot. Therefore, it was not clear who else could have stolen the gun. Further, he never made any report to the police whether he saw the person who stole the gun or that his life was in danger. Therefore, there was no evidence that the deceased persons tried to shoot him or that his life was in danger.

12. That his defence did not hold water as it did not explain how if the pillion passenger had gotten off the motorcycle when they were on his lane, at what point he got on his lane since they both died together aboard the motorcycle on the right lane. That he did not explain at what point the motorcycle went to its proper lane to chase the motor vehicle and if indeed they were trying to shoot him, they would have easily shot at him from their lane. Further, if the motor cycle was from the left lane and the Appellant was also coming from the left lane, point of impact would have been side by side and not a head on collision as was established. Further, it was not explained why no bullet was discharged if indeed the deceased had their gun ready to shoot. Additionally, the accident took place in an area dominated by pastoralist hence not uncommon to find them with unregulated guns.

13. She submitted that being in possession of a gun and having no driving license had nothing to do with the Appellant's negligence and PW1 testified that the license was never traced. It was never pleaded that the manner the rider drove the motorcycle contributed to the accident hence no evidence that the deceased contributed to the occurrence of the accident. That the Appellant failed to lead credible evidence that the deceased were trying to shoot at him and that they encroached on his lane and

therefore, the Respondent proved on a balance of probability that the Appellant was to blame. That having admitted to encroaching onto the motorcycle's lane and hitting the deceased's persons, he was therefore under a duty to show why he would not be held liable a duty he failed to discharge. Reliance was placed on the case of Mbuthia Macharia v Annah Mutua Ndwiga & another (2017) KECA 290(KLR) that the legal burden is discharged by way of evidence with the opposing party having a corresponding duty of adducing evidence in rebuttal.

14. As to damages, she urged the court to uphold Kshs.100,000/- for funeral expenses as was awarded by the trial court based on the fact that the Appellant did not demonstrate why the same should be set at Kshs.60,000/-. She submitted that funeral have become expenses in the recent past hence the amount awarded by the trial court was modest.

15. On award on loss of dependency, the counsel submitted that the trial court erred adopting a global sum approach whereas the deceased income was ascertainable through the letter of employment. The trial court also adopted very old precedents which were determined almost 20 years ago instead of relying on recent authorities. Hence, the trial court finding was not based on any cogent grounds thus occasioning grave injustice to the deceased estate. That the mere fact that the letter of employment was issued after the accident did not negate the fact that the deceased was employed as the employer himself testified in court confirming the employment and earnings. Further, he was in the informal sector and was not issued with any formal contract. That the Appellant was served with the said letter and had an opportunity to conduct investigations to confirm whether the deceased was employed. She urged the court to adopt the multiplier approach and adopt a multiplicand of Kshs.12,000, multiplier of 40 years since the deceased was 20 years old and placed reliance on the case of Crown Bus Ltd & 2 others v Jamilla Nyongesa & Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) (2020) eKLR where a multiplier of 39 years was adopted for a 21 year old deceased. She urged the court to enhance the award to Kshs.2,000,000/- if the court is inclined to global sum approach taking into account deceased tender age.

16. This is a first appeal and therefore the duty of this court is to consider and evaluate afresh and reach its own findings thereon. This is as established in Selle & Another versus Associated Motor Boat & Co. Ltd. & Others (1968) EX 123, where this principle was well explained in the following manner;

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

17. The Appellant's counsel raised a preliminary point of law to wit, that the cross appeal was not properly on record having being filed beyond the prescribed 30 days timeframe commencing from the date of the judgment and no application for enlargement of time was made by the Respondent.

18. Order 42 Rule 32 of the Civil Procedure Rules states as follow: -

> "The court to which the appeal is preferred shall have power to pass any decree and make any order which ought to have been passed or made or to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour

of all or any of the respondents although such respondents may not have filed any appeal or cross- appeal."

19. This rule does not provide for any timelines within which a Cross Appeal is to be filed. However, other courts of concurrent jurisdiction when faced with a similar issue have held that a cross appeal should be filed within a reasonable time, suitably before directions are given. The Appellant quoted the case of Bulsho Trading Company Ltd v Rosemary Likholo Mutakha & another (2020) eKLR where the court quoted Kenya Power & Lighting Co. Ltd v Peter Langi Mwasi [2018] KEHC 4833 (KLR), where the Court was of the view that a Cross Appeal has to be filed within a reasonable time, after the filing of the Appeal. The court held that;

> "The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time."

20. In Safaricom Plc v Kibo Capital Group Limited & another [2025] KEHC 4644 (KLR)

> "The Court is not persuaded that it should strike out the Notice of Cross Appeal as no prejudice to the Appellant has been shown. Striking out the Cross Appeal at this stage would amount to locking out the Respondent from being heard. This is despite the Act and the Rules specifying no specific timelines for filing. Had the Cross Appeal been filed after directions had been given, that would have been outside the purview of what is a reasonable time period. For now the Court holds that it was still within reasonable time."

21. The Appellant filed his appeal on 18/09/2024 and the Respondent's cross appeal was filed on 14/10/2024, less than a month after the filing of the Appellant's appeal. The matter was mentioned on 15/10/2024 for direction on a preliminary application that was made by the Appellant. The directions on appeal were given on 18/02/2025 hence the cross appeal was filed before the directions were given and was also filed within a reasonable time after the appeal was filed by the Appellant.

22. Taking the view that so long as a cross appeal is filed within 30 days of service of the appeal the same should be deemed as properly filed, and, alive to the need for the court to consider such filing in its circumstances, I am satisfied that there being no specific timelines in law for the filing of a cross appeal, and on the facts herein, the cross appeal is properly on record.

23. Moving on, the parties raised three issues for determination to wit;

    i. Liability

    ii. Award on loss of dependency

    iii. And award on funeral expenses

Liability

24. The evidence at the trial court was as follows; PW1, a police officer testified that the motorcycle was being driven by Samiter Lekaao aged 17 years and aboard a pillion passenger Lesalulungu aged 20 years. That the driver of the motor vehicle failed to keep to his proper lane and hit the motorcycle. That the first responders recovered an AK 47 inside a green sack wrapped in a red Maasai shuka at the scene

of the accident next to the motorcycle and handed it over to DCI for further investigations. That the deceased died at the scene and the Defendant was charged in E011/2024. That the driver of the motor vehicle failed to keep to his lane and hit the rider of the motorcycle. There was a gun that was recovered but it had not discharged any bullets. It had not been used to shoot. It had been wrapped in a shuka. That the Defendant recorded that the Plaintiff tried to shoot him but did not record any OB report.

25. On cross examination, she testified that there was no eye witness. They did not recover the driving license for the rider and that the family informed her that they destroyed all the documents in accordance with their culture. That she did not produce legends, sketch plans or photographs of the scene.

26. On re-examination, she testified that it is not illegal for a 17 years old to be licensed to ride a motorcycle.

27. DW1, the Appellant testified before the trial court that he met a motorbike carrying a passenger. Indicated on the right and it went off. The passenger removed a gun and pointed it at him. They had blocked him. He decided to push them to the edge of the road and they collided head to head. He hit them with his vehicle and they died on spot. That they encroached onto his lane, he left his lane and he collided with them. That he was in danger and felt afraid and that if they had not blocked him, the accident would not have happened.

28. On cross examination, he testified that the motorcycle was coming from a different direction. The person got off and removed the gun. His headlights were on so he saw him remove the gun with his hand. He did not know whether they were on speed or had already stopped. He was not on speed and that they blocked him. He did not know why they stopped. That the gun that was used to threaten him was stolen. There were two guns and the other one was wrapped in a shuka and it was the one that was recovered. That the police called and told him later that they died on the spot. He was the only one remaining at the scene. He did not report that they had tried to shoot him. He hit them on their lane and later returned to his lane.

29. The trial court after considering the evidence held that the accident occurred on the right lane, the point of impact being in the motorcycle's lawful lane and found the driver of the vehicle responsible for the accident and assigned him 100% responsibility.

30. In the instant case, there was no eye witness from the Respondent's side simply because the persons who could have given an account on how the accident occurred perished on the spot. The eye witness account before the trial court was that of the Appellant. The Appellant's counsel placed reliance on the case of Kimani (suing as the administratrix of the Estate of Amos Kanina Kimani-deceased) v Mwangi (Civil Appeal No. 120 of 2021) (2024) KEHC 2434 (KLR) where the court dismissed the appeal for lack of an eye witness.

31. My view is that even though there was no eye witness from the Respondent's side, though PW1 failed to produce the sketch plans, legend and photos, the explanation by DW1 on how the accident occurred was enough for the court to determine liability. The court could still determine liability based on the Appellant's evidence and the circumstances of the case. I find guidance in the case of Mercy Ben & another v Mt Kenya Distributors & another [2022] eKLR where Justice R. K. Limo opined as follows;

> " While it is true that none of the appellant's witnesses gave a first-hand account of how the accident occurred, the testimony of DW1 in my view gave enough indications for the trial court to draw some inferences. The reason why I take this position is that accidents do happen and can be witnessed but at times it can happen where there are no eye witnesses like it occurred in this instance. The only eye witness is the lorry driver who stood blamed for the accident. In such instances, a court should treat the evidence tendered with some caution

since the evidence of such a person could be tilted with a view to absolving himself from blame. In such situations, though it is trite that in action for negligence, the burden of proof rests upon the plaintiff alleging it to establish the element of tort, negligence can be inferred in the absence of any either plausible explanation on how the accident occurred. This the rationale behind the doctrine of re ipsa loquitor….In this matter there is denying fact that the person who could have been in a better position to explain what happened during the incident, perished in the accident and the police officer summoned to testify unfortunately took no part in the investigation of the accident and turned up in court without the police file ostensibly to testify and produce the Police Abstract because he had been paid Kshs. 5,000 by the Plaintiff's Counsel to testify. His evidence was of little assistance to the trial court in determining how the accident occurred and who was to blame. This court has also noted from the appellant's pleadings that they did not plead the doctrines of res ipsa loquitor but as held in Margaret Waithera Maina versus Michael K. Kimaru [2017] eKLR it is not necessary that a plaintiff must plead res ipsa loquitor for the doctrine to apply. It is sufficient to prove facts which show that the doctrine applies.

However, in this instance, this court has found that the evidence tendered by the respondents' own driver shows that negligence to some degree can be inferred against him. There is no way the deceased could have made a U-turn when the respondent's lorry was overtaking. There is also no chance that the driver could have fathom that the deceased was trying to make a U-turn because he had already passed him. Had he knocked him from the front of his lorry, his explanation would have held some water. This court cannot disregard the undeniable fact that access to justice to victim who cannot speak for themselves like in this instance would be a tall order unless courts considers keenly circumstances obtaining with a view to dispensing substantial justice. In my view the absence of an eye witness in itself should not be an impediment to justice particularly where the doctrine of res ipsa loquitor applies."

32. The Appellant admitted hitting the deceased persons and that they died on the spot. He admitted that the point of impact was on the right lane, the deceased lane and after the accident, he moved his vehicle to his correct lane, the left lane. The reason he gave for him moving to the right lane, was that the pillion passenger wanted to shoot him and they had blocked him so he pushed them to the edge of the road and they collided head to head.

33. His testimony was that they encroached onto his lane, he left his lane and he collided with them. He testified that the person got off and removed the gun and that his headlights were on so he saw him remove the gun with his hand. That the gun that was used to threaten him was stolen. There were two guns, one was wrapped in a shuka and it was the one that was recovered. He was the only one remaining at the scene. He did not report the attempt to shoot him.

34. The explanation in the defence evidence requires a keener scrutiny. The defendant's defence in my interpretation is that he hit the motorcycle deliberately in self defence since the pillion passenger aimed to shoot at him. In such circumstances, the tort of negligence would not arise as those facts transcend the realm of a cognizable offence under criminal law.

35. Inexplicably, the Appellant admits that he did not book a report of the incident with the police. He did not report the attempt to shoot him. A wrapped gun was found at the scene. The Appellant states the gun used to aim at him was stolen. By who and how, it is not stated. He asserts that the pillion passenger alighted from the motorcycle and aimed to shoot at him. It is not explained at what time the passenger re-boarded the motorcycle noting that the rider and passenger were crushed together.

36. Only a formal report and in depth investigations would have vindicated the Appellant's contention. In the absence of a report to the police hence no investigations, the Appellant's inaction concerning the alleged attack and the narration of events robs it of any semblance of credibility. The letter from the directorate of criminal investigations produced by the appellant refers to a report of an accident reported vide OB02/16/11/2022 with no element of an attack on the Appellant save for the recovery of an AK47 riffle at the scene of the accident. the Appellant I do not believe him.

37. It is this court's duty to re-evaluate the evidence on the question of liability which duty extends to determine whether, based on the pleadings and the evidence, the finding on liability by the trial court at 100% against the Appellant was sound.

38. The Appellant in his pleadings denied negligence on his part and in the alternative, blamed the rider of negligence. The Appellant was the only eye witness. His evidence is that he drove into the motorcycle when a gun was aimed at him. That explanation has been found wanting for reasons stated above. The doctrine of les ipsa loquitor sets in.

39. The Canadian case, which is persuasive to this Court, Fontaine vs. British Columbia (Official Adminsitrator) 1998 CanLII 814 (SCC) (1998) ISCR 424 considered res ipsa loquitor and stated:-

> " 19 For res ipsa loquitur to arise, the circumstances of the occurrence must permit an inference of negligence attributable to the defendant. The strength or weakness of that inference will depend on the factual circumstances of the case. As described in Canadian Tort Law (5th ed. 1993), by Allen M. Linden, at p. 233, "[t]here are situations where the facts merely whisper negligence, but there are other circumstances where they shout it aloud."

40. In the instant appeal, am persuaded that the facts as emerge from the evidence at the trial court permits the inference of negligence on the part of the Appellant. There is no evidence in support of negligence on the part of the Respondent. To the contrary, the Appellant introduces evidence of a criminal act by the victims of the incident, a matter he did not report to the police and which was thus not investigated. I uphold the trial court's finding on liability.

Quantum

41. It is trite law that an appellate court will not disturb an award for damages unless it is demonstrated that the trial court applied the wrong principles while awarding damages. This was held in the case of Butt v. Khan [1981] KLR 349 per Law, J.A that:

> " An appellate court will not disturb an award of 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."

42. The Respondent's counsel challenged the trial court's award on loss of dependency on account that the trial court disregarded the letter of employment that was produced to show that the Respondent was employed and earning a salary of Kshs.12,000/- a month. Further, the trial court disregarded the evidence of PW3, the deceased's employer who confirmed that he had employed the deceased and was paying him Kshs.12,000/-.

43. The trial court while adopting the global sum approach noted that the Respondent produced letter of employment but the multiplier approach could not apply as there was no proof of earnings or income

from the employment the deceased were engaged in and based on the case of Gammel versus Wilson (1981) 1 All E.R 575 and Albert Odawa vs Gichimu Gichenji NKU HCCA No. 15 of 2003 (2007) eKLR, awarded the Respondent Kshs.1,100,000/- as general damages.

44. During trial the Respondent's counsel had urged the trial court to adopt the multiplier approach as follows;

    Kshs.12,000/-x 12 months x 40 years x 1/3=Kshs.1,920,000/-

45. The Appellant's counsel in his submissions had proposed a multiplicand of Kshs.7,240 for general labourers, multiplier of 35 years and a ratio of a 1/3 since he was not married and had no children.

46. Regarding the award of damages under this head, the court in Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749, stated that:

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

47. In D K M (Suing as Legal Representative to the Estate of J M M – Deceased) vs. Mehari K. Towolde [2018] eKLR the court stated that it cannot calculate the loss of dependency based on the total pay as the deductions do not necessarily go to the benefit of the dependants.

48. In Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] eKLR the court stated thus:

    > " 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 or the minimum wage 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."

49. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. The letter of employment that was produced is dated 6/7/23. This was 8 months after the accident. In my view, evidence of employment ought to be existent during the course of the employment. Further, the letter did not state whether the amount indicated therein was the deceased net income or not. PW3 also failed to mention whether Kshs.12,000/- was the net income. This left a lot for speculation and the trial court was perfectly right in adopting a global sum approach.

50. The Respondent's counsel in her submissions urged this court to enhance the amount awarded by the trial court to Kshs.2,000,000 taking into consideration the tender age of the deceased if this court is inclined in adopting the global figure approach.

51. As to whether I should enhance the amount awarded by the trial court, I have reviewed the trial court's assessment of damages for loss of dependency. It is my finding that the damages are not inordinately high or low and neither did the trial magistrate apply wrong principles. I find no basis upon which to interfere with the damages awarded under this head.

52. The other issue was on funeral expenses. The Appellant submitted that the award of Kshs.100,000/- was excessive given the circumstances of the case and guided by the case of Jacob Ayiga Maruja & another v Simeon Obayo (2005) eklr where an award of Kshs.60,000/- was made as funeral expenses. The court is urged to adopt the same amount.

53. Damages in respect of the funeral expenses of the deceased person, are allowed to be recovered by section 6 of the *Fatal Accidents Act*. An expense incurred in relation to the funeral of a deceased is recoverable if it was reasonably incurred. Section 6 provides that;

> " In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought."

54. It is noteworthy that in Jacob Ayiga case (supra) the matter was decided in 2005.

55. There were no receipts that were produced to substantiate the claim for funeral expenses. However, the court in Achenda & another (Suing as the legal representatives/administrators of the Estate of the Late Jophan Achenda) v West Kenya Sugar Company Ltd (Civil Appeal E004 of 2022) [2023] KEHC 18044 (KLR) noted that a perusal of the authorities revealed that where funeral expenses are pleaded, they may still be awarded even though no receipts have been produced to support such expenses. The court proceeded and awarded Kshs.100,000/- as funeral expenses. In Ojilong (Suing as the Legal Rep. of the Estate of Rodgers Ochiko Ojilong - Deceased) v Board of Governors & 3 others (Civil Appeal E001 of 2022) [2024] KEHC 7181 (KLR), the court enhanced the mount of Kshs.100,000/- awarded by the trial court as funeral expenses to Kshs.150,000/-.

56. In light of the above, the award of Shs. 100,000 for funeral expenses was spot on.

57. With the result that the Appeal and cross appeal lack merit and are dismissed. Each party to bear its own costs.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF JUNE 2025.

A.K. NDUNG'U

JUDGE