Apamo & another v Okungu & another (Suing as the Legal Representatives in the Estate of Moses Odiwour Okungu (Deceased)) (Civil Appeal E067 of 2023) [2025] KEHC 10333 (KLR) (10 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10333 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E067 OF 2023

AM MUTETI, J

JULY 10, 2025

BETWEEN

CALVINE OCHIENG APAMO .... 1ST APPELLANT

CAROLINE OUMA AKUMU .... 2ND APPELLANT

AND

EUNICE ATIENO OKUNGU .... 1ST RESPONDENT

JACOB OKUNGU OLIANGA .... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES IN THE ESTATE OF MOSES ODIWOUR OKUNGU (DECEASED)

(Being an appeal from the Judgment /Decree of the Honorable B.A Omollo (SRM) delivered on 25/04/2023 in KISUMU CMCC NO.172 OF 2018)

JUDGMENT

1. The appellants in this matter appealed to this court against the decision of the learned Hon. B.A Omollo SRM who had found them jointly and severally liable to compensate the estate of the late Moses Odiwour Okungu who died in a road accident on the 9th December 2016 along Kisian -Bondo road. The accident involved Motor Cycle Registration No. KMCT xxx Q and Motor Vehicle KCG xxx Z.
2. The appellants were found to have been 100% liable for the accident and the court entered judgment against them as hereunder;-
   a. General damages for loss of dependency in the sum of Ksh. 2,688,000/-
   b. General damages for pain and suffering in the sum of Ksh. 140,000/-

c. Special damages Ksh. 39,238/-

d. Costs of the suit

e. Interest on general damages from the date of judgment until payment in full.

3. The appellants have appealed against the judgment on the following grounds;-

i. That the Learned Trial Magistrate erred in fact and in law by failing to dismiss suit and apportioning 100% liability to the Appellants without considering the Circumstances of the case.

ii. That the Learned Trial Magistrate erred in law and in fact in finding in favour of the Respondent against the Appellant when there was totally no credible evidence or proof of negligence on the part of the Appellant.

iii. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellants did not call any witness to controvert the plaintiff's claim.

iv. That the Learned Trial Magistrate erred in law and in fact in awarding the Respondent Kshs. 140,000/= as damages for pain and suffering which award was excessive as the deceased died on the same day of accident.

v. That the Learned Trial Magistrate erred in law and in fact in awarding the Respondent Kshs. 2,688,000/-; damages under the Fatal Accident's Act for 18 year old which award was too excessive in the circumstances.

vi. That the Learned Magistrate erred in law and in fact in holding that the deceased was qualified as a electrical engineer there was no proof.

vii. That the Learned Magistrate erred in law and in fact in adopting a multiplicand of Kshs. 16,000/= for an electrician which income and occupation was not proved.

viii. That the Learned Magistrate erred in law and in fact-in relying on the maximum number of productive working years which was 42 years in the circumstances and failing to consider vicissitudes of life when awarding damages under the *Fatal Accidents Act*.

ix. That the Learned Magistrate erred in law and in fact in adopting a multiplier of 42 years which was an erroneous estimate of lost years.

x. That the Learned Magistrate erred in law and in fact in calculating loss of dependency using multiplier approach instead of a global award.

xi. That the Learned Trial Magistrate's exercise of discretion in assessment of liability and quantum was injudicious.

4. The appellants have basically raised two issues for determination;-

a. Who was liable for the accident?

b. Whether the damages assessed by the learned trial court were reasonable and comparable in the circumstances of the case.

Appellant's Case.

5. The claim herein as set out in the Plaint dated 11th April, 2018 filed on 18/04/2018 is a claim for damages in negligence on account of fatal injuries sustained by the deceased.

6. The Respondent's contented that on or about 9th December, 2016 the deceased was riding his motor cycle Registration Number KMCT xxx Q off the left side of Kisian - Bondo road at Namba Kapiyo junction area the deceased stopped for a while before joining the Kisian - Bondo road when the Appellant's motor vehicle registration no. KCG xxx Z which was approaching from the Kisian direction was so carelessly, negligently and/or recklessy driven, managed and/or controlled by either one of the appellant or the appellant's driver, agent, servant or employee that it was caused to veer, swerve, move off the road to its left and knock the aforesaid motor cycle Registration Number KMCT xxx Q as a result of which the deceased suffered bodily injuries to which he succumbed and died.

7. The appellants filed a statement of Defence dated 16th May, 2018 and denied that the accident did not occur in the manner expressed in the plaint.

6. The Appellant entered appearance and filed his Statement of Defence on 22/07/2020 and denied that the accident did not occur in the manner disclosed in the Plaint and attributed the cause of the accident to the Deceased's negligence.

7. This being a first appeal, the appellants submitted that under Section 78 of the *Civil Procedure Act*, Cap. 21 of the Laws of Kenya, this court is duty bound to re-evaluate, re- assess and re-consider the evidence adduced and come up with its own conclusions bearing in mind that as an appellate court, it did not have the opportunity to hear the witnesses testify in the first instance before the subordinate. The appellants relied on the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123).

8. The appellants urged this court to consider whether the respondents discharged the evidential burden to prove that they were negligent so as to justify the eventual award by the court.

9. The appellant the appellants contended that the trial court erred in law by finding them liable 100% and awarded excessive quantum of damages under the *Law Reform Act* and the *Fatal Accidents Act*

10. The appellants contended that the witnesses who testified for the respondents were not able to establish negligence on their part thus the trial court erred in relying on their evidence to condemn the appellants to shoulder 100% liability.

11. According to the appellants Pw1 admitted in cross-examination that he did not witness the accident for he was not at the scene at the time of the accident.

12. PW2- PC Edward Ambanga a police officer attached to Maseno police station testified on behalf of the OCS. He stated that an accident occurred on 09/12/2016 along the Kisumu-Bondo road involving motor vehicle registration number KCG xxx Z and motor cycle registration no KMCT xxx Q.

13. That the accident was confirmed vide OB No. 4 of 09/12/2016. That the rider of the suit motor cycle rider died and the case was pending under investigation. The witness also spoke about a pillion passenger who also suffered injuries as result of the accident.

14. On cross examination Pw2 confirmed that he was not the Investigating officer herein and as per the file, the matter is still pending under investigation.

16. According to the appellants there was no eye witness account given to the court as to how the accident occurred.

17. The court however notes from the record Pw4 Godfrey Omondi Onyango who testified on the 13/8/2019 and adopted his statement filed on 18th April 2018 as his evidence in chief was in the company of the deceased when they were hit by the appellants motor vehicle thus the submission by the appellants that there was no eye witness to the accident was not only misleading but also false.

18. Further, the appellants submitted that DW 1 PC John Kipsang stated that he was not the investigating officer and he had come to court to produce the police file and OB extract in respect of the accident. That the Investigating Officer had been transferred to Garissa. That the police visited the scene of accident. That the rider who is the deceased herein was to blame for the accident according to Dw 1. The witness however on cross-examination clarified that it was the driver of the Motor Vehicle KCG xxxZ who blamed the rider for the accident. His attempt to produce the file was scuttled by the respondents' counsel when he objected to the production of the documents.

19. The appellants argued that the Honourable trial magistrate apportioned liability on the Appellants without considering the evidence on record. The appellants did not however point out the particulars of the evidence that they considered to have been ignored by the trial court.

20. Further, it was argued for the appellants that the suit herein from allegations of negligence arising from a traffic accident resulting to fatal injuries to the deceased Respondent.

21. The appellants cited Section 107 (1) of the *Evidence Act*, Cap. 80 Laws of Kenya which states that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

22. It was therefore the duty of the Respondents to prove their allegations on a balance of probabilities. The appellants maintained that this burden was always on the Respondents to prove their case on the balance of probabilities even if the case was heard on formal proof. The appellants relied on the case of Kirugi & another v Kabiya & 3 others [1987] KLR 347) in support of that argument.

23. The appellants maintained that the Respondents were under a legal obligation to prove their case against the Appellant on a balance of probabilities that the Appellant's driver caused the accident through negligent driving. It was not the duty of the Appellant to disprove his liability for the accident.

24. The appellants argued that the trial court was in error in blaming the Appellant for the accident whom they argued was entirely blameless.

25. In the appellants view, this being an adversarial system, it was not enough for the respondents to throw everything at the court and tell it to scrap through and arrive at a favourable decision. The respondents had a duty to persuade the court that they had indeed established their case to the required standard of proof on a balance of probabilities. The appellants maintained the judgement ought to be set aside and quashed.

26. The appellants strongly argued that their appeal should be allowed with costs.

27. In furtherance of their arguments, the appellants relied on the case of Equator Distributors v Joel Muriu & 3 others [2018] eKLR in which the court stated as follows_"...On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eye witness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is upon the court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered. In this appeal, the appellant has not demonstrated to us that the trial court acted on wrong material in giving credence and weight to the police sketch map. In our view, the map has a probative value as it shows the relative positions of

the two motor vehicles immediately after the accident. We find no reason to fault the judge for giving weight to the police sketch map…"

28. The sketch map in the instant case would have been produced by DW1 when he attempted to produce the police file but the court rejected the documents thus this court is unable to tell from the appellants' submissions how they intended the court to rely on a document that was not admitted in evidence.

29. The police file having been listed as one of the defense documents, the appellants ought to have exercised due diligence to ensure that the same was produced however having failed to do so, the trial court was denied the advantage of reviewing the sketch map to verify whether the respondents were to blame for the accident as contended by the appellants.

30. On quantum, the appellants submitted as follows;-

    a) Under the *Fatal Accidents Act*

    The appellants submitted that under the *Fatal Accidents Act*, an award is usually made for loss of dependency. For an award of loss of dependency to be made, evidence ought to be marshalled by the dependants of the deceased. The burden squarely lies with the deceased's dependants to make out a case for an award of loss of dependency to be made.

31. The learned trial magistrate in his judgment opted to apply the multiplier approach in arriving at an award of Kshs. 2,688,000/= for loss of dependency. The appellants contended that the award was manifestly excessive contrary to the evidence adduced during trial.

32. In the appellants view, the award made for loss of dependency was not only excessive but was also an erroneous estimate of damages awardable in view of the evidence tendered during trial.

33. In the appellants view the learned trial magistrate in her judgment adopted a multiplier of 42 years and a multiplicand of kshs. 16,000/= Multiplier and by doing so occasioned an injustice to them.

34. The appellants further submitted that, the learned trial magistrate applied a multiplier of 42 years in calculating the award of loss of dependency under the *Fatal Accidents Act*. While adopting the multiplier of 42 years, the learned trial magistrate observed that the deceased was expected to work up to 65 years. The deceased died aged 18 years old as per the Certificate of Death.

35. The Appellant faults the learned trial magistrate for adopting the multiplier without taking into account the vicissitudes and vagaries of life. According to the appellants, there was no guarantee that the deceased would have worked until the retirement age. In their view the court ought to have adopted a shorter multiplier.

36. The appellants went further to submit that this court has in most cases observed that when adopting an appropriate multiplier, the vicissitudes and vagaries of life ought to be taken into account. The appellants cited the persuasive case of John Muchiri Njoroge & Another vs Prisca Mmbone & Another [20191-KLR where Kamau J observed;

    > " This court agreed with the Appellants that it was erroneous for the learned trial magistrate to have purported to have adopted a multiplier of thirty one (31) years as the multiplier on the basis of the same having been a balance of the deceased's working years. This was because even where a person is expected to retire at sixty (60) years, the vicissitudes and/or vagaries of life do not guarantee him the entire balance of working years".

    However, it is this court's view that the decision cited presupposes that in all probability, the life of an individual is likely to be shortened by vagaries of life. That is not a scientific fact based on any empirical

data to support the view expressed by the Hon. Judge thus there still does exist a possibility of one working till they retire in the natural course of events.

37. The Appellants took the view that the multiplier adopted was based on wrong principles and was too excessive in the circumstances for failing to take into account the vagaries and vicissitudes of life. The appellants therefore invited the court to set aside the multiplier of 42 years adopted by the subordinate court.

38. The appellants contended that taking into account the vicissitudes of life, and considering that the deceased died aged 18 years, the court ought to have adopted a global award instead Multiplicand

39. The Appellant humbly submits that it was erroneous for the trial magistrate to adopt Kshs. 16,000/= noting that no evidence whatsoever was adduced and/or produced (pay slips) to prove the deceased's earnings. According to the appellants it was only pleaded that the deceased was a student at Bondo Technical Training Institute undergoing a diploma in electronic engineering as well as casual labourer earning Kshs. 800/= per day which he used to support his family. There was however no proof of earning produced before court. The appellants argued therefore that it was very unfair for the trial court to rely on a figure of Kshs. 16,000/= without explaining how it had reached at such a figure as there was no proof.

40. The appellants posed the question, What was the learned trial magistrate's basis for adopting a multiplicand of Kshs. 16,000/= noting that no pay slips were produced to prove the deceased's earnings? It was submitted for the appellants that the learned trial magistrate was under duty to analyze the evidence on record so as to come up with the appropriate amount for the multiplicand.

41. The Appellants humbly submit that in the instant case where the deceased's income was not proved, the learned trial magistrate ought to have used global award.

42. In support of their arguments the appellants relied on the case of Chen Wembo, Hanqiangzhou & Kobay Ashi Koji v IKK & H M M (suing as the legal representatives and administrators of the estate of C RK (Deceased) (Civil Appeal 32 of 2014) [2017] KEHC 4070 (KLR), Hon Meoli J. stated: " even where there is evidence that a child was undertaking a professional course in university, was brilliant and promising, the path is always a fraught with imponderables. The speculative nature of the, matter renders the court's exercise of its discretion delicate. More so, as in this case where minimal material is supplied to the court by the claimants".

43. The issue that that arises from the submission of the appellant taken together with the authority cited above is whether the respondents' supplied material that would properly guide the court on the issue of the multiplicand.

44. The appellants went ahead to propose that a global award of Kshs. 1,000,000/= due to inflation rate would have been an appropriate award in the circumstances. In proposing the award, the appellants relied on the case of Kengen Limited Moses M Kombo v Jane Nesunga Khala (suing as the personal representative and Administrator of the estate of Alex Wekesa Nyongesa - Deceased [2017] eKLR where the court awarded Kshs. 500,000/= under loss of dependency for an 18 year -old deceased. The appellants urged the court to re-evaluate the evidence on record and arrive at its own conclusion on what would have been the appropriate award for loss of dependency under the *Fatal Accidents Act*.

45. ii) Under the *Law Reform Act*

The appellants submitted that under the *Law Reform Act*, awards are usually made for Pain and Suffering and Loss of Expectation of Life. The Appellants submitted that the award under this head

was fair and ought not to be disturbed, Ground 4 of the Memorandum of Appeal was therefore erroneous according to them.

46. The appellants concluded their submissions by stating that the award on general damages under the *Fatal Accidents Act* were manifestly excessive to warrant this court exercising its discretion to interfere with the same and make an appropriate award.

Respondents' Case.

47. The respondents argued that the Appeal herein has no merit and the same ought to be dismissed with costs to the Respondents.

48. The respondents urged the court to exercise its jurisdiction as per the decision of the Court of Appeal in Mercy Kirito Mugeti vs Beatrice Nkatha Nyaga & 2 others [2013] Eklr, citing with approval the case of Selle and Another -vs- Associated Motor Boat Co. Ltd & Others [1968] EA 123, in which the court stated that:

> "The court must reconsider the evidence evaluate it itself and draw it's own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular the court is not bound necessarily to follow the trial judge's finding of fact if it appears either that she has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impressed based on the demeanor of a witness is inconsistent with the evidence in the case generally."

49. The respondents further submitted that an appeal to this court from a trial in the lower court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. The appellant is entitled to a re-evaluation of the evidence in a manner akin to a rehearing of the matter.

50. According to them, the trial Court took into account relevant factors in assessing damages thus this court has no business interfering with the same unless the appellant demonstrates that the amount of damages is so inordinately high to render the award wholly an erroneous estimate of damages.

51. The respondents took the position that the trial court fully took into account the relevant factors being the pleadings, evidence on record and the submissions by the Appellants and Respondents and correctly found the appellants 100% wholly liable for the accident and further awarded the Respondents damages commensurate with the age of the deceased at the time of the accident, loss of expectation of life and general damages for loss of dependency as pleaded and proved during trial on a balance of probabilities.

52. The respondents in response to the Appellants issues regarding whether they had proved their case on the limb of liability and damages for the award of quantum in a fatal accident claim under the provisions of The *Law Reform Act* cap 26 Laws of Kenya and the *Fatal Accidents Act* Cap 32 Laws of Kenya awarded by the trial court, reiterated the plaintiffs' written submissions and authorities in KISUMU CMCCC NO. 172 OF 2018 which submissions and authorities have been duly considered by this court.

53. According to the respondents the evidence on record was that the 1st and 2nd Appellants are the registered owners of the suit motor vehicle KCG xxxZ Toyota Hiace Van by virtue of information contained in the copy of records produced as PEXT 5 in the lower court.

54. The respondents went on to submit that the evidence by the eye witness (PW4) and PW2 (Police Officer) together with the documentary evidence produced established that the said accident occurred on the 09/12/2016. The fact was also confirmed by the Police abstract (PEXT 4).

55. The aforesaid accident involved the Appellants' motor vehicle registration number KCJ xxx7 Toyota Hiace Van and the Deceased herein who was lawfully riding a motor cycle registration number KMCT xxx Q off the left side of the aforesaid road according to the eye witness Pw4.

56. The eye witness testified in court vide his adopted written statement which was amended on the 12/03/2019 rectifying the date of the accident to read 09/12/2016. PW4 testified that on the 9th December, 2016 at about 9:00 he was a pillion passenger aboard a motor cycle registration number KMCT xxxQ (which was being ridden by the deceased) from Kaloka to Holo along the Kisian- Bondo road when at Namba Kopiyo junction area they (PW4 and the deceased) had stopped for a while at the junction on the left side of the said road facing Bondo direction so as to wait for the road to clear for them before they could join the tarmac road to Holo when suddenly they were knocked from the right side by a 14 seater matatu registration number KCG xxxZ which was approaching from Kisian direction.

57. The motor vehicle was moving at a high speed and it suddenly lost control and swerved to the far left off the road thereby knocking them down before it stopped 10 metres away. Pw4 testified that they were thrown into the air by the impact and they suffered bodily injuries however. PW4 later learnt that the rider his friend Moses Odiwuor Okungu (deceased) succumbed to his injuries while undergoing treatment at Agakhan hospital, Kisumu.

58. PW4 the (eye witness) blamed the driver of motor vehicle registration number KCG xxx Z for driving too fast in the circumstances, veering/ swerving/moving carelessly off the road, knocking/hitting motor cycle registration number KMCT xxx Q, permitting or causing motor vehicle KCG xxx Z to knock the deceased, failing to keep proper look out for other road users especially in the motor cycle registration number KMCT xxx Q among other reasons.

59. The respondents submitted that on the basis of that evidence the respondents were able to establish on a balance of probabilities that the accident was solely caused by the appellants driver thus the court in finding the appellants liable 100% was correct in its analysis of evidence and that this court should no be minded to interfere with the decision of the lower court on liability.

60. The respondents cited Salmond and Houston on the law of Torts 19th Edition which defines negligence to be "A conduct, not state of mind which involves an unreasonably great risk of causing damage. It is the omission to do something that a reasonable man would. The whole aspect is guided upon those considerations which ordinarily regulate the conduct of human affairs in relation to what they would do or not do."

61. The respondents submitted that the manner in which the appellants drove fitted within the definition of negligence in the book above.

62. According to the respondents, they satisfied the provisions of Sections 107,108,109 and 112 of the *Evidence Act* on the burden of proof. The eye witness who accompanied the deceased when the accident occurred witnessed the accident and tendered direct evidence as to how the accident occurred and how the appellants' driver was negligent in the manner he drove the suit motor vehicle.

63. The respondents maintained that the oral evidence of Pw4 was direct in relation to the facts of the case. The evidence set the test set out under section 62 of the *Evidence Act*.

64. The respondents went on to state that the appellants did not avail either the driver or turn boy who witnessed the accident to testify in rebuttal of the respondents' case instead, the appellants chose to avail DW1 (a police officer PC John Kipsang) who did not witness the accident nor was he the investigating officer to testify orally without adducing any documentary evidence in support of his allegations. DW1 stated during examination - in chief and cross examination that he was not the investigating officer of the case as such he did not know the circumstances of how the accident occurred he could not know and could not tell. The witness further admitted that he did not visit the scene of the accident.

65. According to the respondents that witness was of no assistance to the appellants case thus the respondents evidence remained unrebutted.

66. DW1 also admitted during cross-examination that since he was not the investigating officer, his evidence during examination-in chief was solely based on the police file which was not produced in court as an exhibit. The allegation of the appellants' driver blaming the deceased for the accident could not be proved without the police file. That bit of evidence amounted to hearsay since the driver never testified.

67. Further DW1 also admitted during cross-examination that there was no independent witness who recorded a statement contrary to what was recorded by PW4 the eye witness herein and that no independent witness was also called by the appellant to testify in court in rebuttal of the respondents' case.

68. The respondents thus urged this court to find that based on the above arguments the trial court fully took into account the relevant factors being the pleadings, evidence on record and the submissions by the Appellants and Respondents in arriving at its decision thus there was no misdirection to warrant the intervention by this court on the issue of liability.

Quantum.

69. The respondents submitted that on quantum, this court should be guided by the decision of the the Court of Appeal in Bashir Ahmed Butt vs. Uwais Ahmed Khan (1982- 88) KAR which set out the parameters under which an appellate court will interfere with an award in general damages when it held that: -'An appellate court will not disturb an award for general damages unless it is SO inordinately high or 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...'

70. The same was reiterated in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, where the Court of Appeal held that "...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. "

71. The respondents also urged this court to consider the case of Shabani V City Council of Nairobi (1985) KLR, 516 on the specific issue by the appellants' that the quantum awarded was inordinately high. The Court of Appeal equally held as follows: An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or on a misapprehension of the evidence.

72. The respondents maintained that the award was reasonable and this court should not be minded to interfere with it. The appellants other than arguing that a global award would have been more appropriate, they did not demonstrate that the damages were unreasonably high to warrant interference by this court.

The respondents further emphasized on the need for consistency in awards by the courts. The respondents cited the case of KIGARAGARI -V- AYA [1985] KLR, 273 where the Court of Appeal held:-

a. In awarding damages for personal injury, the courts should consider that there is need to develop consistency in the awards and that the awards should both be within the limits of decided cases and avoid the effect of making insurance cover and fees unaffordable for the public.

b. In order for the appellate court to interfere with the High court award on general damages, it had to be shown that the sum awarded was demonstrably wrong or that it was based on a wrong principle or was so manifestly excessive or inadequate that a wrong principle may be inferred,

73. The Respondents had claimed damages under the provisions of the *Law Reform Act* Cap 26 Laws of Kenya and *Fatal Accidents Act* Cap 32 Laws of Kenya being both dependants of the estate of the deceased and the Legal Representatives of the estate of the deceased (Mother and Father respectively). The fact of their dependency was not disputed by the appellants and they produced a grant of letters of administration in support of their case.

74. In respect of pain and suffering, the respondents submitted that from the evidence on record, the deceased herein suffered the accident on the 16th December, 2021 and sustained serious bodily injuries from which he succumbed and died on the same day as per the Death Certificate produced as PEXT 2 and Post Mortem Report produced as PEXT 3. The respondents submitted that the deceased must have endured excruciating pain as a result of his injuries before succumbing and dying on the same day while undergoing treatment at Jaramogi Oginga Odinga Teaching & Referral Hospital in Kisumu. 75. Accordingly, the respondents submitted that an award of Kshs. 140,000/= as awarded by the trial court was sufficient and the same was not contested by the appellants.

76. The respondents cited the case of General Motors East Africa Limited vs Eunice Alila Ndeswa & another [2015] Eklr where similar award of Kshs. 150,000/= as the award of pain and suffering for a deceased who died the same date of the accident. The respondents urged the court to consider enhancing the award under this head, however this court notes that there was no cross-appeal by the respondents thus the submission unmerited.

77. In respect of loss of expectation of life, the respondents also claimed and pleaded for the award of Loss of expectation of life *Law Reform Act* Cap 26 Laws of Kenya for being dependants of the estate of the deceased but the trial court omitted/ failed to make an award to the respondents under this head with no explanation at all.

78. The respondents therefore urged this honourable court to exercise its inherent powers provided under Sections 1A, 1B& 3A of the *Civil Procedure Act* and award the respondents the award under this head of loss of expectation of life which the trial court failed to award the respondents entitled to be awarded the same under the *Law Reform Act* cap 26, Laws of Kenya for the ends of justice.

79. The respondents anchored their argument under Section 3A of the *Civil Procedure Act* which they submitted to appears to have been introduced to augment the provisions of section 3, vesting in the courts inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse

of the process of the court. The respondents extrapolated the argument and urged this court to find that this power has now been broadened by the introduction in 2009 of the overriding objective in Sections 1A & 1B of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya.

80. The respondents further submitted that the extent of inherent powers of the court was eloquently explained by the authors of the Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14 as follows; "The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

81. The respondents cited the case of Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others [2014] eKLR wherein the Court awarded Kshs. 140,000.00 as damages for loss of expectation of life, and urged that taking into account the tender age of the deceased person herein Kshs. 140,000.00/= would be fair under this head.

82. Further, In the case of Moses Akumba & Another vs Hellen Karisa Thoya [2017] eklr, Chitembwe J. held that an award of Kshs. 200,000/= for loss of expectation of life of a deceased who was a fisherman was not inordinately high.

83. The respondents thus urged the court to consider exercising its inherent power under the law and make an a ward for loss of expectation of life which the lower court did not however award.

84. On loss of dependency the respondents urged the court to find that the multiplier adopted as well as the multiplicand were reasonable and adequately supported by the available evidence considering the fact that the deceased at time of his abrupt death from the road traffic accident did not suffer from any ailment, was of good health thus would have lived fully up-to the retirement age prescribed in law being 60 years.

According to the respondents the appellants did not state in what manner the trial court may have misapprehended the evidence or in what way they fault the said court.

85. PW1's Testimony on record, both oral and adopted written statement clearly indicated that the deceased was a student at Bondo Technical Training Institute undergoing a diploma training in electrical and electronic engineering as well as a casual labourer making an average of about Kshs. 800/= daily. PW1 produced Student Card PEXT 10(a), Student Exam Card PEXT 10(b) and Registration of New Students Form PEXT 10(c) all from Bondo Technical Training Institute which documents confirmed that the deceased was indeed pursuing Diploma training in Electrical and Electrical Engineering course at the institution at the time of his untimely death.

86. The Respondents further called PW2 (Melvin Odhiambo Olero) an electrician employed by Bibox Capital Kenya who testified orally in court while adducing documentary evidence that he has been in

employment since 2014 and that he studied the same course as the deceased. PW2 was called to testify on the earnings of a qualified electrical engineer who studies and finishes his studies. PW2 stated that he was a qualified electrician who has a Diploma Certificate in Electrical Engineering produced as PEXT 12the same course the deceased herein was pursuing at the time of his death. The evidence was relevant in support of the multiplicand.

87. It is important for this court to point out that the multiplicand of Ksh 16000 adopted by the court was premised on that evidence and it clearly was a figure borne out of evidence contrary to the appellants submission that the multiplicand could not be supported.

88. The respondents submitted that this court should not be minded to interfere with the dependency ratio of 1/3 which is the normal dependency ratio adopted by trial courts when dealing with matters concerning an unmarried adult who dies and is survived by his parents and siblings as in this case.

89. The respondents closed their argument by submitting that the calculation for General damages for loss of dependency would therefore work out as follows as per the trial court's findings:- 16,000 x 12 x 42 x 1/3 = Kshs. 2,688,000/=.

    The special damages were not disputed therefore the findings of the trial court on the same according to the respondents should be upheld.

90. The respondents further submitted that in their view the decision of the learned honorable magistrate should be upheld as hereunder;-

    Liability: 100% against the Appellants

    General damages:

    Pain and suffering Kshs. 140,000/=

    Loss of expectation of life Kshs. 140,000/=

    Loss of Dependency Kshs. 2,688,000/=

    Proven special Damages Kshs. 39,238/=

    TOTAL Kshs. 3,007,238/=

Analysis And Determination.

91. The duty of this court as a first appellate court was well settled in the case Selle and Another Vs Associated Motor Boat Co. ltd & others [1968] EA 123. The court is expected to re-evaluate the entire evidence tendered before the trial court and draw its own conclusions therefrom while remembering that unlike the trial court it did not have the advantage of hearing or seeing the witness testify thus due allowance must be made for that.

92. The respondents in this matter called Pw4 Godfrey Omondi Onyango who was in the company of the deceased when the accident occurred. The witness recorded a witness statement which he relied on wholly at the trial as his evidence in chief.

93. The statement reads;- ‘’ ...we had stopped for a while at the junction on the left side of the road facing Bondo direction so as to wait for the road to clear for us before we can join the tarmac road to Holo when suddenly we were knocked from the right side by a 14 seater matatu registration number KCG xxx Z which was approaching from Kisian direction. The aforesaid motor vehicle which was moving at a high speed suddenly lost control and swerved to the far left and off the road thereby knocking us down before it stopped 10 meters away. We were thrown into the air by the impact and we suffered

bodily injuries however I learnt later that the rider my friend Moses Odiwuor Okungu succumbed to his injuries while undergoing treatment at Agakhan Hospital Kisumu. I blame the driver of the motor vehicle registration number KCG xxx Z for driving too fast in the circumstances …"

94. The witness was cross examined and he maintained that the motor cycle was stationery and that the vehicle was moving at high speed when it hit them.

95. The evidence of that witness was not in any way shaken or displaced by the appellants witnesses. The attempt by the appellants to argue that there was no eye witness was therefore calculated to mislead this court in order to interfere with the trial magistrates finding without any evidential basis.

96. The respondents may not have been at the scene but their witness was able to give a detailed account of what transpired at the scene when the accident occurred.

97. The appellants did not call the driver of the matatu which the witness Pw4 had placed blame on. The provisions of Section 107 of the *Evidence Act* that the appellant cited would therefore come into play. The appellant wanted the court to find that the deceased was to blame either wholly or partly, the burden shifted to them after the unchallenged testimony of Pw1 went on record. See Kengere Vs Aisha Motor Dealers ltd $ 2 others (Civil Appeal E007 of 2023) [2025] KEHC 4798 (KLR). The initial burden would lie on the plaintiff (respondents) but once he had established his case the burden would shift to the defendant (appellants).

98. Nothing would have been easier than for the appellants to call the driver of the matatu to testify and counter the testimony of Pw4. The calling of Dw1 in this court's view did not assist in dislodging the respondent's case. Dw 1was not the investigating officer and all he said was that the driver of Motor Vehicle KCG xxx Z blamed the deceased for the accident but he did not say why the said driver could not be called. His evidence in defense was worthless in this court's view. See also Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi $ Another [2005] 1EA 334 where the court held that as a general proposition under Section 107(1) of the *Evidence Act* Cap 80 the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Section 109 and 112 of the Act.

99. The appellants having failed to lead any evidence to displace the case by the respondents, the courts finding of 100% liability on the part of the appellants was merited and is hereby upheld.

100. On quantum, the appellants have taken issue with the multiplicand of Ksh 16,000/- arguing that the same had no basis. The court however notes that the respondents called evidence through Pw3 Melvin Odhiambo Olero who testified that he held a diploma certificate which he produced in evince as proof that he was a qualified in Electrical engineering and that he earned Ksh. 16,000/-.

101. The respondents called Pw3 in a bid to establish what the deceased would have probably earned immediately after leaving college had his life not been brutally cut short through the appellants' negligence. It is the finding of this court that on the basis of the evidence of that witness the court could safely settle on that multiplicand thus this court finds no error on the part of the trial court.

102. The suggestion of a global award in the face of that evidence would have improper since the court would be venturing into the realm of guesswork yet it had before it reliable evidence that established with certainty what the deceased would have earned had he lived to complete his education and venture into the job market.

80. In regard to the multiplier, there was no dispute that the deceased died at the young age of 18 years. The adoption of 42 years as a multiplier was not in this courts view unreasonable. The trade the pursuing

did not lie in the category of highly hazardous jobs that probably one would not make it to the age of 60 years even with the vicissitudes and vagaries of life. The deceased was not shown to have been suffering any disease that threatened his life. The decision by the trial magistrate was a discretionary one and this court would not be inclined to interfere with it without proof that the learned Hon. Magistrate either misdirected himself on a matter of law or failed to take into account relevant matters in arriving at the multiplier. See Ephantus Mwangi $ Another Vs Duncan Mwangi Wambugu (1982-88) 1 KLR 278.

103. Further, it is trite law that in arriving at the multiplier the age of the deceased and the balance of earning life are key considerations. The age of the deceased in this case allowed the adoption of a multiplier of 42 taking into account all, the circumstances. It is evident from the evidence of Pw4 who was with the deceased when the accident happened that the deceased led a careful life as a young man given the fact of him observing traffic rules as he rode unlike make others of his age who would be excited and cruising recklessly on our roads. He probably would have lived a full life were it not for the negligent act of the appellants' driver.

104. The respondents invoked the inherent power of this court and urged the court to consider making an ward of Ksh 140, 000 as damages for loss of expectation of life. The respondents termed this figure to be the conventional award given by the courts under this head.

105. However, this court notes that the respondents did plead for loss of expectation of life and neither did they prefer a cross appeal against the trial court's decision. The law is that a court can only lawfully grant that which is prayed for by a party.

Parties are strictly bound by their pleadings and courts are not at liberty to dish out awards or orders to parties where the party has not specifically sought the order or award. See Daniel Otieno Migore Vs South Nyanza Sugar Co. Ltd [2018] eKLR. The principle ensures that there is fairness in litigation because the opposing party only answers to the claim as presented and the trial court cannot go on a frolic of its own trying to discover or imagine what other prayer should be granted over and above what is specifically prayed for. The courts would end up prejudicing the opposing party who would have not had the fair opportunity to respond to the specific limb of claim. The inherent power of the court cannot be resorted to where a party fails to specifically plead for a certain relief because that would be tantamount to a court descending into the murky waters of litigation without affording the other party an opportunity to be heard contrary to Article 50 of *the Constitution*.

This court therefore declines the invitation by the respondents to award damages for loss of expectation of life since that was not pleaded and there is no cross- appeal in any event.

104. In the end having analyzed the evidence on record and considered all the authorities by the parties, this court has come to the inescapable conclusion that the appeal has no merit on both liability and quantum. The same is hereby dismissed with costs to the respondents.

105. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 10TH DAY OF JULY 2025.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Ms Mukhongo for respondents

No appearance for appellant