Mbogo & another (Suing as the Legal Administrators of the Estate of Joseph Omolo Oloo) v Angaya (Civil Appeal E046 of 2024) [2025] KEHC 12786 (KLR) (19 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12786 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CIVIL APPEAL E046 OF 2024

DK KEMEI, J

SEPTEMBER 19, 2025

BETWEEN

PRISCAH AKINYI MBOGO AND MACKLINE ANYANGO OMOLO (SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF JOSEPH OMOLO OLOO) ..... APPELLANT

AND

STEPHEN OKOTH ANGAYA ..... RESPONDENT

(Being an appeal from the whole judgment delivered by Hon. Stella Wanjiru Mathenge (SRM) on 5th September 2024 in Bondo Civil Suit No. E067 of 2022)

JUDGMENT

1. The Appeal arises from the whole judgment delivered by Hon. Stella Wanjiru Mathenge (SRM) on 5th September 2024 in Bondo Civil Suit No. E067 of 2022.

2. Joseph Omolo Oloo(Deceased) sustained fatal injuries on 15th May 2022 at 3.45 pm while travelling as a passenger in motor vehicle registration number KBA 253Z. He blamed the Respondent or his authorized servant and/or agent for negligently driving the motor vehicle that lost control, veered off the road, and rammed into a culvert. He succumbed to the injuries and passed away on 7th September 2022.

3. Vide the Plaint dated 8th July 2022 supported by his verifying affidavit, the deceased lodged a claim against the Respondent. The Plaint was Amended on 17th January 2023 and filed in the names of the Appellants herein as Legal Representatives of the deceased's estate and on behalf of the estate of the deceased under the *Law Reform Act* and Fatal Accident Act, wherein the Appellants sought: special damages of Kshs. 28,550.00 exclusive of funeral expenses and post-mortem report, general damages, costs of the suit, and interest at court rates. The Appellants pleaded that they were the wife and daughter, respectively of the deceased.

4. In the Plaint, the deceased pleaded particulars of injuries as: fracture of 6th, 7th and 8th ribs with soft tissue injuries due to road traffic accident; injuries to the head; injuries to the chest; injuries to the neck; and injuries to the abdomen. It was in the amended Plaint that the particulars of injuries were deleted but PW2 Priscah Akinyi Mbogo pleaded in her witness statement dated 17th January 2023 at paragraph 4 that the X-ray reports revealed that the deceased sustained head injury, chest injury and coughing blood, neck injury and experienced abdominal pain. She pleaded that the doctors at Sagam Community Hospital informed her that the deceased had sustained fractures on his ribs, lower abdomen, and neck and complained about headaches.

5. In his amended statement of defence dated 9th February 2023, the Respondent pleaded that he was a stranger to the allegations that the Appellants had lodged the suit as the legal representatives of the estate of the deceased and on behalf of the estate of the deceased under the *Law Reform Act* and Fatal Accident Act. He denied being the registered owner of the suit motor vehicle or that the deceased was a lawful passenger on the material date. The particulars of negligence were denied, and pleaded that if at all the said accident did occur, it was wholly caused and/or substantially contributed by the deceased's negligence. He denied the particulars of the claim brought under the *Law Reform Act* and Fatal Accident Act. He pleaded that the suit should be dismissed with costs.

6. Dr. Vincent Mwima (PW1), in charge at Sagam Hospital, stated that the deceased was admitted on 15th May 2022 for complaints of backache. He had soft tissue injuries secondary to R.T.A. He was observed for three days and discharged with no complaints. On being cross-examined, he stated that the deceased had been seen at the facility two hours after the accident. He stated that the deceased had been treated in another facility and that he did not treat the deceased. He stated that the deceased was supposed to undergo a Chest and Pelvic X-ray, but he could not tell if it was done or not. It was his testimony that the deceased seemed to have died approximately four months after the accident. He stated that he did not know if the accident caused the death. He stated that at their facility, the deceased was only given fluids, painkillers, and medication for inability to pass stool, which complication would be related to the accident. He stated that on the discharge date, he had no complaints. On re-examination, he stated that he did not know if the injuries from the accident caused his death, and that the death a few months later could be caused by infection.

7. Priscah Akinyi Mbogo (PW2), the 1st Appellant herein, testified that she was in court to testify over an accident that involved her husband. On being cross-examined, she stated that she was married to the deceased but had no marriage certificate. She stated that they had three children, but she had not filed their birth certificates in court. She stated that it was her brother Japheth who informed her about the accident. That she went to Sagam Hospital the next day to see the deceased. She stated that she had been informed that the deceased was at Ramula Hospital but she did not have the treatment notes from Ramula. She stated that she did not file the X-ray reports for injuries, but that the X-rays were done. She stated that she had medical notes for 23/5/2022, 6/6/2022, and 27/6/2022 from Aluor Health Centre. She stated that there is a connection between the accident and the deceased. She admitted not having produced a receipt to showing that she spent Kshs. 25,000.00 or a receipt for funeral expenses. On re-examination, she stated that she received a call at night. She admitted that she did not file evidence to show that she was married to the deceased. She stated that the deceased sustained head injury, chest injury, neck injury and abdominal pain, and coughed blood. She stated that the deceased was taken first to Ramula, then to Sagam Hospital. That the deceased was also attended to at Aluor and Bondo Hospitals.

8. Albert Odenyo (PW3), a co-passenger to the deceased in motor vehicle registration number KBA 253Z, stated that the motor vehicle was over speeding and fell on the left side of the road. He stated that he lost consciousness upon impact. He stated that the deceased died one month later.

9. Dr. Wanjovu Juma (PW4), a medical officer at Bondo Sub-County Hospital stated that the postmortem was conducted on 30/9/2022 at Lwak Mortuary where it was established inter alia: that there were no external injuries; that fingers were showing dark purplish discoloration showing lack of oxygen supply to those parts; that the lungs were normal; that he had small, hard clots in the pulmonary vessels; the heart was slightly enlarged with small bleeding points on the left ventricle; had accumulated clots in the chambers; head was normal; that on nervous system, there was a dark colored re-organizing left sided sub-dural hematoma showing a clot which had been there for more than three weeks; spinal column was normal. He stated that, in his opinion, there was a cardio-pulmonary event with hemorrhage secondary to a history of trauma that was the cause of death. He stated that the cause of death was simply the clots in the pulmonary vessels and the heart. He noted that there was bleeding in the head which showed trauma in the past. According to him, the cause is an indirect cause of death, and if it were the direct cause, his death would have occurred days after the road traffic accident. He stated that the clots relate to the illness process, and if one is sick and not moving, then clots may appear. On being cross-examined, he stated that he was aware the deceased had been involved in a road traffic accident. He stated that he conducted the postmortem about four months after the accident, where he found the head was normal apart from the hematoma. That he found no external injuries on the head, neck, abdomen, and chest. He stated that there were no fractures, but there was a blood discoloration in the hematoma. He stated that the cause of death was the clots in the heart and pulmonary vessels. He stated that this death could be associated with the road traffic accident indirectly, but not directly. He stated that his conclusions show the cause of death was related to past trauma, though he was not specific that the past trauma was due to the road traffic accident of 15th May 2022. He stated that he could not personally confirm that the death was not a result of the road traffic accident of 15th May 2022.

10. No. 235864 Inspector Maloba (PW5) of Bondo Police Station, while producing the police abstract, stated that the accident was self-involving while the driver was trying to avoid potholes. He stated that the deceased and others were injured. He stated that one person died later.

11. Stephen Okwiri (PW6), a Clinical Officer at Bondo Sub-County Hospital, stated that he had treatment notes for the deceased who was attended to on 22/6/2022. On being cross-examined, he stated that the accident occurred on 15/5/2023, but that the deceased was seen seven days after the accident. He stated that P.Exh 10 shows the deceased sustained soft tissue injuries, but stated that he did not indicate the severity of the injuries. He stated that the degree of soft tissue injuries determines how fast they heal. He stated that the deceased was given painkillers and antibiotics. He stated that the deceased was admitted in the outpatient department and later discharged. He stated that the deceased was sent for X-ray to see if he had fractures, but he had no rib fractures.

12. In his defence and on being cross-examined, Stephen Okoth (DW1) testified that he was the owner of the motor vehicle. He stated that he was the one driving on the material date at a speed of 50Km/h and could see the potholes on the road. He stated that were it not for the potholes, he wouldn't have had the accident. He stated that while avoiding the potholes, he lost control while returning to his lane.

13. The Appellants filed written submissions, which were considered by the learned trial Magistrate. The Respondent did not file written submissions.

14. In her judgment, the learned trial Magistrate held that since the Respondent narrated as to how he was avoiding potholes on the road, while PW5 blamed the Respondent for over speeding, the Respondent was 100% liable for the accident. Regarding the cause of death, the learned trial Magistrate held that the Appellants were unable to establish that the death was connected to the soft tissue injuries he had been treated for and discharged at Sagam Hospital. According to learned trial Magistrate, the chain of

causation broke at the time of discharge from Sagam Hospital, in the absence of a complaint on his chest or head at that facility. The learned trial Magistrate found the deceased had sustained soft tissue injuries which could not be said to be the cause of death as a result of the accident. If death had been proved, the learned trial Magistrate held that the deceased would have been entitled to Kshs. 150,000.00 for pain and suffering, and Kshs. 100,000.00 for Loss of Expectation of Life. On Loss of Dependency, the learned trial Magistrate held that the Appellants had failed to show that they were wives, parents, or children of the deceased to succeed in a claim under Section 4(1) of the Fatal Accident Act. According to the learned trial Magistrate, the Ad litem obtained by the Appellants did not show the relationship between the Appellants and deceased and by having their names on it, did not mean that they were the wives of the deceased. Reliance was placed on the case of Cherotich vs Anzal Communications Ltd (Civil Appeal No. 98 of 2022) [2024] KEHC 2175 (KLR); Rahab Wanjiru Nderitu v Daniel Muteti & 4 others [2016] eKLR and Stephen Kivuti Kiura vs Anastacia Murugi Muthui & Another [2021]eKLR that dependency is a matter of fact and evidence has to be adduced to prove the same. In the end, the learned trial Magistrate held that though the Respondent caused the accident, the accident did not lead to the death of the deceased and went ahead to order the suit dismissed with costs to the Respondent.

15. Aggrieved, the Appellants lodged the present appeal vide the Memorandum of appeal dated 26th September 2024, contending that:

    1. That the learned trial magistrate erred in law and in fact in dismissing the Appellants' claim.
    2. That the learned trial magistrate erred in law and fact in failing to consider the proved injuries as well, which were sustained by the deceased as a result of the accident, in awarding damages.
    3. That the learned trial magistrate erred in law and fact by not considering the pleadings and submissions filed before her.
    4. That the learned trial magistrate erred in law and fact by not considering the oral evidence adduced by the Appellant in court regarding the claim in question.
    5. That the learned magistrate erred in law and fact by failing to consider the documentary evidence and the submissions presented by the Appellant in considering the claim in question.
    6. That the judgement by the learned trial magistrate was against the weight of the need to dispense justice with fairness and thus bad in law.

16. The Appellants pray that the impugned judgment be set aside, an award entered in favour of the Appellants, and costs of this appeal and the suit be awarded to the Appellant.

17. The appeal herein was canvassed by way of written submissions.

18. I have considered the appeal in light of the evidence on record and written submissions filed on behalf of the parties herein.

19. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same. See Selle vs. Associated Motor Boat Co. [1968] EA 123).

20. Odunga J. (as he then was) in China Wu Yi Company Limited vs Ronald Manthi David [2021] KEHC 1626 (KLR) stated that this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyze the same, evaluate it and arrive at its

independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

21. And in Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] e KLR, the court held thus;

> " This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

22. In Ephantus Mwangi and Another vs Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278, the Court of Appeal held that:

> " A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

23. The learned trial Magistrate dismissed the Appellants' suit for lack of evidence that they did not prove that either the Appellants were wives, parents, or children of the deceased as contemplated under Section 4(1) of the Fatal Accident Act. The legal burden of proof was on the Appellants to prove their claim on a balance of probabilities. It was therefore incumbent upon the Appellants to prove their assertions pleaded in the Amended Plaint.

24. The issue for determination is whether the Appellants proved their case as pleaded in the Amended Plaint on a balance of probabilities.

25. Section 107(1) of the *Evidence Act*, Cap 80 provides 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.

26. However, the burden may shift to the Defendant to disprove the alleged claim. This is the evidential burden of proof, which is well captured under Sections 109 and 112 of the *Evidence Act*. See Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another [2005] 1 EA 334.

27. The two concepts are well illustrated by the Court of Appeal in the case of Mbuthia Macharia v Annah Mutua & Another [2017] eKLR, that:

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes an evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced." See Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR,

28. The standard of proof is well captured in the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, where the Court held that:

Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372, discussing the burden of proof, had this to say:

> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, we think it is more probable than not, the burden is discharged, but if the probabilities are equal, it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained."

29. Kimaru J. (as he then was) in William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526 stated that:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposite party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegation that he made has occurred."

30. The learned trial Magistrate held the Respondent 100% liable for the accident, but found that since the cause of death was not proved went ahead to find that the claim was not proved.

31. As regards the issue of awards of general damages , the Court of Appeal in Kemfro Africa Ltd v A. M. Lubia & Another (1988)1 KAR 727 discussed the principles to be observed when an appellate Court is dealing with an appeal on assessment of damages. The Court expressed itself clearly thus:

> The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.

32. It is not in dispute that the Appellants pleaded their claim under the *Law Reform Act* and Fatal Accident Act. Section 4(1) provides as follows:

> Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst those persons in such shares as the court, by its judgment, shall find and direct:
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> Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person.

33. Section 2(5) of the *Law Reform Act* provides:

> The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act* (Cap. 32) or the *Carriage by Air Act*, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

34. Under the *Fatal Accidents Act*, every action brought under the provisions of the Act shall be for the benefit of the spouse, parent, and child of the person whose death was caused as a result of a fatal accident while the *Law Reform Act* makes provisions that the rights conferred under the Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the *Fatal Accidents Act*.

35. The Court of Appeal in Mwangi & Another (Suing as the Legal Representatives of the Estate of the Late Richard Mwangi Gathoni Deceased) v Ngure & Another (Civil Appeal 57 of 2020) [2023] KECA 448 (KLR) (14 April 2023) (Judgment) had this to say:

> " ...it is important to distinguish between damages forming the subject of *Fatal Accidents Act* and those under the *Law Reform Act*. When the victim of a personal injury action has died prior to trial, two distinct claims are possible. A claim can be brought for the benefit of the deceased's estate under the *Law Reform Act* or on behalf of the dependants of the deceased under the *Fatal Accidents Act*. While these claims can be pursued separately, they are often brought together. When a claim is brought for the benefit of the deceased's estate, this is founded on a continuation of the cause of action to which the deceased was entitled at the instant before they died. On the other hand, when a claim is brought on behalf of the dependents, a fresh cause of action is created, although the claim will only succeed if it can be shown that the deceased would have recovered damages if they were still alive. Therefore, a claim under the *Law Reform Act* on behalf of the deceased's estate must be brought by the administrator or executor of the estate.

36. It is trite law that the issue of dependency is a question of fact, and thus, the Appellants were under an obligation to prove the same. In her evidence, PW1 testified that she was married to the deceased, though she did not tender any marriage certificate or birth certificates for the children. The Respondent denied those facts. In her judgment, the learned trial Magistrate found the Appellants had failed to prove the fact of dependency. According to the learned trial Magistrate, the Appellants failed to tender any evidence to show that they were the wife and daughter of the deceased.

37. The Court of Appeal in Joseis Wanjiru v Kabui Ndegwa Kabui & Another [2014] eKLR, stated thus:

> " The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law, it is excluded..."

38. In Stephen Kivuti Kiura v Anastacia Murugi Muthui & another [2021] eKLR L. Njuguna, J held while citing the case of Rahab Wanjiru Nderitu v Daniel Muteti & 4 Others [2016] eKLR:

> " It is trite law that dependency is a matter of fact and evidence has to be adduced to prove the same. Though the respondents listed the dependants, no birth certificates were produced or at the very least, a letter from the chief to show that the children exist. The wife did not tender any evidence to show that she was married to the deceased either under the statute or under customary law. To that extent, I find that no dependency was proved and no award ought to have been made under that head. However, the awards for pain and suffering and loss of expectation of life are upheld, and so are the special damages."

39. I find that the learned trial Magistrate correctly found that the claim under the Fatal Accident Act was not proved.

40. On the awards assessed by the learned trial Magistrate under the *Law Reform Act* though not awarded, I find that the learned trial Magistrate erred in law and fact by failing to find cause of death was proved against the Respondent.

41. The learned trial Magistrate found that none of the doctors confidently stated that the accident caused the death. Reference was made to the deceased's initial treatment of soft tissue injuries and more specifically the backache. According to the learned trial Magistrate, the chain of causation broke at the time of discharge from Sagam Hospital, in the absence of a complaint on his chest or head at that facility.

42. It is noted that PW1 stated that the deceased had soft tissue injuries secondary to road traffic accident but again stated that he did not treat the deceased though the deceased had been treated in another facility. He stated that he could not tell if the x-ray was done on the deceased and that none was in the patient's file. His opinion that the accident did not cause the death of the deceased was based on the patient file and his experience. On re-examination, he stated that he did not re-examine the deceased as he was not working at the facility on 15th May 2022. He stated that he did not know if the accident caused the deceased's death. He actually stated that he needed to look at the post mortem report to give a critical answer.

43. PW4 opined the cause of death were the clots in the pulmonary vessels and heart. He stated that there was bleeding in the head which showed trauma in the past. He confirmed that the clots related to illness process and if one is not moving, then the clot may appear. He stated on cross-examination, that the cause of death was related to past trauma though he was not specific that it was due to the accident of 15th May 2022. He stated that he could not conclude personally that his death was not as a result of the road traffic accident on 15th May 2022.

44. On his part, PW6 stated that the deceased was seen at their facility seven days after the accident. He stated that he did not attend to the patient at Bondo Sub-County Hospital. He stated that he had not indicated the severity of the soft issue injuries. According to PW1, the deceased had no rib fractures.

45. The certificate of death dated 3rd November 202 though not exhibited and the postmortem report dated 30th September 2022 show that the deceased passed away on 7th September 2022 and that the cause of death was cardiopulmonary embolism due to subdural hematoma due to trauma.

46. Premised on the treatment notes from the mentioned hospitals and medical professionals, the learned trial Magistrate concluded that the cause of death was not proved on balance of probabilities against the Respondent, and therefore the Appellants were not entitled to claims under the *Law Reform Act*.

47. Section 48 of the *Evidence Act*, provides for the admissibility of expert opinion as follows:-

1.

1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.

2. Such persons are called experts.

48. The principles relating to expert evidence were elucidated in the case of Stephen Kinini Wang'ondu v The Ark Limited (2016) eKLR, where Mativo J. (as he then was) stated that:-

> " Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, provided it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.
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> While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this:
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> a. Firstly, expert evidence does not 'trump all other evidence'. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with mathematical precision.
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> b. Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
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> c. Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case, which they accept in order to decide which expert evidence is to be preferred.
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> d. Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones."

49. The Court of Appeal in Dhalay v. Republic (1995 – 1998) EA 29 held as follows with regards to expert evidence:

> "Where the expert who is properly qualified in his field gives an opinion and gives reasons upon which his opinion is based and there is no other evidence in conflict with such opinion, we cannot see any basis upon which such opinion could ever be rejected. But if a court is satisfied on good and cogent ground(s) that the opinion though it be that of an expert, is not soundly based, then a court is not only entitled but would be under a duty to reject it." (Emphasis added).

50. In Drake vs. Thos Agnew & Sons Ltd (2002) E.W.H.C. 294, it was held that:-

> "It is my view it's correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it."

51. It is not disputed that the deceased was involved in an accident on 15th May 2022 while travelling as a passenger in the Respondent's motor vehicle. In his re-examination, PW1 admitted that he did not examine the deceased. He stated that he was not working at Sagam Facility at the time. He stated that death a few months later can be caused by infection. He stated that the deceased sustained soft tissue injuries but again stated that he was not able to tell if x-ray was done and he could not see the X-ray. On what basis then would PW1 state that the deceased's death was caused by the accident? I find PW1's evidence not of probative value for the court to place reliance on.

52. Further, PW6 stated that he had not indicated the severity of the soft issue injuries. According to PW1, the deceased had no rib fractures but failed to produce an X-tray evidence. The court finds PW4's evidence was the evidence that on a balance of probabilities established the cause of death as a result of the accident of 15th May 2022. PW4 opined that past history of trauma was the cause of death. He concluded that the cause is an indirect cause and not direct. He opined that the cause of death could be associated with the road traffic accident indirectly.

53. On a balance of probabilities, I find PW4's evidence cogent and of probative value for the court to have placed reliance on. See Kimaru J. (as he then was) in William Kabogo Gitau vs George Thuo & 2 others (2010) 1 KLR 526. In the premises, death was proved as having arisen from the accident of 15th May 2022. The learned trial Magistrate erred in law and in fact in finding that the Appellants were unable to prove death on a balance of probabilities against the Respondent, thus not entitled to an award of damages for pain, suffering and loss of expectation of life. As the deceased had been ferried as a passenger in the Respondent's vehicle, i find that he did not contribute to the accident as he had no control in the manner in which the vehicle was driven and or controlled. As has been stated by Pw4, the chain of causation of the death was attributed to the accident. The Respondent confirmed that he was trying to avoid potholes and lost control of the vehicle. It is instructive that had the Respondent been driving at a low speed the accident could have been avoided. I find that the Respondent was negligent as he owed a duty of care to the passengers that he carried. I find that the Respondent was wholly to blame for the accident and thus I apportion liability to him at 100%.

54. The learned trial Magistrate assessed damages under the heads of damage for pain and suffering at Kshs. 150,000.00 and loss of expectations of life at Kshs.100, 000.00. It is trite law that awards of damages is a discretion of the trial Court.

55. I find the trial court did not act on a wrong principle of law or misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous

estimate of the damages. See Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000. I find no reasons to interfere with the award for being reasonable and sufficient compensation.

56. On special damages, the Appellants had pleaded for medical report at Kshs. 3,500, search at Kshs. 550, postmortem fee, funeral expenses and Ad Litem expenses. The learned trial Magistrate found the only awardable amounts would have been Kshs. 3,550(medical report and search fee). No receipt was provided for the Ad Litem noting that it is court document where receipts are issued. No receipt was tendered for the postmortem. For the funeral expenses, it will be noted that PW2 never led any evidence in Court. The award of Kshs. 3550.00 is maintained, and in any case the Appellants have not challenged the award in this appeal.

57. Given the foregoing observations, I allow the appeal in the following terms:

    a. The appeal is partially allowed.

    b. Liability is apportioned to the Respondent at 100%.

    c. The learned trial Magistrate's finding that the Appellants' claim under the Fatal Accident Act had not been proved is upheld.

    d. The learned trial magistrate's finding that Appellants claim under the *Law Reform Act* was proved is upheld and that the award of damages shall be as follows:

        i. Kshs. 150,000.00 for pain and suffering

        ii. Kshs. 100,000.00 for Loss of Expectation of Life.

    e. The Appellants are awarded half costs in this appeal as well as full costs in the lower court

    It is so ordered.

DATED, SIGNED, AND DELIVERED AT SIAYA THIS 19TH DAY OF SEPTEMBER 2025.

D. K. KEMEI

JUDGE

In the presence of:

Ms. Achieng.....for Appellants

Ms. Raburu..... for Respondent

Okumu..... Court Assistant