



**Maingi & another (Suing as the legal representatives of the Estate of Kelvin Maingi Leonard)
v Kyalo (Civil Suit 17 of 2018) [2024] KEHC 2728 (KLR) (13 March 2024) (Judgment)**

Neutral citation: [2024] KEHC 2728 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 17 OF 2018
FROO OLEL, J
MARCH 13, 2024**

BETWEEN

**MICHAEL MUTUNGA MAINGI & MARGARET WAMBUI MWANGI (SUING
AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KELVIN MAINGI
LEONARD) PLAINTIFF**

AND

CHARLES MAUNDU KYALO DEFENDANT

JUDGMENT

A. Introduction

1. This Suit herein was initiated by way of Plaint dated 13.8.2018 wherein the Plaintiff^s sought the following orders; Special damages of Kshs.347,450/=, General damages under the Fatal Accident Act and the Law Reform Act plus Costs of the suit and interest.
2. The plaintiffs averred that they were the legal representative of the estate of the late PASKA NZIOKA MUTUNGA (Deceased). On 20.12.2015, the deceased was lawfully travelling in Motor Vehicle Registration number KBZ 687 F (hereinafter referred to as the 1st suit Motor vehicle) along Mombasa - Nairobi road near Mtito wa Mawe area, when the defendant either by himself, driver, servant or agent is said to have negligently and in a zig zag manner managed motor vehicle registration number KCA 524 Z (2nd suit motor vehicle-lorry), that he caused it to violently collide with the 1st suit motor vehicle as a result of which the deceased sustained fatal injuries.
3. The plaintiffs further blamed the defendant for being negligent and particularized the same. The deceased died at a prime age of 30 years and was working with Ethics & Anti-corruption Authority earning a gross salary of Kshs.180,665/= per month. The deceased estate was survived by his father MICHAEL MUTUNGA MAINGI, wife MARGARET WAMBUI MWANGI and daughter THERESIA ETANA NDINDA, who as a result of this accident, were robbed of their breadwinner



and had suffered great loss and damage. They therefore prayed that they be awarded damages as prayed for in the plaint.

4. The Defendant filed his statement of defence on 21st September 2018, where he denied and traversed all the averments made in the plaint. In the alternative and without prejudice to what was pleaded in his statement of Defense, the Defendant further blamed the driver of the 1st suit motor vehicle for causing the accident, due to her negligence, carelessness and/or recklessness, which were particularized. The suit as filed was therefore incompetent, defective, fictitious, misdirected and constituted an abuse of the process of the court. The same ought therefore to be dismissed. The Plaintiff's further did file their reply to defence on 24.09.2018 reiterating the contents of the Plaint and put the defendant to strict proof to the contrary.

B. Evidence at Trial

5. The Plaintiff called two witnesses. PW1 Margaret Wambui Mwangi testified that the deceased was her husband and he unfortunately had been involved in a road traffic accident, which occurred on 20.12.2015 and sustained fatal injuries. She adopted her witness statement dated 15.08.2015 and further stated that she did not witness the accident. It was her testimony that her husband was 30 years old as at the time he died and they were blessed with a child, named Teresia Ndinda who was 9 months old as at the time of the accident. Her husband was an officer at Ethics and Anti-Corruption Commission and used to earning a gross salary of Kshs 180,000/= per month. She further testified that Michael Mutunga Maingi was her father in law and the mother in law is called Teresia Mutunga. The deceased was the head of the family and provided all the basic needs of the family. He would support them by buying farm inputs and sending monthly stipend of up to the tune of Kshs.20,000/= per month.
6. PW1 further testified that, they incurred funeral expenses, which she also claimed, she produced all the documents filed in her list of documents as Exhibit P1 to P12 and reiterated that the untimely death of her husband immensely affected his family and parents and prayed to be awarded damages as sought for in the plaint.
7. Upon cross examination, PW1 stated that she did not witness the accident and was not aware of the circumstances leading to the accident. She said her husband was the owner of the 1st suit motor vehicle motor vehicle and in her statement she had blamed the driver of the 2nd suit motor vehicle for causing the accident. She was referred to look at both police abstract and she confirmed that as per the said police abstracts, it was indicated that the driver of the 1st suit motor vehicle was to blame for the accident.
8. She reiterated that she was the wife of the deceased but had not filed any document in court to prove the same. Her husband worked at EACC and to prove the same she had filed his pay slip but not his employment letter. The deceased at the time of his death was earning Kshs 180,000/=, which after deduction left a net pay of Kshs 81,240/=. She also had not produced any documents to show that the deceased used to support his parents.
9. In re-examination, PW1 stated that her husband was a passenger and not the driver in the 1st suit motor vehicle. They had conducted a customary marriage and in the birth certificate of Teresia Ndinda, produced into evidence, the deceased was listed as her father. She also reaffirmed that in the deceased's pay slip, the gross salary earned was Kshs.180,655/=.
10. PW2 Lawrence Mutinda Makau, testified that he knew the deceased, who was his friend. On 20.12.2015, he had been involved in an accident, and he was a passenger in the 1st suit motor vehicle with the deceased, when the accident occurred. On the material day, they were three passengers in the



1st suit motor vehicle and were from Machakos heading to Nairobi at around 11pm. The deceased was seated on the left front seat. As they were travelling, they found a lorry which had stalled on the road and decided to overtake it, while overtaking, the 2nd suit motor vehicle, which was lorry used to ferry sand emerged from the opposite direction, their driver tried to swerve back to its lane, but he also noticed that the lorry was also moving unsteadily in a zig zag manner and was over speeding, at which point an accident occurred in the middle of the road.

11. It was his further evidence, that they had finished overtaking the stalled lorry but had not gotten back to their lane, when the accident occurred. He lost consciousness after the accident and did not know if the deceased died in hospital or at the scene of the accident. He blamed the driver of the lorry who he said should have swerved to avoid the accident. The said driver did not give way nor did he move off to the left shoulder of the road.
12. Upon Cross examination PW2 stated that as at the time of the accident, the Nairobi Mombasa highway had not been dulled. The deceased was the co- driver, while he was at the back seat chatting with the driver and the deceased and therefore could see the front view well. The driver of the 1st suit motor vehicle, wherein he was a passenger saw a lorry that was stuck on the road and started to overtake and it was at that point that an accident did occur in the middle of the road. PW2 was referred to his witness statement and he confirmed that, therein he blames both drivers for causing this accident. PW2 also confirmed that his name was not in the police abstract produced, but he had also been issued with an abstract which he had used in his case. He also did not have his statement recorded at the police station, but reiterated that he was involved in the said accident, got injured and was rushed to hospital.
13. In reexamination, PW2 confirmed that he was a passenger in the 1st suit motor vehicle and that the police abstract dated 20.12.2015 indicated that there was one unknown male passenger & one unknown female driver in the said 1st suit motor vehicle. The deceased herein had also been indicated as a passenger.
14. The Defendant called two witnesses. DWI Charles Maundu Kyalo, confirmed that he was the owner of the 2nd suit motor vehicle. He adopted his witness statement and produced all the documents filed in his supplementary list of documents as Defence Exhibits. On 20.12. 2015, he was called by his driver who informed him that they had gotten into an accident at Mtito Mawe along Nairobi Mombasa road. He went to the scene of the accident, and saw that indeed his lorry (the 2nd suit motor vehicle) which was from travelling from Nairobi direction toward Machakos had collided with a small car (the 1st suit motor vehicle) which was coming from the opposite direction. The accident/point of impact occurred on the lane of the lorry and he blamed the driver of the 1st suit motor vehicle for causing the accident based on what he saw at the scene of the said accident.
15. Upon Cross examination, DW1 stated that he was not the driver of the 2nd suit motor vehicle, but was called at around midnight and it took him about 15 minutes to get to the scene of the accident as he was around Athi River area. At the scene, the 2nd suit motor vehicle was partly off the road but on its lane and the motor vehicles were not entangled together, the lorry was damaged on the front driver's side while the 1st suit motor vehicle was damaged on the whole front area. He found the injured had been taken to hospital and the police were at the scene of the accident. The 2nd suit motor vehicle was not loaded with goods as at the time of the accident and his driver did not sustain injuries. DW1 blamed the driver of the 1st suit motor vehicle for causing the accident as she was driving on the wrong lane/ side. Upon reexamination, DW1 stated that when he arrived at the scene of the accident, the two-suit motor vehicles had not been removed from the scene of the accident and that there was a police road block which was about 100m away from the point of impact.



16. DW2 TITO NZIOKA, testified that on the material day, he was the driver of the 2nd suit lorry, and further adopted his witness statement. DW2 blamed the driver of the 1st suit motor vehicle because she was overtaking over a bridge, when it was not safe to do so. He said he had just passed a police road block and left it about 200m behind when he saw the small car overtaking coming towards Nairobi. The said car was overtaking a trailer, which too was moving but before the small car could finish overtaking the trailer, it hit the trailer and lost control, thereby rolling on to his side. It was his evidence that he saw what transpired and to avoid the said accident, he moved off the road, but the 1st suit motor vehicle still came to his lane as it had lost control and violently collided with the 2nd suit motor vehicle. If the driver of the 1st suit motor vehicle had not lost control, she would have managed to pass as he had given away. He was not to blame for this accident and prayed for the suit to be dismissed.
17. Upon Cross examination, DW2 testified that the accident occurred between the two suit motor vehicles, and it was the 1st suit motor vehicle, which had passengers. The police came and first rescued the passengers in the 1st suit motor vehicle before he was rescued. From the roadblock he had moved about 200m and was driving at about 30km/hr, when the accident occurred. DW1 was shown the investigation report and he opined that he did not agree with the contents thereof. He confirmed that the issue of the trailer being overtaken was not mentioned in the abstract, nor was the said trailer stopped at the police road block.
18. His evidence was based on his eye witness account of the accident and his evidence was accurate. To avoid the accident, he had partially swerved off the road but the 1st suit motor vehicle came and collided head-on with the 2nd suit motor vehicle. He reiterated that the 1st suit motor vehicle hit the axel of the trailer it was overtaking, just before the Cabin and it threw the 1st suit motor vehicle onto his lane causing it to smash into the 2nd suit motor vehicle on the driver's side. In reexamination, DW2 reiterated that he was not speeding as he had just cleared the police road block and it was the 1st suit motor vehicle that came to his lane, where the accident occurred despite trying to move off.

B. Parties Submissions

I. The plaintiff submissions

19. The Plaintiff filed submissions dated 24.07.2023 wherein they submitted mainly on two main grounds. On liability, it was submitted that 1st suit motor vehicle had already overtaken the motor vehicle ahead of it and was rejoining its lane but since the defendant's driver was over speeding, he was unable to slow down to give way thus the head of collusion occurred. In addition, the Plaintiff did contend that there was no other vehicle involved in the accident as alleged by DW2 as those details would have been captured in the police abstract and the 3rd motor vehicle (lorry/ trailer) stopped by the police officers who were a few meters ahead at the road block.
20. The plaintiff further submitted that the testimony of DW2, that he was driving at 30km/hr was complete falsehood as it is impossible at such a speed for an accident to occur, that lead to the death of two people and serious injuries on one victim. It was therefore submitted that the Defendant was 100% liable and should be so held by this honorable court.
21. On quantum, while relying on the case of Douglas Ooga Nyansimara vs Sammy Mutunga Mkau & Another [2016] e KLR it was submitted that an award of Kshs 150,000/= for pain and suffering would be sufficient. On loss of expectation of life, while relying on the case of Johnes Eshapaya Olumasayi & Another vs Minial H. Ialji Koyedia & Another (HCC 1368 of 2006) and Le Tayoro & Another vs JK (Civil Appeal no 13 of 2020) It was submitted that an award of Kshs 300,000/= would be sufficient as the deceased herein died at the age of 30 years.



22. On loss of dependency, it was submitted while relying on the case of Berly Betha Malowa Were vs Kenya Ports Authority (MSA HCCC no 246 of 2009) and VKM (legal representatives if SM) vs Alfonso Muteria and County Council of Tharaka Meru (HCCC No 133 of 2008) that the deceased was an employee of the Ethics and Anti-Corruption Commission earning a gross pay of Kshs 180,665/= and this was proved/supported by the payslip that was produced in Evidence. The deceased was survived by a wife, one child and his parents, and therefore had dependents within the meaning of section 4 of the *Fatal Accidents Act*. The Plaintiff recommended 2/3 of the salary be used in calculating the award under this head and life expectancy of 30 years. The Plaintiff prayed for an award to be calculated as $Kshs.180,655 \times \frac{2}{3} \times 12 \times 30 = Kshs.43,357,200/=$. The Plaintiff contended that they had pleaded and proved special damages to the tune of Kshs.347,450/= and prayed that Judgement be entered for this sum plus costs and interest.

(ii) The Defendant submissions.

23. The Defendant filed submissions dated 25.09.2023. On liability, the defendant did submit that that the police abstracts produced by the Defendant dated 20.12.2015 and the one produced by the Plaintiff dated 30.12.2018 both blame motor vehicle KBZ 687 F for the accident therefore the deceased should be held 100% for his misfortune.
24. In addition, it was submitted that while PW2 claimed to be an eye witness to the accident, his name was not in the two police abstracts produced into evidence and further he did not produce any document to place him at the scene of the accident. Further, that during cross-examination, PW2 confirmed that the 1st suit motor vehicle was overtaking but this was not brought out in his witness statement thus he could not be relied on as being a truthful witness. PW2 had also alleged that the suit lorry was over speeding, yet it became clear in evidence presented that the said motor vehicle has just come from a police road block where it had been stopped a few meters to the scene of the accident thus could not have gained speed. PW2 therefore did not prove any negligence on the part of the Defendant but to the contrary it was actually proved by evidence that the accident did occur in the lane of the suit lorry and blame laid on the driver of the 1st suit motor vehicle.
25. It was submitted that the evidence of the defendant witnesses was consistent on how the accident occurred. Reliance was placed on the cases of Constance Pili Stephen vs Abdalla Omar & another [2016] Eklr, Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] e KLR, Catherine Wambui Njogu vs Jacob Mash Shake & Another [2019] e KLR and Benter Atieno Obonyo vs Anne Nganga & Another [2021] e KLR.
26. On Quantum, it was submitted that had the case against the Defendant been proven then an award of Kshs.10,000/= would be sufficient for pain and suffering as the deceased died instantly. On loss of expectation of life, it was contended that an award of Kshs.100,000/= would have been sufficient.
27. On the award under the Fatal Accident award, it was submitted that the deceased was earning Kshs.181,240.25/= per month upon deductions and given the increased incidences of uncertainties of life, a multiplier of 20 years would be sufficient. On dependency, the Defendant contends that no documentation was produced to prove dependency or that the wife and child used to be supported by the deceased therefore it was contended that an award of Kshs9,748,830/= calculated as $12 \times 20 \times 181,240.25 \times \frac{1}{2}$ would be sufficient. The award of special damages had been proven and the plaintiff would have been entitled to that award of Kshs 347,450/=.
28. But since negligence on the part of the Defendant had not been proved, the defendant did pray that this suit be dismissed with costs.



D. Analysis & Determination

29. I have considered the Pleadings and evidence before this court and find that the issues for determination are;
- a. Who is liable for causing the accident and to what extent?
 - b. Whether the Plaintiff is entitled to General Damages under the *Fatal Accidents Act* and *Law Reform Act*.
 - c. Whether the Plaintiff is entitled to Special Damages
 - d. Who should bear the costs of this suit.
30. It is not in contention that an accident occurred on 20.12.2015 along Mombasa Nairobi road near Mito wa Mawe between Motor Vehicle Registration number KBZ 687 F and motor vehicle registration number KCA 524 Z as a result of which the deceased sustained fatal injuries. The *Evidence Act*, cap 80 of the Laws of Kenya at Section 107 and 109 provide as follows;
107. Burden of proof
- (1) 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.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
109. Proof of particular fact
- The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
31. I also refer to The halsbury's laws of England, 4th Edition, Volume 17 at para 13 and 14 where it states that;
- “The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
- {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence.”



32. In the case of Evans Nyakwana Vs Cleophas Rwana ongaro (2015) eKLR it was held that

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purpose of section 107(i) of the Evidence Act, Chapter 80 laws of Kenya. Furthermore the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side.”

33. On the first issue of liability, PW2 and DW2 both testified that they were in the two suit motor vehicles and witnessed or were directly impacted by the said accident. The deceased herein according to the testimony of PW1 and PW2 was a passenger in the 1st suit motor vehicle. This evidence was corroborated by the police abstracts dated 25.12.2015 and 30.06.2018 that were presented before the court. PW1 was not an eye witness but PW2 was and in his evidence in chief blamed the driver of the suit lorry for this accident, but in cross examination changed tune and blamed both drivers for the accident.

34. In cross examination PW2 did state that, “our driver saw a lorry stuck on the road and started to overtake, the accident occurred immediately after overtaking in the middle of the road.....in my statement I blamed both drivers. In re examination the said witness did further state that;

“The deceased was not in control of the motor vehicle and I had a clear view of the front and saw how the accident occurred. The lorry was at high speed and the accident occurred in the middle of the road”

35. According to the police abstract dated 25.12.2015, the driver of KBZ 687 F was to blame for the accident. In the same abstract, it is indicated that an unknown female was the driver of the motor vehicle and that the deceased herein was a passenger thus corroborating the evidence of PW1 and PW2.

36. DW1 also testified that he was called by DW2 and went to the scene of the accident where he found that indeed an accident involving his lorry had occurred. It was his testimony that, “At the scene the lorry was from Nairobi, while the small car was from the opposite direction. Accident occurred on the lorry lane and the Athi River traffic police were at the scene.” In cross examination DW1 reiterated his evidence and further stated that, “The lorry was partially off the road {But on its lane}. Accident occurred on the lorry lane.”

37. DW2 also did testify and blamed the driver of the 1st suit motor vehicle for overtaking over a bridge when it was not safe to do so. He had just passed/left a police road block barely 200meter behind when he saw a the 1st suit motor vehicle overtaking toward him and on his lane. His evidence verbatim was that, “The trailer too was moving, before the small car could Finnish overtaking, it hit the trailer’s axel. The small car lost control and started rolling on my side, when I saw what happened, I moved off the road, abit, I was still at gear 3, the small motor vehicle came and hit the lorry..... if the KBZ 687F driver was in control, I had moved off & he/she would have passed.” In cross examination DW2 reiterated that he saw the accident occur and his version of events was accurate. He had partially swerved and moved off the road, when the suit motor vehicle came and hit the suit lorry



38. The abstract dated 25.12.2015 indicates under the result of the investigations or prosecutions head (if known) that ; “CASE PUI” , however the abstract dated 30.6.2018 indicates under the result of the investigations or prosecutions head (if known) that ; “KBZ 687 IS TO BLAME.”
39. While the evidence of PW2 and DW2 are contradictory in nature, I did observe the demeanor of both witnesses and while the both appeared honest, DW2 was more assured in his evidence and more cogent as to what transpired. Both witnesses placed a third motor vehicle (a lorry used to carry sand and/ or trailer) at the scene of the accident. PW2 evidence implied that the lorry has stalled on the road (implying a mechanical breakdown) and that they were overtaking the said lorry when immediately after finishing to overtake an accident did occur in the middle of the road. On the other hand, DW2 evidence was that the suit motor vehicle was overtaking a trailer over the bridge, when it lost control, hit the trailer’s front axle, its driver lost control and started rolling towards him. He tried to swerve but the suit motor vehicle came and crushed into the front of his lorry.
40. In the case of Grace Kanini Muthini vs Kenya Bus Service Ltd and Another HCC 4708 of 1989, the court stated as follows;

“On liability, the Plaintiff did not adduce any evidence beyond stating that the accident was reported to Police. She produced in evidence a Police Abstract of the accident. This document indicated that on 15th August, 1988 at 2.20p.m. an accident occurred on 1st Avenue, Eastleigh and General Waruinge junction involving motor vehicle KVZ 919 owned by the first defendant and driven by the second defendant and one Muthini Ndunda, the deceased. The said Muthini Ndunda is described therein as a pedestrian and the injuries are said to have been fatal. This document does not improve the case of the plaintiff. All that is recorded therein is the fact of an accident involving the deceased and the 1st defendant’s motor vehicle which was being driven by the 2nd defendant.....

What is disputed is whether he sustained the fatal injuries as a result of his own negligence or as a result of the negligence of the driver, or partly as a result of his negligence and partly as a result of the driver’s negligence. The Plaintiff’s evidence does not shed any light on this disputed fact. And the defendant preferred not to offer any evidence. If the defendant had the burden of proof, I would have unhesitatingly presumed some adverse fact against him. But he did not bear the burden of proof. It was on the plaintiff and she had to prove her case on a balance of probabilities. On the undisputed facts, it is entirely probable that the accident was caused by the negligence of the second defendant. It is equally probable that it was caused by the negligence of the second defendant. And it is also equally probable that it was caused partly by the negligence of the deceased. Without the advantage of divine omniscience, I cannot know which of the probabilities herein coincides with the truth. And I cannot decide the matter by adopting one or the other probability without supporting evidence. I can only decide the case on a balance of probably if there is evidence to enable me to say that it was more probable than not that the second defendant wholly or partly contributed to the accident. There is no such evidence. In the premises, I must, not without a little anguish, dismiss the Plaintiff’s suit on the ground that fault has not been established against the defendants.....” See *M’mbula Charles Mwalimu v Coast Broadway Company Limited* [2012] eKLR.

41. Similarly, in *Lakhamshi Vs Attorney General* (1971) EA 118 it was held that:

“A judge is under a duty when confronted with conflicting evidence to reach a decision on it and inmost traffic accidents , it is possible on a balance of probability to conclude that



one or other party was guilty, or both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the Centre of the road, the other must be negligent in failing to take evasive action. It is usually possible, although extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them.

42. Under the circumstances of this case, indeed if there was a lorry, which had a mechanical problem and was left unattended to on the road, at least the traffic police who were in the vicinity and both Defendants witnesses would have confirmed this as a fact, and its owner/driver charged in court for negligence. It's details also would have been captured in either of the police abstracts produced. This was not the obtaining position and in all likelihood the 1st suit motor vehicle was overtaking a moving lorry/ trailer as described by PW2 and/or DW2 and that is why its registration or involvement in this accident was not captured.
43. This court too cannot independently confirm and/or verify that the 1st suit motor vehicle hit the trailer axle and that caused it to roll and ram into the suit lorry. What the evidence clearly brings out is that the 1st suit motor vehicle driver was at fault as she was overtaking over a bridge, when it was not safe to do so and could not manage to finish overtaking the lorry and/or trailer and safely swerve back to its lane. As a result, she rammed into the suit lorry, which was on its rightful left lane enroute to Machakos town and therefore the said driver of the 1st suit motor vehicle must bear liability for this accident.
44. PW2 evidence that the suit lorry was being driven at high speed in a zig zag manner too, is not logically supported by the evidence on record. The suit lorry had just been stopped at a police road block barely 200 - 300m before the accident occurred, it also explains the immediate presence of police officer the witnesses placed at the scene of accident. The court takes judicial notice that within such a short distance it is not possible for the lorry to have attained high speed as alleged. Further as to whether he was moving at 30km/hr or at a higher speed too does not tilt the scale in favour of the plaintiffs, as it was the 1st suit motor vehicle that moving at high speed while overtaking over a bridge, when it was not safe to do so. Ultimately and unfortunately the said suit motor vehicle rammed at high speed into the oncoming lorry and the said accident caused fatalities.
45. On a balance of probably and based on the evidence adduced, I find that it was more probable than not that the driver of the 1st suit motor vehicle, who also passed on was wholly negligent and caused this accident by overtaking when it was not safe to do so and proceeded to ram into the suit lorry, which was on its rightful lane. In the premises, I must, not without a little anguish, dismiss the Plaintiff's suit on the ground that fault has not been established against the defendants.
46. This court has a duty to assess the damages in a way it would have in the event the claim was successful which I will do herein below. As regards special damages, the amount of Kshs.347,450/= was not disputed by both parties. The court was able to consider various receipts that were produced for the funeral home, clothes, food, burial expenses, motor vehicle search, and for obtaining the limited grant. They total to Kshs.347,450/= which was pleaded and proven thus awarded.
47. On the award of general damages, it is not disputed that the deceased was an employee of Ethics and anti-corruption commission, earning approximately Kshs.180,655/= and was aged 30 years. It was proved that the deceased was married and was blessed with one child. The certificate of confirmation of grant issued too does confirm that his father was a co administrator to his estate, and a dependent as defined by section 4 of the Fatal reform Act.



48. In respect of awards for pain and suffering and loss of expectation of life, the guiding principles are well settled. In *West Kenya Sugar Co Limited v Philip Sumba Julaya* (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR) it was held that: -

“...As regards damages awarded under the *Law Reform Act*, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. In addition a plaintiff whose expectation of life has been diminished by reason of injuries sustained in an accident is entitled to be compensated in damages for loss of expectation of life. The generally accepted principle is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident...”

49. The first limb is that of pain and suffering. According to the police abstracts, and the evidence adduced, the deceased died on impact of the accident and no evidence was led to prove otherwise. I am guided by the finding of the court in the case of *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another* (Suing as the legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where the court observed that:

“...The conventional award for loss of expectation of life is Ksh 100,000/- while for pain and suffering the awards range from Ksh 10,000/= to Ksh 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

50. Looking at awards made under loss of expectation of life, the Court in the case of *Rose v Ford* [1937] AC 826, held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further in *Benham v Gambling* [1941] AC 157 it was held that-

“In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.” (emphasis added).

51. In the case of *Acceler Global Logistics v Gladys Nasambu Waswa & another* [2020] eKLR, Mativo, J upheld an award of Kshs. 50,000/= where the deceased was said to have died on the spot, as did Hon Majanja, J in *Sukari Industries Limited v Clyde Machimbo Juma* [2016] eKLR where he reduced an award of Kshs 150,000/= for pain and suffering to Kshs.50,000/=. In this case since the deceased died on the spot, a sum of Kshs. 50,000/= for pain and suffering would have been sufficient in the circumstances. On loss of expectation of life, this court finds that an award of Kshs.100,000/= would have been sufficient.

52. On loss of dependency, I am guided by the observation of the Court of Appeal for East Africa in the case *Chunibhai J Patel and Another vs PF Hayes and Others* [1957] EA 748, observed 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 dependent's, 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 dependent's. 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.”

53. From the deceased pay slip admitted into evidence, the deceased earned a salary of Kshs.180,665/= per month with a net salary of Kshs.81,240/=. The deceased was 30 years old at the time his death. Being that there was no evidence of previous illnesses, or incapacity, he would have most likely worked up to the age of retirement, but also subjected to vagaries of life. PW1 evidence was that the deceased was the family bread winner and used to support his parents. In our Kenyan context, that hold true. Therefore I would have awarded the plaintiffs loss of depedancy as follows; $2/3 \times 25 \text{ years} \times 12 \text{ months} \times \text{Kshs.81,240} = 16, 248 000/=$.

Disposition

54. In the premises, and having considered all the evidence adduced I do find that the Plaintiff has failed to prove that the defendant and/or his driver were liable for causing the accident which occurred on 20.12.2015, which accident lead to the demise of their loved one. The driver of the suit motor vehicle registration Number KBZ 687F was to wholly blame for the same. The upshot is that the suit against the defendant is dismissed with costs.

55. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 13TH DAY OF MARCH, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 13TH DAY OF MARCH, 2024.

In the presence of;

Mr. Kaminda for Appellant

Mr. Mutua for Respondent

Sam Court Assistant

