REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 3 OF 2016

1. **FAUZIA SHABAN**
2. **UMMISITI MBARAK (Suing as the Administrators ad litem of**

MBARAK MOHAMED SALIM ....PLAINTIFFS

VERSUS

SHEILA PROPERTIES LIMITED......................1ST DEFENDANT

ABDULSAMAD ABEID .... 2ND DEFENDANT

CORAM: Justice R. Nyakundi

Khatib Advocates for the Plaintiff

Kishore Nanji Advocates for the Defendants

JUDGMENT

The plaintiffs **Fauzia Shaban, Ummisiti Mbarak** on behalf of the estate of the deceased (of **Mbarak Mohamed Salim**) commenced the claim against the defendants **Sheila Properties Ltd** and **Abdulsamad Abeid.**

The claim as pleaded in the amended plaint arose from a motor traffic accident which occurred on 7.1.2013 while the deceased was travelling as a passenger on board motor vehicle registration Number KBR 900X Toyota Prado when the 2nd defendant drove the aforesaid motor vehicle in a reckless and negligent manner causing the same to overturn.

As a result of the accident the deceased suffered fatal injuries. The 1st defendant who was the owner of the motor vehicle has been blamed pursuant to the doctrine of vicarious liability and the particulars of negligence are as pleaded in paragraph 6 of the amended plaint.

The defendant in their joint defence filed in court on 9.1.2017 vigorously contested the claim by the plaintiffs that the alleged accident was negligently caused. The defendants deny that the deceased **Mbarak Mohamed Salim** was a lawful passenger on board motor vehicle registration number KBR 900K in which they are blamed for negligence and breach of duty of care in the resultant death.

The defendants in the alternative admit occurrence of the accident as alleged by the plaintiffs. The defendant forcibly contest that the plaintiffs claim for reason that it was lodged in total contravention with Section 4 (2) of the Limitations of Act Cap 2 (2) or under Section 4 (1) of the Fatal Accidents Act on grounds that:

(a). The accident referred to took place on 7.1.2013 in consequence of which the deceased received serious injuries.

(b). As a result of the said injuries the deceased died on the same day at Tawfiq Hospital on 7.1.2013.

(c). The suit herein was not filed until 14.1.2016 well after 3 years from the date on which the accident or cause of action arose.

The evidence at the trial in support of the claim was received and admitted from **Fauzia Shaban**, widow to the deceased. According to her

witness statement filed in court on 14.1.2016 and beefed up with her viva voce evidence in court she stated as follows:

> **(a). That the deceased was involved in a Road Traffic Accident on 7.1.2013 while on board motor vehicle registration number KBR 900X.**
>
> **(b). That the offending motor vehicle was owned by the 1st defendant while on the material day it was under the direction, and control of the 2nd defendant as the agent, employee, driver or servant of the 1st defendant. A further evidence from PW1 was to the effect she petitioned for Limited Grant of Adlitem on 26.1.2015 on P & A 5 of 2015 to file the claim on behalf of the Estate of the deceased, which was duly issued by the High Court of Malindi.**
>
> **(c). That by suit of the Limited grant she moved the court for leave to file the suit out of time pursuant to the provisions in Section 27, 28 and 30 of the Limitations Act.**

The plaintiff further stated in court that the deceased was survived by **Fauzia Shaban –spouse, Ummisiti Mbarak – daughter aged 27 years old, Mohamed Mbarak – son aged 25 years, Firdans Mbarak – daughter aged 21 years, Falid Mbarak – son**)

The plaintiff further stated in court that the deceased prior to his death was actively involved in business generating income and the entire family dependent on him for their welfare and best interest. She told the court that every month she was able to be advanced a monthly stipend of Kshs.120,000/= as a provision for maintenance. Following the death all that seemed to have disappeared hence the need for claim against the defendants. There was also evidence of statement of accounts of the deceased from Gulf Bank Ltd admitted as exhibits in support for loss of dependency.

There was no viva voce evidence on the part of the defendants, although **Abdulswamad Said** had filed a witness statement dated 8/3/2013 alluding to the circumstances of the accident on 7.1.2013. I am not alone on what I say both counsels favoured me with written submissions which would be reflected in my analysis and determination herein under.

Analysis and determination

> **(a). Whether the deceased was involved in an accident with the defendants motor vehicle.**
>
> **(b). Whether the defendant was the sole author of the accident in negligence or the deceased did contribute in one way or another to the occurrence of the accident.**
>
> **(c). Whether the bar of limitation under Section (4) of the Limitation of Actions Act is applicable to this claim.**
>
> **(d).Whether the claimant as the executor administrator to the estate of the deceased is entitled to a measure of quantum under the Law Reform Act and Fatal Accidents Act.**

Issue No. 1occurance of an accident

In dealing with the pleadings, averments in the affidavits and witness statements it is quite clear that on 7.1.2013, the deceased **Mbarak Mohamed Salim** was travelling as a passenger in motor vehicle Registration No. KBR 900X being driven by the 2nd defendant. It is also clear police abstract dated 13.3.2013 the Base Commander Kilifi Police Station vide Police ref AR/F/3/2013 opened an inquiry file to investigate the cause of the accident. The revelation on the brief facts of the accident are contained in the preamble of the police abstract to the effect that it was self-involved along Kilifi-Malindi Road on 7.1.2013. The driver of the subject matter vehicle was positively identified as **Abdulswad Abeid**, the 2nd defendant to this claim.

With regard to part 1 of the Evidence Act it describes facts requiring no proof in four categories:

> **(a). Facts judiciary noticed**
>
> **(b). Agreements on facts not in issue.**
>
> **(c). Facts of which court shall take judicial notice.**
>
> **(d). Facts admitted in civil proceedings.**

Therefore, ***“every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be both to be admitted by that other party to the proceedings.”***

It is common ground in the matter that the occurrence of the accident is not denied. That therefore disposes of the first issue to this claim.

Issue No. 2 Causation and negligence

The Law

The Traffic Act Cap 403 of the Laws of Kenya in terms of Section 46, 47 and 49 imposes a duty of care to drivers that while in control and driving any motor vehicles should do so without being reckless, careless or drive in a manner which is dangerous to other road users having regard to all the circumstances and surrounding of the road, including the nature, condition, the amount of traffic which might be reasonably or actually be expected on the aforesaid road at the time of the accident.

Negligence as pleaded by the plaintiff is an omission prescribed in the statutory provisions upon which the driver of a motor vehicle in this case the 2nd defendant could be reasonably be held accountable for the breach of duty of care based on the evidence.

The word negligence was taken up by legal scholars **Charles Worth and Percy on negligence in their book 9th Edition at paragraph 101,** where they observed that negligence has three meanings:

(a). State of mind in which it is opposed to intention.

(b). Careless conduct and

(c). The breach of a duty to take care that is imposed by either Common Law or statute Law.

In these three definitions on a case to case approach the probability of existence or non existence of facts are established for a party to discharge the burden of proof under Section 107 (1) of the Evidence Act. Thus **Itay or Bourhill v James Young {1941} SC 395, 429,** the court correctly stated:

> **"No doubt the duty of a driver to use proper care not to cause injury to persons on the highway or in the premises adjourning the highway, but it appears to me that his duty is limited to persons so placed that may reasonably be expected to be injured by the omission to take such care."**

The case embraces the need for the driver of a motor vehicle to take reasonable care on account of relevant factors that might be prevailing so as not to occasion a collision by an act of omission or negligence. But even when a statute does impose a duty of care. What is reasonable care is obtainable on evaluation of the facts of each case and its also a question of degree between the tortfeasor and the victim of the accident.

It was held in **Crul Brown v Judith Green and Ideal Car Rental Claim No. 2006 HCV 02566:**

> **"It is clear that there is, indeed a common duty as well as statutory duty for motorist to exercise reasonable care while operating their motor vehicle on a road and to take all necessary steps to avoid an accident."**

One of the principal factors that a court of law trier of facts has to bear in mind in exercising its discretion is the object and scheme illuminated in the persuasive authorities in **Cloud v Nuwez Civil Appeal No. 19 of 2000 and Bolam v Friem Hospital Management Committee {1957 1 WLR 582 – 586** where the following words of **Mcnair J** are pertinent.

> **"In the ordinary case which does not involve any special skill, negligence in Law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do, and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligence? In an ordinary case, it is generally said you judged by the action of the man in the street. He is the ordinary man. In one case it has been said you judge it by the man on top of the Clapham omnibus. He is the ordinary man. But where you get a situation which involves the same special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have special skill. A man need not possess the highest expert skill; it is well established Law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."**

In this particular case, the plaintiff on liability relied on the admitted fact of occurrence of the collision, the police abstract and the doctrine of res ipsa loquitor on the particulars of negligence. Due to the lapse of time the litigation the trial commenced and despite several notices to the base commander – Kilifi, who visited the scene it became difficult to secure his attendance to testify as to the outcome of the investigations with regard to the Road Traffic Accident.

On the part of the defendants without necessarily characterizing their right to remain silent; First on these matters as pleaded in the plaint on negligence and the relevant paragraph on res ipsa loquitor, as an admission of guilt of negligence, the evidence by the plaintiff would be assessed in line with the standard of proof on a balance of probabilities.

Second, in view of the manner in which the accident occurred the oral evidence by (PW1) as supported with police abstract is prima facie evidence of causation solely attributed to the 2nd defendant.

It is useful to note that an examination of the admissibility of the police abstract in connection with other facts admitted by the defendant, the existence of fact as to the extent of liability are consistent with the principle of a prima facie case. **The legal scholar, Stephen JF, in his book Digest of the Law of Evidence 12th Edition London 1948 Art** I observed on the word relevance of evidence as follows:

> **"Any facts to which it is applied are so related to each other that according to common course of events, one either taken by itself or in connection with other facts either proves or renders probable the past, present or future existence or non-existence of the other."**

The defendant account was that the accident which occurred did not constitute negligence. He did not however adduce evidence to disapprove the facts that can be deduced from the statutory provisions in the Traffic Act on presumption of negligence and further pursuant to the Common Law principles on negligence.

In **Yungle Jacobs & Co. v Kennedy {1964} 1AER 888 Lord Denning** remarked:

> **"It would not be right to suggest that the lights were not working properly or any other device. Furthermore when you have a device of this kind set up for public use in active operation, I should have thought that the presumption should be that it is in proper working order unless there is evidence to the contrary and there is none here."**

The plaintiff in her testimony referred the court to the motor vehicle inspection report dated 18.1.2013 which admittedly found no pre-accidents defects to have contributed to the accident.

I have carefully analysed the evidence, and both submissions by counsels representing the plaintiffs and the defendants. The plaintiffs unchallenged evidence turns on significantly on the doctrine of res ipsa loquitor as pleaded in paragraph 11 of the amended plaint.

With this in mind, I first find this remarkable statement in the case of **Caparo Industries PLC v Dickman {1990} 1 ALL ER 568, 573 – 574** of relevance to the next trajectory I take on the discussion on the applicability of the **Doctrine of res ipsa loquitor.** The court stated:

> **"What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighbourhood and that the situation should be one in which the court considers it fair, just and reasonable. That the law should impose a duty of a given scope upon the one party for the benefit of the other."**

Turning now to the real basic structure of this doctrine which sometimes even eludes eminent jurists as regards its interpretation in reference to duty of care and negligence. In his support for this doctrine **Charles Worth & Percy on negligence 10th Edition 2001 p. 351** identified the key pillars hereinunder:

> **"The maxim is not a rule of Law, it merely describes a state of the evidence from which it is possible to draw an inference of negligence. It is based on common sense, its purpose being to enable justice to be done. When the facts bearing on causation and the standard of care exercised are known to the claimant but ought to be within the knowledge of the defendant. It will not assist where there is no evidence to support an inference of negligence and a possible non-negligence cause of the injury exists."**

The requirement of the maxim are:

> **i. That thing causing the damage was under the management or control of the defendant or his servants and**
>
> **ii. That the accident of such a kind as would not in the ordinary course of things have happened without negligence on the part of the defendants. An essential element of the doctrine to be applicable is the fact that the claimant does not know how he came to be injured."**

In the case of **Shtern v Villa Mora cottges Ltd & Another {2012} JMCA 20**, the doctrine was extensively considered:

> **"As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case see Clerk & Lindsed OP, cit, para, 8 – 149 See also Ng Chan Pui v Lee Chuen Tat 1988, RYR 298, per Lord Griffiths at Page 306, But the actual proof of carelessness may often be problematic and the question in every case must be, what is a reasonable inference from the known facts."**

The basis for this principle is generally said to be in the likelihood that negligence caused the injury, circumstantial evidence is made sufficient as a matter of Law under Section 107 (1) of the Evidence Act to offer the plaintiff to discharge the burden of proof on a balance of probabilities.

In the instant case the onus was clearly upon the plaintiff to show that there was sufficient material upon which, to infer res ipsa loquitor that the defendant was wholly liable for the accident. The elements of the doctrine have also been set out in the following cases **Keats Njuguna Mucheru v Mash Express Ltd 2008 eKLR, Kago v Njenga CA 1/1979 eKLR, Msuru Munidin v Nazzir Bin Seif EL Kasabu & Another {1960} EA 201.** The Court of Appeal held in **Embu Public Road Service v Riimi {1968} E.A. 22** seized the occasion to state as follows:

> **"Where an accident occurs and no explanation is given, by the defendant which could exonerate him from liability then the court would be at liberty to apply the doctrine of res ipsa loquitor and hold the defendant liable in negligence."**

In sink to the instant claim is the case of **Jackline Obondo v Kenya Bus Services & Another {2007} eKLR where Kimaru J** stated:

> **"However upon evaluating the evidence on record, its clear that when the plaintiff boarded the said motor vehicle at Bando he expected to be ferried safely to her destination, Nairobi. She did not reach safely to her destination. The bus which she was travelling in was involved in an accident as a consequence of which she was injured."**

Similarly, in our case scenario, the deceased was a passenger in motor vehicle KBR 900X Toyota Prado on 7.1.2013. The vehicle belonged to the 1st defendant and being driven on the material day by the 2nd defendant when the vehicle overturned causing injuries to other occupants save that the deceased sustained fatal injuries in which he died soon thereafter the collision.

In addition, the fact of the accident being self - involving is not denied by the defendant. With this in mind motor vehicle inspection report showed no pre-accident defects of the vehicle, to have facilitated the occurrence of the accident.

In equal measure I am satisfied that negligence is all about who should bear the burden of loss that resulted on the fatal injury incident. The position therefore, I take as obtained from the circumstantial evidence adduced by the plaintiff and or admitted fact by the respondent is that the issue of liability falls within the following ambit.

(a). The defendants vicariously owed a duty of care to the deceased on 7.1.2013.

(b). That the defendants joint conduct, manner of driving of the 2nd defendant constituted a breach of the duty of care and as a result an accident occurred in which the deceased was fatally injured.

(c). That the 2nd defendant conduct was the proximity cause of the deceased injury and without it he could have been alive.

(d). Plausibly the formulation of this accident and assumption of the risk and actual causation is based on res ipsa loquitor so I do find against the defendants jointly and severally.

Issue No. 3

Whether the suit is statute barred.

The basis of this ground was canvassed by virtue of an exparte order made by the court granting leave to the plaintiff to bring an action for damages against the defendants for beyond the prescribed period of 3 years under Section 4(1) of the Limitations Actions Act Cap 22 of the Laws of Kenya.

In his final submissions Learned counsel for the plaintiff argued and contended that there was a material factor which occasioned delay in filing the suit within time. However, upon seeking leave to file a suit out of time, there was no preliminary objection as the parties entered into the consent to have suit filed outside the limitation period.

With regard to the defendant counsel submissions there was no evidence why leave to file the suit out of time was given by the court. To buttress opposition to the leave so claimed by the plaintiff to have been granted by consent counsel cited and placed reliance on the following authorities **Oruta & Another v Nyameto Civil Appeal No. 96 of 1984, Muriki v Giovanni Civil Appeal No. 216 of 1997, Cozens v North Devin Hospital Management Committee {1966} 2 ALL ER 799,** Learned counsel submitted that the statutory defence of Limitation preserves the defendants rights and in all circumstances should be enforced. It was also learned counsel contention that there was little or no evidence before the court with regard to the fact that the suit was statute bared and there were no material factors applicable for leave to be granted in favour of the claimant.

The effect of Limitations of Actions Act has been summarized in the case of **Donovan v Gwentoys 1990 1WLR 472 al 479**, where **Lord Griffiths** stated that:

> **"the primary purpose of the limitations period is to protect a defendant from the injustice of having to face a stale claim, that is a claim which he never expected to have to deal."**

As stated in Section 4 (1) of the Limitations Act no action founded on tort shall be brought after the expiration of three years from the date on which the cause of action accrued.

As a matter of practice pursuant to Section 27, 28,29 & 30 of the Limitation Act the court is empowered to consider the factors and the reasons for the delay on the part of the plaintiff specifically Section 27 of the Act sets out conditions which must be satisfied before such leave is granted.

As the Law now stands the application for leave is heard exparte under Section28 of the Act where the judge exercises discretion in that respect to have the applicant file the suit outside the statutory period. The defendant only get a chance to front a challenge during interpartes hearing.

As has been indicated from the submissions in dealing with the initial application on limitations and leave both parties entered into a consent order to have the plaintiff file her suit outside the limitation period. The plaintiffs in their affidavit had alleged that the probate court took long to issue special grant of letters of administration provided for under Section 54 of the Law of Succession. It is common ground that the

plaintiffs were not ignorant of the Law but the respective grant had to be issued by the Court.

The leave which the court granted in view of the consent may not be considered provisional subject to be challenged by the defendant in the main trial. It must however be noted that the defendant raised limitation as a procedural defence specifically to urge the court to strike out the suit for being an abuse of the court process.

Notwithstanding the defendant contention the question which presents itself is what weight should this court accord the submissions on limitation of the cause of action.

To answer the above, I bear in mind that a judge of equal jurisdiction made the decision for leave to file the suit outside the limitation period. It is plain and clear that jurisdiction in our system of courts is conferred by the constitution and enabled by statute and the High Court in particular has a statutory framework on administration and adjudicatory role as defined under Article 165 of the Constitution.

By virtue of that legal instrument the court with concurrent jurisdiction is properly determined the issue of limitation. I discern to say that there is no evidence that the judge who heard the leave application in the presence of both parties and on account a consent order was recorded to give rise to the present claim cannot be defeated at this stage as submitted by the defendant.

In my opinion the plaint filed by the plaintiff as statute barred the consent order remedied the defect. In case of ignorance of material facts on actions for negligence under Section 27 of the Act and the properly exercised judicial discretion cannot be faulted. Once the evidence satisfied the stature of limitation and the parties went a step further in the civil proceedings to record a consent. There is no further opportunity to re-open the issue for a second time. That disposes of the ground on limitation.

Having settled the issue of liability and Limitations of Actions Act under Section 4 (1) of the statute, what is left is the quantum payable to the plaintiff under the Law Reform and Fatal Accidents Act.

Damages under the Fatal Accident Act

The pertinent evidence in support of this limb came from the widow of the deceased. According to the death certificate the deceased died at the age of 48 years, leaving behind the widow aged 24 years old. Further, the deceased was survived by four of her children as particularized in the plaint in the testimony of the plaintiff (PW1) the deceased was self-employed selling fuel products and also worked as clearing and forwarding agent. He was the sole breadwinner: According to (PW1) from the produced bank statements she also told the court that the monthly disposable income for the family per month was Kshs.120,000/= which is no longer available due to the wrongful death. This evidence by the plaintiffs would form the basis of which I assess damages.

Learned counsel for the plaintiff on loss of dependency submitted on the multiplier of 20 years and a ratio of 2/3 on the following cases **Cecilia Wanja Maina & 2 Others v Reme K. Ltd & 2 Others {2015} eKLR, Joseph Kahiga Gathi v World Vision Kenya & 2 others 2014 eKLR** As regards proof of earnings counsel urged the court to follow the Court of Appeal decision in **Jacob Ayiga Maruja v Simeon Obayo {2005} eKLR.** In this regard counsel argued that the deceased was a certified accountant with an account of Kshs.200,000/= be applied to calculated loss of dependency.

Learned counsel for the defendant submitted and asked me to apply the principles in **Mwanzia Mutua v Kenya Bus Services Ltd & Another, Albert Odawa v Gicharu Gichanji HCC Appeal No. 15 of 2003** to base calculations on global sum approach to award between 500 – 600,000.

It is however important to point out notwithstanding both counsels submissions on assessment of damages is discretionary judicial function within the laid down settled principles. The assessed amount must also be reasonable and the court remaining faithful to the doctrine of stare decisis. The relationship between the sense of proportion and loss or damage was clearly stated in **Cookson v Knowles {1979} AC 556-575** as follows:

> **"The court has to make the best estimates that it can having regard to the deceased's age and state of health and to his actual earnings immediately before his death, as well as to the prospects of any increases in his earnings due to promotion or other reasons. But it has always been recognized, and is clearly sensible, that when events have occurred, between the date of death and the date of trial, which enable the court to rely on ascertained facts rather than on mere estimates, they should be taken into account in assessing damages this kind of assessment artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow's death, but also as to the hypothetical degree of likelihood that all sorts of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuity in work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill health? Would they have increased and if so when and by how much? To what extent if any would he have passed on the benefit of any increases to his wife and depedent children."**

The Kenyan model of assessment of damages follows **Cookson (supra)** principles as can be expressly confirmed in the case of **Roger Dainty v Mwinyi Omar Haji MSA CA Civil Appeal No. 59 of 2004 eKLR** where the court observed that:

> **"To ascertain the reasonable multiplier or multiplicand in each case the court would have to consider such relevant factors as the income or prospective income of the deceased, the know of work the deceased was engaged in the prospect of promotion and misexpectation of working life."**

Claims for accident fatality are covered under the Fatal Accidents Act Section 4 (1) of the Act. Thus the courts power to exercise discretion comprises of damages for bereavement as not proportioned to the injury resulting from the death to the dependants respectively suffered by the children or spouse by reason of the death; lost financial dependency and value of the services, that the deceased would have provided had he survived. When assessing damages under this head on loss of financial dependency, the court takes the view that the deceased would have spent some of his or her income to himself or herself and the rest in supporting the dependants. Its that financial dependency that is worked out by taking the deceased's net income and making a deduction to reflect the proportion of that income he could have spent partly on the dependants.

Going by the above guidelines the concerns I have with this case is the speculative approach taken by the plaintiff's counsel. There is no question no cogent evidence produced by the plaintiff to show that the deceased earned Kshs.200,000/= per month before his death or the fact of financial provisions of Kshs.120,000/= to the spouse in support of the family maintenance.

The bank statements upon which the income of the deceased was premised provide some evidence of income but lacks consistency and reliability.

Based on the figures, it would not be imaginary to take an average income of Kshs.30,000/= per month obtained in the business and occupation the deceased was engaged in during his lifetime. So the post fatal loss of income is to be calculated on this guide and not the multiplicand of the plaintiff.

As regards the multiplier the deceased was a businessman who died at the age of 48 years as documented in the death certificate. The deceased would have lived far beyond the official retirement of 60 years for public officers in government service. His working life dependent on good health and other vagaries or uncertainty of life subject to those vicissitudes of life I adopt a multiplier of 20 years as the lost years arising from the death of the deceased.

Therefore, the loss of dependency ought to be calculated in respect of the deceased estate: thus 30,000 x 12 x 2/3 x 20 = Kshs.2,400,000/=.

In principle the Law Reform Act assessment of damages is underpinned on all approach that on the death of any person all causes of action vested in him or her shall survive for the benefit of his estate.

As the reasoning and interpretation of the Act explains where personal injury causes losses of expectation of life, damages not recoverable for that loss by a living plaintiff. This rule for assessment of damages under this Act of Loss of expectation of life seems to follow the jurisprudence by Judges who have fixed it at a conventional sum. On this question of damages in the English case of **Flint v Lovell {1935} 1KB354 Lord Wright** said:

> **"A man has, a legal interest entailing him to complain if the integrity of his life is impaired by tortious acts, not only in regard to pain, suffering and disability, but in regard to the continuance of life for its normal expectancy. A man has a legal right, that his life shall not be shortened by the tortious act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given. It has also long been settled Law that a claim for non-pecuniary damages for pain and suffering and loss of amenity are also recoverable upon the death of the deceased."**

These pronouncements were carried forward in **Philips v The South Western Railway Co. {1879} 4 Q.B.D 406** in the speech by Cockburn CJ that the plaintiff was entitled to compensation for:

> **"The bodily injury sustained, the pain undergone, the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent."**

The principles obviously are under this claim as a matter of good sense governing the exercise of the courts discretion to compensate the plaintiff or the estate of the deceased for all that pain directly caused by the injury, including fright, nervous shock and residual pain, the pain and suffering caused by operations or remedial treatment and the live compensation is also made for a variety of unpleasant mental experience, the consciousness of present disability and shortened life expectancy, fear of future incapacity, embarrassment or humiliation caused by disfigurement and hysteria or neurosis caused by the injury **(See West v Shepherd 196E A.C. 326 at 346).**

In the case of **Jane Katumbu Mwanzia v T. M. Mwanzui {2001} eKLR** the court adopted a principle that:

> **"although there was no special proof by way of receipts the plaintiff is entitled to funeral expenses the court allowed a sum of Kshs.100,000/=."**

In accordance with the guidelines in this case, I award the plaintiff Kshs.100,000/= as funeral expenses.

On loss of consortium the rationale behind this claim is based on right acquired by one spouse over the other broadly speaking involving companionship, love, affection, comfort mutual services and sexual intercourse. All these corpus of social rights available in a marriage union is what Law refers to as consortium (See **Best v Samwel Fox & Co. Ltd v J. W. Thompson {1951} 2 KB 639).** Loss of consortium is therefore a derivative injury giving rise to a separate cause of action capable of attracting damages against the defendant who caused the injury.

In **Rodrighez v Bethlem Steel Corp 1974 525 PZD 669** the court adopted the view:

"That injury to the spouse was primary in nature and that each spouse suffers an immediate, personal loss when the other is injured and that each is entitled to recover from the responsible tort feasor."

The action is founded upon propriety interest of the spouse in a marriage state to wit the servitium of the wife or vice versa. As a result of this I award Kshs.100,000/= for loss of consortium.

Specials for petition of obtaining limited grant of Letters of Administration Ad Litem specifically pleaded and proved together with fees for securing the death certificate I accept the claim and award Kshs.25,100/=.

So, from the above it seems to me that on the pleadings and primafacie evidence, the plaintiffs have established their case on the balance of probabilities for an award of damages in this order:

Damages under the Law Reform Act:

(a). Pain and suffering Kshs.100,000/=

(b). Loss of expectation of life Kshs.150,000/=

(c). Funeral expenses Kshs.100,000/=

For the above reasons and in this case the interpretation and application of the provisions of the two statutes Section 2 (1) of the Law Reform Act and Section 4 (1) & (5) of the Fatal Accidents Act and Judicial precedents developed over time endears me to make the following final orders in favour of the plaintiff:

(1). The claim in the amended plaint dated 14.3.2017 is allowed as follows:

(a). Loss of dependency	**Kshs.2,400,000/=**
(b). Loss of expectation of life	**Kshs. 150,000/=**
(c). Pain and suffering	**Kshs. 100,000/=**
(d). Funeral expenses	**Kshs. 100,000/=**
(e). Loss of consortium – servitium	**Kshs. 100,000/=**
(f). Specials	**Kshs. 25,100/=**

Costs of the suit to the plaintiffs plus interest on the total sum at court rates.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF APRIL 2020

....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr. Atiang holding brief for Khatib for the plaintiffs

2. Mr. Ogeto holding brief for Kishore for the defendants