

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**CIVIL CASE NO. 2 OF 2023**

**EVANGELINE MWANDISHA HILTON** (*Suing as personal representative of the Estate of MARY NDAWA MWANDISHA - Deceased*)..... **PLAINTIFF**

**VERSUS**  
**MODERN COAST COACHES LIMITED**..... **DEFENDANT**

**JUDGEMENT**

**Introduction**

1. The plaintiff filed this suit against the defendant vide a plaint dated 20/12/2022 seeking the following reliefs:
  - (1) General Damages under Law Reform Act and Fatal Accident Act.
  - (2) Special damages.
  - (3) Costs of the suit.
  - (4) Interests.

**Background**

2. The plaintiff filed this suit as the personal representative of the estate of the deceased the late Mary Ndawa Mwandisha who died on 24/7/2022 as a result of a road traffic accident which involved a motor vehicle registration number **KCF 641U** Scania in which the deceased was travelling as a fare

paying passenger. As a result of the accident, the deceased sustained fatal injuries.

3. The plaintiff claims that the accident was caused by the negligence, recklessness and or carelessness on the part of the driver of the said motor vehicle which was owned by the defendant.
4. Her claim is that the defendant is liable and/ or is vicariously liable and hence legally bound to compensate the estate of the deceased. The plaintiff pleaded the particulars of negligence as follows:

**I. Driving the motor vehicle registration number**

**KCF 641U recklessly without due care.**

**II. Failing to stop, apply brakes and or swerve the**

**said motor vehicle to avoid plunging into the**

**river Nithi being the scene of accident**

**III. Permitting the subject motor vehicle to veer off**

**the bridge, plunge into the said river and fatally**

**causing the premature and the untimely death**

**of deceased on the spot.**

5. The plaintiff further pleads that she shall rely on the doctrine of *les ipsa loquitor*. That as a result of the accident the deceased lost her expectation of life and her estate has suffered loss and damage.

6. The plaintiff filed the claim under the **Fatal Accidents Act (Cap 32 of the Laws of Kenya)** for the benefit of herself as a dependant and under the **Law Reform Act Cap 26 Laws of Kenya** for general damages for pain, suffering, lost years, loss of expectation of life as well as special damages.
7. The defendant entered appearance and filed a defence and denied the averments in the plaint. He avers that the deceased was negligent for failing to take adequate precaution for her own safety, to heed traffic rules, regulations when travelling and failing to buckle up.
8. The defendant further pleads that any such occurrence as the plaintiff may prove, occurred without any negligence on its part and the same was due to an inevitable accident. The defendant further denied all the allegations in the plaint and prays that the suit be dismissed with costs.

### **Plaintiff's case**

9. The deceased happened to be a fare paying passenger in the ill-fated bus registration number KCF 641U which was involved in a road accident along the Meru-Nairobi road at famous Nithi Bridge where thirty-six (36) passengers lost their lives and others sustained injuries. Evidence was adduced by PW-1 No. 54086 Senior Seargent James Munyi of Traffic Department at Chogoria Police Station. He is the one

who investigated the accident. He testified that the deceased Mary Ndawa Mwandisha was a passenger in the said bus KCF641U Scania Bus and was at the time travelling from Maua.

10. According to PW-1- the bus lost control as it was descending from Marima towards Nithi River and hit a Motor vehicle KDT 331T Nissan X-Trail which was being driven toward Meru Direction. After that Collision, the bus hit the guard rails at the bridge and plunged into the river. The bus was being driven by Paul Muriithi Kamau who perished in the accident alongside the thirty-six passengers.

11. According to PW-1- the driver of the bus was to blame for the accident as well as the bus company for failing to maintain the parts and equipment contrary to **Section 55(I) as read with Section 58 of the Traffic Act (Cap 403 Laws of Kenya)**. The manager of the bus company Modern Coast was charged. PW-1- confirmed that the deceased was one of the passengers who perished. He produced the Police Abstract as Exhibit -1.

12. PW-2- Evangeline Mwandisha Hilton adopted her witness statement as her evidence. She testified that the deceased was her fourth born child who she depended on for upkeep as she is a retired civil servant. She testified that she received a

report that the deceased was involved in the accident and passed away. She told the court that at the time the deceased met her death she was a qualified doctor and was working at Life Care Hospitals in Meru earning a gross salary of Kshs. 200,000/=. The PW-2- relied on the following documents:

- 1. Copy of her identity card*
- 2. Grant letters of Administration Ad Litem*
- 3. Death certificate dated 15/9/2022.*
- 4. Postmortem report dated 25/7/2022*
- 5. Police abstract.*
- 6. Bundle of academic documents of the deceased.*
- 7. Contract of employment*
- 8. Invoices, Receipts and burial expenses*
- 9. Demand letter*
- 10. Receipt of demand letter*
- 11. Statutory Notice of Claim's Manager Direct Line*

*Assurance*

*Company Limited*

- 12. Copy of the records of Motor vehicle KCF 614U*

13. The plaintiff testified that she was fully dependent on her daughter on whom she had spent a lot of money to see her

through education. She urged the court to award her general damages.

14. The defendant did not adduce any evidence to substantiate the averments in its statements of defence.

15. The parties agreed to file written submissions. The plaintiff filed submissions dated 9/11/2024. No submissions were filed by defendants as at 13/5/2025.

### **The Plaintiff's Submissions**

15. He submits that the issues which the court should determine are :

*I) Whether the estate of the deceased and her defendants suffered injury and/or damage as a result of the accident*

*II) Whether the plaintiff is entitled to damages.*

16. He submits that the burden of proof as articulated under **Sections 107, 108 and 112 of the Evidence Act** requires a party who alleges to prove. Relies on **Anne Wambui Nderitu -v- Joseph Kiprono & Another (2005) IE A 334** where it was held that -

***“As a general proposition under Section 107(I) of the Evidence Act (Cap 80 Laws of Kenya) the legal burden of proof lies upon the party who involves the aid of the law and substantially asserts the affirmative of the***

***issue. There is however the evidential burden that is cast upon any party the burden of proving and particular fact which we desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”***

17. On liability, he submits that the facts of the case speak for itself, it is undeniable fact that at the time of the accident the deceased was at all-time a fare paying passenger in Motor Vehicle KCF 641U and the driver owed her a duty of care.
18. He submits that due to wanton negligence and recklessness, the driver caused the motor vehicle to plunge into River Nithi leading to the untimely death of the deceased then aged twenty-eight (28) years. The plaintiff submits that the defendant's driver was 100% liable based on the evidence on record. He submits that since the driver was the defendant's agent, the defendant herein should be held vicariously liable, there being absence of evidence to the contrary.
19. On damages payable to the deceased, he relies on **Section 4 of the Fatal Accident Act Cap 32** which 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 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 of the persons respectively for whom and for whose benefit the action is brought, and the amount so recovered, after deducting the costs and recovered from the defendant shall be divided amongst those persons in such shares as the court, by its judgment shall find and direct.”***

20. He submits that the award of the quantum of damages is a matter purely within the discretion of the court which should be guided by previously decided cases with similar circumstances. He submits that for pain and suffering, the deceased was said to have died on the spot after the accident.

He urges the court to consider the current economic melt-down and astronomical inflation and urges the court to award Kshs.200,000/= for pain and suffering.

21. For loss of expectation of life, the plaintiff has urged the court to consider that the deceased was twenty-eight years old at

the time she met her untimely death. She had a bright future having just entered the job market as a medical expert. He pleads that she be awarded Kshs.500,000/= as a reasonable amount under this head.

22. On damages for lost years under **Law Reform Act** he relies on the case of **Sheikh M. Hassan -V- Kamau Transport (1982-88) I KAR 946** where the guidelines were given as follows:

- a) *That sum to be awarded is never conventional one but compensation for pecuniary loss,*
- b) *It must be assessed justly and with moderation,*
- c) *Deduct the victims living expenses during the “lost years” for they would not form part of the estate,*
- d) *A young child’s present or future earnings in most cases would be nil.*
- e) *An adolescent would usually be real, assessable and small.*
- f) *Calculate the annual gross loss,*
- g) *Apply the multiplier (estimated number of “lost working years” accepted as a reasonable in each case),*
- h) *Deduct the victims probable living expenses of a reasonably satisfying enjoyable life for him or her.*

23. The plaintiff also relies on the case **Beatrice Wangui -V- Joseph Kiprono Repkoi and Another (2005) I E.A 334 Thairu** where Justice Lingeru cited with approval the case of **Pegg Frances Hayes and Others -V- Chunibhai J. Patel & Another** cited in the Court of Appeal for Eastern Africa in **Radhakerishan M. Khemancy -V- Mrs. Lachaba Murlidar (1958) E. A 268, 269** where it was held as follows:

***“I have no doubt as to the principles which are to be applied. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Praces Hayes and others against Chubibbai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:***

***“The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. His income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years’ purchase. The multiplier will bear a relation to the expectation of earning life of the***

**deceased and the expectation of life and dependency of the widow and children. He capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration for the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderable) will be the lump sum the court should apportion among the various dependants.”**

**Upon an appeal against this judgement this court held [1957] RA. 748 (C.A):**

**“That the method of assessment of damages adopted by the learned chief justice was correct.””**

24. The plaintiff further relies on the case of **Dickson Taabu Ogutu**, Court of Appeal where it was stated that:

**“The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it, the Judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a calculation.”**

25. The plaintiff proposes that since the deceased was of good health and was earning Kshs. 200,000/= per month, a multiplicand of 1/2 be applied and a multiplier of 32 years based on the current retirement age in Kenya which is sixty (60) years, the vicissitudes of life notwithstanding; that  $200,000 \times 12 \times 32 \times 1/2 = 38,400,000/-$ .

26. He has urged the Court to consider that professionals continue to practice even after they retire and base the lost years to seventy (70).

27. On special damages it is submitted that they were pleaded and proved in the sum of Kshs. 149,000/=. He also prays for costs.

### **Analysis and determination**

28. I have considered the pleadings, the evidence adduced and the submissions. I find that the issues for determination are:

- 1) *Liability*
- 2) *Quantum of Damages*

#### **1) Liability**

29. Liability connotes the state of being responsible or accountable for something particularly in a legal context. It encompasses various forms of legal responsibility including the contractual, tortious, criminal and vicarious liability.

30. Essentially it signifies that the person or entity is legally obligated to fulfil a duty or suffer a penalty for failing to do so.

See Halsbury's Law of England, Liability is determined from the evidence adduced by the parties. The standard of proof in civil cases is on a balance of probabilities. The Law in our Jurisdiction is that he who alleges must prove. **See section 107 of the Evidence Act**, Supra.

31. In **Maria Liabaitaru M'mairanyi & others -v- Blue Shield Insurance Company Limited, Court of Appeal (2005) E. A. 280**

It was held that:

***“Whereas under Section 107 of the Evidence Act (which deals with the evidentiary burden of proof) the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. Section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the court to believe in its existence.”***

32. The plaintiff had the burden to prove on a balance of probabilities that the defendant was negligent in his manner of driving and therefore liable of causing the accident. Liability is determined by applying common sense to the

facts of each particular case. The plaintiff's case is that the defendant's driver was to blame for the accident.

33. This fact was confirmed by the testimony of PW1 Senior Seargent James Munyi who investigated the accident and testified that the accident occurred at about 6.30 hours after the defendant's driver lost control and had a head on collision with motor vehicle KCF 641U owned by the defendant lost control and had a head on collision with the motor vehicle KBT331T then plunged into River Nithi. The witness testified that thirty-six (36) passengers lost their lives and the deceased in this case Mary Ndawa Mwandisha was one of the passengers in the bus who lost her life. The witness produced the police abstract as P exhibit -1.

34. The fact that the accident occurred and that the deceased lost her life is not in dispute. The evidence of PW-2- was not controverted as the defendant did not adduce any evidence. The general denial by the defendant was a just mere statement which was not substantiated.

35. In **Shaveebal limited -v- County Government of Machakos (2018) eKLR** Justice Ondunga (as he then was) while citing with approval the case of **Trust Bank Ltd -V- Paramount Universal Bank Ltd and 2 others,**

**Nairobi Milimani HC.CCS NO 1243/2001** where it was held-

***“It is trite that where a party fails to call evidence in support of its case, that parties pleadings remain mere statements of fact since in doing so the party fails to substantiate its pleadings and in the same vein failure to adduce evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”***

36.It follows that this court has to go by the evidence of the plaintiff that she was a fare paying passenger in the ill-fated bus. The driver/agent of the defendant had one important responsibility of ensuring the safety of its passengers was guaranteed by observing all the applicable Traffic Rules and Regulations to avoid the accident.

37.The testimony of PW-1- has demonstrated that the driver was negligent and drove the vehicle recklessly and failing to control the motor vehicle in order to avoid causing the accident. By colliding with an oncoming vehicle then plunging into the river is clear evidence of reckless and dangerous driving in violation of the **Traffic Act**. The doctrine ‘*Res Ipsa Loquitur*’ applies as the facts proves that the case speaks for itself.

38. In legal context, the doctrine of '*Res Ipsa Loquitur*' is a doctrine that allows a plaintiff to infer negligence on the part of the defendant based on the circumstances of an accident, even without direct evidence of negligence. The doctrine applies when the event is one that ordinarily wouldn't occur without negligence and the defendant had exclusive control over the instrument that caused the injury, '*Res Ipsa Loquitur*' shifts the burden of proof to the defendant to demonstrate that they were not negligent. The evidence tendered by the plaintiff places the blame squarely on the defendant's driver and/or agent.

39. The plaintiff produced a copy of the record from National Transport and Safety Authority showing that the defendant, Modern Coast Coaches Limited was the owner of the motor vehicle at the time of the accident. The law places vicarious liability on the owner of the vehicle that attaches when it is proved that the driver was his employee or agent. **In Kenya Bus Service Ltd -v- Humprey (2003) eKLR 665 and Karisa -v- Solanki (1969) E.A 318** the Court of Appeal stated as follows: ***“Where it is proved that the car has caused damages by negligence, then in the absence of evidence to the contrary a presumption arises that it was driven by a person whose negligence the owner’s***

***responsible. (See Bernard -v- Sully (1931) 47 7 L R 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver.”***

40. The evidence by PW-1- proved that the defendant was the owner of the bus KCF641U which was being driven by his driver, servant or agent. The deceased, driver and the bus company were blamed. The company was blamed for failing to maintain parts and equipment on the bus in contravention of **Section 55 (1) as read with Section 58 of the Traffic Act.** The deceased was just a passenger who had no control on the manner of driving of the motor vehicle. She bears no blame for the occurrence of the accident. The plaintiff has proved the case on balance of probabilities against the defendant. The plaintiff proved that the driver was to blame for driving the vehicle negligently and the defendant by failing to ensure that the vehicle was fit to be used on the road.

41. For these reasons, I find that the defendant's driver was 100% to blame for the accident and being an employee/servant, of the defendant, the defendant is 100% vicariously liable.

### **Quantum of damages**

42. As it is well articulated by the plaintiff in its submissions, the award of damages is an exercise of discretion by the trial Court. It is trite Law that the exercise of discretion should be done judiciously and based on laid down principles on awarding damages. These are, that damages are meant to compensate for pecuniary loss and should not be too high or low as to present an erroneous award.

43. Where an award of monetary compensation is appropriate, the crucial question should be, what is reasonable amount in the circumstances of the case?

44. The award should be assessed justly and with moderation. Where the court has to award damages for lost years, the victim's living expenses should be deducted and apply a reasonable multiplier, see **Sheikh M. Hassan Kamau Transporters (Supra) and Peggy Frances Hayes and Others -V- Chulibhai J. Patel** (supra), where the plaintiff claims dependency, he/she must claim under **Section 4 of the Fatal Accident Act Cap 32 Laws of Kenya** which

provides for person(s) who can bring a claim under the section, they include: wife, husband, parent and child of the person whose death was caused. The plaintiff brings the claim as the parent of the deceased. She is therefore entitled to file such a claim under the section.

45. The plaintiff proved that the deceased was employed as a Medical Doctor. Her estate suffered loss and she is therefore entitled to damages. The damages are under three heads.

### **1) Pain and Suffering.**

46. The plaintiff's case is that the deceased died instantly upon the occurrence of the accident. This was confirmed by PW-1. The postmortem form shows that the deceased died on 24/7/2022 at about 18.30 Hours, the postmortem was performed on 25/7/2022. Cause of death was blunt injuries to the head, chest, limbs and abdomen due to motor vehicle accident. This shows that the death was spontaneous. In **Hyder Nthenya Musili and Another -V- China Wu Yi Limited and Another (2017) eKLR** the court stated 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 as a result of his injuries in the period before his death. The generally accepted principle is therefore that***

***very nominal damages will be awarded in these two heads if death followed immediately after the accident. The conventional award for the loss of expectation of life is kshs. 100,000/- while for pain and suffering the award range from Ksh.10,000/= to Ksh.100,000/- with ..... damages being awarded if the pain and suffering was prolonged before death ...”***

47.The deceased died instantly and did not suffer prolonged pain. I find that an award of Kshs. 50,000/- under this head is reasonable.

#### **Loss of Expectation of life**

48.The deceased was 28 years old. She was quite industrious both in school and her place of work with a bright future. This cut short by the untimely death. The accident cut short her life so soon after she entered the job market and upon successful training as a medical expert. This was a great loss not only to her family but to this country which greatly needed her services.

49.Courts have awarded a conventional figure of Ksh.100,000/- under this head. See Brian **Rottger -v- Josliner Mapenzi Karisa and Another (2023) KEHC26981 KLR & Moses Ngania & Others -v- Nancy Ndongi Adulu** (suing as the Legal Representative of the Estate of Clinton Morgan

Kiprotich) Supra. I find that kshs.100,000/- is a reasonable award under this head.

## **2) Loss of Dependency**

50.This addresses the action brought under **Fatal Accident Act** and case brought for the benefit of a spouse, parent, child of the person whose death was caused as a result of a fatal accident. The plaintiff is the mother of the deceased and she is therefore entitled to file a claim for dependency.

51.The plaintiff has proved that the deceased was a medical doctor. She was a brilliant child, judged from the academic records produced in evidence. She was employed as a medical doctor earning a salary of kshs.200,000/=as per the contract of employment which was produced as exhibit.

52.The plaintiff has proved that the deceased had an income. The plaintiff is a dependant entitled to file claim for dependency. The duty of this court is to determine the reasonable amount of damages to compensate the plaintiff. The income of the deceased has been proved and therefore a multiplier and multiplicand approach should apply and the court to determine the dependency ratio.

53.On the multiplier, the deceased was 28 years old. The retirement age in Kenya is sixty (60) years. The deceased had thirty-two (32) years of her active working life. The

plaintiff proved that she was supported by the deceased as she is retired and has no income. The deceased was not married.

54. In **Moses Ngania and 2 others -V- Nancy Ndongi Adulu** (suing as the Legal Representative of the **Estate of Clinton Morgan Kiprotich**) **Civil Appeal E005/2023 (2024) KEHC 4005 (KCR) 25/4/2024** Judgment, Justice Murima held,

***“...Taking the foregoing into consideration coupled with the fact that the deceased was not married, it is the finding of this court, respectfully so, that dependancy ratio of 2/3 was steep warranting this court’s intervention since courts have over time found that the ration of 1/3 to be on the lower side, this courts finds that the circumstances of this case would call for equal apportionment.”***

55. The court adopted a multiplier of twenty (20) years. I find this case a good guide in assessing the quantum of damages. The deceased was earning a gross salary of Kshs.200,000/= . The deceased would have worked up to the retirement age. However, the court has to consider the vicissitudes of life. Taking this into consideration a multiplier of twenty-five (25) years should apply. This works out as;

$$200,000 \times 12 \times 25 \times 1/2 = 30,000,000/=$$

**Special damages:**

56.The plaintiff pleaded and proved special damages of Kshs. 149,375/=.

Costs of the suit:

**Section 27(1) of the Civil Procedure Act** provides:

***“27. (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.*”**

57.Thus costs are at the discretion of the court and follow the event. Thus a successful litigant is entitled to an award of costs. The award of costs being a matter of exercise of judicial discretion, the court should exercise discretion Judiciously and in accordance with the law.

58.I should not depart from the rule that a successful litigant is entitled to costs. I therefore award the plaintiff the costs of the suit.

**Conclusion**

59.For the reasons stated in this judgment, I find that the plaintiff proved her case against the defendant on a balance of probabilities. I enter judgment for the plaintiff as against the defendant at 100% liability as follows:

- a) Pain and suffering - 50,000/-***
- b) Loss of expectation of life - 100,000/-***
- c) Loss of dependency - 30,000,000/-***
- d) Special damages - 149,375.00***
- e) Costs of the suit (to be taxed)***

**Total = 30,299,375.00**

***Dated, signed and delivered at Kitui this 7<sup>th</sup> day of October, 2025.***

**HON. LADY JUSTICE L. GITARI  
JUDGE**