Musili & another (Suing as legal representatives of the Estate of the Late MacDonald Maithya John - Deceased)) v Khalifa & another (Civil Case E001 of 2021) [2025] KEMC 58 (KLR) (24 March 2025) (Judgment)

Neutral citation: [2025] KEMC 58 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE E001 OF 2021

YA SHIKANDA, SPM

MARCH 24, 2025

BETWEEN

PIUS MULINGE MUSILI ..... 1ST PLAINTIFF

GLADYS MBITHE JOHN ..... 2ND PLAINTIFF

SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE MACDONALD MAITHYA JOHN - DECEASED)

AND

ABUBAKAR ABAADI KHALIFA ..... 1ST DEFENDANT

BONIFACE MATHEKA MUNYOTO ..... 2ND DEFENDANT

JUDGMENT

1. The plaintiffs herein Pius Mulinge Musili and Gladys Mbithe John (hereinafter referred to as the 1st and 2nd plaintiffs respedtively) bring this action against Abubakar Abaadi Khalifa and Boniface Matheka Munyoto (hereinafter referred to as the 1st and 2nd defendants respectively) as the Legal representatives of the estate of Macdonald Maithya John the deceased person herein. In a plaint dated 4/1/2021 but filed in court on 6/1/2021, the plaintiffs averred that on or about 18/11/2019 the deceased herein was lawfully travelling as a passenger aboard motor vehicle registration number KCB 724T belonging to the defendants along Wote-Makindu road when at Itulu area, when the driver of the said motor vehicle so negligently drove, managed and/or controlled the motor vehicle that it caused an accident.

2. The 1st defendant was sued as the registered owner of motor vehicle registration number KCB 724T at the material time whereas the 2nd defendant was sued as the beneficial owner thereof. The plaintiffs further averred that at the time of his death, the deceased was aged 21 years and was in good health with bright future prospects. The plaintiffs relied on the doctrine of Res ipsa loquitor, the *Traffic Act*

and the Highway Code. They pleaded the following particulars of negligence against the defendants and/or their driver:

a. Driving at a speed that was excessive in the circumstances;

b. Driving dangerously and carelessly along the said road;

c. Failing to brake, slow down and/or in any other manner possible to control the said motor vehicle so as to avoid the said accident;

d. Failing to maintain any and/or proper and effective control of the said motor vehicle;

e. Causing the said accident.

3. The plaintiffs thus pray for judgment against the defendants for:

a. Special damages in the sum of Ksh. 341,900/=;

b. General damages for loss of dependency, loss of expectation of life and pain and suffering under the *Fatal Accidents Act* and the *Law Reform Act*;

c. Costs of the suit;

d. Interest on the above.

The Defence

4. The 2nd defendant entered appearance on 22/3/2021 and filed a statement of defence on the same day, in which he denied the plaintiffs' claim in toto. The 2nd defendant denied that he was the beneficial owner of the accident motor vehicle, denied that the said motor vehicle was driven along the said road on the material day, denied that the deceased herein was a lawful passenger in the suit motor vehicle, and denied the particulars of negligence as well as the occurrence of the accident. The 2nd defendant averred that in the alternative and without prejudice, if the accident occurred, which was denied, then the same was solely and/or substantially contributed to by the deceased's own negligence. The 2nd defendant pleaded the following particulars of negligence on the part of the deceased:

a. Failing to take any or any adequate precaution for his safety;

b. Failing to heed the instructions on safety precautions when travelling; and

c. Failing to heed the traffic rules and regulations when travelling.

5. The 2nd defendant denied the applicability of the doctrine of Res ipsa loquitor and relied on the doctrine of volenti non fit injuria. The 2nd defendant further averred in the alternative and without prejudice that if the accident occurred then the same was beyond the 2nd defendants' control. The 2nd defendant prayed that the plaintiffs' suit be dismissed with costs.

The Evidence

The Plaintiffs' Case

6. At the hearing of the suit, the 1st plaintiff testified and called one other witness. The 1st plaintiff did not witness the accident and therefore was not in a position to tell how the accident occurred. The 1st plaintiff testified that he was the paternal uncle of the deceased herein and was informed of the accident. He adopted his statement in evidence and produced several documents in support of his case. PW 2 Police Constable Edwin Cheruiyot testified and produced a police abstract on the accident.

He confirmed that motor vehicle registration number KCB 724T was involved in an accident on 18/10/2019 at Itulu area along Wote-Makindu road. The witness further confirmed that the deceased was a passenger in the accident motor vehicle at the material time. That the accident was self-involving.

The Defence Case

7. The 2nd defendant did not call any witness.

Non-appearance By 1St Defendant

8. The record indicates that the 1st defendant did not enter appearance nor file a defence. There is no indication as to whether the 1st defendant was ever served with summons to enter appearance and the plaint. The plaintiff never moved the court with respect to the 1st defendant.

Main Issues For Determination

9. In my opinion, the main issues for determination are as follows:

    i. Whether an accident occurred on 18/11/2019 along Wote-Makindu road involving motor vehicle registration number KCB 724T;

    ii. Whether the motor vehicle belonged to the defendants at the material time;

    iii. Whether the deceased was a passenger in motor vehicle registration number KCB 724T at the material time;

    iv. Whether the driver of the suit motor vehicle was negligent in the circumstances and therefore liable for the accident;

    v. Whether the 2nd defendant is vicariously liable for the accident;

    vi. Whether the deceased died as a result of injuries sustained in the accident;

    vii. Whether the estate of the deceased and his dependants are entitled to damages;

    viii. If so, the nature and quantum thereof;

    ix. Who should bear the costs of this suit?

The Plaintiffs' Submissions

10. In their submissions, the plaintiffs relied on the evidence on record and submitted that the defendants were to blame for the accident. That the defendants did not call any witness. The plaintiffs urged the court to find the defendants 100% liable. On quantum, the plaintiffs proposed a sum of Ksh. 100,000/= for loss of expectation of life and relied on the authority of Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR.

11. For loss of dependency, the plaintiffs proposed a multiplicand of Ksh. 17,561/=, a dependency ratio of 2/3 and a multiplier of 39 years. According to the plaintiffs, loss of dependency would work out as follows:

    17.561 × 12 × 39 × 2/3 = 5,479,032/=

12. For pain and suffering, the plaintiffs proposed a sum of Ksh. 100,000/= and relied on the authority of Yaf Japan Motors Limited & 2 others v Wambugha & another [2023] KEHC 22438 (KLR) wherein

Ksh. 100,000/= was awarded. For special damages, the plaintiffs urged the court to award a sum of Ksh. 341,900/=. The plaintiffs also prayed for costs of the suit and interest.

The 2Nd Defendant's Submissions

13. The 2nd defendant submitted that the 1st plaintiff was not a dependant under the Law of Succession and urged the court to dismiss the claim under section 58 of the *Law of Succession Act*. The 2nd defendant further submitted that no eye witness to the accident was called to testify and no police officer was called to testify on who was to blame for the accident. The 2nd defendant argued that the plaintiffs had failed to prove negligence on the part of the 2nd defendant. The 2nd defendant relied on the authority of Evans Muthaita Ndiva & another v Father Rino Meneghello & another [2004] eKLR.

14. The 2nd defendant submitted that the deceased was equally to blame for the accident for not taking care of his safety. He urged the court to apportion liability in the ratio of 70:30 in favour of the 2nd defendant. In what appears to be confusion on the part of the 2nd defendant, he submitted at a later stage that the court should apportion liability in the ratio of 60:40 in favour of the 2nd defendant. That the deceased fail to take any adequate precautions for his own safety and was being careless on the road.

15. For loss of dependency, the 2nd defendant proposed a multiplicand of Ksh. 6,415.55/= being the minimum wage for a general labourer in 2017, a multiplier of 20 years and a dependency ratio of 1/3. According to the 2nd defendant, damages for loss of dependency would work out as follows:

    6,415.55 × 12× 20 × 1/3 = 513,244/=.

16. The 2nd defendant proposed a sum of Ksh. 10,000/= as damages for pain and suffering. For loss of expectation of life, the 2nd defendant proposed Ksh. 70,000/=.

17. The 2nd defendant argued that the award for loss of expectation of life under the *Law Reform Act* ought not to be awarded as it would amount to double compensation. On special damages, the 2nd defendant submitted that the plaintiffs be awarded Ksh. 391,900/= which should be included in the award of general damages.

Analysis And Determination

18. I have considered the evidence on record and given due regard to the submissions made by the parties. I must say that the submissions made on behalf of the 2nd defendant were quite underwhelming. I doubt that the same were prepared by an Advocate and if they were so prepared, then there is a big problem. I will leave it at that. From the evidence of the 1st plaintiff and PW 2, I have no doubt that an accident occurred on 18/11/2019 at Itulu area along Wote- Makindu road involving motor vehicle registration number KCB 724T and the deceased herein. The defendants did not attend court to rebut the plaintiffs' evidence on the occurrence of the accident.

19. The police abstract produced in evidence indicates that the 2nd defendant was the owner of the accident motor vehicle at the material time. The plaintiffs also produced a copy of records from the Registrar of motor vehicles which indicates the 1st defendant as the registered owner of the motor vehicle as at 10/12/2020. Section 8 of the *Traffic Act* provides that the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. There is no contrary evidence and as such, I find no difficulty in finding that the defendants were the owners of the accident motor vehicle at the material time. The police abstract produced in evidence indicates that the deceased was a passenger in the accident motor vehicle at the time of accident. The defendants did not attend court nor call any witness to rebut that fact.

Liability

20. The plaintiffs pleaded several particulars of negligence as against the defendants. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the *Evidence Act* which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour.

21. In the case of Kirugi & Another v Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held as thus:

> " The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

22. The issue that the court has to grapple with is whether the plaintiffs have established negligence against the defendants. In a bid to resolve the issue, I will consider some authorities.

23. There is no version as to how the accident is said to have occurred. It is only indicated that the accident was self-involving. It is not clear what exactly led to the unfortunate situation. In the leading case of Scott v London and St Katherine Docks Co [1865] 3 H & C 596, Erle CJ at page 600 held as follows:

> " There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

24. In Black's Law Dictionary 9th Edition page 1424, the principle of Res ipsa loquitor is defined as follows:

> " [Latin "the thing speaks for itself"] Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."

25. The Dictionary goes further to explain the circumstances the Court will infer negligence as follows:

> " The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."
>
> "It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of

course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

Kennedy L.J. in Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548 at p. 551 as follows:

" ....that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

The Learned Judge then continued:

" Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak, eloquent of the negligence of somebody who brought about the state of things which is complained of."

26. In Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson stated:

" In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

27. In the case of Embu Public Roads Services Ltd v Riimi (1968) EALR 22, the Court of Appeal held as follows:

" The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident".

28. Similarly, in the case of Barkway v South Wales Transport Co Ltd [1950] 1 All ER 392 at 393 B, which was quoted with approval by the Court of Appeal in the case of Nandwa v Kenya Nazi Ltd[1988] eKLR, it was held that:

> " The application of the doctrine of res ipsa loquitur, which was no more than a rule of evidence affecting onus of proof of which the essence was that an event which, in the ordinary course of things, was more likely than not to have been caused by negligence was by itself evidence of negligence, depended on the absence of explanation of an accident, but, although it was the duty of the respondents to give an adequate explanation, if the facts were sufficiently known the question reached to be one where the facts spoke for themselves, and the solution must be found by determining whether or not on the established facts negligence was to be inferred."

29. From the foregoing, it is clear that the doctrine of res ipsa loquitor applies only where circumstances are established which afford reasonable evidence, in the absence of explanation by the defendant, that the accident arose from their negligence. In an appropriate case, the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case.

30. Do the facts speak for themselves in this case? The deceased was a mere passenger in the motor vehicle. The condition of the motor vehicle was in the control and management of the driver. It was the defendants' driver who was driving and in control of the motor vehicle, and not the deceased. It is not in dispute that the accident was self-involving. No other motor vehicle was involved. In the ordinary course of things, a motor vehicle which is in proper mechanical condition and which is driven by a prudent driver exercising due care and attention cannot just cause and accident.

31. It is obvious that the driver lost control of the motor vehicle. A prudent driver is expected to drive at a reasonable speed and be mindful of any eventually that may occur on the road. I find that the evidence on record establishes a prima facie case of negligence against the driver of the accident motor vehicle as pleaded by the plaintiffs. No explanation was given by the defendants to exonerate the driver from culpability. There is absolutely no evidence to show that the deceased was negligent in any way. I find that the doctrine of Res ipsa loquitor applies to the circumstances of this case. The doctrine is a rule of evidence which need not be pleaded. Consequently, I find the driver of the accident motor vehicle 100% liable in negligence for the accident.

32. Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, respondeat superior, the responsibility of the superior for the acts of their subordinate or, in a broader sense, the responsibility of any third party that had the "right, ability or duty to control" the activities of a violator. The owner of a motor vehicle can be held vicariously liable for negligence committed by a person to whom the car has been lent, as if the owner was a principal and the driver his or her agent, if the driver is using the car primarily for the purpose of performing a task for the owner.

33. In the case of Morgan v Launchbury[1972] ALL ER 606, it was held, inter alia, that:

> " To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner."

34. Similarly, In Kaburu Okelo & Partners v Stella Karimi Kobia & 2 Others [2012] eKLR the Court of Appeal held that:

> " Vicarious liability arises when the tortious act is done in the scope of or during the course of one's employment or authority."

35. Where a motor vehicle is driven by a person other than the owner, there is a rebuttable presumption that the driver was acting as an agent of the owner of the motor vehicle. In the case of Kenya Bus Services Ltd v Humphrey [2003] KLR 665; [2003] 2 EA 519, the Court of Appeal cited Kansa v Solanki [1969] EA 318 wherein it was held that:

> " Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (See Bernard V Sully [1931] 47 TLK 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 of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

36. There is sufficient evidence on record to show that the defendants were the owners of the accident motor vehicle at the material time. The defendants did not attend court to deny that whoever drove the accident motor vehicle at the material time was acting as their agent. I have already pointed out that the 1st defendant did not enter appearance nor file a defence. No step was taken by the plaintiffs against the 1st defendant. There is no proof that the 1st defendant was served with summons to enter appearance and plaint. In the absence of proof of service, there will be no reason to find the 1st defendant liable, notwithstanding the fact that he did not enter appearance. Consequently, I find the 2nd defendant 100% vicariously liable for the accident.

Quantum

37. Having made a finding on liability, it follows that the estate of the deceased and his dependants, if any, are entitled to damages. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts. This Court has to bear in mind the principles that guide assessment of damages as espoused in West (HI) and Sons Ltd v Shepherd [1964] AC 326 where Lord Morris said:

> " But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible,

comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional".

38. I am also guided by Lord Denning's decision in Kim Pho Choo v Camden & Islingtom Area Health Authority, [1979] 1, ALL ER 332 which was adopted in the case of Nancy Oseko v Board of Governors Masai Girls High School [2011] eKLR where Wendoh, J stated that:

> " In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. .....the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant."

39. The following principles are germane in assessing damages for personal injury claims:

    i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;

    ii. The award should be commensurate to the injuries suffered;

    iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;

    iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;

    v. Awards should not be inordinately too high or too low.

40. I proceed to assess and award the damages payable as follows:

    1.Damages for pain and suffering

    The evidence indicates that the deceased died on the spot or soon after the accident. Damages under this head are awarded on the basis of the time the deceased suffered pain before death. The longer it took the deceased to die, the higher the damages. In most authorities, an award of between 10,000/= and 50,000/= was made for persons who died on the spot. Considering the age of most authorities coupled with the vagaries of inflation, I find that an award of Ksh. 70,000/= would be reasonable. I award the same. In the case of Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others [2013] eKLR, the deceased died on the spot following an accident and Ksh. 50,000/= was awarded.

    2.Damages for loss of expectation of life

    The evidence on record indicates that the deceased died at the age of 21 years. This was indicated in the copy of the death certificate produced in evidence. The trend in the authorities indicates that the younger the deceased at the time of death, the higher the award. On my part, I have considered the authority of General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR, wherein the deceased died at the age of 20 years and an award of Ksh. 100,000/= was affirmed on appeal. The plaintiffs proposed a sum of Ksh. 100,000/=. I would have awarded a higher figure had it been proposed. In the circumstances, I award Ksh. 100,000/= as submitted by the plaintiffs.

3.Damages for loss of dependency

Section 4(1) of the *Fatal Accidents Act* provides as follows:

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

41. The plaintiffs listed two sisters, a brother and a guardian as the dependants of the deceased. These are not proper dependants under the Act. The 1st plaintiff did not state that he depended on the deceased. His testimony was that the deceased assisted his siblings. In the case of Beatrice Wangui Thairu v Hon. Ezekiel Barng'etuny & Another (Nairobi HCCC No. 1438 of 1998 (unreported), and referred to in Rev. Fr. Leonard O. Ekisa & Another v Major Birgen [2005] eKLR, Ringera J (as he then was) said, inter alia -

> " ...The extent of dependency is a question of fact to be established in each case..."

42. There is no evidence to show that the deceased's siblings depended on him, particularly those who were adults. In my view, where an alleged dependant does not fall under the categories listed in section 4(1) of the *Fatal Accidents Act*, there must be acceptable proof of dependency. Damages under this head cannot be awarded as a matter of course. In the circumstances, the claim for loss of dependency fails. I make no award for the same.

4. Funeral and related Expenses

The plaintiffs pleaded a sum of Ksh. 296,150/= for funeral expenses under the head of special damages. In the case of Damaris Mwelu Kerewoi v Mbarak Kijan Ali, MombasaHCCC No. 776 Of1995 Hayanga J (as he then was) observed that the court can take judicial notice of the fact that funeral expenses are usually incurred and that where they are not proved, the court can award a nominal amount. In the case of Marion Njeri Kago- v - Kenya Railways Corporation [2014] eKLR, the court held as follows:

> " Funeral expenses, though usually claimed as special damages, are a proper claim under the *Law Reform Act*. That way the court is able to award a reasonable sum, depending on the Deceased's station in life and other factors, without the confines of strict proof."

Section 2(2)(c) of the *Law Reform Act* provides as follows:

> " Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—
>
> where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to

his estate consequent on his death, except that a sum in respect of funeral expenses may be included".

Similarly, section 6 of the *Fatal Accidents Act* provides that:

> " In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought".
>
> The above implies that funeral expenses can be awarded under the two Acts. This way, the court will assess the same depending on the circumstances of the case without insisting on strict proof as in special damages. The plaintiffs produced receipts in evidence. The receipts ad up to Ksh. 263,900/=. I have disregarded receipts that are not related to the funeral. Consequently, I award Ksh. 263,900/= as funeral and related expenses.

5. Special Damages

In their plaint, the plaintiffs pleaded special damages of Ksh. 45,750/= (apart from the funeral expenses) being legal fees for obtaining letters of administration, police abstract and motor vehicle search. It is trite law that special damages must be specifically pleaded and strictly proved. In Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd the court said:-

43. It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"

44. In Ouma v Nairobi City Council [1976] KLR 304 after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in support the following passage from Bowen L.J's Judgment on page 532 and 533 in Ratcliffe v Evans [1832] 2Q.B. 524 an English leading case on pleading and proof of damage:

45. The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

46. Similarly, in the case of Hahn v Singh [1985] KLR 716, it was held that:

> " ... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."

47. There are no receipts in support of the claim for the motor vehicle search, the police abstract as well as fees for obtaining the grant of letters of administration. Consequently, I find that no special damages have been proven and decline to award any sum in respect thereof.

The Issue Of Double Compensation

48. The 2nd defendant submitted to the effect that damages awarded under the *Law Reform Act* ought to be deducted from the total award. I am aware of the practice by some courts including superior courts, that where damages under the *Law Reform Act* and those under the *Fatal Accidents Act* are to be paid to the same persons, damages awarded for loss of expectation of life are deducted from the total award. Although I have not awarded damages for loss of dependency, I will address the issue. There are divergent views on the subject. The proponents of deduction rely on the Court of Appeal decision in the case of Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR. I have meticulously read and analysed the authority. I will reproduce some passages from the decision for purposes of clarity. In that case, Kneller JA observed as follows:

49. Why do Kemfro and Kanini say the damages in Civil Suit 2381 should be reduced by Kshs 25,000" Because the Kshs 25,000 was awarded under the *Law Reform Act* and it should be subtracted from the amount awarded under the *Fatal Accidents Act* is their answer..... And did the Judge take account of the assessment for the estate under the *Law Reform Act* when it came to that for Lubia under the *Fatal Accidents Act*? He added all the assessments together, it is true, but, in my judgment, an arithmetical deduction need not be set out as for an examination answer. The test is whether or not this Court can be satisfied the Judge remembered before he assessed the loss for Lubia at Kshs 150,000 that Lubia would inherit the Kshs 25,000 from Myra's estate. In my view he did and I base that on the way in which he directed himself and the sum he awarded Lubia under the *Fatal Accidents Act* which even if the Kshs 25,000 under the *Law Reform Act* were not taken into account was not manifestly excessive. Thus, I would dismiss the appeal from the award in Civil Suit 2381 of 1979".

Chesoni Ag. JA held as follows:

> " In my view what section 2(5) of the *Law Reform Act* means is that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the *Fatal Accidents Act* are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the *Fatal Accidents Act* the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction as suggested by Mr Barasa". I agree with Mr Kwach that the award under the *Law Reform Act*, if any, is one of the factors to be taken into account, and the learned Judge took it into account. Had he not taken into account the Kshs 25,000 he had awarded under the *Law Reform Act* he might have awarded more than Kshs 150,000 under the *Fatal Accidents Act*: The Judge did what he was required to do and as I do not agree with the English authorities that suggest or say that there should be a mathematical deduction as opposed to mere taking into account the award under the *Law Reform Act*. I do not find any error in the approach by the learned Judge".

50. In the above case, the court unanimously dismissed the ground of appeal that the trial Judge should have deducted the award made under the *law reform Act* from the one made under the *Fatal Accidents Act*. The principle that was laid down in the case is that in awarding damages under the *Fatal Accidents Act*, what is required is that the trial court must take into account the award made under the *Law Reform Act* where the beneficiaries of both awards are the same. The principle is premised on section 2(5) of the *Law Reform Act* which provides as thus:

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

52. The principle is also based on section 4(2) of the *Fatal Accidents Act* which stipulates that:

"In assessing damages, under the provisions of subsection (1), the court shall not take into account —

(a)	any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;
(b)	any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph".
(a)	any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;
(b)	any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph".

53. The Court of Appeal in the Kemfro case (supra) interpreted the provision to mean that an award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act* and so it appears the Legislature intended that it should be considered. Indeed, the position was affirmed by the Court of Appeal on 14/10/2015 in the case of Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR wherein the court held as follows:

54. This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for

pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

> " 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
>
> 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
>
> 8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

55. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction".

56. Thus, the allegation of double compensation is a misconception. I would not have deducted any of the awards made under the *Law Reform Act* from the award made under the *Fatal Accidents Act*.

Disposition

57. In summary, I find that the plaintiffs have proven their case on a balance of probability against the 2nd defendant. The case against the 1st defendant is dismissed with no orders as to costs, for the reasons already indicated. Consequently, I hereby make the following awards as against the 2nd defendant:

a. Damages for pain and suffering.....Ksh. 70,000/=

b. Damages for loss of expectation of life.....Ksh. 100,000/=

c. Funeral expenses.....Ksh. 263,900/=

Total.....Ksh.433,900/=

58. The plaintiffs are also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the *Civil Procedure Act* which provides that:

(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

59. In the case of Jane Wanjiku Wambui v Anthony Kigamba Hato & 3 others [2018] eKLR, the court stated that:

> "First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.
>
> Second, Under Section 26(1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:
>
> a. The period from the date the suit is filed to the date when the Court gives its judgment; and
>
> b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."
>
> Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4 (8th April 2015) stated in part, as follows:
>
> It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment.....Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

60. From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR).

61. Consequently, interest on the damages for pain and suffering and loss of expectation of life shall accrue at court rates from the date of judgment/decree until payment in full and on funeral expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 24TH DAY OF MARCH, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A SHIKANDA