



**Mwendwa & another (Suing as the Administrators and Personal Representatives
of the Estate of Onesmus Kyalo Munyeke - Deceased) v Kioko & another
(Civil Case E031 of 2021) [2025] KEMC 96 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEMC 96 (KLR)

**REPUBLIC OF KENYA
IN THE MAKINDU LAW COURTS
CIVIL CASE E031 OF 2021
YA SHIKANDA, SRM
MAY 19, 2025**

BETWEEN

AGNETA NDONYE MWENDWA 1ST PLAINTIFF

CAROLYNE NZILANI MUNYEKE 2ND PLAINTIFF

**SUING AS THE ADMINISTRATORS AND PERSONAL REPRESENTATIVES
OF THE ESTATE OF ONESMUS KYALO MUNYEKE - DECEASED**

AND

DOMINIC KIMEU KIOKO 1ST DEFENDANT

PIRZADA MOTORS COMPANY LIMITED 2ND DEFENDANT

*(Suing as the Administrators and Personal Representatives
of the estate of Onesmus Kyalo Munyeke-Deceased)*

JUDGMENT

The Action

1. The plaintiffs herein Agneta Ndongye Mwendwa and Carolyne Nzilani Munyeke (hereinafter referred to as the 1st and 2nd plaintiffs respectively) brought this action against Dominic Kimeu Kioko and Pirzada Motors Company Limited (hereinafter referred to as the 1st and 2nd defendants respectively) as the Personal representatives of the estate of Onesmus Kyalo Munyeke the deceased person herein. In a plaint dated 10/2/2021 but filed in court on 11/2/2021, the plaintiffs averred that on or about 3/9/2020 the deceased herein was a pedestrian along Mombasa-Nairobi Highway at Moi Girls area when the 1st defendant so negligently and recklessly drove, managed and or controlled motor vehicle registration number KCZ 245U and caused and or permitted the same to lose control, thereby occasioning an accident and as a result, caused the death of the deceased.



2. The 1st defendant was sued as the driver of motor vehicle registration number KCZ 245U whereas the 2nd defendant was sued as the registered owner thereof. The plaintiffs relied on the doctrine of Res ipsa loquitor, the [Traffic Act](#) and the Highway Code and pleaded the following particulars of negligence against the 1st defendant:
 - a. Driving motor vehicle registration number KCZ 245U recklessly and dangerously on a road that is frequently used by other road users without regard to those other users;
 - b. Driving at an extremely excessive speed in the circumstances and failing to manage and control the motor vehicle in a proper way to avoid the accident;
 - c. Failing to exercise due care and attention while driving and failing to keep proper distance as required by law;
 - d. Failing to slow down, swerve, manage and apply brakes so as to avoid the accident;
 - e. Failing to drive the motor vehicle registration number KCZ 245U on a suitable speed that would have enabled him to slow down in time to avoid the accident;
 - f. Failing to keep a proper lookout and failing to adhere to the Traffic code.
3. The plaintiffs averred that after the accident, the 1st defendant was charged with the offence of dangerous driving (should be causing death by dangerous driving) contrary to section 46 of the [Traffic Act](#) vide Makindu Traffic case no E011 of 2020. That the 1st defendant pleaded guilty and was fined Ksh. 20,000/= as a penalty and which conviction the 1st defendant never appealed against. The plaintiffs further averred that the deceased's estate and his beneficiaries suffered loss and damage. That the deceased was at the time preceding the accident and ultimate death, 44 years old and was employed as a cook at Moi Girls Secondary school Kibwezi and was earning an income of Ksh. 20,000/= per month. The plaintiffs thus prayed for judgment against the defendants for:
 - a. General damages for pain and suffering;
 - b. General damages for loss of expectation of life;
 - c. General damages for loss of dependency;
 - d. Special damages as pleaded;
 - e. Costs of this suit;
 - f. Interest on the above;
 - g. Such other and further relief that the court may deem fit and just to grant.

The 2nd Defendant's Defence

4. The 2nd defendant entered appearance on 19/3/2021 and filed a statement of defence on the same day. The record indicates that the 2nd defendant later filed an application dated 27/6/2022 seeking to have its name struck out from the suit on the ground that as at the time of the accident, the motor vehicle had been sold to the 1st defendant. The application was allowed on 17/4/2023. As a result, the name of the 2nd defendant was struck out from the suit. The case proceeded against the 1st defendant alone. It is for this reason that I will not highlight the 2nd defendant's defence.



The 1st Defendant's Defence

5. Counsel for the 1st defendant entered appearance on 6/5/2021 and appears to have erroneously filed a joint statement of defence on the same day. The statement of defence indicates that counsel was acting for both defendants. The 1st defendant denied the plaintiffs' claim in toto. He denied that they were the driver and registered owner respectively of motor vehicle registration number KCZ 245U and denied that an accident occurred. In the alternative, the 1st defendant averred that if the accident occurred, which was denied, then the same was wholly and/or largely contributed to by the negligence of the deceased. The 1st defendant pleaded the following particulars of negligence against the deceased:
 - a. Failing to observe the Highway code;
 - b. Failing to keep a proper look out and to have any sufficient regard for other road users on the said road and particularly to the defendant's vehicle;
 - c. Failing to heed to the presence of the defendant's motor vehicle at the said road;
 - d. Failing to give any adequate warning of his presence at the said road;
 - e. Walking on the road;
 - f. Causing the accident.
6. The 1st defendant denied the applicability of the doctrines of Res ipsa loquitor and vicarious liability and urged the court to dismiss the plaintiff's suit with costs.

The Evidence

The Plaintiffs' Case

7. The plaintiffs' case was heard by another Magistrate who was subsequently transferred. The record indicates that the plaintiffs called two (2) witnesses in a bid to prove their case. PW 1 was the 2nd plaintiff. She adopted her statement dated 12/1/2022 and filed in court on 21/1/2022 as part of her testimony. The 2nd plaintiff reiterated the averments contained in the plaint but on cross-examination, it was revealed that she did not witness the accident. The 2nd plaintiff produced in evidence the documents filed in court. PW 2 Police Sergeant Benson Muema testified on the circumstances of the accident. The witness stated that the 1st defendant was the driver of the accident motor vehicle and that the deceased was a pedestrian. The witness confirmed that following the accident, the 1st defendant was charged and convicted of the offence of causing death by dangerous driving and was fined Ksh. 20,000/=.

The Defence Case

8. The 1st defendant adopted his statement in evidence. He admitted that he was the driver of the accident motor vehicle at the material time but stated that the motor vehicle belonged to his employer's wife. That while travelling from Mombasa to Nairobi and upon reaching Kiundwani area, he heard a loud bang then something fell on the front windscreen of the motor vehicle. The 1st defendant thought that he was under attack from thugs. He did not stop but drove to Makindu police station and reported the incident. While at the police station, he was informed that a lifeless body had been found on the road. The 1st defendant testified that he did not see anybody crossing the road as it was dark and that the oncoming motor vehicle had its full lights on. It was the testimony of the 1st defendant that he did not know whether the pedestrian was hit by the oncoming motor vehicle or his motor vehicle. The 1st



defendant blamed the deceased for crossing the road where there was no Zebra crossing and in the face of two motor vehicles approaching from opposite directions.

Facts Not in Dispute

9. From the evidence of both parties, the following facts are not in dispute:
 - a. The 1st defendant was the driver of motor vehicle registration number KCZ 245 U on 3/9/2020;
 - b. The 1st defendant had bought the said motor vehicle in his name;
 - c. An accident occurred on 3/9/2020 involving the said motor vehicle;
 - d. The deceased herein was involved in a road accident on the same night and at the same place where motor vehicle registration number KCZ 245 U was said to have been involved in an accident;
 - e. Following the accident, the 1st defendant was charged with the offence of causing death by dangerous driving whereupon he pleaded guilty and was convicted and sentenced;
 - f. The 1st defendant did not appeal from the conviction and sentence in the traffic case.

Main Issues or Questions for Determination

10. In my view, the main issues for determination are as follows:
 - a. Whether the accident involved the deceased and motor vehicle registration number KCZ 245 U;
 - b. Whether the deceased was fatally injured in the accident;
 - c. Whether the 1st defendant was negligent and thus liable for the accident;
 - d. Whether the estate of the deceased and his dependants are entitled to damages; and
 - e. If so, the nature and quantum thereof;
 - f. Who should bear the costs of this suit?

The Plaintiffs' Submissions

11. The plaintiffs filed written submissions. The plaintiffs submitted that the Defendant's liability in this matter rests not only on his negligent actions but also on his position as the driver of the motor vehicle at the time of the accident. That the defendant failed to adduce any Employment contract revealing that he was indeed employed by one Paul Nzomo as the latter's driver. The Plaintiffs further submitted that the Defendant's negligence caused the accident leading to the death of the deceased. That in Traffic Case Number E011/2020 at the Chief Magistrates Court at Makindu, the Defendant pleaded guilty to a charge of causing death by dangerous driving where he was fined the sum of Kshs. 20,000.00. The plaintiffs argued that the unchallenged admission demonstrates a recognition of fault, which should be viewed as establishing liability in this civil case as well.
12. The plaintiffs submitted that the admission by the 1st defendant that he did not see a person crossing the road reveals a lack of attention and his inability to observe his surroundings or control the vehicle to avoid the accident constitutes negligence. That a pedestrian cannot be faulted for crossing the road



as roads are used by motorists and pedestrians as well. The plaintiffs urged the court to find the 1st defendant 100% liable for the accident.

13. On quantum, the plaintiff submitted a sum of Ksh. 100,000/= for pain and suffering. On loss of expectation of life, the plaintiffs proposed Ksh. 150,000/=. For loss of dependency, the plaintiffs urged the court to adopt a multiplicand of Ksh. 20,000/=. They further urged the court to adopt a multiplier of 26 years and a dependency ratio of 2/3. The award would thus be Ksh. 4,160,000/=. The plaintiff asked the court to award special damages as pleaded. The plaintiff also prayed for costs of the suit and interest. Copies of authorities relied upon were not annexed to the submissions.

The 1st Defendant's Submissions

14. The 1st defendant also filed written submissions. Counsel for the 1st defendant attempted to mislead the court on the nature of the evidence that had been adduced by the 1st defendant and also attempted to adduce new evidence through submissions. I must deprecate the conduct of counsel for the 1st defendant. The 1st defendant argued that the plaintiffs had failed to prove negligence against him. The 1st defendant further argued that the plaintiffs' witnesses did not witness the accident and that their evidence was hearsay. That no eye witness was called to testify. Counsel for the 1st defendant further tried to mislead the court on the testimony that had been adduced by PW 2. The 1st defendant relied on authorities whose copies were not annexed. On quantum, the 1st defendant submitted that since negligence had not been proven against him, no damages were awardable. The 1st defendant urged the court to dismiss the plaintiffs' suit with costs.

Analysis and Determination

15. I have carefully considered the evidence on record as well as the submissions by the plaintiff. I have further considered the applicable law. It is not in dispute that the 1st defendant's motor vehicle was involved in an accident on the material night. The 1st defendant alleged that his motor vehicle was hit by something. He denied having knocked down the deceased. However, it is undisputed that he was charged with the offence of causing the death of the deceased herein by dangerous driving. He pleaded guilty to the offence and was convicted and sentenced accordingly. The proceedings of the traffic case were produced in evidence. PW 2 also testified and produced a police abstract which confirmed that the accident involved the 1st defendant's motor vehicle and the deceased herein. The 1st defendant's allegation that he did not knock down the deceased was clearly an afterthought. I am convinced that the accident in issue involved the deceased and the 1st defendant's motor vehicle.
16. There is also sufficient evidence to prove that the deceased herein was a pedestrian along the Mombasa-Nairobi Highway and at the scene of the accident on the material night. This information is contained in the police abstract that was produced in evidence. The evidence on record also confirms that the deceased died as a result of injuries sustained in the accident. The post mortem form and certificate of death are clear on that.

Liability

17. The plaintiff pleaded several particulars of negligence as against the defendant. 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.



18. In the case of *Kirugi & Another v Kabiya & 3 Others* [1987] KLR 347, the Court of Appeal held 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.”
19. The plaintiffs did not call any eye witness to the accident. However, they produced in evidence certified copies of the proceedings in Makindu SPMC Traffic case No. E011 of 2020 in which the 1st defendant pleaded guilty to causing the accident and the death of the deceased. He had been charged with the offence of causing death by dangerous driving. The 1st defendant admitted that he pleaded guilty to the charge and was convicted and sentenced. It is also not in dispute that no appeal was preferred against the conviction and sentence. Section 47A of the *Evidence Act* provides:
- “A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”
20. In the case of *Philip Keipto Chemwolo & another v Augustine Kubende* [1986] KECA 87 (KLR), the Court of Appeal held:
- “Now, it was correct for the learned judge to refer to Mr Chemwolo’s conviction because section 47A of the *Evidence Act* (cap 80) declares that where a final judgment of a competent court in criminal proceedings has declared any person to be guilty of a criminal offence, after the expiry of the time limited for appeal, judgment shall be taken as conclusive evidence that the person so convicted was guilty of that offence. It follows that in the civil proceedings which are contemplated, Mr Chemwolo’s conviction will be conclusive evidence that he was guilty of carelessness. But that does not matter, because it may also be that Mr Kubende was guilty of carelessness, and if were to be so, then the position would be as explained in *Queen’s Cleaners and Dyers Ltd. v EA Community and others* (supra); and despite Mr Chemwolo’s conviction, the issue of contributory negligence may still be alive if the facts warrant it.”
21. A similar finding was made by the Court of Appeal in the case of *Abdi Ali Dere v Firoz Hussein Tundal & 2 others* [2013] KECA 167 (KLR), by the High court in *Priscilla Njeri Wamiti & 2 others v Shiku John Company Ltd* [2017] KEHC 6929 (KLR) and recently in *Murigi & another v Mwangi & another (Administrator of the Estate of Bernard Njuguna (Deceased))* [2023] KEHC 27113 (KLR).
22. In *Robinson v Oluoch* [1971] EA 376, the court observed as follows:
- “Section 47A of the *Evidence Act* was introduced into the *Evidence Act* by an amendment in the schedule to the Statute Law (Miscellaneous Amendments) Act 1969 and it states that a final judgement of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgement or after the date of the decision of any appeal therein, whichever is latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged. The respondent in this case was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence and in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying that a conviction for an offence involving



negligence driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in the subsequent civil proceedings. That is not what section 47A states. It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident. Accordingly, the Judge was right in not striking out the defence as a whole.”

23. The same position was expounded by the court in *Queens Cleaners and Dryers Ltd v East African Community and others* [1972] EA 229 as follows:

“Careless driving necessarily connotes some degree of negligence, and in those circumstances it may not be open to the respondent to deny that his driving in relation to the accident, was negligent...The expression “conclusive evidence” in section 47A of the *Evidence Act* means evidence which cannot be the subject matter of dispute, qualification or challenge. The word ‘conclusive’ has a number of meanings such as final, that closes the question, and decisive, and, in the context of the section “conclusive evidence” is evidence of such a nature. It would therefore be wrong to admit evidence to explain why a plea of guilty was tendered for it would at least go to qualify if not to nullify what the Legislature has decreed shall be conclusive. There is nothing in section 47A that supports the view that the section has no applicability except to criminal proceedings. That section simply lays down that a final judgement of the court (or an appellate court in appeal thereon) cannot be impugned. It must relate to both criminal and civil proceedings. Generally speaking, traffic offenders are not criminals in the narrow sense of the word, but I fail to see that because in certain places such cases are dealt with in courts trying no other kind of case, and because they are referred to as ‘traffic cases’ rather than as “criminal cases”, they are not cases within the criminal jurisdiction of the courts. The offence to which the third appellant pleaded guilty (careless driving), as its definition makes clear, is that there was lack of care in the manner of his driving and care, or rather in the legal duty to take care, is at the root of the tort of negligence...The “degree of negligence” cannot be resolved by referring back to what happened in the other court; that has never been possible. It must be done by evidence in the instant proceedings. To establish a claim in negligence simpliciter the degree thereof is immaterial for if you are negligent in the smallest degree it is enough to fix you with liability and there is no problem: applying section 47A the conviction spells out negligence and that concludes the matter. But where contributory negligence is concerned, it is different for the court must investigate whether one or the other or both of the parties were at fault so as to apportion the damage according to the relative importance of their acts in causing the damage and their relative blameworthiness. What section 47 does is to make it impossible to hold that the person convicted was not negligent at all for the conviction is conclusive evidence that he was, i.e. the court can find that his blameworthiness was small enough; it cannot find that he had none.”

24. The foregoing confirms that the 1st defendant having pleaded guilty to the offence of causing death by dangerous driving and having been convicted in respect thereof and there being no appeal from such conviction, cannot turn around and claim that he did not cause the accident or was not negligent at all. The funny narratives being advanced by the 1st defendant and his counsel must of necessity be disregarded. However, the 1st defendant was at liberty to adduce evidence that would prove contributory negligence on the part of the deceased. In his testimony, the 1st defendant stated that he



did not see any person crossing the road. That he only heard a loud bang and something fell on the front windshield of his motor vehicle.

25. The 1st defendant purported to blame an oncoming Lorry which had its full lights on and also raised the issue of there being no Zebra crossing at the scene. No third party proceedings were taken out by the 1st defendant against the driver or owner of the alleged Lorry. If the 1st defendant did not even see the deceased on the road, it implies that he was not observing a proper look out. That he drove without regard to other road users. The excuse that there was no Zebra crossing is too lame to attribute any negligence to the deceased. Pedestrians cannot be knocked down simply because there is no Zebra crossing sign on the road. Does it mean that if there is no Zebra crossing no pedestrian should be allowed to cross the road? A lot of roads or Highways have no Zebra crossing signs. The 1st defendant cannot blame the deceased yet he did not even see him on the road before the accident. He could not even tell how the accident occurred. I find no evidence to attribute negligence on the deceased. Consequently, I find the 1st defendant 100% liable for the accident. The evidence on record indicates that the 1st defendant was the owner of the accident motor vehicle. His narrative that it belonged to his employer does not hold water. He admitted that he bought the motor vehicle in his name. As such, the issue of vicarious liability does not arise.

Quantum

26. There is sufficient evidence to prove that the deceased died as a result of the accident. Consequently, I find that the estate of the deceased as well as his dependants 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”.

27. I am also guided by Lord Denning’s decision in *Kim Pho Choo v Camden & Islington 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.”

28. 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.
29. Being guided by the above principles, 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 following the accident. In the authority 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. 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. I have also taken into consideration the vagaries of inflation. I find an award of Ksh. 70,000/= would be reasonable. I award the same.

2. Damages for loss of expectation of life

The evidence on record indicates that the deceased died at the age of 44 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. I have on my part, considered the authority of *Cornelia Elaine Wamba v Shreeji Enterprises Ltd & Others*[2012]eKLR wherein the deceased died at the age of 31 years and Ksh. 150,000/= was awarded under this head on 21/9/2012. In the case of *Richard Macharia Nderitu v Phillemon Rotich Langas* [2013] eKLR, the deceased died at the age of 47 years. The court awarded Ksh. 100,000/= under this head on 28/3/2013. Given the age of the deceased at the time of death and in view of the vagaries of inflation, I make an award of Ksh. 150,000/= under this head.

3. Damages for loss of dependency

The deceased died at the age of 44 years. It was pleaded and stated in evidence that the deceased was a cook who earned Ksh. 20,000/= per month. The earnings of the deceased were supported by a letter from his employer which was produced in evidence. In the case of *Jacob Ayiga Maruja & another v Simeon Obayo* [2005] eKLR, the Court of Appeal held as follows:

“We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things”.

30. The plaintiff urged the court to adopt the multiplier approach. The deceased was survived by a widower and four children who were of tender age at the time of the deceased's demise. 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".
(Underlining mine)

31. Damages for loss of dependency are not awarded as a matter of course. There must be proof of such dependency especially where the alleged dependant or dependants do not fall under the categories listed in the *Fatal Accidents Act*. I therefore find that the widower and the children of the deceased are proper dependants and therefore entitled to an award of loss of dependency. There are conflicting decisions particularly in the High court on how damages under this head ought to be awarded in the absence of proof of exact earnings of the deceased. Some Judges adopt the global award approach whereas others adopt the multiplier approach. I will highlight some of the authorities:

a. Njoki Njenga v Umoja Floor Mills & Another [2006] eKLR.

In this case, the deceased was said to be a businessman at the time of his death. It was said that he earned about Ksh. 120,000/= per month. No documentary evidence was adduced to prove his earnings. Musinga J (as he then was) adopted a figure of Ksh. 10,000/= as the multiplicand.

b. Mwita Nyamohanga & another v Mary Robi Moherai suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & another [2015] eKLR.

In this case, Majanja J (as he then was) held that proof of earnings by way of testimony was sufficient evidence. The court relied on the oral testimony of what was said to be the deceased's earnings.

c. Phillip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR.

In this case, the deceased was said to be a businessman at the time of death earning about Ksh. 40,000/= per month. There was no documentary proof of his earnings. Mutende J held that in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee.

d. Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR.

In this case, the deceased was said to have been a businessman prior to his death. There was no documentary proof of his earnings. Ngaa J held as follows:

“It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case”.

The court proceeded to make a global award under this head.

e. General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR.



In this case, the deceased was said to be a mechanic at the time of death but there was no documentary proof of his actual earnings. Aburili J held as follows:

“There is an established formula for calculating loss of dependency and giving global figures is not one of them. On that basis, I fault the trial magistrate for applying wrong principles of law in assessing general damages for loss of dependency..... where there is no documentary evidence of employment, the court would consider reasonable income for a casual labourers as a base for income because it would have been unreasonable not to allocate any sum of income to the deceased who used to go out and eke out a living daily. The case of Wambua vs Patel And Another, [1980] KLR 336 cited with approval in Kimatu Mbuvi vs Augustine Kioko CA203/2001 is clear that it is not just documentary evidence that can prove earnings and that to maintain that stand would do a lot of injustice to many illiterate Kenyans who do not keep records and yet earn livelihoods in various ways”.

The court adopted the minimum wage of an ungraded mechanic artisan.

- f. Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another.

In this case, which was quoted with approval in Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR, Ringera J (as he then was) held as follows:

“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.”

- g. Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR.

In this case, Nambuye J (as she then was) observed as follows:

“As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books.”

- h. Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016] eKLR.

In this case involving a deceased minor, the trial court had estimated the expected earnings of the minor and applied the multiplier approach. On appeal, Gikonyo J held that in such circumstances, the court’s obligation would have been to achieve the assessment of a fair award in the circumstances of the case for loss of dependency rather than courting an obsession to applying a multiplier to facts which are not apt. That the least income adopted by the trial magistrate lacked a foot on which to stand. The multiplier was also inappropriate in this case.

- i. Violet Jeptum Rahedi v Albert Kubai Mbogori [2013] eKLR.



The deceased herein was said to be a business man but there was no clear evidence of his earnings. Hatari Waweru J (as he then was) made an estimate of the monthly earnings and adopted the multiplier method.

31. The existence of divergent views on the issue as highlighted herein above poses a dilemma especially on the lower courts who are bound to follow decisions of higher courts by virtue of the doctrine of stare decisis. While grappling with the issue, I came across the English decision of the House of Lords in the case of *Gammel v Wilson* [1981] 1 ALL ER 578 wherein Lord Scarman observed as follows:

“The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in *Gammel’s* case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a ‘conventional’ award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a ‘conventional’ award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in *Gammel’s* case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it”.

32. In this case, the plaintiffs merely produced a letter from the deceased’s employer. The letter was not accompanied by a payslip or other document to confirm the exact earnings of the deceased. It is not clear whether the sum of Ksh. 20,000/= was the net or gross salary. The deceased’s earnings must have been subject to statutory deductions. This information is not clear from the letter by the deceased’s employer. In the circumstances, I find that the multiplier approach would not be appropriate as the same would be speculative. In the circumstances, I will adopt the global sum approach. Considering the age of the deceased and number of his dependants, and the fact that the deceased was also expected to pay taxes and be subject to other statutory deductions, I find that a sum of Ksh. 1,800,000/= would be reasonable. I award the same. It is also a fact that human life is not permanent and the court has to take into account the vicissitudes of life. I am mindful of the principles applicable in assessing damages as espoused herein above. I have further taken consideration of the fact that the plaintiffs have already been awarded damages under the *Law reform Act*.

4. Funeral and related Expenses

33. The plaintiffs pleaded a sum of Ksh. 172,840/= for funeral expenses under the head of special damages. The plaintiffs produced what appears to have been a food budget for the funeral. No receipts were produced to indicate how much was incurred in terms of burial expenses. In the case of *Damaris Mwelu Kerewoi v Mbarak Kijian Ali*, Mombasa HCCC NO. 776 OF 1995 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.”

34. Similarly, in the case of Jacob Ayiga Maruja & Another v Simeon Obayo [2005] eKLR, the Court of Appeal had this to say regarding funeral expenses:

“We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on”.

35. 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”.

36. 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”.

37. 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. Even in the absence of receipts, funeral expenses can still be awarded if claimed. The court may take into account the deceased’s status in society prior to his/her death. I am aware of the conduct of funerals and in particular African funerals. Consequently, I award Ksh. 172,840/= as funeral expenses.

5. Special Damages

38. In their pleadings, the plaintiffs pleaded special damages (apart from funeral expenses) of Ksh. 42,750/=. 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:-

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”

39. 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:

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.”

40. The plaintiffs produced receipts for the special damages as pleaded. Consequently, I award the sum of Ksh. 42,750/= as special damages.

Disposition

41. In summary, I find that the plaintiffs have proven their case against the 1st defendant on a balance of probabilities. I hereby enter judgment in favour of the plaintiff against the defendant and make the following awards:

- a. Damages for pain and suffering.....Ksh. 70,000/=
 - b. Damages for loss of expectation of life.....Ksh. 150,000/=
 - c. Damages for loss of dependency.....Ksh. 1,800,000/=
 - d. Funeral and related expenses.....Ksh. 172,840/=
- Grand Total.....Ksh.2,192,840/=

42. 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.”

43. 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.”

44. 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)

45. 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).

46. Consequently, interest on the damages under the *Law Reform Act* and the *Fatal Accidents Act* shall accrue at court rates from the date of judgment/decree until payment in full and on special damages and funeral expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 19TH DAY OF MAY, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.

HON Y.A. SHIKANDA

