Akuma (Suing as the Legal Representative of the Estate of the Late Kelvin Ongeri Obutu – Deceased) v Ogega & another (Civil Appeal E019 of 2025) [2025] KEHC 16489 (KLR) (11 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16489 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E019 OF 2025

DKN MAGARE, J

NOVEMBER 11, 2025

BETWEEN

SEBASTIANO OBUTU AKUMA [SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE KELVIN ONGERI OBUTU – DECEASED] ..... APPELLANT

AND

VICTOR NYAMWEYA OGEGA ..... 1ST RESPONDENT

VICTORIA KWAMBOKA ONGERI ..... 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. P.K. Mutai (PM) delivered on 22.01.2025 in Kisii CMCC No. E1008 of 2022. The appellant was the plaintiff in the lower court

2. The Memorandum of Appeal dated 28.01.2025 is against the award of liability and general damages. The Appellant posited that the lower court erred in dismissing the suit in spite of the appellant having proved the case on the required standards. He set out the following grounds:

    a. The learned trial magistrate erred in law and fact in holding that the appellant did not prove his case on liability.

    b. The learned trial magistrate erred in fact and law in failing to enter judgment in favour of the appellant in respect of the claims for general damages under the *akn ke act 1946 7 Fatal Accidents Act* and the *akn ke act 1956 48 Law Reform Act*.

    c. The learned magistrate's decision was unjust and against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

d. That the learned magistrate erred in law in disregarding the appellant's submissions on liability and the applicable laws thereby arriving into wrong decision and judgment on liability.

e. That the learned magistrate misapprehended the fact that the Appellant had proved his case on the required standards and proceeded to give judgment that went against the weight of evidence before court.

Pleadings

3. The Plaint dated 13.12.2022 claimed damages for an accident that occurred on 30.09.2021 when the deceased was a rider of motor cycle registration number KMER 698 X along Kisii-Migori Road at Iterio area when the Respondent his driver or agent negligently and dangerously drove motor vehicle Registration No. KDG 897 U Toyota Hiace to rum into the deceased and hence causing fatal injuries to the deceased.

4. The suit was brought by a father of the 35-year-old deceased. It is not clear whether the deceased had any other family or what his income was. The ages of the parents was not given. He was said to be in good health with greater dreams and aspirations.

5. The Appellants set forth particulars of negligence for the accident motor vehicle, and pleaded special damages of Ksh.110,550 = as well as general damages under the *akn ke act 1956 48 Law Reform Act* and *akn ke act 1946 7 Fatal Accidents Act*. The appeal is not on special damages.

6. The Respondent entered appearance and filed a defence dated 27.1.2022, in which they denied the particulars of negligence and damages pleaded in the plaint. He further set out ten particulars of negligence attributed to the deceased motor cyclist. They stated that the accident occurred despite best effort and diligence.

7. The lower court heard the parties and proceeded to render the impugned judgment in which the court dismissed the suit. The court did not nevertheless assess damages. The later part is improper. This aspect was addressed in the case of Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, where the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

8. The case before the court seems different from what the court decided on. In the judgment the court indicated that two witnesses testified while no defence witness testified. However, the proceedings tell a different story.

9. The first witness was the Appellant who adopted his statement and produced 10 exhibits. He indicated that he did not know that the deceased was riding a motor cycle. He did not produce evidence of earning.

10. PW2 Inspector Betty Chepkosgey produced a police abstract. She stated that there were two fatalities. The same involved motor vehicle registration number KDG 897 U and motor cycle registration

number MKER TVS. She stated that the traffic case was taken to court but it is pending under investigations.

11. The respondent testified through Dominic Mitobo. He stated that he was driving at 36 km h. The motor cycle emerged from the left. He swerved to his extreme left and collided with the motor cyclist.

Submissions

12. The Appellant filed submissions dated 19.9.2025. It was submitted that the Appellant adduced credible evidence through PW1 and PW2 which confirmed that the accident occurred, causation by the Respondent and the result was death of the deceased person. On this, reliance was placed inter alia on Kanyuru Munyororo v Joseph Ndumia Murage & Another HCCC No. 95 of 1998.

13. It was submitted on the issue of liability that the Appellant's evidence clearly demonstrated that the cause of the accident was entirely attributable to the Respondent, who was 100% at fault. In support of this position, reliance was placed on the case of Trust Bank Limited v Paramount Universal Bank & 2 Other (2003) eKLR.

14. The appellant submitted that the Respondent called no witness to support the aversions in the defence which remained mere assertions. On this, reliance was placed on Mortex Khitwear Limited v Gopitex Knitwear Mills Ltd HCCC No. 834 of 2002.

15. The Appellant therefore submitted he had proved negligence and the court was not correct in dismissing the case. Reliance was placed on the case of Motex Knitwear Limited V Gopitex Knitwear Mills Limited [2009] eKLR thus:

    a. "Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

16. The Appellant also submitted that the plaint dated 13th December 2022 was meritorious and ought to have been allowed. The Appellant did not submit on quantum.

17. On the part of the Respondent, by submissions dated 5.9.2025. It was submitted that police abstract blamed the deceased for the accident. That there was no evidence connecting the Respondent to the causation of the accident. Reliance was placed on Patrick Mutie Kamau & Another v Judy Wambui Ndurumo (1997) eKLR.

18. The Respondent also submitted that the onus was on the Appellant to prove the case against the Respondent and which the Appellant failed. As such, it was submitted that there could be no liability without fault. Reliance was placed on Kiema Mutuku v Kenya Cargo Hauling Services Ltd 1991 KLR.

19. Therefore, the Respondent submitted that the lower court was justified in dismissing the Appellant's case. The proceedings in this matter and MCCC No. 1007 of 2022 seem comingled or were adapted as evidence in this matter. However, the court shall rely on proceedings for this file in absence of any order consolidating the two files. The submissions relate to the claimant in MCCC No. 1007 of 2022.

Analysis

20. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate

court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

21. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424, the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

22. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

23. The Appellant urged the court to find that the lower court erred in finding the Appellant 100% liable. The court is tasked to establish whether the lower court erred in finding, on a balance of probabilities that the Appellant failed to prove his case. The legal burden of proof lies upon the party who invokes the aid of the law and asserts an issue based thereon. In Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under Section 107 (1) of the *akn ke act 1963 46 Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act."

24. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case. In Evans Nyakwana –vs- Cleophas Bwana Ongaro [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *akn ke act 1963 46 Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the *akn ke act 1963 46 Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

25. The question then is what amounts to proof on a balance of probabilities. Kimaru J in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

26. The balance of probabilities is also about what is likely to have happened than the other. Lord Nicholls of Birkenhead in Re H and Others (Minors) [1996] AC 563, 586 held that;

> " The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....."

27. Furthermore, the standard of proof in civil cases must carry a reasonable degree of probability, but not so high as is required in a criminal case for such standard is based on a preponderance of probabilities. In Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Judges of appeal held that:

> " Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-
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> > "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
> >
> > This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

28. The court blamed the Appellant for not producing other evidence. However, the rider was dead as well as the pillion passenger. There was no magic for calling the two. This leaves the court with construction of the scene. PW2 stated that they made a decision to charge the Respondent driver. This was not rebutted. The factual matrix was set out by the respondent, who was present. In the case of Mombasa Maize Millers & another v Elius Kinyua Gicovi [2021] eKLR Nyakundi J referred to Wayne Ann Holdings Limited (T a Superplus Food Stores) v Sandra Morgan, and held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant

for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:

> ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

29. The devil is always in the details. The stopping time for 36 kph should be about 12 m. This will take less than 2 seconds. The vehicle could virtually stop instantly. The one thing the driver avoided was braking. Secondly, if the motor cyclist emerged from the left, which prudent driver can swerve to the extreme left to meet with the motor cyclist?

30. The impact resulting in two deaths on the spot does not in any way show the truth of the Respondent's case. The case in the court below was not handled by the appellant in the best way. If the Respondent is to be believed then they were to blame for swerving to the left instead of stopping or swerving to the right. The motor cyclist is also to blame for joining the road when it was not safe to do so. However, the empirical admissions from the defence shows that the respondent was more to blame.

31. The evidence of the Respondents was not inconsistent with his negligence for the accident. This is the rule in Embu Road Services V Riimi (1968) EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 in which the courts held inter alia that; -

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence". See also Odungas Digest on Civil case law and Procedure 3rd Edition Vol 7 page 5789 at paragraph (D).

32. Accordingly, I set aside the dismissal of the suit and enter judgment for the appellant. In totality of the circumstances, I find that the cyclist was 30% to blame while the respondent was 70% to blame.

33. The court now turns to quantum of damages. This is dealt with in three aspects; general damages for loss of dependency, pain and suffering, special damages, and loss of expectation of life.

34. It must be remembered that an award of general damages should be commensurate with the loss suffered and may only be interfered with if it is shown to have been made on wrong principles or is manifestly excessive or inadequate. This principle was well established in the case of Butt v Khan [1981] KLR 349, where the Court of Appeal held that an appellate court should not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate of damages. This was also addressed in the case ofSouthern Engineering Company Ltd v Mutia [1985] KECA 49 (KLR), where the court of appeal stated as follows:

> ... the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general

conditions prevailing in the country generally, and to prior decisions which are relevant to the case in question. This is shown by a passage from an English case in the House of Lords to which reference has often been made in this Court, but which I think illustrates Mr. Gautama's point that it is the quality and calibre of the judgment in question which is its most important factor, and that the reference to other and possibly to outside decisions is, in a sense, incidental to that. The passage is from Lord Morris' speech in H West & Son v Shephard, [1964] AC 326 at page 353, and reads as follows:-

"The difficult task of awarding money compensation in a case of this kind is essential a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment.

Even more definite regarding the upward trend was the statement made by Madan JA twenty-one months later in Ugenya Bus Services v Gachoki Civil Appeal 66 of 1981, where there was a hand injury but also the amputation of the right leg, as follows:-

" I also know that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs. 20,000.00 for the loss of a forearm or Kshs. 50,000.00 for the loss of an eye. Even without the curse of inflation they were niggardly. I remember but ignore them. We have inflation with us. We all have to live with the exorbitance which inflation has brought into our lives."

35. However, the court below neglected its duty to properly assess damages, a duty it is bound to perform or, alternatively, remit to the lower court for assessment. That duty was addressed in the case of Lei Masaku versus Kalpama Builders Ltd [2014] eKLR, where the court noted as follows: -

> It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

36. In this instance, this court will opt to assess damages based on the evidence on record, which is predominantly documentary and or statutory. The court can apply the minimum wage or a global sum for general damages under loss of dependency. Before addressing the question of which of the two methods, the court will use, it must be succinct that none of the two methods is superior to the other. The use of multiplicand is ideal for working age people and not children and people long past working age. In the circumstances of this case, a multiplier method is more ideal. In the case of China

Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] KEHC 359 (KLR), the court, R. Nyakundi stated as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Kshs.18,000 per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *akn ke act 1946 7 Fatal Accidents Act*.

37. Looking at the circumstances of this case, where the deceased's source of income was ascertainable though the exact amounts were not proved, the court is entitled to adopt the minimum wage and applying the multiplicand approach, as opposed to resorting to a global sum assessment. Ringera J, (as he then was) in Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993 stated as follows on the debate of the multiplicand approach, and global sum assessment:

> ...The multiplier approach is just a method of assessing damages and not a principle of law or 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 ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown 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. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."

38. The death certificate does not indicate occupation. The deceased died in Iterio outside the former municipalities. The best the court can use is the Regulation of Wages (General) (Amendment) Order, 2022, for outside municipalities. The deceased was a rider and farmer in outside municipalities. General labourers outside municipalities are entitled to Ksh 8,109.90 = for all other areas. The deceased was 35 years old at the time of death. There was no evidence of a wife or children. The age of the parents is not given.

39. The next question is the multiplier. The deceased was 35 years old with no wife and children except a parent. Deceased was subject to vicissitudes of life that may have sent him to his early grave. He may have also lived until a ripe old age working and contributing to nation building. It may never be known. Nevertheless, the court must have those competing factors in mind. Ringera J in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), held at page 248 that:

> The principles applicable to an assessment of damages under the *akn ke act 1946 7 Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be

discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.

40. Doing the best I can, this court adopts a multiplier of 20 years. It is evident that, over time, the parents would have lost dependency to the deceased's future wife and children, and they themselves would have aged. The dependency ratio, therefore, remains a question of fact to be determined from the circumstances of each case. As was held by Odunga J (as he then was) in J W N v Kassam Hauliers Limited [2020] eKLR, the dependency ratio is a question of fact to be determined from the evidence on record and the circumstances of each case. The court stated as follows:

> 17. Conventionally Courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2 3. On the other had they have taken unmarried people to spend more on themselves more than their dependants more so parents hence have apportioned a dependency ratio of 1 3 which has over time been enhanced to 1 2.

41. In the circumstances, given that the deceased was single, a dependency ratio of 1 3 will suffice. This works out as follows:

Ksh 8,109. 90 x 20 x 12 x 1 3 = 648,792 =.

42. The next issue concerns pain and suffering. The deceased died on the spot. The principles governing awards under this head were discussed in the case of Francis Odhiambo Nyunja & 2 Others V Josephine Malala Owinyi (Suing as the Legal Administrator of The Estate of Kevin Osore Rapando (Deceased) [2020] eKLR, where it was held that damages for pain and suffering depend on the degree of consciousness and the duration of suffering before death. The Court, Justice W. Musyoka stated as doth:

> 13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Kshs. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:
>
> > "[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years hence I cannot say that that the sum of Kshs 50,000 awarded under this head is unreasonable."

43. Further, in the case of Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph 21 the Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes

away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

44. The above case law points to the fact that the award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted unlike in a case where a deceased dies later on. In this case, the deceased passed away on the same day of the accident.

45. Therefore, all factors considered, given that the deceased died on the spot, a nominal amount of Ksh. 30,000 = will suffice.

46. On the question of loss of expectation of life, the law on this aspect is well settled. The deceased was 35. There was no evidence of any malaise. He was riding a motor cycle taxi hence being a useful member of society and to his estate. The deceased was mid-way his life. In the case of Victor Hosea Letting v Anwarali and Brothers Limited & another [2019] KEHC 9309 (KLR), the court awarded Ksh 150,000 = for a 27 year old deceased. In the case of Mercy Muriuki & another v Samuel Mwangi Nduati & Anor (Suing as the Legal Administrators of the Estate of the late Robert Mwangi) [2019] KEHC 9014 (KLR), while addressing the question of loss of expectation of life, the Judge posited as follows:

    22. Under the *akn ke act 1956 48 Law Reform act*, In Rose vs Ford, (1937) AC 826 it was held that damages for loss of expectation of life can be recovered on behalf of a deceased's estate. Further, in Benham vs Gambling, (1941) AC 157 it was further held that only moderate awards should be granted under this head for the following reasons:

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

    23. The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs 100,000 - while for pain and suffering the awards range from Kshs 10,000 = to Kshs 100,000 = with higher damages being awarded if the pain and suffering was prolonged before death.

47. In the circumstances of this case, a sum of Ksh 150,000 = will suffice as damages for loss of expectation of life.

48. Special damages were pleaded. The next question is whether they were proved. The amounts pleaded were advocates fees of Ksh 50,000 =, funeral expenses of Ksh 60,000 = and motor vehicle search. The amount of Ksh. 50,000 = is unreasonable and untenable. There is no basis laid for the same hence it is disallowed. A sum of Ksh 550 = is proper and proved. The next question is a sum of Ksh. 60,000 = as funeral expenses. Though decidedly special damages, there is no strict rule as to the funeral expenses.

The appellant did not lead much useful evidence on these expenses. However, they must have been incurred. In the case of Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR, the court stated:

> Funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000 = which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000 = must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000 = we have awarded herein apply strictly to the circumstances of this case.

49. Further, in the case of Premier Diary Limited v Amarjit Singh Sagoo & another [2013] KECA 95 (KLR), the Court of Appeal [Onyango Otieno, Azangalala & Kantai, JJ. A] addressed funeral expenses and their notoriety in Africa as follows:

> In fact we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000 = was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.

50. In the circumstances, I find that a sum of Ksh. 60,000 = was a reasonable sum for funeral expenses. I award the same.

51. The net effect is that the appeal is allowed. The next issue is who is to bear costs. The issue of costs is governed by Section 27 of the *akn ke act 1924 3 Civil Procedure Act*, which provides as follows:

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

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

52. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously

meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

53. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows:

> 18. It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.
>
> 22. Although there is eminent good sense in the basic rule of costs - that costs follow the event- it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings - a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Applicant.

54. Costs must thus follow the event. The event is the allowing of the appeal, and the Appellant is entitled to costs. A sum of Kshs. 75,000 = shall suffice.

Determination

55. In the upshot, I make the following orders:

a. The appeal is allowed. The judgment and decree of the lower court is set aside. In lieu thereof, I make the following orders:

i. Judgment is entered for the appellant against the respondents on liability at 70:30.

ii. General damages for loss of dependency is assessed at 648,792 =.

iii. Special damages of Ksh. 60,550 =

iv. loss of expectation of life 150,000 =

v. Pain and suffering Ksh. 30,000 =

vi. Costs in the lower court to the Appellant.

b. Costs of Ksh. 75,000 = to the appellant for this appeal.

c. Interest on general damages from the date of judgment in the lower court while interest on special damages from the date of filing.

d. 30 days stay of execution.

e. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11 TH DAY OF NOVEMBER, 2025 . JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Michael