REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. E120 OF 2024

BETWEEN

ALPHONCE MBINDA MUSYOKI……1ST APPELLANT

PHYLIS MUTHEU MBINDA……2ND APPELLANT

AND

ESTHER M'MBONE NYONG'A &
MONICA MWIKALI MULEI
(Suing as the Legal Administrators
of the Estate of the late
MORRIS MATHEKA MULEI, deceased)……
RESPONDENTS

(Being an appeal from the judgment and decree of Hon. H. M. Mbati (Principal Magistrate) delivered on 26th March 2024 in MCCC No. E207 of 2023 at the Chief Magistrates Court, Machakos)

JUDGMENT

Background

1. The appellants seeks to overturn the judgment of Hon. H.M. Mbati dated 26th March 2024 rendered in Civil Case No. E207 of 2023 at the Chief Magistrates Court at Machakos.

2. The genesis of this case can be traced to a plaint dated 15th June 2023 where the respondents herein sued the appellants herein seeking special damages in the sum of Kshs.1,013,270, general damages for loss of dependency, loss of expectation of life and pain and suffering under the Law Reform Act and Fatal Accident Act, costs of the suit, interest for the said special damages, general damages and costs of the suits at court rates and any other relief the court deemed fit to grant.
3. In the plaint, the respondents averred that on or about the 24th of September 2022, the deceased was lawfully riding motor cycle Reg No. KMES 915V along Machakos - Kangundo road when at Kamuthanga Area, the appellants either by themselves or through their authorized driver, agent, servant and or employee controlled and/or managed motor vehicle registration no KCE 352M so negligently that the said motor vehicle was permitted to overtake at such high speed when it was not safe to do so and veered off into the lane of motor cycle Reg No. KMES 915V and rammed head on with the said motorcycle and as a result the deceased sustained fatal injuries.
4. The appellants in a defense dated 5th July 2023 denied the respondents' claim in its entirety and put them to strict proof thereof.
5. Upon hearing both parties, the trial court in its judgment dated 26th March, held that the appellants were 100% liable

for the accident. Consequently, the trial court awarded Kshs.50,000 for pain and suffering, Kshs.100,000 for loss of expectation of life, Kshs.16,000,000 for loss of dependency, and Kshs.834,750 as special damages. The trial court held that since its jurisdiction was Kshs.10,000,000, its award was an all-inclusive award of Kshs10,000,000; inclusive of costs and interests.

The Appeal

6. This decision has triggered the appeal before me. The appellant filed this appeal vide the Memorandum of Appeal dated 23rd April 2024 on eight (8) grounds reproduced verbatim as follows. That-:

(1) The learned magistrate ignored and/or misapprehended the totality of the appellants' evidence including the fact that the appellants were neither driving the suit motor vehicle nor at the scene of the accident when the accident occurred and thereby reached the wrong conclusions.

(2) The learned magistrate ignored and/or misapprehended the totality of the parties' evidence including the fact that there was no sufficient evidence adduced by the respondents that the deceased was earning a monthly income of Ksh. 100,000 and hence reached a

wrong conclusion on the damages for lost years.

(3) The learned magistrate wrongly exercised her discretion in awarding special damages for claims not proven by documentary evidence.

(4) The learned magistrate wrongly exercised her discretion in holding the appellants 100% liable for the accident despite evidence of extenuating circumstances at the scene of the accident showing that the accident was neither negligent nor intentional.

(5) The learned magistrate wrongly exercised her discretion and wrongly interpreted the law and precedent in awarding general damages to the respondents and in so doing awarded excessive general damages.

(6) The learned magistrate wrongly exercised her discretion and wrongly interpreted the law and precedent in awarding damages for loss of expectation of life, lost years and general damages for pain and suffering and reached a wrong conclusion.

(7) The learned magistrate misapprehended the applicable laws and principles and thereby reached the wrong conclusions on the liability of the appellants.

(8) The learned magistrate erred in law and in fact by taking into account extraneous matters and failed to take into account relevant matters in arriving at her decision.

7. Consequently, the appellants pray for the appeal be allowed and the judgment of the trial court be set aside and substituted in terms of the appellants' statement of defence, that this court be pleased to grant any or such other further orders as it deems fit and for costs of the appeal.
8. The appeal was canvassed by way of written submissions. The appellants filed written submissions dated 4th April 2025 to support their appeal. The respondents filed written submissions dated 13th June 2025 in rebuttal. I have summarised these submissions below.

Appellants' submissions

9. The appellant submits that the issues for determination in this appeal are (a) whether the 1st and 2nd appellants were to blame for the accident, (b) whether the trial court erred in adopting the multiplier method instead of the global sum approach in the absence of evidence of the deceased's earnings, (c) whether the special damages claimed and awarded by the trial court were reasonable and necessary in the circumstances of the case, and (d) who shall bear the costs of this suit.

10. On the first issue, it is submitted that the trial court failed to correctly assess the degree of liability to be apportioned to either party, given the circumstances surrounding the accident, the evidence adduced and the probative value of the said evidence. It is submitted that in determining matters liability, there is no standard principle to be applied. This contention is buttressed with the decision in **Omoke v Owino & 3 others (Civil Appeal E103 of 2023) [2024] KEHC 2652 (KLR).**

11. It is the appellants case that the Police Officer in the trial court blamed the appellants for the accident but failed to produce any evidence that they were to blame by way of occurrence book extracts (OB) and sketch maps/sheets from the scene of the accident or otherwise.

12. It is submitted that the police officer produced the Police Abstract dated 11th November, 2022 which is not conclusive proof of liability. The decisions in **Ndege & another (Suing as Administrators of the Estate of Moses Kariuki Muthaga Deceased) v Ontumbi & another [2023] KEHC 19905 (KLR)**, and **Kennedy Nyangoya V Bash Hauliers [2016] KEHC 2616 (KLR)**, are relied on to reinforce this submission.

13. It is submitted that when there is no concrete evidence to determine who is to blame for the accident, both parties should be held equally to blame. The decision in **Ontiri v**

Mulwa [2024] KEHC 5162 (KLR) is relied on to bolster this assertion.

14. It is the appellants case that the respondents are tasked with the duty and burden to prove whatever claims they assert whether the same is controverted or not per Sections 107, 108 and 109 of the Evidence Act and the decisions in **CIC General Insurance Limited v Muiruri [2025] KEHC 3161 (KLR)**, **Eastern Produce (K) Ltd v Christopher Atiado Osiro [2006] KEHC 3200 (KLR)**, and **John Simon Ashers & Another V Nelson Okello Onjao [2020] KEHC 3056 (KLR)**, which they did not do.

15. The appellants therefore urge that liability should be apportioned in the ratio of 50:50 between the appellants and respondents.

16. On the second issue, it is submitted that the trial court erred in law and fact in concluding that the deceased was earning a monthly income of Kshs.100,000, thereby awarding an exorbitant amount of Kshs.16,000,000 under the limb of loss of dependency, in the absence of any documentary proof such as payslips, bank statements or salary structures. It is submitted that the respondents failed to discharge the evidentiary burden of proving the deceased's income.

17. It is urged that where the deceased's income is not proven, courts have opted to rely on the minimum wage or award damages using the global sum approach method.

18. It is submitted that the deceased's law firm predominantly operated at a loss during the years 2016, 2017, 2018, 2020 and 2021 as denoted by the use of brackets in the audited financial statements, which signifies negative earnings. *Christine Jonick's Book, Principles of Financial Accounting, page 13,* is relied on to buttress this submission. It is therefore urged that the trial court's conclusions were not supported by the evidence on record.

19. It is the appellant's case that the trial court erred in law by improperly shifting the burden of proof to them, requiring them to demonstrate that the firm operated as a partnership rather than a sole proprietorship contrary to the well-established legal principle that he who alleges must prove.

20. It is submitted that the trial court erred by adopting a high multiplier on the assumption that the deceased would have worked until the age of 70 years.

21. It is contended that in the clear absence of evidence of the deceased's income, a global award for the loss of dependency should have been adopted by the trial court. The decisions in **Albert Odawa v Gichimu Gichenji [2007] KEHC 1358 (KLR), Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] KEHC 10 (KLR)**,and **Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu**

Deceased) [2020] KEHC 5897 (KLR) are relied on to reinforce this contention.

22. The appellants propose that given the deceased passed away at the age of thirty-eight (38), an amount of Kshs.2,000,000 is sufficient compensation factoring in inflation. The decisions in **Sagini & another (Suing as the Personal Representatives and Legal Administrators of the Estate of Josephat Nyamweya Nyakioga - Deceased) v Mariga (Civil Appeal E024 of 2023) [2024] KEHC 6525 (KLR), Njoroge (Suing as the Legal Administrator of the Estate of Francis Karanja Wainaina - Deceased) v Ponderosa Logistic Ltd (Civil Appeal 92 of 2016) [2024] KEHC 1606 (KLR), Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) [2021] KEHC 4971 (KLR),** and **Mutua & another (Suing as the Administrators to the Estate of the late Benard Mutua Mwanzia - Deceased) v Mwalimu [2025] KEMC 20 (KLR)** are relied on to support this proposal.

23. It is submitted that in assessing compensatory damages, the law aims to indemnify the victim for the loss they have suffered and not penalize the tortfeasor for the injury caused. The decisions in **FM (Minor suing through Mother and Next Friend MWM) V JNM & Another [2020] KEHC 557 (KLR)** and **Power Lighting Comp. Ltd**

& Another vs. Zakayo Saitoti Naingola & Another [2008] KEHC 504 (KLR) are cited to reinforce this submission.

24. The appellants contest the award of special damages on the basis that it was manifestly excessive, unsupported by proper evidence, and offends the principles of fairness, necessity, and proportionality.

25. It is submitted that the award of special damages should be moderate to reflect only what is reasonable and justifiable in the circumstances. The Court of Appeal decision in **Premier Diary Limited v Amarjit Singh Sagoo & another [2013] KECA 95 (KLR**), is relied on to buttress this assertion.

26. On the last issue of costs, it is urged that it is trite law that costs follow the event as provided for under Section 27 (1) of the Civil Procedure Act. The appellants therefore pray to be awarded costs.

Respondents' submissions

27. On the first ground of appeal, the respondents submit that despite the fact that the appellants contend that they were neither driving the suit motor vehicle nor were they at the scene of the accident, they are vicariously liable for the actions of the driver of the subject motor vehicle KCE 352M. They rely on the decisions in **Beatrice William Muthoka & another (Both Suing as Legal Representatives of the**

Estate of the Late William Muthoka Yumbia (Deceased)) vs Agility Logistics Limited [2020] eKLR, Joel. V. Morison [1834] EWHC KB J39, Bachu v Wainaina (CA No. 14 of 1976 Nakuru Automobile House Ltd v Zavdin CA 63 of 1986) Central Motors (Glasgow) Ltd v Cessnock Garage & Motor Co. [1925] SC 79 802, and **Ribiru v Ndung'u (Suing on Behalf of the Estate of the Late Joram Ndung'u Mwaniki) & 2 others (Civil Appeal 37 of 2023) [2024] KEHC 339 (KLR) (25 January 2024) (Judgment)** to buttress their submission.

28. On the second ground of appeal, it is the respondents' case that the trial court assessed in totality the evidence before it and determined that the respondents had tendered sufficient evidence on the proof of earnings of Ksh.100,000 and that the appellants had neither tendered any evidence to the contrary nor did they call a witness to controvert the evidence before the court on proof of earnings. The respondents rely on the decision in **Springboard Capital Limited v Njenga & another (Civil Appeal 14 of 2024) [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment)** to support their contention.

29. On the third ground of appeal, it is submitted that the learned magistrate properly applied the principle that special damages must be specifically pleaded and strictly

proved in making his determination on special damages and therefore this ground of appeal is unmerited.

30. On the fourth ground of appeal, it is the respondent's case that the trial court correctly found the appellants 100% liable in view of the police officer's testimony, eye witness and the vehicle inspection report. It is urged that there is no evidence of any circumstances, extenuating or otherwise, that warrant disturbing the finding of the trial court on liability.

31. On the fifth and sixth grounds relating to the award of general damages, it is submitted that for the award pain and suffering at Ksh 50,000 was justified because the deceased died on the spot. The decisions in **Hyder Ntheny Muslili & Another Vs China WuYi Limited & Another [2017] eKLR and Ndeti & Another (Suing on behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased) v Mwangangi & another (Civil Appeal E282 of 2021), Ndeti & Another (Suing on behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased) v Mwangangi & another (Civil Appeal E282 of 2021), Nairobi HCCC No. 191 of 2013 Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased vs. Elijah Oketch Adellah [2015] eKLR, Malindi Civil Appeal No. 17 of 2015 & 18 of 2015 - Moses Akumba & another vs. Hellen Karisa Thoya [2017] eKLR,** and

Machakos High Court Civil Appeal No 50 of 2016 - Kenya Power and Lighting Co Ltd vs. Sophie Ngele Malemba & Another [2019] eKLR are relied on to buttress this assertion.

32. It is the respondents' case that the trial court's award of Ksh. 100,000 for loss of expectation of life based on the decision in **Sidi Kazungu Gohu & another (legal representatives of the Estate of George Yongo Katana (Deceased) v Fatuma Abdi Mohamed & Another [2021] eKLR**.

33. On the 7th and 8th grounds of appeal as raised by the appellants, it is submitted that the same are a convoluted attempt by the appellants to attack the judgment of the trial court in long winding and ambiguous terms which hold no water.

34. It is submitted that the trial magistrate correctly applied the applicable laws and at no instance did the trial court address its mind to extraneous matters as alleged by the appellants. The decision in **Mkube v Nyamuro [1983] LLR at 403, where Kneller JA & Hancox Ag JJA** is relied on for this submission.

35. The respondents conclude by urging this court to dismiss this appeal with costs.

Analysis and Determination

36. I have considered the grounds of appeal, read through the record of appeal and the submissions of the parties. It is clear that this appeal is against both the liability apportioned at the ratio of 1oo% in favour of the respondent against the appellant and the quantum of damages awarded by the trial court.

37. Therefore, the issues that present themselves for determination by this court are (i) whether the trial court erroneously apportioned liability and (ii) whether the awards of pain and suffering, loss of expectation of life, loss of dependency and special damages granted by the trial court were erroneous or unjustified and/or excessive in the circumstances of this case.

38. This is a first appeal. As enunciated **in Selle v. Associated Motor Boat Co. Ltd [1968] EA**, this first appellate court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis but bearing in mind the fact that this court did not have an opportunity to see and hear the witnesses first hand.

Liability

39. Bearing this in mind, I proceed with the issue on liability. On this issue, I note that the first ground of appeal is to the effect that the trial court ignored the fact the appellants were neither driving the suit motor vehicle, nor

were they at the scene of the accident. The appellants did not specifically submit on this rather they urged that the respondents witness, the police officer, blamed the appellants for the accident but failed to produce any evidence other than a police abstract which is not conclusive proof of liability or that an accident happened.

40. The respondents on the other hand urged that it was immaterial whether the appellants were driving or were at the scene of the accident because they pleaded and argued their case on the doctrine of vicarious liability. On the issue of the evidence, they submitted that they tendered sufficient evidence to prove that the appellants were 100% liable for the accident.

41. On vicarious liability, the Court of appeal in **Paul Muthui Mwavu v Whitestone (K) Ltd [2015] KECA 745 (KLR)** pronounced itself thus:

> **[21] Moreover, even assuming that the issue of vicarious liability was an issue for determination, in the Nuthu case, this Court applied *Morgans v Launchbury & Others* *[1972] 2 ALL E R 607* in which it was stated:-**
>
> ***" In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner's servant or at the material time the driver was acting on the owner's behalf as his agent. To establish the***

existence of the agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or on his instructions and was doing so in the performance of the task of duty thereby delegated to him by the owner or so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instruction the matter is liable."

[22] In the same Nuthu case the Court restated the law on vicarious liability adopting the statement of *Newbold P* in *Muwonge vs A.G. of Uganda (1967) EA 17* as follows:

"The law is so long as the driver's act is committed by him in the course of his duty, even if he is acting deliberately, wantonly, negligently, or criminally, or even if he is acting for his own benefit or even if the act is committed contrary to his general instructions, the master is liable."

42. Guided by foregoing, it is evident from the record, specifically the NTSA Motor Vehicle of Records attached, that the appellants are the registered owners of the suit motor vehicle Registration No. KCE 352M. In addition, in his

witness statement dated 4th August 2023, the driver of the suit motor vehicle states that upon the occurrence of the accident, he informed his employer of what had transpired and the employer organized for another driver to take the suit vehicle to Machakos Police Station. No evidence to the contrary has been tendered by the respondents for this court's consideration. Based on this, it is my conclusion that the appellants were the indeed the registered owners of the suit motor vehicle Registration No. KCE 352M and the driver of the suit vehicle was driving it under their employ. As such, the appellants were vicariously liable for the actions of their driver and cannot dispute liability by urging that they were neither driving the suit motor vehicle nor at the scene of the accident.

43. The other issue that arises on liability is whether the trial court erred by apporting 100% liability on the appellants.

44. The legal burden of proof as provided for under Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya provides that:

"(***1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."***

45. In addition, the evidential burden of proof is captured under Sections 109 and 112 of the Evidence Act, as follows:

"109.The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.

……

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him".

46. The Court of Appeal in **Nadwa -vs- Kenya Kazi Ltd (1988) eKLR** observed:

"In an action for negligence the burden is always on the plaintiffs to prove that the accident was caused by the negligence of the defendant. However, if in the cause of trial there is proved a set of facts which raises a prima facie interference that the accident was caused by negligence on the part of the defendant the issue will be decided in the plaintiffs favour unless the defendant's evidence provides some answer adequate to displace that interference."

47. In the instant case, the respondents had an eyewitness, the pillion passenger. His sworn testimony was that the suit vehicle was being driven at a very high speed as it tried to overtake a saloon car whereupon it veered off its lawful lane

and rammed onto the motorcycle causing the fatality of the rider and life-threatening injuries to himself.

48. The police officer, PC Gideon Kipruto, who testified on behalf of the respondents stated that the point of impact was on the right lane as one faces Kangundo area on the extreme right. He also produced the police abstract, and a sketch plan of the scene confirming his evidence. He informed the trial court that at the time of drawing the sketch plans the scene of the accident was intact apart from the departure of the pillion passenger who had been rushed to the hospital in critical state. He also affirmed that he gave the recommendation that the driver of Motor-Vehicle Registration Number KCE 352M be charged and that the driver was subsequently charged.

49. I must point out at this juncture that the appellants submissions that the respondents did not produce any other evidence other than the police abstract, is inaccurate and unsupported by the record. I am also unconvinced that the respondents tendered any credible evidence before me to apportion liability 50:50.

50. In so finding, I am guided by the Court of Appeal decision in **Michael Hubert Kloss & another v David Seroney & 5 others [2009] KECA 146 (KLR)** where it observed:

"The determination of liability in a road traffic case is not a scientific affair. Lord Reid put it more

graphically in <u>Stapley v Gypsum Mines Ltd</u> (2) (1953) A.C. 663 at p. 681 as follows:

"To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it……

"The question must be determined by applying common sense to the facts of each particular case."

51. In addition, in **<u>Mumbi M'Nabea v David M.Wachira [2016] KECA 773 (KLR)</u>,** the Court of Appeal observed:

"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not."

52. In the instant case, considering the facts on record, the evidence in the Occurrence Book and the Police Abstract, the evidence of the investigating officer who visited the accident scene, the investigating report, the sketch map, the fact that PC Kipruto blamed motor vehicle KCE 352M for the

accident and charged the driver with the offence of causing death by dangerous driving in TR No. E128 of 2022 and noting that there is no other evidence tendered to rebut this, I am of the considered view that the evidence tendered by the respondents was, on a balance of probabilities, enough to bestow 100% liability on the appellants.

53. I therefore find the holding of the trial court on liability at 100% as proper. I see no justifiable reason for disturbing the same and it is now hereby upheld.

Award on pain and suffering

54. On pain and suffering, the trial court awarded the Ksh 50,000. One of the appellants' ground of appeal was that the trial court wrongly interpreted the law and precedent in awarding damages for pain and suffering and reached a wrong conclusion. The respondents urged that the learned magistrate's award is correct and ought not to be disturbed as it was arrived at by consideration of comparable court cases.

55. The Court of Appeal in **Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR** is categorical that:

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern

Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

56. Similarly in **Butt v. Khan Civil Appeal No. 40 of 1997** it was held:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles or that he misapprehended the evidence in some material respect, and so arrive at a figure which was either inordinately high or low."

57. What therefore emerges is that the principles on which an appellate court will disturb an award of damages are well settled. An appellate court will only interfere with an award of damages if it is satisfied that the award is inordinately low or high, or that the trial court took into account irrelevant factors in assessing the damages.

58. As such, the question that arises is whether the trial court's award of Ksh.50,000 was excessive and unjustified. In **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), *Muchemi J,* (as she then was) held at paragraph 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."

59. **Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR**, where the deceased died immediately after the accident and the trial court awarded Ksh 50,000 for pain and suffering, the appellate court 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 Ksh.10,000 to Ksh.100,000 over the last 20 years hence I cannot say that that the sum of Ksh.50,000 awarded under this head is unreasonable."

60. In the instant case, it is evident that the died on the spot. As such, considering that the various decisions of the High Court range from Ksh.10,000 to Ksh.100,000 over the last 20 years for the award of pain and suffering, I do not find the award by the trial court in this case excessive. Therefore, I find no reason to interfere with the trial court's award of Ksh.50,000 for pain and suffering.

Award on loss of expectation of life

61. In the same breath, considering, from case law cited above, that the conventional award for loss of expectation of life is Kshs.100,000, I find no reason to interfere with the award of the trial court on this. Indeed, the trial court aptly observed, and outlined case law in his decision where courts have consistently awarded a conventional sum of Kshs.100,000 for loss of expectation of life. Thus, the appellants ground of appeal that the trial court wrongly exercised its discretion and wrongly interpreted the law and precedent in awarding damages for loss of expectation of life does not stand. The award of Ksh.100,000 therefore is upheld.

Loss of dependency award

62. The appellants fault the award of Ksh.16,000,000 for loss of dependency because they argue that the deceased's monthly income could not be ascertained. They urge therefore, that the global sum of Ksh.2,000,000 is sufficient compensation factoring in inflation. The respondents on the other hand contend that they produced financial statements, which revealed that the total figure of all the salaries was Kshs.1,272,000 which figure was arrived at by deducting the expenses/drawings from the total earnings. It was their case that the profit was translated to approximately Ksh.100,000.

63. Loss of Dependency is a claim that arises from the Fatal Accidents Act. Section 4 (1) of the Fatal Accident Act provides:

"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;.."

64. Evidence before the trial court was that the deceased was 38 years old, and an advocate practicing in O.N. Makau & Mulei Company Advocates. The respondents claimed that

he was the managing partner in this law firm. I note from the record that all the financial statements from 2017-2021 refer to the deceased as the proprietor. The respondents witness, the accountant, Mr. Joseph Mwinzi, produced the audited accounts and also testified that the deceased was the managing partner of O.N. Makau & Mulei Company Advocates. Although the appellants urge that the nomenclature of the firm suggests the existence of a partnership, they did not adduce any evidence to rebut the financial statements that name him as the proprietor of the law firm.

65. I also note from the financial statements of 2017, 2018 and 2019 that there was a figure of salaries and wages of Ksh.3,229,416, Ksh.3,127.380 and Ksh.1,902,708 respectively. In my considered opinion, this is an indication that the deceased was drawing a salary from the law firm. Further, in 2020, the net profit was in 2020 was Ksh.1,214, 537. It was also testified by the accountant that the law firm had 11 employees. The appellants did not call any witness to controvert this evidence or the evidence of the audited accounts.

66. I am therefore of the view, based on the evidence in the record, particularly that of the figure of salaries and wages of 2017, 2018 and 2019 per the financial statements, and the net profit of 2020 of Ksh.1,214,537 and dividing it by 11 employees, the figure arrived at by the trial court of

Ksh.100,000 as the salary of the deceased is not excessive or far-fetched. The trial court utilised the uncontroverted financial statements on the record to arrive at its conclusion. Based on this, it would be untenable and unfair to resort to the principle of lump sum or alternatively, base its multiplicand on minimum wage.

67. I note that the trial court found the multiplier of 20 years appropriate. Considering that the deceased was only 38 years old, it is not inaccurate to hold that there is a possibility that he would have worked for up to or more than 60 years. Therefore, I find that the trial magistrate was correct to apply 20 years as the multiplier. Consequently, I find no convincing reason to interfere with the findings of the trial court on the damages awarded for loss of dependency.

Award on special damages.

68. On the award of special damages, the trial court awarded Ksh.834,750 which the appellants fault for being excessive. The respondents contend that the trial court made a correct finding on special damages.

69. It is now firmly established that special damages must not only be specifically pleaded but also strictly proved, before they can be awarded by the court. The Court of Appeal in **Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985]** KLR 716, at P. 717, and 721 held:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved…. for they are not the direct natural or probable consequence 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 nature of the acts themselves."

70. I note that the respondents claim for special damages was of Ksh.1,013, 270. Having gone through the record, I have determined that the special damages pleaded and proved were Ksh.550 for the motor vehicle search and receipts amounting to 834,200 as funeral expenses all amounting to Ksh.834,750. Thus, the trial court's finding on special damages is sound.

71. Having appraised the evidence afresh, I have no option but to find that the appellants failed to establish their case. I am also satisfied with the all-inclusive award of Ksh.10,000,000 based on the trial court's pecuniary jurisdiction. As such, I affirm the decision of the trial court. The appeal fails and is dismissed with costs to the respondents.

It is so ordered.

Dated, signed and delivered at Machakos this 13th day of November, 2025.

RHODA RUTTO

JUDGE

In the presence of;

……for Appellant

……for Respondent

Selina Court Assistant