REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. E244 OF 2021

PHILISILLA MKAMBURI MUEMA (Suing as the Administratix of the estate of the late IBRAHIM MWANGA MWAIZAI-DECEASED).....PLAINTIFF

VERSUS

JESSE NJIRU.....1ST DEFENDANT

N.S. CAR DEALERS LTD.....2ND DEFENDANT

JUDGMENT

THE ACTION

The plaintiff herein Philisilla Mkamburi Muema (hereinafter referred to as the plaintiff) brings this action against Jesse Njiru and N.S. Car Dealers Ltd (hereinafter referred to as the 1st and 2nd defendants respectively) as the Legal representative of the estate of Ibrahim Mwanga Mwaizai, the deceased person herein. In a plaint dated 2/11/2021 but filed in court on 3/11/2021, the plaintiff averred that on or about 15/5/2021 the deceased herein was a passenger aboard motor vehicle registration number KDB 651Q belonging to the defendants along Mombasa-Nairobi road when at Kibwezi SGR station area, the driver of the said motor vehicle drove so negligently and recklessly that he caused a self-involving accident and the deceased herein sustained fatal injuries.

The defendants were sued as the registered and/or beneficial owners of motor vehicle registration number KDB 651Q at the material time. The plaintiff further averred that at the time of his death, the deceased was aged 36 years and was in good health and working as a Salesman in the hospitality industry, earning Ksh. 1,500/= per day. The plaintiff relied on the doctrine of *Res ipsa loquitor*, the Traffic Act and the Highway Code. She pleaded the particulars of dependants, special damages as well as the following particulars of negligence against the driver of motor vehicle registration number KDB 651Q:

a) Driving at an excessive speed in the circumstances;
b) Driving without due care and attention;
c) Driving with his headlights being off when it was still dark;
d) Careless overtaking when it was not safe;
e) Being in a hurry.

The plaintiff thus prays for judgment against the defendants jointly and severally for:

a) General damages;
b) Special damages in the sum of Ksh. 23,600/=;
c) Costs of the suit;
d) Interest at court rates.

THE DEFENCE

The defendants entered appearance on 29/1/2022 and filed a joint statement of defence on 20/4/2022, in which they denied the plaintiff's claim in *toto*. The defendants denied that they were the registered and/or beneficial owners of motor vehicle registration number KDB 651Q, denied that the said motor vehicle was driven by any lawful agent or driver of the defendants and denied occurrence of the accident as well as the involvement of the deceased herein. The defendants further denied that the deceased was a lawful passenger in the suit motor vehicle, denied that the accident was caused by the negligence and/or recklessness of the defendants' driver and denied the particulars of negligence pleaded.

In the alternative, the defendants averred that if the accident occurred, which was denied, the same was wholly caused and/or materially contributed to by the negligence of

the deceased (wrongly indicated as plaintiff). The defendants pleaded the following particulars of negligence as against the deceased (wrongly indicated as the plaintiff):

a) Failing to wear a seatbelt when travelling in the said motor vehicle;
b) Failing to have any or any sufficient regard for his own safety when travelling in the said motor vehicle.

The defendants further averred in the alternative that if the accident occurred, which was denied, then the same was caused by a diversion along the said road and without any warning, so that either of the defendants were unable, notwithstanding the exercise of all reasonable care and skill on their part, to avoid the said accident. The defendants denied the applicability of the doctrine of *Res ipsa loquitor* and denied that the estate of the deceased and/or dependants suffered loss and damage. They urged the court to dismiss the plaintiff's suit with costs.

WITHDRAWAL OF SUIT

On 17/6/2025, the plaintiff withdrew the case as against the 2nd defendant. The matter thus proceeded against the 1st defendant alone.

THE EVIDENCE

The Plaintiff's Case

At the hearing of the suit, the plaintiff testified and called one other witness. The plaintiff did not witness the accident and therefore was not in a position to tell how the accident occurred. The plaintiff testified that the deceased was her son. She adopted her statement as part of her testimony. The plaintiff was called and informed of the accident by a relative. She rushed to the scene but found that the deceased had been taken to Makindu hospital. Upon reaching Makindu hospital, she was informed that the deceased had died on the way to hospital. That the deceased was buried the following day. The plaintiff testified that she incurred expenses. That the deceased was aged 36 years and worked as a Salesman in the hospitality industry. It was the evidence of the plaintiff that the deceased had informed her that he used to earn at least Ksh. 1,500/= per day.

That the deceased assisted the plaintiff as well as his siblings who were in school. That more than half of the deceased's salary was used to support his family. The plaintiff prayed for compensation. The plaintiff produced several documents in support of her case. PW 2 Sammy Ndunda Mela testified that on the material day, he was cycling his motor cycle along Mombasa-Nairobi road. That when he reached Kibwezi SGR area, he saw the accident motor vehicle being driven at a high speed. That the motor vehicle hit an uneven area on the road and as a result, the driver lost control. That the motor vehicle veered off the road and rolled. PW 2 stated that a Good Samaritan called the police who visited the scene and took away the bodies of the occupants. The witness blamed the driver of the accident motor vehicle for driving at a high speed and without a proper lookout.

The Defence Case

The 1st defendant did not call any witness.

MAIN ISSUES FOR DETERMINATION

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

i. Whether an accident occurred on 15/5/2021 at Kibwezi SGR area along Mombasa-Nairobi road involving motor vehicle registration number KBD 651Q;
ii. Whether the motor vehicle belonged to the 1st defendant at the material time;
iii. Whether the deceased was a passenger in motor vehicle registration number KDB 651Q at the material time;
iv. Whether the driver of the suit motor vehicle was negligent in the circumstances and therefore liable for the accident;
v. Whether the 1st defendant is vicariously liable for the accident;
vi. Whether the deceased died as a result of injuries sustained in the accident;
vii. Whether the estate of the deceased and his dependants are entitled to damages;
viii. If so, the nature and quantum thereof;
ix. Who should bear the costs of this suit?

THE PLAINTIFFS' SUBMISSIONS

In his submissions, the plaintiff relied on the evidence on record and submitted that the defendants were to blame for the accident. That the defendants did not call any witness. The plaintiff urged the court to find the defendants 100% liable. The plaintiff relied on the authority of ***Embu Public Road Services Ltd v Riimi [1968] EA 22.*** On quantum, the plaintiffs proposed a sum of Ksh. 100,000/= for pain and suffering and relied on the authority of ***Evanson Ndungu Mukunya v JNM & MWN (Suing as the legal representatives of JMN [2022] eKLR,*** wherein an award of Ksh. 100,000/= was upheld where the deceased died after 30 minutes from the time of the accident.

For loss of expectation of life, the plaintiff proposed a sum of Ksh. 150,000/= and relied on the authorities of ***Moses Akumba & another v Hellen Karisa Thoya [2017] eKLR***, wherein Ksh. 200,000/= was awarded for a deceased aged 25 years at the time of death, and ***West Kenya Sugar Co. Ltd v Philip Sumba Julaya [2019] eKLR***, wherein an award of Ksh. 200,000/= was affirmed on appeal for a deceased who died at the age of 27 years. The plaintiff urged the court to adopt the minimum wage for a Salesman in 2021 being Ksh. 16,102.75/=, a multiplier of 24 years and a dependency ratio of 1/3. Accordingly, the plaintiff proposed loss of dependency as follows:

$$16{,}102.75 \times 12 \times 24 \times 1/3 = 1{,}545{,}864/=$$

The plaintiff urged the court to award Ksh. 23,050/= as funeral expenses and relied on an authority whose copy was not annexed. For special damages, the plaintiff urged the court to award Ksh. 550/=. The plaintiff also prayed for costs and interest.

THE 1ST DEFENDANT'S SUBMISSIONS

The 1st defendant did not file any submissions.

ANALYSIS AND DETERMINATION

I have considered the evidence on record and given due regard to the submissions made by the plaintiff. From the evidence of the plaintiff and PW 2, I have no doubt that an

accident occurred on 15/5/2021 at Kibwezi SGR area along Mombasa-Nairobi road involving motor vehicle registration number KDB 651Q and the deceased herein. The 1st defendant did not attend court to rebut the plaintiff's evidence on the occurrence of the accident. The police abstract produced in evidence indicates that the 1st defendant was the owner of the accident motor vehicle at the material time. There is no contrary evidence and as such, I find no difficulty in finding that the 1st defendant was the owner of the accident motor vehicle at the material time. The police abstract produced in evidence indicates that the deceased was a passenger in the accident motor vehicle at the time of accident. The 1st defendant did not attend court nor call any witness to rebut that fact.

Liability

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

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

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

There is one version as to how the accident occurred. The version was given by PW 2. According to the witness, the accident was self-involving. That the motor vehicle was being driven at a high speed. It hit an uneven section of the road where after the driver lost control. The motor vehicle veered off the road and rolled.

It is not clear what exactly led to the unfortunate situation. The plaintiff relied on the doctrine of *Res ipsa loquitor*. In the leading case of ***Scott v London and St Katherine Docks Co (1865) 3 H & C 596***, Erle CJ at page 600 held as follows:

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

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

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

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

"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."

"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."

'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The

doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."

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

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

The Learned Judge then continued:

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

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

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

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

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

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

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

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

Do the facts speak for themselves in this case? The deceased was a mere passenger in the motor vehicle. The condition of the motor vehicle was in the control and management of the driver. It was the 1st defendant's driver who was driving and in control of the motor vehicle, and not the deceased. It is not in dispute that the accident was self-involving. No other motor vehicle was involved. In the ordinary course of things, a motor vehicle which is in proper mechanical condition and which is driven by a prudent driver exercising due care and attention cannot just veered of the road and roll.

It is obvious that the driver lost control of the motor vehicle. A prudent driver is expected to drive at a reasonable speed and be mindful of any eventually that may occur on the road. I find that the evidence on record establishes a *prima facie* case of negligence against the driver of the accident motor vehicle as pleaded by the plaintiff. No explanation was given by the 1st defendant to exonerate the driver from culpability. There is absolutely no evidence to show that the deceased was negligent in any way. I find that the doctrine of *Res ipsa loquitor* applies to the circumstances of this case. The doctrine is a rule of evidence which need not be pleaded. Consequently, I find the driver of the accident motor vehicle 100% liable in negligence for the accident.

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

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

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

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

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

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

" Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises* that it was driven by a person for whose negligence the owner is responsible *(See Bernard V Sully [1931] 47 TLK 557. This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver."

There is sufficient evidence on record to show that the 1st defendant was the owner of the accident motor vehicle at the material time. The 1st defendant did not attend court to deny that whoever drove the accident motor vehicle at the material time was acting as his agent. Consequently, I find the 1st defendant **100% vicariously liable** for the accident.

Quantum

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

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

must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional".

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

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

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.

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

1) **<u>Damages for pain and suffering</u>**

The evidence indicates that the deceased died on the spot or soon after the accident. This is clearly indicated in the Post-mortem form. Damages under this head are awarded on the basis of the time the deceased suffered pain before death. The longer it took the deceased to die, the higher the damages. In most authorities, an award of between 10,000/= and 50,000/= was made for persons who died on the spot. Considering the age of most authorities coupled with the vagaries of inflation, I find that an award of **Ksh. 70,000/=**

would be reasonable. I award the same. In the case of ***Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others [2013] eKLR***, the deceased died on the spot following an accident and Ksh. 50,000/= was awarded.

2) **Damages for loss of expectation of life**

The evidence on record indicates that the deceased died at the age of 36 years. This was indicated in the copies of the Post-mortem form and certificate of death produced in evidence. The trend in the authorities indicates that the younger the deceased at the time of death, the higher the award. On my part, I have considered the authority of ***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. The plaintiff proposed a sum of Ksh. 150,000/=. I find the proposal reasonable and proceed to award **Ksh. 150,000/=** under this head.

3) **Damages for loss of dependency**

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

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

The plaintiff listed herself as the mother to the deceased and six (6) siblings of the deceased who included three adults and three minors as the dependants of the deceased. Save for the plaintiff, the siblings are not proper dependants under the Act. In the case of ***Beatrice Wangui Thairu v Hon. Ezekiel Barng'etuny & Another (Nairobi HCCC No. 1438 of 1998 (unreported),*** and referred to in ***Rev. Fr. Leonard O. Ekisa & Another v Major Birgen [2005] eKLR,*** Ringera J (as he then was) said, *inter alia* -

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

There is no evidence to show that the deceased's siblings depended on him, particularly those who were adults. In my view, where an alleged dependant does not fall under the categories listed in section 4(1) of the Fatal Accidents Act, there must be acceptable proof of dependency. Damages under this head cannot be awarded as a matter of course. There is no evidence to show that the deceased's siblings depended on him and in which manner. I find that the only dependant is the plaintiff.

The deceased died at the age of 36 years. The plaintiff pleaded and testified that the deceased was a Salesman earning Ksh. 1,500/= per day. No documents were produced to show the occupation of the deceased and what he earned. 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".

I have considered the plaintiff's submissions on what should be awarded under this head. How then should the court award damages for 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) *Ann 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 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) <u>Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another.</u>

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) <u>Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR.</u>

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 made an estimate of the monthly earnings and adopted the multiplier method.

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 Gammell'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 Gammell'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 Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it".

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, the fact that he had only one dependant, 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. 1,000,000/=** 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 plaintiff has already been awarded damages under the Law reform Act.

4) **Funeral and related Expenses**

The plaintiff did not specifically plead for funeral expenses but urged the court to award Ksh. 23,050/= under this head. The plaintiff appears to have been referring to the amount of Ksh. 10,000/= for the post mortem report, Ksh. 3,050/= as mortuary fees and Ksh. 10,000/= for transporting the body as pleaded under the caption of special damages. No receipts for these amounts were produced. In the case of ***Damaris Mwelu Kerewoi v Mbarak Kijan 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."

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

"Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—

where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included".

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

"In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought".

The above implies that funeral expenses can be awarded under the two Acts. This way, the court will assess the same depending on the circumstances of the case without insisting on strict proof as in special damages. I am aware of the nature of African funerals and I am sure that more than Ksh. 23,050/= must have been spent during the funeral. The expenses mentioned in the plaint are related to the funeral. I would have awarded a higher figure had the plaintiff properly pleaded the same. However, since the plaintiff has asked for a specific nominal figure, I will award **Ksh. 23,050/=** as prayed.

5) <u>Special Damages</u>

In his plaint, the plaintiff pleaded special damages of Ksh. 550/= (apart from the funeral related expenses) being fees for obtaining a motor vehicle copy of records. 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"

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."

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

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

There is a receipt in support of the claim for the motor vehicle search. Consequently, I award **Ksh. 550/=** under this head.

DISPOSITION

In summary, I find that the plaintiff has proven her case on a balance of probabilities against the 1st defendant. Consequently, I hereby make the following awards in favour of the plaintiff and against the 1st defendant:

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. 1,000,000/=

d) Funeral and related expenses……Ksh. 23,050/=

e) Special damages……Ksh. 550/=

Total……**Ksh.1,243,600/=**

The plaintiff is 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."

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

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

Second, Under Section 26(1) of the Civil Procedure Act, the Court has discretion to award and fix the rate of interests to cover two stages namely:

a. The period from the date the suit is filed to the date when the Court gives its judgment; and

b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix."

Odoki, Ag. JSC, writing for the majority of the Supreme Court in the Ugandan case of ***Omunyokol Akol Johnson v Attorney General (CIVIL APPEAL NO.6 of 2012, UGSC 4* (8th April 2015)** stated in part, as follows:

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment……..Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

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).***

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

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 8TH DAY OF DECEMBER, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.