REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E202 OF 2024

SHADRACK ARUNGAI ……..……... APPELLANT

- VERSUS -

STELLA ATIENO MIGAI (Suing as the administratix of the estate of BONFACE MASIME MASINDE – DCD) .....……..… RESPONDENT

(Being an appeal from the judgment and decree of Hon. K. Cheruiyot SPM delivered on the 13/9/2024 in Ksm CMCC No. 112 of 2017, Stella Atieno Migai (Suing as the administratix of the estate of Bonface Masime Masinde – Dcd) v Shadrack Arungai)

J U D G M E N T

1. The respondent filed the primary suit before the trial court vide an amended plaint dated **28/9/2018.** She claimed general damages under the ***Fatal Accidents Act*** and the ***Law Reform Act*** and special damages of **Kshs. 507,100/-** for fatal injuries to the deceased following a road traffic accident.

2. The appellant entered appearance and filed a statement of defence & counterclaim dated **15/3/2019** in which he denied the respondent's claim and instead claimed contributory negligence on the deceased's part. He counter-claimed for special damages of **Kshs. 816,460/-** for loss incurred, damage in inspection, towing and storage charges as well as purchase of spare parts, repair and labour costs.

3. The matter proceeded to trial and by a judgment delivered on **13/9/2024,** the trial court decreed: -

    a) Liability at 100% for the respondent against the appellant.

b) ***Pain and suffering Kshs. 50,000/-***

c) ***Loss of expectation Kshs. 200,000/-***

d) ***Loss of dependency Kshs. 4,800,000/-***

e) ***Special damages Kshs. 507,100/-***

f) ***Total = Kshs. 5,557,100/-.***

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **11/10/2024** and raised eighteen (18) grounds of appeal summarized as follows: -

a) ***The trial court erred in law and in fact in holding the appellant liable in negligence at 100% without the same being established to the required standard by the plaintiff whilst ignoring the cogent evidence presented by the defendant.***

b) ***The trial court erred in law and in fact in awarding Kshs. 200,000/- for loss of life expectation without considering the appellant's submissions or any legal precedent.***

c) ***The trial court erred in law and fact in using the multiplicand approach while awarding loss of dependency and ignoring the appellant's submissions on the use of the global award without giving any reason for exercising its discretion.***

d) ***The trial court erred in law and in fact in allowing special damages for Kshs. 507,100/- without giving any reason therefor or analysing the evidence and making any findings thereon contrary to Order 21 Rule 4 of the Civil Procedure Rules 2010.***

e) The trial court failed to find that the repairs to the respondent's tuk tuk was Kshs. 189,892/- and award that sum for the damage to that vehicle as there was no credible evidence that the vehicle was a write off.

5. The appeal was disposed off by written submissions that were highlighted on the **16/6/2025**. The appellant submitted that the testimony of **Pw2** which the trial court based its decision on liability, was unreliable as the court ignored vital aspects of his testimony. That conversely, the trial court failed to give reasons why it did not believe the testimony of **Dw1** and **Dw2** as required by ***Order 21 Rule 4 of the Civil Procedure Rules***.

6. That in further non-compliance with the provisions of ***Order 21 Rule 4,*** the trial court failed to set out the points of determination and reasons for determination. That it gave no reasons for its findings. Reliance was placed on the cases of **MRWN v SJN (Civil Appeal 267 of 2018) [2023] KECA 457 (KLR) (20 April 2023) (Judgement)** & **Francis Barasa Lurare & Another v Denis Nyongesa Maloba [2020] eKLR.**

7. That this court ought to set aside the judgement of the trial court on liability or in the alternative apportion the deceased 80% liability.

8. On loss of dependency, it was submitted that the respondent did not plead or provide particulars of the persons for whom the suit was being brought as required under ***Section 8 of the Fatal Accidents Act*** thus there could not be any award for loss of dependency.

9. On special damages it was submitted that though the respondent pleaded **Kshs. 507,100**/-, only **Kshs. 459,800/-** was proved and thus should be granted.

10. That as its counterclaim was denied on account of the receipts relied on by the appellant lacking stamp duty stamps, this was not representative of the law as held by the Court of Appeal in the case of **Paul N. Njoroge v Abdul Sabuni Sabonyo [2015] eKLR**.

11. On the other hand, the respondents submitted on liability that the same was well proved through the testimony of **Pw2**, the only person who witnessed the accident. That the testimony of the appellant's witnesses was unbelievable and meant to mislead the court.

12. That the special damages as awarded by the trial court were pleaded and adequately proved by receipts. That the judgment of the trial court does not offend ***Order 21 Rule 4 of the Civil Procedure Rules*** as it is explicit on the issues. That even if the Court were to find that the provisions were not adhered to, this would not nullify the judgment as doing so would be against the overriding objectives of the law.

13. On the award for loss of dependency, it was submitted that the dependency, multiplier and ratio adopted were fair and ought not to be interfered with. That the appellant's counterclaim was not accompanied by a verifying affidavit and was therefore defective.

14. This being a first appeal, the Court is duty bound to evaluate the evidence at the trial afresh and come to its own independent findings and conclusions. See **Selles & Anor v Associated Motor Boat Co Ltd & Others [1968] EA 123.**

15. Before the trial court, the respondent testified as **Pw1**. She adopted her statement filed on the **10/3/2017** as her evidence in chief. That she was the deceased's wife. That she was not at the scene but received a call asking if

she knew the deceased so she proceeded to the scene. That she did not find the deceased there and proceeded to JOOTRH where she found the deceased already dead. That the tuk tuk which the deceased used to provide for the family was written off and subsequently there was an assessment.

16. In cross-examination, she told the court that the deceased's driving license and Identity Card were lost during the accident. That the deceased was **38 years** old at the time of the accident.

17. **Pw2, Eric Ochieng Otieno** adopted his statement dated **13/12/2023** as his evidence in chief. He testified that the accident did not occur in the middle of the road but rather that the suit vehicle was being driven in a zig zag manner and ended up hitting the tuktuk on the far left side of the road. That his name was not in the police abstract as he had rushed to the hospital and did not return to the scene.

18. In cross-examination, he told the court that he witnessed the accident as he was being carried as a pillion passenger on a motorcycle that was riding about 150 meters behind the deceased's tuktuk. That it was dark as there were no street lights and as such, he could not confirm how many people were in the lorry.

19. That they slowed down on seeing the lorry move in a zig zag manner. That he did not see people from a security firm and also did not know who called the police officers. He further denied seeing the cargo that was carried by the lorry.

20. In re-examination, he testified that they called the deceased's wife through a contact they got from a wallet that had fallen on the road.

21. **Pw3 Eliud Nasale**, an assessor testified that he did an assessment of a tuktuk registration number **KTWA 343M Atul** on the **3/5/2016**. He produced the report as a **PExh14**.

22. In cross-examination, he testified that the pre-accident value of the tuktuk was **Kshs. 280,000/-** and that the repairs would cost **Kshs. 163,700/-** plus VAT. That although the repair costs did not exceed the pre-accident value, once repair estimates exceed half of the pre-accident value, repairing is not cost effective.

23. **Pw4 No. 83627 PC Gladys Chemutai** produced the Police abstract dated **19/5/2016** on the accident as **PExh6**. She testified that she was not the investigating officer. In cross-examination, she stated that she could not tell if the tuktuk driver had a valid license and that no one was charged for the accident. That she did not visit the scene and could not tell the damages caused to the vehicle and tuktuk.

24. **Dw1 Victor Mutara Mwijua** adopted his statement dated **17/4/2017** as his evidence in chief. That he blamed the tuktuk for the accident as it hit him while on his lane. That he was not charged with any offence and further that he was not alone in the lorry but with the owner of the vehicle.

25. In cross-examination, he told the court that he was driving the lorry from Kitale. That he noticed the tuktuk when it was near. That he was driving at 30km/h and carrying 110 bags of maize.

26. **Dw2 Shadrack Muture Arunga** adopted his recorded statement as his evidence in chief. He stated that the accident occurred at around 11.30pm when the road was clear. That **Dw1** was his driver having employed him 3

years before the accident date. That the tuk tuk was on a very high speed while they were driving slowly. That his driver used his lights.

27. In cross-examination, he testified that he first saw the tuktuk when it was near the entrance. That his driver applied brakes and the tuktuk hit the lorry when they had stopped. That the lorry overturned because there was a slope and when it was hit on the right it rolled to the left.

28. From the foregoing, the grounds of appeal may be summarized as follows: -

    a) **That the trial court erred in giving a judgment that failed to comply with Order 21 rule 4 of the Civil Procedure Rules.**

    b) **That the trial court erred in apportioning liability at 100% against the appellant.**

    c) **That the trial court erred by using the multiplicand method thus arriving at an award for loss of dependency that was excessive.**

    d) **That the trial court erred in law and in fact in awarding Kshs. 200,000/- for loss of life expectation.**

    e) **That the trial court erred in allowing special damages of Kshs. 507,100/- without giving any reason therefor and failing to find that the repairs of the respondent's tuktuk amounting to Kshs. 189,892/- were unsubstantiated.**

    f) **That the trial court erred in dismissing the appellant's counterclaim.**

29. The first ground was that the trial court's judgment failed to comply with ***Order 21, Rule 4 of the Civil Procedure Rules 2010*** which provides as follow: -

> ***"Judgments in defended suits shall contain a concise statement of the cause, the points for determination therein and the reason for such decision."***

30. The above position was reiterated in the case of **Wamitu v Kiarie (1982) KLR 481**, where the court held inter alia that:

> ***"In defended suits, the Judgment shall contain a concise statement of the case, points of determination, the decision thereon and the reason for such a decision as required by Order XX, rule 4 of the CPR (as it was then cited) and now Order 21 rule 4."***

31. In view of the foregoing, it is clear that every court is enjoined to ensure that, in cases that are defended, in the concise statement of the case, both the rival pleadings and the evidence in support thereto are addressed.

32. I have perused the impugned judgment. I note that the trial court partially complied with the provisions of ***Order 21 rule 4.*** It set out a concise summary of the cases of both the plaintiff and defendant. However, it failed to set out the points for determination and further failed to give reasons for the determination of special damages which the appellant has taken issue with.

33. In light of the above, I find fault with the trial court's judgment for failure to comply with the provisions of ***Order 21 Rule 4 of the Civil Procedure Rules.*** That failure however, may not be fatal because of the duty bestowed

on this Court as a first appellate court. This Court is enjoined to re-evaluate the evidence tendered in the subordinate court, both on points of law, and facts and make its own findings and reach its own independent conclusions. I will thus turn to the other issues framed for determination.

34. On liability, the appellant was held 100% liable for causing the accident. In **Stapley v Gypsum Mines Limited (2) (1953) A.C 663 at P. 681** reiterated in the case of ***Ndatho v Chebet (Civil Appeal 8 of 2020) [2022] KEHC 346 (KLR) (16 March 2022) (Judgment)*** Lord Reid reasoned that: -

> ***"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 fact of each particular case. One may find that a matter of history, several people have been at fault and that if anyone of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes, it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly cause the accident. I doubt whether any test can apply generally."***

35. It is trite law that he who alleges must prove. ***Section 107 (1) of the Evidence Act, Cap 80 Laws of Kenya***, provides that: -

> ***"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."***

36. In **Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334**, the Court of Appeal held that: -

> ***"As a general proposition under Section 107 (1) of the 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."***

37. Accordingly, it was the respondent's duty to produce evidence that the appellant was liable for causing the accident that led to the fatal injuries on the deceased.

38. **Pw2** was the independent witness to the accident. He testified that the appellant's vehicle was moving in a zig zag manner when it hit the deceased's tuktuk which was on the far left side of the road.

39. Juxtaposed against this was the testimony presented on behalf of the appellant. **Dw1**, the driver of the lorry testified that the deceased's tuktuk hit the lorry forcing it to overturn. **Dw2**, the owner of the lorry corroborated **Dw1's** testimony stating that the tuktuk hit the lorry, which had stopped and

this caused the lorry to overturn. Both **Dw1** and **Dw2** testified that the lorry was packed with 110 bags of maize.

40. I have considered this evidence before the trial court. I am in agreement with the trial court that it defies the laws of physics that a tuktuk, which is a far lighter vehicle/object compared to a lorry, would hit and tip over a lorry which in itself is far much heavier, let alone one which is packed with 110 backs of maize.

41. The balance of probabilities is that, the lorry must have been speeding and may have been moving in a zig zag manner as testified by **Pw2.** That is why when it hit a light weight tuk tuk, it lost control and overturned. In the circumstances, I am persuaded that the trial court considered the evidence tendered within the appropriate legal framework in arriving at a sound finding that the respondent had proved her case on a balance of probabilities.

42. Accordingly, I find no basis upon which this Court can interfere with the trial court's finding on liability.

43. The appellant impugned the trial court's judgement on account that the trial court used the wrong method in calculating loss of dependency thus arriving at an award that was excessive.

44. The law on the circumstances under which the court will interfere with an award of quantum by the trial court is settled that the appellate court will only interfere with the award of damages if; ***in exercising its discretion the trial court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice*** as held in the cases of; **Mbogo & another Vs Shah (1968) EA** and **Mkube v Nyamuro 1983 KLR 403**.

45. Furthermore, the Court of Appeal in **Loice Wanjiku Kagunda v Julius Gachau Mwangi CA 142/2003 (unreported)** stated that: -

> ***"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see Manga vs Musila [1984] KLR 257)."***

46. The principle was re-stated by the Court of Appeal in **Kemfro Africa Ltd - Vs- A.M. Lubia and Another (1988) KAR 722,** thus: -

> ***"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 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. The same position was taken in Denshire Muteti Wambui V. KPLC (2013) eKLR."***

47. The appellant pleaded that the respondent did not plead nor provide particulars of any dependants as required by ***section 8 of the Fatal Accidents Act***. Further, that as the trial court was minded to use the

multiplier approach, it ought to have used the minimum wage as multiplier since none was pleaded by the respondent.

48. ***Section 8 of the Fatal Accidents Act*** states: -

> ***8. Plaintiff to deliver full particulars of the persons for whom damages claimed.***
>
> > ***"In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered."***

49. In **Elizabeth Gacoki w/o Kihara v Paul Ekulan & another [1987] eKLR** the court held that: -

> ***"The Fatal Accidents Act, Cap 32 Laws of Kenya, does require that the full particulars of the deceased's dependants be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency. The plaintiffs were under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also, the duration of that dependency."***

50. In this case, the particulars of the deceased`s dependants have not been listed anywhere in the plaint. In addition, no evidence was adduced to prove the extent of dependency of the alleged dependants. In the premises, there was

no basis for a claim for loss of dependency. That ground succeeds and the award of **Kshs.4,800,000/- for loss of dependency** is hereby set aside.

51. However, if I am wrong and since I am not the final Court, the Court of Appeal will want to know my finding on dependency if it had been pleaded. There was no satisfactory evidence on which the earning of the deceased could be based. This is because since the earnings of the deceased could not be ascertained with certainty.

52. In the premises, the trial court should either have used the minimum wage as multiplier or the global sum.

53. In **Mwanzia v Ngalali Mutua Kenya Bus Ltd** cited in **Albert Odawa v Gichumu Githenji [2007] eKLR**, the court observed that: -

> ***"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."***

54. Similarly, in **Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR**, it was 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."

55. In **Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi (suing as administrator and personal representative of Antony Mwiti Gakungu deceased [2020] eKLR**, the court applied a global sum approach where there was no satisfactory proof of the monthly income.

56. Notably, the trial court applied the sum of **Kshs. 30,000/-** as the deceased's monthly income whereas the respondent had pleaded that the deceased used to earn **Kshs. 60,000/-** per month and failed to provide any proof of the same. There is no reason given by the trial court for this adoption and to this extent I find that the trial court erred in proceeding with the multiplicand method as it was not the appropriate method in this case which suited the global sum approach.

57. Having found as such, I will proceed to consider comparable awards from case law. In **Mroso (Suing as the Legal Representative of the Late Mroso Margaret) v Ndoo & another (Sued on behalf of the Late Daniel Musyoka) (Civil Appeal E070 of 2024) [2025] KEHC 11159 (KLR) (24 July 2025) (Judgment),** the High Court upheld an award of **Kshs. 950,000/-** for loss of dependency where the deceased was 38 years old.

58. In **M'ekotha & another v Kathambi (Suing as the Legal Representative of the Estate of Jacob Kinyua - Deceased) (Civil Appeal E106 of 2022) [2023] KEHC 20797 (KLR) (26 July 2023) (Judgment)** where the deceased was 38 years old at the time of his death, the High Court upheld the award of **Kshs. 3,000,000** for loss of dependency.

59. In **Sinohydro Tianjin Engineering Co Ltd v Okumu (Suing as the administratix of the Estate of Joel Odhiambo Kimbage) & another (Civil Appeal E287 of 2020) [2023] KEHC 23911 (KLR) (Civ) (18 October 2023) (Judgment)** where the deceased was 39 years old and had failed to comply with ***section 8 of the Fatal Accidents Act*** as in this case, the trial court set aside the award of **Kshs. 3,500,000/-** for loss of dependency and replaced it with one of **Kshs. 1,500,000/-**.

60. Taking all the aforementioned into consideration as well as the factors of inflation as well as the vagaries of life, I find that an award of **Kshs. 1,5000,000/-** for loss of dependency would have been adequate.

61. The appellant further impugned the trial court's judgment on account of the award of **Kshs. 200,000/-** for loss of expectation of life. In **Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR** it was observed that: -

> ***"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 award range from Kshs. 10,000/= to Kshs. 100,000/=***

with higher damages being awarded if the pain and suffering was prolonged before death."

62. On my part, I find that an award of **Kshs. 200,000/-** would be adequate compensation under this head. It was not too high to amount to an error in principle. The following cases are of relevance: - s I rely on the following cases:

    a) **Cromwell Mzame v Zablon Mwanyumba Lalu (Suing as Administrator of the estate of Allen Warito Lalu (Deceased) & another (2022) eKLR**; where the court awarded a sum of **Kshs. 200,000/-** as general damages for loss of expectation of life for a 30-year-old deceased.

    b) **Mwaura v Asingo & Yugu (Suing as Administrator and Personal Representative of the Estate of Maurice Oketch Asingu - Deceased) (Civil Appeal E88 of 2022) [2024] KEHC 7842 (KLR) (27 June 2024) (Judgment)**; the court awarded the plaintiff a sum of **Kshs. 200,000/-** as damages for loss of expectation of life for a 47-year-old deceased.

    c) Similarly, in **West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] KEHC 6121 (KLR)**; the court found that an award of **Kshs. 200,000/-** is not excessive for damages under the head loss of expectation of life.

63. Accordingly, I find no reason to interfere with the trial court's award on loss of expectation of life.

64. On the award of special damages awarded of Kshs. **507,100/-**, the appellant contended that the same was not proven as there was no credible evidence that the vehicle was written off.

65. It is trite law that special damages must be both pleaded and proved before they can be awarded by the court. Suffice it to quote from the decision of the Court of Appeal in **Hahn v Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716** where it was held that:

> ***"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."***

66. The respondent filed the relevant receipts regarding the tuktuk and relevant assessor's report. The same were not disputed by the appellant before the trial court. There was no alternative report or evidence to displace that of the assessor. I find no reason to interfere with the same.

67. Finally, the appellant contended that the trial court erred in dismissing his counterclaim on account that there was sufficient evidence establishing the respondent's negligence and further that the receipts establishing the expenses claimed were not stamped.

68. In response, the respondent contended that the appellant's counterclaim was defective as it was not accompanied by a verifying affidavit and thus non-compliant with ***Order 4 Rule (1) (2) and Order 7 Rule 5 (a) of the Civil***

Procedure Rules that is mandatory in nature and requires a Counter Claim to be accompanied by a verifying affidavit.

69. ***Order 4 Rule (1) (2) of the Civil Procedure Rules*** provides that: -

> ***"… (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1) (f) above. (6)the court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule"***

70. ***Order 7 rule 5(a) of the Civil Procedure Rules*** provides as follows:

> ***"5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by –***
>
> ***a) An affidavit under order 4 rule 1 (2) where there is a counter-claim."***

71. Therefore, the filing of the amended defence and counterclaim without a verifying affidavit renders them as being defective. However, it is my view, that the said defect is not fatal.

72. I agree with the finding in the case of **Jefitha Muchai Mwai v Peter Wangio Thuku [2015] eKLR**, where Limo J held that: -

> ***"… If a party inadvertently leaves out a verifying affidavit or any other document like a statement, he/she could be given a chance to file one and the matter can proceed for determination on merit. If the other party is affected by the attendant delay appropriate costs should adequately address the problem…"***

73. While the rules of procedure are to be adhered to, the courts are encouraged not to be slaves to the said rules when faced with inadvertent transgressions and unintentional omissions by the parties. In the case of **Microsoft Corporation v Mitsumi Computer Garage Ltd & Another Nairobi (Milimani) HCCC No. 810 of 2001 [2001] KLR 470; [2001] 2 EA 460**, Ringera J (as he then was) stated that:

> ***"… Rules of procedure are handmaidens and not mistresses of justice and should not be elevated to a fetish as theirs is to facilitate the administration of justice in a fair, orderly and predictable manner, not fetter or choke it and where it is evident that the plaintiff has attempted to comply with the rule requiring verification of a plaint but he has fallen short of the prescribed standards, it would be to elevate form and procedure to a fetish to strike out the suit. Deviations from or lapses in form or procedure, which do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect, ought not be treated as nullifying the legal instruments thus affected and the Court should rise to its higher calling to do justice by saving the proceedings in issue…."***

74. From the record, it is clear that the issue of lack of verifying affidavit was never raised before the trial court. The matter proceeded to trial and a judgment was rendered after the trial court considered the issues before it.

75. Further, the respondent has not shown any prejudice that she suffered or stood to suffer which could not be remedied by an award of costs. Accordingly, I find that the counterclaim filed by the appellant was not defective and was properly before court.

76. As to whether the trial court erred by dismissing the said counterclaim as pleaded by the appellant, I do note that contrary to the appellant's allegation that the same was dismissed due to lack of stamps on the receipts adduced, the trial court found that, having held the appellant 100% liable for the accident, and as the counterclaim sought compensation for damages allegedly occasioned as a result of the deceased's negligence, the same was for dismissal. I find that finding to be sound and I uphold it.

77. The upshot of the above is that I find that the appeal to be partially successful in as far as I set aside the award for loss of dependency by the trial court of **Kshs. 4,800,000/-**. Each party to bear own costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **19th** day of **December**, **2025**.

A. MABEYA, FCI Arb

JUDGE