

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VIHIGA**  
**CIVIL APPEAL NO E018 OF 2024**

**RICHARD OKUMU OKELLO (Suing as  
Representative and Administrator of  
the Estate of CLINTON OKUMU OKELLO (Deceased).....  
APPELLANT**

**VERSUS**

**ALFRED KIPSIELE KOECH.....  
.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon R. M. Ndombi (PM) delivered at Vihiga in the Principal Magistrate's Court Civil Case No E214 of 2022 on 8<sup>th</sup> April 2024)**

**JUDGMENT**

**INTRODUCTION**

1. In her decision of 8<sup>th</sup> April 2024, the Learned Trial Magistrate, Hon R. M. Ndombi, Principal Magistrate, struck out the Appellant's suit with costs to the Respondent.
2. Being aggrieved by the said decision, on 18<sup>th</sup> April 2024, the Appellant herein filed a Memorandum of Appeal dated 15<sup>th</sup> April 2024. He relied on three (3) grounds of appeal.
3. His Written Submissions were dated 12<sup>th</sup> February 2025 and filed on 13<sup>th</sup> February 2025 while those of the Respondent were dated 20<sup>th</sup> February 2025 and filed on 25<sup>th</sup> February 2025. The Judgment herein is based on the said parties' Written Submissions which they relied upon in their entirety.

**LEGAL ANALYSIS**

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.
5. This was aptly stated in the case of **Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123** where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses and thus make due allowance in that respect.
6. Having looked at the Grounds of Appeal and the parties' Written Submissions, it appeared to this court that the issues that had been placed before this court for determination were as follows:-
  - i. **Whether or not the Appellant had the *locus standi* to institute the suit;**
  - ii. **Whether or not the Learned Trial Magistrate erred in failing to make a finding on liability and quantum which would have otherwise been awarded to the Appellant had his claim succeeded.**
7. The court deemed it prudent to address the issues under the following distinct heads.

**I. LOCUS STANDI**

8. Grounds of Appeal No (1) and (2) of the Memorandum of Appeal were dealt with under this head.
9. The Appellant cited Section 2(1) and 80(2) of the Law of Succession Act Cap 160 (Laws of Kenya) and Section 2(3) of the Law Reform Act Cap 26 (Laws of Kenya) and admitted that he indeed did not have *locus standi* to file the Plaint on 16<sup>th</sup> September 2022 under the Law Reform Act as he procured the Limited Grant Ad-litem on 21<sup>st</sup> September 2023. He did not, therefore, fault the Trial Court for coming to the said conclusion.
10. He, however, pointed out that he had also pleaded his claim under the Fatal Accidents Act which aspect he argued the Trial Court ought to have considered before dismissing the suit. He further cited Sections 4(1) and 7(1) of the Fatal Accidents Act Cap 32 (Laws of Kenya) and Section 2(1) of the Law of Succession Act. He emphasised that the requirement of obtaining a grant of representation prior to representing the deceased's estate was not requisite under Section 7 of the Fatal Accidents Act. He placed reliance on the case of **Troustik Union International & Another vs Jane Mbeyu & Another [1993]eKLR** where the court observed that there was no grant of letters of administration in that suit and hence set aside the award under the Law Reform Act but affirmed the damages under the Fatal Accidents Act. He relied on several other cases amongst them the case of **Roman Hintz vs Mwang'ombe Mwakima [1984]eKLR** where the court therein held that the respondent therein did not have the *locus standi* to file a suit under the Law Reform Act but that he did not require Letters of Administration *Ad-litem* prior to filing a claim under the Fatal Accidents Act.

11. He contended that at Paragraph 3 of the Complaint, he had pleaded that he was suing as the father and the Legal and Personal Representative of the estate of the deceased and that he had brought the action for his benefit and that of the estate under the Law Reform Act and the Fatal Accidents Act. He argued that Section 4 of the Fatal Accidents Act had listed those mandated to bring a suit under that Act and that such persons were required to do so for their benefit and for the estate of the deceased. He added that a parent was listed as a beneficiary under the Fatal Accidents Act and was allowed as well as a child to bring a suit under the said Fatal Accidents Act without Letters of Administration Ad-Litem.
12. It was his contention that the Respondent adversely relied on the cases of **Julius Adoyo & Another vs Francis Kiberenge Bondeva** and **Virginia Edith Wambui Otieno vs Joash Ochieng Ougo & Omolo Siranga** (eKLR citations not given). It urged this court to uphold his claim suit under the Fatal Accidents Act where he had capacity, bearing in mind that the Constitution of Kenya had not envisaged blanket condemnation as was wrongly demonstrated in the case of **Julius Adoyo & Another vs Francis Kiberenge Bondeva** (Supra).
13. On his part, the Respondent referred to Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya) and placed reliance on the case of **Selle & Another vs Associated Boat Co Ltd & Others** (Supra). He agreed with the Trial Court's holding that the Appellant had no capacity to institute the suit. He relied on the cases of **Josephine Ndunge Nzusyo vs Housing Finance Company of Kenya Limited[2007]eKLR**, **Hawo Shanko vs Mohamed Uta Shanko[2018]eKLR** and **Julian Odoyo**

## **Ongunga vs Francis Kiberenge Abano Civil Appeal No 119 of 2015**

(eKLR citation not given) where the common thread was that a party lacked the *locus standi* to file a suit before obtaining a grant limited for that purpose.

14. He invited the court to note that during cross-examination, the Appellant stated that he had not obtained letters of administration at the time of filing suit, but took them out at a later stage.

15. Notably, the Appellant had admitted in his submissions herein that he had no *locus standi* to file suit under the Law Reform Act for want of a Limited Grant of Letters of Administration *Ad-litem*, a position that the Respondent associated with fully. It was, therefore, not necessary to interrogate whether the Appellant had the *locus standi* to institute the suit under the Law Reform Act as that was the correct position of the law as the Trial Court affirmed. However, it was important to ascertain whether or not the Appellant had the *locus standi* to institute proceedings under the Fatal Accidents Act.

16. Section 7 of the Fatal Accidents Act states as follows:-

**“If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought if it had been brought by and in the name of the executor or administrator, and every action so brought shall**

**be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator**(emphasis court).”

17. It therefore followed that an action could be maintained under the Fatal Accidents Act without letters of administration as long as the action was brought by a person for whose benefit the action could have been brought by an administrator or executor if letters of administration were issued.

18. Section 4 (1) of the Fatal Accidents Act further set out the persons for whose benefit an action under the Act could be brought. It 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**( emphasis court), **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 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 deduction of 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:**

**Provided that not more than one action shall lie for and in respect of the same subject-matter of complaint, and that every such**

**action shall be commenced within three years after the death of the deceased person.”**

19. In the Plaintiff dated 14<sup>th</sup> September 2022 and filed on 16<sup>th</sup> September 2022, the Appellant had indicated that he was suing in his capacity as the father of Clinton Okumu Okello (hereinafter referred to as “the deceased”). He produced two (2) letters from their Area Assistant chiefs proving his relation to the deceased herein. As the Respondent did not adduce any evidence to rebut the Appellant’s assertions in this regard, he was, therefore, qualified to be a person for whose benefit the action was brought in accordance with Section 4(1) of the Fatal Accidents Act. The action under the Fatal Accidents Act was thus maintainable for the benefit of the Appellant.

20. In the circumstances, this court agreed with him that the Trial Court misapprehended the law in dismissing his suit under the Fatal Accidents Act.

21. In the premises, Grounds of Appeal No (1) and (2) were merited and the same be and are hereby allowed.

## **II. LIABILITY**

22. Ground of Appeal No (3) was dealt with under this head.

23. The Respondent did not call any witnesses and/or submit on the issue of liability. Having dismissed the Appellant’s case, the Trial Court did not also address itself on the issue of apportionment of liability herein.

24. As this court had found that the Appellant had the *locus standi* to institute this suit under the Fatal Accidents Act, it proceeded to make its determination on liability as it had both original and appellate jurisdiction.

It was its view that directing another trial court in the magistracy to render its decision on apportionment of liability and the quantum that was payable would only delay the determination of the dispute between the parties herein.

25. The Appellant submitted that he tendered evidence to prove that an accident occurred on 19<sup>th</sup> July 2022 wherein the deceased, a two (2) year old son and her mother sustained fatal injuries while they were passengers in Motor Vehicle Registration Number KCR 653V (hereinafter referred to as “the subject Motor Vehicle”). He argued that the Respondent did not call any witness to rebut their allegations or the contents of the Police Abstract Report dated 21<sup>st</sup> July 2022.
26. He was categorical that the accident was self-involving and that as the deceased and her mother were passengers, they could not have contributed to its occurrence whatsoever and that even if no eye-witness testified, only the driver of the subject Motor Vehicle could have explained how the said accident occurred. He added that as he pleaded the doctrine of *res ipsa loquitor*, the onus of proof shifted to the Respondent to avail evidence to prove that he was not liable for the negligence in relation to the accident.
27. He further submitted that it had been held over time no eye witness was required to be called in a self-involving accident because there was only one vehicle for which apportionment of liability did not arise. In this regard, he placed reliance on the case of **Sally Kibii & Another vs Francis Ogaro[2012]eKLR** where it was held that the doctrine of *res ipsa loquitor* would apply where the subject matter was entirely under the

control of one party and something happened while under the control of that party, which would not in the ordinary course of things not happen without negligence.

28. He also relied on the case of **Sammy Ngugi Mugo vs Mombasa Salt Lakes Ltd & Another [2014] eKLR** where it was held that where an accident occurred and no explanation was given by the defendant which could exonerate him from liability, then the court would be at liberty to apply the doctrine of *res ipsa loquitur* and hold the defendant liable in negligence.
29. He also cited the case of **Beatrice Kanini Mutua vs Titus Mulinge Kativanga & Another [2019] eKLR** where the court found the Respondent wholly liable in negligence where the appellant was a passenger and the accident in issue was self-involving. He urged this court to hold that the Respondent was wholly vicariously liable for the negligence of his driver, agent and/or servant. He was categorical that they had proved their case on a balance of probability.
30. He further argued that he had proved that the Respondent was the registered owner of the subject Motor Vehicle as at the time of the accident through the Police Abstract Report that was produced in court. He stated that no evidence was adduced to the contrary.
31. Notably, according to the aforementioned Plaint, the deceased and her mother were lawful passengers in the subject Motor Vehicle which was being driven along Busia-Kisumu Road at Kefri area on 19<sup>th</sup> July 2022 when the driver and/or servant or agent of the subject Motor Vehicle negligently drove, managed and/or controlled it causing it to lose control

and roll several time as a result of which the deceased and her mother sustained fatal injuries. They both died on the spot.

32. In his evidence, the Appellant pointed out that he did not witness the accident but he was only informed after it had happened. He produced the Death Certificate and Police Abstract Report in support of his case. The Police Abstract Report confirmed that the accident involved the subject Motor Vehicle which belonged to the Respondent herein.

33. As the deceased was a fare-paying passenger in the Respondent's Motor Vehicle, he was not in control of the said subject Motor Vehicle and was thus under no duty to exercise caution to avoid the accident. As the accident was self-involving and the Respondent did not call any eye witness to explain exactly what may have happened or if the deceased contributed to the causation of the said accident so that this court could determine the issue of contribution on liability on his part, this court found and held that the Respondent was wholly vicariously liable for the accident herein.

34. In the premises foregoing, Ground of Appeal No (3) regarding the apportionment of liability was merited and the same be and is hereby allowed.

### **III. QUANTUM UNDER THE FATAL ACCIDENTS ACT**

35. The aspect of quantum under Ground of Appeal No (3) was dealt with under this head to avoid the superior/appellate courts sending matters back to the trial courts to carry out that noble exercise.

36. While it was this court's view that it was prudent for courts of first instance to assess quantum even if they were dismissing a claim, there was no directive that was cast in stone as was held in the case of **Andrew Mwori Kasaya [2016] KECA 408 (KLR)**, to suggest that it was mandatory that a court assess such damages. It was simply a matter of good practice. It did not therefore take away the discretion of a trial court to consider each case on its own set of facts. The Trial Court's failure to assess damages that would have been awarded to the Appellant in the event that his claim succeeded was, therefore, not prejudicial to his case despite it being dismissed.
37. As this court had both original and appellate jurisdiction, it proceeded to determine the quantum that would have been payable under the Fatal Accidents Act.
38. The Appellant submitted that the deceased was only two (2) years old hence could not be said to have been in any sort of employment or had any sort of ambitions or in school already. However, he noted that in the African Society, it was expected that when a child grew up, he would be of help to the parents especially financially. He added that there was nothing to prove the path a child would take but that the successful future of such a child could not be guessed as much as it could not also be wished away or given a blind eye merely because such child was two (2) years old.
39. He urged the Trial Court to apply a global award of Kshs 900,000/= noting the aspect of inflation and the decided recent authorities. In this regard, he relied on the case of **Nairobi Bottlers Ltd & Another vs MW**

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**KMW[2021]eKLR** where the court upheld an award of Kshs 1,000,000/= for a deceased minor who was three (3) years old at the time of his death.

40. Notably, the choice of whether to adopt a multiplier or a global award approach was entirely a matter of discretion of the court, but of course, as dictated by the circumstances of the case. This court took the view that, in most cases involving minors of tender age, the multiplier method would set the court to a journey of speculation.

41. In this appeal, the minor died at the age of about two (2) and a half ( $\frac{1}{2}$ ) years. The court could not know what the minor would have turned out to be in life or the earnings to adopt. In this regard, this court relied on the case of **Oshivji Kovenji & Another vs James Mohamed Ongenge[2012] eKLR** it was held that the future of a minor was uncertain and it might be risky to assume what life he/she would have lived into adulthood. The court proceeded to award a global figure under the head of loss of dependency.

42. It was the considered view that a global sum of Kshs 500,000/= would be adequate compensation for loss of dependency for a two (2) year old as the deceased herein. In arriving at the said sum, this court had due regard to the following comparable cases:-

1. **SMK vs Josephat Nkari Makaga[2017] KEHC 445 (KLR)**

where an award of Kshs 800,000/= was made on appeal under the head of loss of dependency for a child aged six (6) years.

2. **Daniel Mwangi Kimemi & 2 Others vs JGM & Another[2016] KEHC 6171 (KLR)** where a ward of Kshs 1,000,000/= given for a nine (9) year old.
3. **Anthony Konde Fondo & Another vs RMC (The Representative of FC (Deceased))[2020]eKLR** where the court awarded Kshs 900,000/= for a child aged seven (7) years.

#### **IV. SPECIAL DAMAGES**

43. The Appellant asserted that proved special damages in the sum of Kshs 92,000/=. He prayed for costs and interest at fourteen (14%) percent from the date of Judgment in the lower court until payment in full.
44. A perusal of the aforesaid Plaint showed that the Appellants specifically pleaded Special Damages totaling Kshs 92,000/= made up of funeral expenses in the sum of Kshs 42,800/= and fees for Demand Letter and Grant of Letters of Administration *Ad litem* in the sum of Kshs 50,000/=.
45. Notably, the Appellant did not produce the receipts to prove payment of Kshs 50,000= for the Demand Letter and the Grant of Letters of Administration *Ad litem*. Indeed, it was trite law that special damages had to be specifically pleaded and specifically proven. However, it did not mean that the Appellants did not incur advocate costs because it was not in dispute that they obtained the Grant of Letters of Administration *Ad*

*Litem* after the suit in the lower court was instituted. To this extent, this court allowed a sum of Kshs 20,000/= to cater for the advocates' costs.

46. The Appellants adduced receipts which amounted to about 71,150/= to prove funeral expenses. Notably, some receipts were duplicated. Be that as it may, the Appellants only pleaded for Kshs 45,800/= for funeral expenses.

47. This court noted that in African customs, funerals were a community affair and that although the family incurred some monies in arranging for the funeral, the bulk of the contributions came from extended family members and the community. Even so, a sum of Kshs 45,800/= was not an unreasonable amount for funeral expenses as the family still incurred some expenses.

48. In view of the fact that there were less receipts than the amount that was pleaded, this court found it prudent to award a global figure of Kshs 70,000/= which was inclusive of the advocates costs for issuing the Demand Letter and obtaining a Grant of Letters of Administration *Ad Litem*.

### **DISPOSITION**

49. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Appeal that was lodged on 18<sup>th</sup> April 2024 was partially merited. The effect of this is that the Judgment of dismissal of suit that was entered by the Learned Trial Magistrate in **Vihiga PMCC No 214 of 2022** on 8<sup>th</sup> April 2024 in favour of the Respondent herein against the Appellant herein be and is hereby set aside and/or vacated and the

same be and is hereby replaced with a decision that Judgment be and is hereby entered in favour of the Appellant herein against the Respondent herein on a hundred (100%) per cent basis for the sum of Kshs 570,000/= made up as follows:-

**Loss of Dependency**  
**Special Damages**

**Kshs 500,000/=**  
**Kshs 70,000/=**  
**Kshs 570,000/=**

Plus costs and interest thereon. For the avoidance of doubt, interest on special damages will accrue at court rates from the date of filing suit while damages under the Fatal Accidents Act Cap 32 (Laws of Kenya) will accrue interest at court rates from the date of judgment of the lower court until payment in full.

50. As the Appellant was partly successful in his Appeal, this court hereby directs that each party will bear its own costs of the Appeal herein.

51. It is so ordered.

**DATED** and **DELIVERED** at **VIHIGA** this **15<sup>th</sup>** day of **December** 2025

**J. KAMAU**  
**JUDGE**