REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. E051 OF 2022

AGNES MBINYA MAKAU & FAITH KAVUTHA MAKAU (Suing as the Administrators of the estate of the late MAKAU MULATYA-DECEASED) .....PLAINTIFFS

VERSUS

DWA ESTATE LIMITED.....DEFENDANT

JUDGMENT

THE ACTION

The plaintiffs herein Agnes Mbinya Makau and Faith Kavutha Makau (hereinafter referred to as the 1st and 2nd plaintiffs respectively) bring this action against Dwa Estate Limited (hereinafter referred to as the defendant) as the Legal representatives of the estate of Makau Mulatya, the deceased person herein. In a plaint dated 8/4/2022 but filed in court on 26/4/2022, the plaintiffs averred that on or about 1/7/2021 the deceased herein was a rider of motor cycle registration number KMDU 243T along the Kibwezi-Kitui road when at Kalamba area, the defendant's driver so negligently drove, managed and/or controlled motor vehicle registration number KCE 839Q that it crushed into the deceased and as a consequence, he sustained fatal injuries.

The defendant was sued as the registered and/or beneficial owner of motor vehicle registration number KCE 839Q at the material time. The plaintiffs further averred that at the time of his death, the deceased was a Salesman for cattle and honey, earning Ksh. 5,000/= per day and used to support his dependants. The plaintiffs relied on the doctrine of *Res ipsa loquitor* and pleaded the particulars of dependants, special damages as well as the following particulars of negligence against the driver of motor vehicle registration number KCE 839Q:

a) Driving at an excessive speed in the circumstances;
b) Driving without due care and attention;
c) Failing to keep to his lane on the road;
d) Failing to see the motor bike in sufficient time to avoid the said accident or at all;
e) Causing the vehicle to block the pathway of the motorcycle;
f) Carelessly overtaking and causing the accident;
g) Talking and waving at people off the road and losing concentration.

The plaintiffs thus prays for judgment against the defendant for:

a) General damages;
b) Special damages in the sum of Ksh. 550/=;
c) Costs of the suit;
d) Interest at court rates.

THE DEFENCE

The defendant entered appearance on 23/5/2022 and filed a statement of defence on on the same day, in which it denied the plaintiff's claim in *toto*. The defendant denied that it was the registered and/or beneficial owner of motor vehicle registration number KCE 839Q, denied the occurrence of the accident as well as the involvement of the deceased herein. The defendant further denied the particulars of negligence pleaded in the plaint. The defendant denied the particulars of dependants, earnings and those of special damages as well as the applicability of the doctrine of *Res ipsa loquitor*.

In the alternative, the defendant averred that if the accident occurred, which was denied, the same was solely or principally caused by the negligence of the deceased who

was riding motor cycle registration number KMDU 243T. The defendant pleaded the following particulars of negligence as against the deceased:

a) Riding motor cycle registration number KMDU 243T at an excessive speed in the circumstances;
b) Turning from left to right at a busy road without making sure it was safe to do so;
c) Turning from left to right off the road without indicating his intention to do so;
d) Generally failing to keep any or proper lookout;
e) Failing to exercise or maintain any proper or effective control of the motor cycle he was riding;
f) Failing to take due care of other road users reasonably expected to be on the road and especially the defendant's motor vehicle;
g) Being reckless and careless generally;
h) Causing the accident.

The defendant urged the court to dismiss the plaintiff's suit with costs.

THE EVIDENCE

The Plaintiff's Case

At the hearing of the suit, three (3) witnesses testified on behalf of the plaintiffs. PW 1 Police Constable Joseph Mugo produced the police abstract in evidence. PW 2 was the 1st plaintiff herein. She testified that the deceased herein was her husband. She did not witness the accident but was informed about it. The witness produced documents in support of their case. It was the evidence of the 1st plaintiff that the deceased had informed her that he used to earn at least Ksh. 5,000/= per day. PW 3 Duncan Chausa Samson adopted his statement filed in court as part of his testimony. His evidence was that on 1/7/2021 at about 3:30 pm he was seated outside a shop off Kitui-Kibwezi road when he saw a motor cycle rider moving from Kitui direction heading towards Kibwezi.

That the motor cyclist was driving at an average speed. The witness stated that there was an oncoming lorry registration number KCE 839Q being driven from Kibwezi direction. That the lorry negotiated a bend at high speed and was being driven on the lane for motor vehicles from Kitui direction, thereby blocking the pathway of the motor cycle. The witness

stated that the motor cyclist swerved to the right to avoid being hit by the lorry which was on his rightful lane. At the same time, the lorry driver saw the motor cyclist and also swerved back to his lane and in the process, crushed into the motorcycle. That the motorcyclist died after about 30 minutes before he was taken to hospital. The witness stated that the police visited the scene but spoke to the lorry driver alone. The witness blamed the driver of the lorry for the accident.

The Defence Case

The defendant called one witness. This was one Boniface Mulinge James who claimed to have been the drover of motor vehicle registration number KCE 839Q on the material day. The witness admitted that the motor vehicle belonged to the defendant and that he was on duty that day. According to the witness, the motorcycle which was being driven from the opposite direction suddenly swerved and moved onto his lane. That he applied brakes in order to avoid the accident but the motor cycle rammed into the left side of the motor vehicle. The witness blamed the deceased for the accident.

FACTS NOT IN DISPUTE

From the evidence of both parties, the following facts are not in dispute:

a) An accident occurred on 1/7/2021 at Kalamba area along Kibwezi-Kitui road;
b) The accident involved motor vehicle registration number KCE 838Q and motor cycle registration number KMDU 243T;
c) Motor vehicle registration number KCE 839Q belonged to the defendant at the material time;
d) The driver of motor vehicle registration number KCE 839Q was driving in the cause of his employment with the defendant herein, at the material time;
e) The deceased was the rider of motorcycle registration number KMDU 243T;
f) The deceased died as a result of the accident;
g) The point of impact was on the extreme left of the road facing Kitui direction from Kibwezi.

MAIN ISSUES FOR DETERMINATION

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

i. Who between the deceased and the driver of the defendant's motor vehicle was to blame for the accident?
ii. Whether the estate of the deceased and his dependants are entitled to damages;
iii. If so, the nature and quantum thereof;
iv. Who should bear the costs of this suit?

THE PLAINTIFFS' SUBMISSIONS

In their submissions, the plaintiffs relied on the testimony of PW 3 and urged the court to find the defendant 100% liable for the accident. 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 plaintiffs proposed a sum of Ksh. 120,000/= and relied on the authorities of ***Abson Motors Limited & 2 others v Sinema Kitsao & another [2016] eKLR,*** wherein Ksh. 100,000/= was affirmed on appeal for a deceased aged 85 years at the time of death, and ***Haroon Yuasa Limited & another v Mbeneka & another (Suing as the legal representatives of the estate of Benard Nzau Muia-Deceased) [2023] KEHC 21265 (KLR)***, wherein an award of Ksh. 100,000/= was affirmed on appeal for a deceased who died at the age of 69 years.

For loss of dependency, the plaintiffs proposed a lump sum of Ksh. 1,500,000/= and relied on the same authority of ***Haroon Yuasa*** (*supra*) as well as another authority whose copy was not annexed. The plaintiff's asked for funeral expenses of Ksh. 80,350/= and special damages of Ksh. 550/=. The plaintiff also prayed for costs of the suit and interest.

THE DEFENDANT'S SUBMISSIONS

The defendant also filed written submissions. The defendant submitted that the plaintiffs were under duty to demonstrate that the accident was caused by the defendant's driver. The defendant contended that the plaintiffs had failed to discharge their duty. That the plaintiffs' eye witness gave evidence that was inconsistent, contradictory and unreliable. The defendant argued that the evidence indicates that it was the deceased who left his lane

and veered to the lane of the defendant's driver. That there was no explanation as to why the deceased would veer to the defendant's driver's lane if the driver had drove back to his lane. The defence submitted that PW 3 did not record his statement at the police station and no explanation was offered as to how the witness came to know of the matter. The defendant relied on the evidence of its witness and urged the court to find that the deceased was solely responsible for the accident.

On quantum, the defendant proposed a sum of Ksh. 30,000/= for pain and suffering. The defendant argued that the deceased died shortly after the accident and as such, a nominal award would suffice. The defendant relied on the authority of ***Joseph Kivati Wambua v SMM & IKM (Suing as the legal representatives of the estate of EMM-Deceased) [2021] eKLR***. For the proposal on the award, the defendant relied on the authority of ***Tessie Margaret Kariuki & another (Suing as Administrators of the estate of Daniel Kariuki Kamanda-Deceased) v Shakhalaga Kwa Jirongo [2014] eKLR***, wherein Ksh. 20,000/= was awarded in 2014 for a deceased who died instantly and ***Simon Bogonko v Alred Mongare Mecha & another (Suing as the legal representatives of the estate of Akama Mong'are-Deceased) [2019] eKLR***, wherein Ksh. 20,000/= was awarded on appeal for a deceased who died on the spot.

For loss of expectation of life, the defendant proposed a sum of Ksh. 100,000/=. The defendant relied on the authority of ***Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the legal administrators of the estate of the late Robert Mwangi [2019] eKLR.*** On the issue of loss of dependency, the defendant argued that no evidence was adduced to prove that the adult children depended on the deceased. The defendant proposed a global sum of Ksh. 700,000/=. The defendant cited three authorities but annexed a copy of one of the authorities which is ***China Civil Engineering & Construction Company (K) Limited v Mwanyoha Kazungu Mweni & another (Suing on behalf of the estate of Ndegwa Mzungu Mweni-Deceased) [2019] eKLR,*** in which Ksh. 700,000/= was awarded for a deceased aged 79 years. For funeral expenses, the defendant urged the court to award between 30,000/= and 60,000/= and relied on the authority ***of Jacob Ayiga Maruja & another v Simeon Obayo (Suing as the Administrator of the estate of Thomas Ndaya Obayo [2005] eKLR***, wherein the Court of Appeal observed as follows:

"We agree and the courts have always recognized that a reasonable award ought to be made in respect of reasonable and legitimate funeral expenses. But when such a large sum is claimed for such expenses then there ought to be proof of what the money was spent on. In this case, we think the Shs.117,325/= awarded by the learned trial Judge as "funeral expenses and other expenses" were wholly unreasonable in the circumstances and we note that the respondent did not give a complete break-down of what he spent the money on. We accordingly reduce that figure to Shs.60,000/= which is just above half of the sum claimed. We, however, must not be understood to be laying down any law that in subsequent cases, Shs.60,000/= must be given as the reasonable funeral and other expenses. Those items are and must remain subject to proof in each and every case and the Shs.60,000/= we have awarded herein apply strictly to the circumstances of this case."

On special damages, the defendant submitted that the court should award what was strictly proved by original receipts.

ANALYSIS AND DETERMINATION

I have considered the evidence on record and given due regard to the submissions made by the parties

Liability

The plaintiffs pleaded several particulars of negligence as against the defendant. 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 are two versions as to how the accident occurred. The versions are in agreement that the accident occurred on the extreme left lane of the road as one faces Kitui direction from Kibwezi. The parties are also in agreement that the point of impact was on the rightful lane of the defendant's driver. It is further agreed that the defendant's motor vehicle and the deceased's motor cycle were being driven in opposite directions. The version given by PW 3 was that the defendant's driver was negotiating a bend while driving on the rightful lane of the deceased and that on sensing danger, the deceased veered to the right. That unfortunately, the defendant's driver also veered back to his lane and as a result, knocked down the deceased.

On the other hand, the defendant's driver denied having driven on the opposite lane. He even denied that there was a bend on the road at the scene. His evidence was that the deceased suddenly swerved to his right and onto the lane of DW 1. That DW 1 applied emergency brakes but the deceased rammed into the motor vehicle. In the English case of ***Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR 1472***, there was a collision in the centre of the road between two vehicles driven in opposite directions. In two hearings, judges had taken different views of the facts. The court was sympathetic to the judge who had found that the cause of the accident was so speculative on the meagre facts available that the plaintiff, who was an innocent third party, had failed to prove her case. However, the court took the view of the other judge that blame should be apportioned equally as between the two drivers. Romer L J stated that a finding to that effect was "the reasonable and probable inference to draw from the facts as found".

This reasoning was adopted in the Kenyan case of ***Lakhamshi v Attorney General [1971] EA 118*** in which Spry V P stated that where two vehicles collide in the middle of the road and there is no explanation, both the drivers should be held equally liable. If one is negligent in driving over the centre of the road, the other is also negligent for not taking any evasive action. A similar finding was made in the case of ***Caroline Anne Njoki Mwangi v Paul Ndung'u Muroki [2004] eKLR.*** In Lakhamshi's case (*supra*), Spry VP observed in part as follows:

"It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally

to blame.....I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it."

Even in Baker's case, ROMER L J was prepared to envisage that circumstances could exist where the evidence was so meagre that any explanation would be purely speculative, and thus the plaintiff's case could not be said to have been proven.

The cases of Baker and Lakhamshi were considered and analysed by the Court of Appeal in the case of ***Abbay Abubakar Haji Patuma Ali Abdulla v Freight Agencies Ltd [1984] eKLR*** in which there was an alleged collision between two motor vehicles caused by cows which were crossing the road. The plaintiff's case was dismissed by the High court. On appeal, the Court of Appeal unanimously affirmed the order of dismissal. Kneller JA observed as follows:

"A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident".

The court further held that where it is proved by evidence that both parties to the accident are to blame and there is no means of making a reasonable distribution, the blame

can be apportioned equally on each. In this respect, the court considered the case of Baker (*supra*). It was the further holding of the court that the position must however be different where there is no evidence to establish that any party was negligent. In that case it cannot be right to apportion blame there being no evidence on which apportionment could be based. In making that finding, the court considered the case of Lakhamshi in which Spry V P stated that it is difficult to appreciate how a party can be held to have been negligent if there is no evidence that he was in fact negligent.

No sketch maps were produced by either party to confirm whether or not there was a bend on the road at the scene. Going by the testimony of PW 3, it is not clear why the deceased opted to veer to the opposite direction and not off the road on his left. There is no evidence to show that the deceased was obstructed from seeing the defendant's motor vehicle in good time. My view is that if indeed the accident happened in the manner suggested by PW 3, the deceased would most likely be knocked down by the right side of the motor vehicle and the point of impact would most likely be in the middle of the road. If the accident occurred in the manner suggested by DW 1, my view is that the point of impact would most likely have been on the lane of DW 1 and not at the extreme left of the road. Furthermore, if indeed the deceased suddenly made a right turn, he would most likely have been hit by either the right side of the motor vehicle or at the front middle but not at the extreme left.

The photographs produced by the defendant clearly show that the motor vehicle was damaged on the left headlamp area. This implies that it was the part of the motor vehicle that hit or was hit by the motor cycle. In my view, there is no way the deceased would have suddenly made a turn and be hit by the extreme left side of the motor vehicle. My analysis of the evidence on record reveals that the deceased was most probably already at the extreme left side as one faces Kitui direction from Kibwezi, when the accident occurred. He had already made the turn when he was knocked down. If the deceased had made a sudden turn, I doubt that he would have rammed into the extreme left of the motor vehicle, considering that the motor vehicles were moving in the opposite direction. That could only happen if the deceased had driven right into the motor vehicle while riding diagonally across the road.

Judging from the evidence, my view is that the deceased made the turn but without proper calculation of the distance between him and the oncoming motor vehicle. On the other hand, the defendant's driver appears not to have slowed down after seeing the deceased. He also appears to have miscalculated the time and distance. That is why the impact was on the extreme left of the road. The individual versions given by PW 3 and DW 1 could not have led to an impact on the extreme left of the road facing Kitui general direction from Kibwezi. I find that both the deceased and DW 1 were negligent in the circumstances. The deceased was negligent in turning to the right without ensuring that it was safe to do so whereas DW 1 was negligent in failing to take evasive action by either slowing down or taking any other evasive action.

In the case of ***Mwatha v Owuor [2024] KEHC 4489 (KLR)***, Aburili J held as follows:

"The law is also trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another, Majanja J, vide Kisii HCC.A 29/2016 cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR where it is cited with approval the decision in Baker v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-

'Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them.'

The learned Judge in the above case stated that where the court is unable to determine who is to blame, it apportions liability equally as illustrated by the Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it was observed that –

'In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our

jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.'

In the end he held that –

'I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party.'

In the instant case, it is clear that an accident occurred on the 20.3.2019 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him from the front while the respondent claimed that he was hit from behind. No sketch plan of the accident scene was produced and apart from the statement of the appellant and the respondent, no other person testified on how they saw the accident happen. Obviously, it is not always the case that there are eye witnesses to an accident and I take cognizance of that fact. It is also a well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong…….I set aside the finding on liability and as there were different versions of how the accident occurred, thereby making it impossible for the court to find with certainty that one party was more to blame than the other, I find and hold that each of the parties was equally to blame for the accident". (Emphasis supplied)

Being guided by the above authorities and noting the circumstances of this case based on the evidence on record, I am inclined to apportion liability equally between the driver of the defendant's motor vehicle and the deceased. 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."

It was admitted that DW 1 was driving the motor vehicle in the course of his employment with the defendant. Consequently, I find the defendant **50% vicariously liable** for the accident.

Quantum

Having made a finding on liability, it follows that the estate of the deceased and his dependants 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 after about 30 minutes following the accident. 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. For instance, 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. I am guided by the authority relied upon by the plaintiff and award **Ksh. 100,000/=** as proposed.

2) <u>Damages for loss of expectation of life</u>

The evidence on record indicates that the deceased died at the age of 66 years. This was indicated in the copy of the 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 ***Marion Njeri Kago v Kenya Railways Corporation [2014] eKLR*** in which Ksh. 100,000/= was awarded where the deceased was aged 53 years at the time of death. I have also considered the authority of ***Mutuku Mbithi v Coast Bus Safaris Ltd & Another [2012] eKLR*** in which an award of Ksh. 100,000/= was awarded as the deceased had died at the age of 57 years. In ***Philip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR***, the deceased died at the age of 65 years. The court awarded Ksh. 100,000/=. On the basis thereof and taking into consideration the vagaries of inflation, I make an award of **Ksh. 120,000/=** as proposed by the plaintiffs. I am not aware of any law either by way of statute or case law that limits the award to Ksh. 100,000/=.

3) <u>Damages for loss of dependency</u>

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 deceased is said to have been survived by two widows and 13 children. Only two were minors at the time of death of the deceased. These are 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..."

In the authority of ***Haroon Yuasa*** (*supra*) the court held that the law recognized dependency of children without any age cap or limit. The court further held that it was reasonable to expect adult children to depend on their aging parents for support. The argument that the deceased had adult children who must prove dependency does not hold water. Both parties agree, rightly so, that the multiplier method would not be appropriate in the circumstances of this case. I will therefore award a global sum. I have considered the age of the deceased, the number of dependants and his station in life. 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 plaintiffs have already been awarded damages under the Law reform Act. I am also well guided by authorities relied upon by the parties. Given the age of the authorities and the vagaries of inflation, I agree with the plaintiffs that an award of **Ksh. 1,500,000/=** would suffice. I award the same.

4) **<u>Funeral and related Expenses</u>**

The plaintiff did not specifically plead an amount for funeral expenses but urged the court to award Ksh. 80,350/= under this head. No receipts for these amounts were produced. However, the 1st plaintiff gave a breakdown of what the money was used for. 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. 80,350/= must have been spent during the funeral. The expenses mentioned by the 1st plaintiff are related to the funeral. I would have awarded a higher figure had the plaintiffs properly pleaded and testified on the same. However, since the plaintiffs have asked for a specific nominal figure, I will award **Ksh. 80,350/=** as prayed.

5) <u>Special Damages</u>

In their plaint, the plaintiffs pleaded special damages of Ksh. 550/= 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 plaintiffs have proven their case on a balance of probabilities against the defendant. Consequently, I hereby make the following awards in favour of the plaintiffs:

a) Damages for pain and suffering.....Ksh. 100,000/=
b) Damages for loss of expectation of life.....Ksh. 120,000/=

c) Damages for loss of dependency……Ksh. 1,500,000/=

d) Funeral and related expenses……Ksh. 80,350/=

e) Special damages……Ksh. 550/=

Total……Ksh.1 800,900/=

Less 50% contribution……Ksh. 900,450/=

Balance due to the plaintiffs……**Ksh. 900,450/=**

The plaintiffs are also awarded interest on the damages as well as half the 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 VIA CTS THIS 23RD DAY OF DECEMBER, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.