THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E069 OF 2022

I SPY AFRICA LIMITED.....1ST APPELLANT

DAVID MWALUI.....2ND APPELLANT

VERSUS

EUNICE WANJIRU KANJA and MARY WANGARI NJUGUNA

(Suing as the administrators to the estate of the late

JOHN MBAU MBUGUA- Deceased) ..... RESPONDENTS

(Being an Appeal from the Judgment and Decree of Hon. E. Olwande (CM) in Mavoko PMCC. No. 745 of 2020 delivered on 28/4/2022)

JUDGEMENT

1. By a plaint dated 25th September 2020, the Respondents (Plaintiffs then) sued the Appellants (Defendant then) as the legal representatives of the estate of JOHN NJAU MBUGUA who died in a road accident on 23rd November 2017 claiming damages under the Law Reform Act and Fatal Accidents Act. The Respondents' case was that on the material day, the deceased was a pedestrian along Mombasa-Nairobi highway at All Parking stage when the 2nd Appellant negligently dove the 1st Appellant's motor vehicle registration number KCG 767A that he caused the same to violently knock down the deceased causing him fatal injuries. The Respondents blamed the 2nd Appellant for the accident and they gave the particulars thereof in paragraph 5 of the Plaint. They held the 1st Appellant vicariously liable for the accident.

2. By Statement of Defence dated 2nd November 2020, the Appellants (Defendants before the trial court) denied the Claim and pleaded contributory negligence against the deceased and they gave particulars thereof at paragraph 5 of the Statement of the Defence. They also denied the particulars of loss and damage and put the Respondents to strict proof.

3. The matter proceeded for hearing when the Respondents called three witnesses while the Appellants called one witness.

4. PW1 the 1st Plaintiff testified and relied on her witness statement filed as her evidence in chief. In her statement she stated that the deceased was her son and that he was employed as a matatu conductor in the Nairobi-Kitengela route. She narrated how on 23/11/2027 she was informed of the accident by her daughter-in-law and Co-plaintiff. She went to Shalom Hospital where she found the deceased then injured and undergoing treatment. The deceased eventually succumbed to his injuries on 25/11/2027. She stated that as a result of the death of the deceased she has lost his support both emotionally and financially. She stated that the deceased was earning Kshs.30,000/= and had a young wife and three children.

5. In cross examination, she stated that the deceased was her first-born son and that when she went to see him in hospital, he was conscious but in serious condition. She confirmed that she had obtained the Grant to file the suit and that at the time of preparation of the Death Certificate she was not asked the occupation of the deceased.

6. PW2, the 2nd Plaintiff also testified and relied on her witness statement as her evidence in chief. She stated that the deceased was her husband and was the sole bread winner of their family. She was informed of the accident on 23/11/2027 through a phone call by one Elijah Ngigi Kihia. She called her mother-in-law and informed her of the same and they both went to the hospital where the deceased had been taken. They found him undergoing treatment. They decided to transfer him to Kenyatta Hospital as the injuries were quite serious but unfortunately, he succumbed to his injuries on 25/11/2017. She stated that the deceased left behind five dependents being herself, her mother-in-law, and three children. She stated that that his death had caused them untold emotional and financial suffering. She produced the exhibits listed of the List of Documents as PExt.1 to 8 in the order they were listed. She sought for damages.

7. In cross examination she stated that she does casual jobs and that the deceased was a conductor earning Kshs.30,000/= per month. She could not tell who gave the details that were filled in the death certificate. She could not tell who was blamed for the accident.

8. PW3 Elijah Ngugi Kihia witnessed the accident. He relied on his witness statement as his evidence in chief. In his statement he narrated how the accident happened. He stated that on the material day, he was driving a matatu and the deceased was his conductor. At Mlolongo at

All Pack Stage, they dropped a certain woman who had a child and luggage. The deceased assisted her cross the road and on returning back to the vehicle he was hit by the accident vehicle. He was hit just as he had finished crossing the road. The impact threw the deceased to the side of the road.

The accident vehicle stopped about 30M ahead after hitting the deceased. Him and the driver of the accident vehicle took the deceased to Shalom Hospital. He then called the wife of the deceased and informed her of the accident. They transferred the deceased to Kenyatta National Hospital.

9. PW3 identified the Plaintiff's as the mother and wife of the deceased. He stated that he worked with the deceased for about 1 year before the accident and that the deceased was earning Kshs.30,000/= per month. He blamed the driver of the accident vehicle for speeding. He stated that All Pack stage has many people but it was not busy as it was 3.00PM. He stated that the speed at which the driver was driving was too high for the area. He maintained that if the driver was doing a speed of 30-40km/h the accident would not have happened.

10. In cross examination PW3 stated that he has been a driver for 20 years and the road where the accident happened is a busy highway. He stated that the recommended speed in the area should be about 30km/h. He stated further that there was no vehicle nearby when the deceased started to cross and that he was hit when he had finished crossing the road.

11. At this point of video clip was played for the witness and he admitted the deceased emerged from in front of a truck and he was running as he crossed the road. He admitted that the deceased could not see the oncoming vehicle on the second lane and that it was not safe for the deceased to cross when the second lane was not visible to him.

12. In re-examination, he stated that the deceased could be seen when he was almost crossing the road. He stated that the camera of the video caught his image in front of the vehicle hence it means the deceased was in front of the vehicle could be seen.

13. DW1 was the driver of the accident vehicle on the material day. He relied on his witness statement as his evidence in chief. He stated that he was driving from the Mlolongo weigh bridge towards Industrial area. There was a lorry in front of him and a matatu parked on the shoulder of the road. The lorry suddenly moved to the outer lane where they

were to the inner lane without indicating. As he moved at a fairly slow speed, the deceased suddenly emerged running in front of the lorry. On seeing him, he applied emergency brakes and swerved to the left. Unfortunately, he hit him slightly on the side and threw him off the road as he attempted to jump.

14. DW1 produced documents in his list of exhibits as DExts.1-4. The said exhibits included a video clip from a camera on the dashboard of his vehicle which showed hoe the accident happened. He stated that the maximum speed allowed in a built-up area is 50km/h and he was doing a speed of 40-45km/h.

15. In cross examination, he admitted that he had no evidence to show what speed he was doing. He also admitted that the clip does not show the speed he was doing. He stated that there was a truck in front of him. He admitted that the deceased was not hit by the truck but by the left side of his bonnet. He stated that the deceased was about 2M ahead when he saw him. He stated that his ability to see was limited to his lane and he did not expect that someone would have emerged from that part of the road because there was an oncoming vehicle.

16. Upon considering the parties pleadings, evidence and submissions, the trial magistrate analysed that DW1 was driving at a considerably high speed considering that the place was a matatu stage with a lot of movement of pedestrians and vehicles. If DW1 was driving at a speed of 40-45km/h as he alleged, he should have been able to stop the vehicle before hitting the deceased. The fact that he was unable to stop the vehicle even though it took a few seconds for the deceased to run across the width of the vehicle and the fact that he hit him with such impact as to cause fatal injuries indicates that DW1 must have been driving at a high speed.

17. However, the trial magistrate also found that the deceased could not escape blame since the place where the accident happened was a busy road with several lanes, it was not wise or prudent of the deceased to cross the road in front of a large vehicle when he could not see which other vehicles could possibly be on the other lanes. The basic rules of crossing the road as per the Highway Code require that a pedestrian first looks right and left to ensure that there is no vehicle on the road that poses a danger to him as he crosses the road. Sine he obviously could not see the outer lane because of the lorry that was obstructing his view, it was not proper for him to cross to the road at that time.

18. From the above analysis, the trial magistrate found the 2nd Appellant was to blame for causing the accident by driving at a high speed considering the circumstances of the road where the accident happened. The deceased was also to blame for crossing the road when his view of the entire road was obstructed. Consequently, the trial magistrate found the 2nd Appellant 70% to blame for the accident and the deceased 30% to blame,

19. On quantum of damages, the trial magistrate found that the same is payable under the Law Reform Act and the Fatal Accidents Act under the heads of Pain and suffering, Loss of expectation of life, Loss of dependency and special damages.

20. On **pain and suffering**, the trial magistrate observed that the deceased died two days after the accident. Counsel for the Appellant submitted for Kshs.50,000/= and relied on the case of:
    - **FMM & Anor v Joseph Njuguna Kuria & Anor (2016) eKLR.**
    - **Frankline Kimathi Baaru & Anor v Philip Akungu Mitu Mborothi (2020) eKLR.**
    - **DMM (Suing as Admin of the Estate of LKM) v Stephen Johana Njue & Anor (2016) eKLR.**

21. Counsel for the Appellants submitted for Kshs.200,000/= and relied on the case of **Alexander Okinda Anangwe (Suing as the Admin of the Estate of Patricia Kezia Anangwe) v Reuben Muriuli Kahuha & Others NRB HCCC 1550/2005.**

22. The trial court observed that the fact that the deceased died after (two) 2 days is an indication that he must have endured a considerable amount of pain and therefore the case of FMM and Frankline cited by the Appellants. Relying on the same and after taking into account the efflux of time, the trial magistrate was of the view that Kshs.100,000/= for pain and suffering would be adequate compensation.

23. On Loss of expectation of Life, the trial magistrate observed that courts usually award a conventional figure under this head bearing in mind the age of the deceased. The deceased dies at a youthful age of 34 years. He

had his whole life ahead of him. This life was cut short by this accident. Counsel for the Appellant submitted for Kshs.100,000/= and relied on the cases of :

- **Wangare v Nkaru (2014) eKLR**
- **Joseph Njuguna Mwaura (Suing as Admin for the Estate of Ann Nduta) v Builders Den Ltd & Anor (2014) Eklr**
- **Joseph Kingori Wandurwa Loise Karimi Nyaga (2021) eKLR**

24. Counsel for the Respondents on the other hand submitted for Kshs.300,000/= and relied on the case of **George Moga v Nairobi Women's Hospital & 3 Others (2015) eKLR.** Having perused the cases cited by both Counsel, the trial magistrate found the same to be useful guides and proceeded to award Kshs.150,000/= under this head after taking into account the efflux of time.

25. On Loss of dependency, the trial magistrate observed that the court had to calculate the loss suffered by the dependents of the deceased taking into account his age, earnings and dependents. The deceased dies at the age of 34 years. The Respondents stated that the deceased was employed as a Matatu conductor a fact which is not disputed by the Appellant. The Respondents stated that the deceased was earning Kshs.30,000/= per month. There was no evidence of this. It was not lost on the trial court that in most cases those who are employed in the informal sector like the deceased was usually do not have their earnings documented in any manner. However, it is not disputed that he was gainfully employed and, in the circumstances, he must have been earning something.

26. The trial court being guided by the case of **Beatrice W. Murage v Consumer Transport Ltd & Anor (2014) eKLR** where the court held that:-

> ***"Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage"***

27. The position has been buttressed in many other cases. The trial court therefore relied on the minimum wage as at the time of the deceased met his death to determine the earnings of the deceased. The

minimum wage for the bus conductors in the year 2022 for a person who works within the city metropolis was Kshs.10,994 and Kshs.23,067. The trial court applied a wage of Kshs.20,000/= on consideration that at the age of 34 years, the deceased cannot be said to have been just starting out on his job.

28. As for the multiplier, the Appellants proposed a multiplier of 17 years while the Respondents proposed a multiplier of 32 years. In the trial court's view, the deceased could have worked as a Matatu conductor till the ripe age of retirement that is 60 years and maybe beyond as is common with those employed in the informal sector. However, after considering the fact that the deceased could have died sooner from other causes, the trial magistrate found that a multiplier of 24 years would be fair and reasonable.

29. It was not disputed that the deceased was married and had children. His mother also testified that he used to help her. The trial court was of the view that a dependency ratio of 2/3 to be applicable

    The award was calculated as follows:-

    Kshs.20,000 x 12 x 24 x 2/3 = Kshs.3,840,000/=

30. In respect to special damages, the Respondents claimed for Kshs.112,991/= as follows:

• Medical expanses	Kshs.25,691.00
• Post Mortem	Kshs. 5,000.00
• Morgue Charges	Kshs. 6,650.00
• Funeral expenses	Kshs.25,000.00
• Police Abstract	Kshs. 100.00
• M/v search	Kshs. 550.00
• Letters of Administration	Kshs. 50,000.00
Total	Kshs.112,991.00

31. The trial court observed that the Respondents had only produced in evidence receipts for medical expenses of Kshs.20,841 and Kshs.11,500 for mortuary charges which the trial court awarded.

32. For the funeral expenses, the trial court was guided by the case of **Premier Dairy Ltd v Amarjit Singh Sagoo & Another (2013) eKLR Civil Appeal No. 312 of 2009** where it was stated:-

> ***"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be***

compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to aa bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs.400,000/= was pleaded in the Plaint and witnesses who were the relatives of the deceased testified that they spent much more than this in preparing for and conducting a cremation, the learned judge awarded a sum of Kshs.150,000/= which sum he saw as reasonable and prudent amount to compensate the family for funeral expanses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages".

33. The Respondents sought Kshs.25,000/= for funeral expenses which the trial magistrate awarded.

34. The other special damages were not proved, hence only Kshs.57,341 was awarded for special damages.

35. The final judgement was as follows:

Liability: 70:30 in favour of the plaintiff against the defendant

Quantum:

a.	Pain and suffering	Ksh.100,000.00/ =
b.	Loss of expectation of life	Ksh.150,000.00/ =
c.	Loss of dependency	Ksh.3,840,000.00/ =
	Total	Ksh.4,090,000.00/=
	Less 30% contribution	Ksh.1,227,000.00 =
	Net award	Kshs.2,863,000.00

36. The Respondents were also awarded the costs plus interest of the suit.

37. The Appellants being aggrieved by the whole of the said judgment lodged this appeal raising 17 grounds of appeal basically challenging liability and quantum.

38. The appeal was canvassed through written submissions. The Appellant's submissions are dated 08/4/2024 whilst the Respondents submissions are dated 12/07/2024.

Appellant's Submissions

39. The Appellants submitted that it is trite law that he who alleges must prove. The cited section 107 (1) of the evidence Act Cap 80 Laws of Kenya which provides that:-

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

40. They relied on the case of **Eastern produce (K) Ltd v Christopher Atiado Osiro (2006) eKLR** where the court stated that the onus of proof lies upon him who alleges and where negligence is alleged, some form of negligence must be proved against the defendant.

41. It was the Appellants' view that the evidence before the trial magistrate was sufficient to establish the particulars of negligence which were allegedly by the Appellants against the deceased and find him solely liable for the accident. That from the evidence at the trial court there were two eye witnesses in this accident; PW3 and DW1.

42. There was also a video footage that was taken by the camera on the dashboard of the accident vehicle that was produced by the Appellants as DExt.3 which was played during the trial and showed that the deceased had been running across the road when he suddenly emerged in front of a truck which was driving in the same direction with the Appellant's car, which was almost side by side with it, at the time of the impact of the accident, which resulted into the death of the deceased.

43. The Appellants submitted that PW3 during cross examination admitted that the deceased emerged from in front of a truck and confirmed that he was running as he crossed the road. PW3 also confirmed that from the point the deceased started crossing the road, he could not see the oncoming vehicle while in front of the truck or the vehicle on the second lane.

44. That DW1 on the other hand adopted his witness statement which stated that he was driving from Mlolongo weighbridge towards industrial area. There was a lorry in front of him and a matatu parked on the shoulder of the road. The lorry suddenly moved from the outer lane where they were, to the inner lane without indicating. He stated that he was driving at a fairly low speed when the deceased suddenly emerged running from the front of the lorry. On seeing him, he applied emergency breaks and swerved to the left. Unfortunately, he hit him slightly on the side and threw him off the road as he attempted to jump.

45. The Appellants submit that from the evidence it is clear that the deceased crossed the road while running and from a point where he could neither see the entire road nor be seen by all drivers and riders on the road. He also crossed at a place that is not a designated pedestrian crossing in utter violation of the rules and guidelines of the Highway Code.

46. The Appellants cited Clause 5 of the Highway Code which provides for the designated pedestrian crossings. It provides that pedestrians should always cross the road at designated areas such as Zebra crossings, foot bridges and pedestrian underpasses or at areas controlled by traffic Marshalls. Otherwise, they should choose a place where they can see clearly in all directions and move toa space where drivers and riders can see them clearly.

47. That Clause 5 of the Highway Code further provides for the guidelines on how pedestrians should cross the road. They should look right, look left, look right again then listen before crossing. They should not run. If traffic is coming, they should let it pass look all around again and listen. They should not cross until there is a safe distance in the traffic and one is certain there is plenty of time because even if traffic is a long way off it may be approaching quickly. The pedestrian should only cross if there is no time between the point of crossing and the oncoming traffic. It is strongly emphasized that a pedestrian should not RUN while crossing the road.

48. It is the Appellants; understanding of the traffic regulations and the provision of the Highway Code that the right of way on any road, is given to motor vehicles. Not pedestrians. The only instance when a pedestrian has a right of way which is considered to be superior to that of any motor vehicle on the road is when the pedestrian is

crossing the road on a Zebra crossing which is a designated pedestrian crossing. In that single instance, all motor vehicles on the road are required by law to stop and give way to such a pedestrian. Such Zebra crossing by their obvious white colour markings on the road are so visible from a distance that any motorist is expected to see it at a distance and slow down such that by the time he reaches it, he must come to a complete stop if there is any pedestrian crossing the road.

49. Where there is no such Zebra crossing, the right of way shifts to the motorists on the road, not the pedestrian. The motorists have the superior claim of being on the road where there is no Zebra crossing, and such a pedestrian must give way for any oncoming motorists, unless and until the pedestrian confirms, by looking to the right, the left and then the right again, and confirming that the road is clear before he can walk across the road, not running as he crosses. Further, the pedestrian should choose a place where they can see clearly in all directions. And move to a space where drivers and riders can see them clearly. This duty on the pedestrian is imposed on him to confirm that all lanes of the road are clear and safe. Not only one lane, such that if in his judgement it would only be safe to cross one lane and the rest of the lanes, would be unsafe, on account of other oncoming motor vehicles in the adjacent lanes, the pedestrian is required to wait until all the lanes are safe before he enters the road.

50. The Appellants submitted that at the trial court, the deceased did not confirm the road was clear on both lanes nor was there evidence that there was a Zebra crossing where the deceased had crossed which is a designated pedestrian crossing or that he had chosen a place he could see clearly in all directions and moved to a space where drivers and riders could see him clearly as provided by Clause 5 of the Highway Code. That the trial court therefore erred when it found the 2nd Appellant liable for the accident based on the fact he should have been able to stop the vehicle before hitting the deceased. The trial court was in obvious error to have shifted this burden to the 2nd Appellant when the 2nd Appellant had the right of way hence the burden automatically fell on the deceased to prove his claim of right to be on the road either by there being a Zebra crossing or that he had confirmed that the road was clear in both lanes before venturing to cross the road, by walking or that he had chosen a place he could see clearly in all directions and moved to a space where the drivers and riders could see him clearly which he did not do or prove.

51. The Appellants submitted that the deceased having broken such fundamental rules of the Highway Code, by failing to confirm that the road was clear before crossing, having opted to obviously run across the road, when it was clearly unsafe to do so, and the circumstances of him having been obscured from the vision of the 2nd Appellant immediately before he suddenly emerged, would not give any logical room for holding the Appellnats liable. Had he been walking, it would have been a different story. The pedestrian walking would have given the 2nd Appellant time to see him and take appropriate action to save the situation of harm. Not so, where he was running. it was so momentary fast. The Appellants relied on the Court of Appeal case in **Patrick Mutie Kamau & Anor v Judy Wambui Ndurumo (1997) eKLR** where the court found the Respondent therein 100% liable and held that pedestrians too owe a duty of care to other road users to move with due care and follow the Highway Code. Clearly, the accident was caused by the Respondent running suddenly across the road without due regard to his own safety and that of others. In that case which was relied on by the Appellants in their submissions the Respondent had crossed in front of a stationary bus without taking any or reasonable steps to ensure that it was safe to do so. The Appellants' motor vehicle was moving on the said road and hit her since he could not see her emerge from the stationary bus.

52. Also, the case of **Julius Omollo Ochando & Anor v Samson Nyaga Kinyua (2010) eKLR**, the High Court found the Appellants not liable and set aside the apportionment of liability of 50%:50%. In allowing the appeal the High Court stated that given the circumstances of the accident, in particular the fact that the Respondent suddenly ran across the road onto the path of the Appellant's vehicle which was travelling on the main highway, it was difficult to lay any blame on the 1st Appellant. The Court stated:-

> ***"Moreover, the fact that the 1st Appellant was not charged, also negates the Respondent's contention that the Appellant's vehicle went off the road and hit him when he was off the road. I find that the evidence which was before the trial magistrate was sufficient to support the defence of the Appellants that the Respondent was hit by the Appellant's vehicle in the middle of the inner lane, as he crossed the road.(....) therefore, the Respondent was negligent in crossing the road at a point***

where it was not safe for him to do so (....) on the other hand, the evidence before the trial magistrate was not sufficient to establish any of the particulars of negligence which were alleged by the Respondent against the 1st Appellant. It is true that the 1st Appellant had a lethal machine (vehicle), under his control and that the Appellant's circumstances of the accident, in particular the fact that the Respondent suddenly ran across the road onto the path of the Appellant's vehicle which was travelling on the main highway, it is difficult to lay blame on the 1st Appellant"

53. In view of the above submissions, the Appellants submitted that there was no evidence from the Respondents or their witness to prove how any of the particulars of negligence that they had alleged against the 2nd Appellant that could have attributed to the 2nd Appellant. They averred that the Respondent's witness, PW3 in his witness statement dated 25/09/2020 and adopted in court stated at paragraph 8 that he had not seen the motor vehicle approaching until he realized that the deceased had been hit. He reiterated this statement during examination in chief and cross examination by stating that he had not observed the state of the road when the deceased was crossing hence, he did not see the motor vehicle registration No. KCG 767A approaching. There was therefore no evidence that the 2nd Appellant was driving at a high or excessive speed. The Appellants relied on the case of **Kamanduu Kaumba & Anor v Kingsway Motors (2020) eKLR** where the Judge upheld the decision of the trial court which dismissed the Appellant's claim with costs to the Respondent on grounds that the Appellants had failed to prove their case against the Respondent on a balance of probabilities. It was held that:

"From the evidence on record, I do not see any iota of it going towards proving that the driver of the subject motor vehicle drove at excessive speed in the circumstances, or that he allowed the motor vehicle to collide with the deceased or that he failed to adhere to the rules of the Highway code or even that he drove on

the wrong side of the road. As was held in Kiema Mutuku v Kenya Cargo Handling Services (1919) 2 KAR 25B

<u>"There can be no liability without fault and a plaintiff must prove some negligence. Taking into account all the evidence on record, it is apparent that the plaintiff herein has failed to discharge the burden of proof by establishing the link between the defendant's actions and the cause of action"</u>

The Appellants submit that the above is what exactly happened in this case. The Appellants totally failed cause of actions to establish the link between the Respondent's actions and the cause of action. It was also held in Stat Pack Industries v James Mbithi Munyao (2005) eKLR that:

"...not every injury is necessary as a result of someone's negligence. That an injury per se is not sufficient to hold someone liable for the same."

The above being the case, it would be presumptuous for this court to conclude that because the deceased died then the Respondent must be assumed to have been careless while driving and/or managing the subject motor vehicle".

54. Relying on the above cited cases, the Appellants urged this court to find persuasion from the same and set aside the trial court's apportionment of liability of 70%: 30% and find the deceased 100% liable for the accident in question. It was submitted that the deceased caused the accident in question by suddenly running across the road from a point where he could neither see the entire road nor be seen by all drivers without due regard to his own safety and that of others in utter violation of the Highway Code.

    In concussion, the Appellant prayed that the appeal be allowed.

<u>Respondents' Submissions</u>

55. The Respondents submitted that the Appeal herein has no merit and nothing has been demonstrated to warrant this Court's interference with the Judgment of the trial Court. That the Highway Code which is based on the Kenya Traffic Act provides for rules and guidelines on how

to use the road. All road users-pedestrians, cyclists and motorists have a right to access the road but they should always act responsibly and as provided by the guidelines so as to ensure safety for all. The efficacy of the provisions of the Highway Code is set in section 68(3) of the Traffic Act Cap 403 of the Laws of Kenya which stipulates that:-

> *"A failure on the part of any person to observe any provisions of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negate any liability which is in question in those proceedings".*

56. The Respondent submit that appeal is also an abuse of Court process merely meant to deprive the Respondents the Judgment entered in their favour.
57. The Respondent started by pointing out the Appellants reluctance to prosecute this appeal; notably the appeal and Appellants' Submissions have been filed out of timelines given by the Court on 7th March, 2024.

58. They wanted it go on record and for the Court to take notice that as they proceeded to file their submissions, they had not been served with any Submissions by the Appellants.

59. The Respondents submitted that it is clear from the Appellants' defence in the trial Court that their defence comprises of denials which do not hold water even in terms of their own evidence as adduced by (DW 1). The Appellants in their defence had denied: -

    - Involvement with any accident with the deceased
    - Injuries upon the deceased
    - Ownership of motor vehicle KCG 767A

60. However, their evidence at the trial Court proves that indeed the accident occurred and the deceased succumbed to injuries sustained, the 1st Appellant is the owner of the motor vehicle KCG 767A and that the deceased's cause of death was a result of the accident between the said Appellant's motor vehicle and the deceased.

61. Parties are bound by their pleadings and the very fact that the averments in the defence are contrary to the 2nd Appellant's evidence at trial is a clear indication that the Appellants' defence at trial has no merit. Reliance was placed on the authority in the case of :-

> ***Independent Electoral and Boundaries Commission & Another -vs- Stephen Mutinda Mule & 3 other (2014)***

eKLR *which restated the decision of the* ***Malawi Supreme Court of Appeal in MALAWI RAILWAYS LTD V NYASULE (1998) MWSC 3*** *in which the Learned Judge quoted an article from Sir Jack Jacob entitled: "The present importance of pleadings " published in "current legal problems, at page 174:-*

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a defiant or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at trial.*
>
> *The Court itself is as bound by the pleadings of parties as they are themselves. It is no part of the duty of the Court to enter into inquiries into the case before it other than to adjudicate upon the specific matter in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by parties. To do so would be to enter upon the realm of defence not made by the parties. Moreover, in such event, the parties themselves, or at any rate, one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing them at all and this a denial of justice.*
>
> *In the adversarial system of litigation therefore, it if the parties themselves who set the agenda for trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda there is no room for an item called "Any other business" in the sense that points other than those specific may not be raised without notice".*

62. **In JOSEPH MBUTA NZIU -V- KENYA ORIENT CO. LTD (2015) eKLR** *the Court referred to a Nigerian decision in the Nigerian Supreme Court of Appeal wherein it stated:- In* ***ADETOUN OLADETI LTD -V- NIGERIA BREWERIES PLC S.C. 91/2002****, Judge Pius Aderemi JSC expressed himself thus:-*

> *"It is now a trite principle law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in their pleadings, or put in another way, which is at variance with the averments of the pleading goes to no issue an must be disregarded.*

63. Where in the present case the Appellants' defence comprises of denials. Evidence subsequently adduced, being contrary to those denials as a consequence hold little or no probative value.

64. As has been stated by the Courts over and over again, a party cannot probate and reprobate at the same time.

65. On liability, the Respondents submitted that the Appellants' evidence is wholly hinged on the 2nd Appellant's – (driver's) uncorroborated evidence on the occurrence of the accident. The same is totally hinged on a dashboard camera that he had installed on his vehicle. However, the 2nd Defendant is unable to state the speed at which he drove the subject motor vehicle, particularly considering that the accident occurred at a busy point of the Highway, with a bus stop where ordinarily one would expect a lot of vehicular and or pedestrian activity.

66. His only defence is that he did not see the deceased until after the accident, then it can be rightly concluded that he was paying attention to other road users as is expected of a driver operating a motor vehicle.

67. Going by the evidence of both parties, the deceased was hit by the front left side of the Appellants' motor vehicle. The said Appellants' motor vehicle was at the extreme left (outer) lane of the highway. This means that the deceased was indeed hit at the edge and not in the middle of the road.

68. It follows therefore, had the 2nd Appellant swerved, slowed down or stopped, the accident would not have occurred.

69. Also, it is clear that the 2nd Appellant either was negligent and did not pay attention to the road ahead or was driving at such excessive speed in the circumstances that he could not stop, slowdown or swerve in time to avoid hitting the deceased. This is particularly so considering that going by his evidence the only other vehicle on his right (outer) lane had already passed and there were no other vehicles that would have limited him from swerving right so as to avoid hitting the deceased.

70. In his defence, the 2nd Appellant attempted to cast blame on a 3rd party motor vehicle which was not even involved in the accident. The driver of the said motor vehicle is not a party to these proceedings.

71. Rule 163 of the Highway code not only enjoins a driver to drive at reasonable speed, but also to keep reasonable distance from vehicle

ahead. There has not been demonstration that the 2nd Appellant braked, swerved or even tried to avoid hitting the deceased.

72. A person driving a motor vehicle is expected to be particularly cautious of other road users and particularly so in busy sections of the road. He is expected to understand that he operates a lethal machine and cannot be expected to abandon caution at any given point. It is for this reason that the law requires that any person undergoes rigorous training and testing before they can be allowed to operate a motor vehicle.

73. The implication herein is that a driver owes duty of care to all road users and in the event of an accident cannot escape liability.

74. It is in evidence that the area at which the accident occurred is a busy area and in particular, the scene of accident was a bus stop within that busy area. Had the 2nd Appellant exercised caution as is expected of him as a driver the accident would not have occurred and the deceased might still be alive.

75. The Respondents' position is that the trial Court in apportioning liability was very lenient on the 2nd Appellant who considering the above should have borne 100% liability.

76. On Quantum, the Respondents submitted that the Trial Court correctly awarded damages under these heads. There is no reasoning for the Court to deduct damages awarded under the fatal accidents Act from those awarded under the Law Reform Act. These are two separate and distinct heads and such deduction would be erroneous. Reliance was placed on the following authority in the case of ***NYERI COA NO. 22 OF 201 4 [eKLR 2015], HELLEN WAMGURU WAWERU (Suing as the legal representative of Peter Waweru Mwenja – deceased) -Vs- KAIRU SHOES STORES LTD*** *-Appeal against the judgment of Ongundi, J, sitting at the High Court in Nyeri dated 20/2/2010 .The COA found that the words "taken into account at Section 4(2) of the Fatal Accidents Act do not amount to a* requirement for the Court to engage in mathematical calculations of deduction whatsoever.

77. The Respondents submit further that the Appellants have demonstrated that this appeal was not filed in pursuit of Justice nor good faith. There has been reluctant in prosecution of this appeal. The Court record is clear on the Appellants deliberate delay. This points to the fact that even they are aware that this appeal lacks merit, nevertheless chose to engage in the futile exercise thereby denying the Respondents access to the decretal sum.

78. Even on the 29th May, 2024 when this matter came up for Mention under the Judiciary Rapid Response Initiative (JRRI), the Appellants did not attend despite service forcing the Deputy Registrar to adjourn to 23rd July, 2024, two months away. Only the Respondents were present.

79. All the timelines given for the Appellants to prosecute this appeal, including even current filing of submissions have been ignored.

80. The Respondents invited the Court to find that going by the authority cited by the Respondents in the Trial Court, the Trial Court was very lenient on the Defendants in both apportionment of liability and award of damages.

81. The damages awarded under the Law Reform Act should not be deducted from those under the Fatal Accidents Act as there is no legal basis for this.

82. The appeal here has no merit and going by the Appellants' conduct the same is only meant to delay the Respondents from accessing damages rightfully due to them. The same is an abuse of Court process and costs would be reasonable compensation.

83. The Respondents prayed for dismissal of the appeal with costs plus any other or further remedies as this Court may deem fit and justifiable.

Analysis and determination

84. This being a first appeal, the duty of this court is as re- stated in the case of ***Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR,*** where it was held in part that:-

> *"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."*

85. I have perused the Record of Appeal, considered and weighed the evidence that was adduced including watching the video clip of the occurrence of the accident and rival submissions and authorities cited on the appeal and I now proceed to determine the appeal herein.

86. The issues for determination in this appeal are as follows:

- **Whether the trial learned magistrate applied the correct principles of law and available facts in apportioning liability.**

- **Whether the learned trial magistrate applied the correct principles of law and available facts in assessment of damages payable to the Respondent.**

Determination on liability

87. The claim herein being an action for negligence, like in all civil litigation, the burden is always on the Claimant to prove that the Respondent was negligent.

88. I have considered the record and at paragraph 5 of the Statement of Defence dated 02/11/2020, the Appellants pleaded and contended that the accident was caused by or substantially contributed to by the actions of the deceased and the particulars are set out thereof. The Appellants also denied ownership of the said motor vehicle KCG 767A and the occurrence of the accident.

89. PW3 testified that indeed on 23/11/2017, the deceased was involved in a fatal road traffic accident while crossing Mombasa Road at a usual pedestrian crossing point at Mlolongo. That the accident occurred along Mombasa Road at a usual pedestrian crossing point at Mlolongo when motor vehicle registration number **KCG 767A** which approached at such a high speed, failed to stop /slow down to give the deceased ample time to cross the road thereby knocking him down. He blamed the driver of motor vehicle registration number **KCG 767A** for driving at a high speed and that is why he failed to stop immediately after hitting him. If the driver was doing 30-40kph as he alleged, the accident would not have occurred.

90. I watched the video clip on how the accident is alleged to have occurred and I could see a person crossing the road emerging from the front of a truck while running then suddenly he was hit by a pickup and he fell down. From the proceedings, I have established that this person running across the road was the deceased herein.

91. The Appellants rely on Clause 5 of the Highway Code which provides for the designated pedestrian crossings and blame the deceased who substantially caused the accident in question by suddenly running across the road from a point where he could neither see the entire road

nor be seen by all drivers without due regard to his own safety and that of others in utter violation of the Highway Code.

92. In the instant case the Defendants/Appellants pleaded and contended that the claim was denied for the reasons that it is the Appellant who was inattentively crossing the road while running at undesignated crossing area for pedestrians without taking any reasonable steps or measure to ensure his safety. The Appellants also testified stating how the accident occurred and produced in evidence the video clip on the same.

93. On the other hand, the Respondents submitted that the Appeal herein has no merit and nothing has been demonstrated to warrant this Court's interference with the Judgment of the trial Court. That the Highway Code which is based on the Kenya Traffic Act provides for rules and guidelines on how to use the road. All road users-pedestrians, cyclists and motorists have a right to access the road but they should always act responsibly and as provided by the guidelines so as to ensure safety for all. That it is in evidence that the area at which the accident occurred is a busy area and in particular, the scene of accident was a bus stop within that busy area. The driver of motor vehicle registration number **KCG 767A** was driving at a high speed and that is why he failed to stop immediately after hitting the deceased. If the driver was doing 30-40kph as he alleged, the accident would not have occurred.
Had the 2nd Appellant exercised caution as is expected of him as a driver the accident would not have occurred and the deceased might still be alive.

94. In the case of **Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan,** the Court held as follows:

> ***"In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:***
> ***"……When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by this want***

of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

95. On whether the deceased is liable for contributory negligence. The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In **De Frias v Rodney 1998 BDA LR 15** it was held as follows:

"Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances, she made an unsuccessful attempt to avoid the collusion."

96. What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by **Alderson B** in **Blyth vs Birmingham Waterworks Co. [1843 – 60] ALL ER 478**

"Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

97. In my view, negligence and contributory negligence comes in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the Plaintiff has established a prima facie case showing the Defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant.
98. Having watching the video clip herein and analysed the evidence on record on how the accident occurred, the element of contributory negligence clearly comes out. I noted that the place where the

accident occurred was a busy road and a Matatu stage with a lot of movement of pedestrians and vehicles. It is my position that the 2nd Appellant was driving at a high speed considering the heavy impact with which his vehicle knocked down the deceased. The 2nd Appellant ought to have been more cautious and slower down while driving in such a busy area.

99. Pursuant to the foregoing, this court does not find any reason to disturb the finding of the trial court on contributory negligence at 70% against the Appellant and 30% against the Deceased. The same is upheld.

Determination on quantum

100. The fact of the matter of assessment of damages is purely at the discretion of the trial court of facts. The idea that an appellate court would fundamentally differ with the trial court is neither here nor there. That is the attention of the principle in **Loice Kagunda v Julius Gachau Mwangi CA 142 OF 2003 the Court of Appeal** held that:-

> *"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence a 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 make 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 Mariga v Musila {1984} KLR 257).

I. For pain and suffering

101. Pain and suffering is an award meant to compensate for pain endured by a person before death. On pain and suffering, the trial court awarded **Kshs.100,000/=.** The Respondent proposed Kshs.200,000/= whilst the Appellant proposed Kshs.50,000/=. There is no dispute that the accident occurred on 23/11/2017 and the deceased died on 25/11/2017 about 2 days after which was a prolonged period and must have endured immense pain. I have considered the decision that was relied on by the Appellants in **FMM & Anor v Joseph Njuguna Kuria & Anor (2016) eKLR** where the deceased died four (4) days after the accident and was awarded Kshs.50,000/= for pain and suffering in the year 2016. The judgement herein was delivered on 28/04/2022 about six years after. Taking into

account the efflux of time, I find the trial magistrate was correct in awarding **Kshs.100,000/=** for pain and suffering.

102. I am persuaded by the finding in the case of **Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR** where Muchemi J. stated:

> ***"The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000 while for pain and suffering the awards range from Kshs.10,000 to Kshs.100,000 with higher damages being awarded if the pain and suffering was prolonged before death".***

I uphold the same.

II. Loss of expectation of life

103. The trial magistrate observed that courts usually award a conventional figure under this head bearing in mind the age of the deceased. The deceased died at a youthful age of 34 years. He had his whole life ahead of him. This life was cut short by this accident. Counsel for the Appellants submitted for Kshs.100,000/= and relied on the cases of :

- **Wangare v Nkaru (2014) eKLR**
- **Joseph Njuguna Mwaura (Suing as Admin for the Estate of Ann Nduta) v Builders Den Ltd & Anor (2014) Eklr**
- **Joseph Kingori Wandurwa Loise Karimi Nyaga (2021) eKLR**

104. Counsel for the Respondents on the other hand submitted for Kshs.300,000/= and relied on the case of **George Moga v Nairobi Women's Hospital & 3 Others (2015) eKLR.** Having perused the cases cited by both Counsel, the trial magistrate found the same to be useful guides and proceeded to award Kshs.150,000/= under this head after taking into account the efflux of time.

105. I have considered the authorities by both advocates that were relied upon by the trial court under this head and I find them to be applicable and persuasive to the instant case. Similarly, I will uphold the award of **Kshs.150,000/=** under this head.

III. Loss of dependency

106. Under the Fatal Accident Act, the deceased was aged 34 years old and had a wife and children. His mother too depended on him That he was in good health and provided for his family physically, emotionally and materially. According to PW1, the family has been robbed of a central pillar and the deceased's child has lost the opportunity to enjoy nurture by his father. That barring the oddities in life, the deceased still had many more productive years.

107. The Respondents testified that the deceased was employed as a Matatu conductor a fact which was not disputed by the Appellants. The Respondents stated that the deceased was earning Kshs.30,000/= per month. There was no evidence of the same. It was not lost on the trial court that in most cases those who are employed in the informal sector like the deceased was usually do not have their earnings documented in any manner. However, it is not disputed that he was gainfully employed and, in the circumstances, he must have been earning something.

108. The trial court being guided by the case of **Beatrice W. Murage v Consumer Transport Ltd & Anor (2014) eKLR** where the court held that:-

> ***"Ordinarily if one does not prove what the deceased earned, the court would base the earnings on the minimum wage"***

109. The position has been buttressed in many other cases. The trial court therefore relied on the minimum wage as at the time of the deceased met his death to determine the earnings of the deceased. The minimum wage for the bus conductors in the year 2022 for a person who works within the city metropolis was Kshs.10,994 and Kshs.23,067. The trial court applied a wage of **Kshs.20,000/=** on consideration that at the age of 34 years, the deceased cannot be said to have been just starting out on his job.

110. As for the multiplier, the Appellants proposed a multiplier of 17 years while the Respondents proposed a multiplier of 32 years. In the trial court's view, the deceased could have worked as a Matatu conductor till the ripe age of retirement that is 60 years and maybe beyond as is common with those employed in the informal sector. However, after considering the fact that the deceased could have died sooner from

other causes, the trial magistrate found that a multiplier of 24 years would be fair and reasonable.

111. It was not disputed that the deceased was married and had children. His mother also testified that he used to help her. The trial court was of the view that a dependency ratio of 2/3 to be applicable

The award was calculated as follows:-

Kshs.20,000 x 12 x 24 x 2/3 = Kshs.3,840,000/=

112. The trial court relied on the minimum wage as at the time the deceased met his death. The minimum wage for bus conductors in the year 2020 for a person who worked within the city metropolis was shown to range between Kshs.10,994 and Kshs.23,067.

113. The trial court adopted a wage of Kshs.20, 000/= per month considering that at the age of 34 years, the deceased cannot be said to have just started out on his job.

114. Therefore, in determining the loss of dependency, lack of proof of deceased's earning is not fatal to the claim as the court has discretion to apply the above principles to base such calculations on global sum approach to award what is appropriate. Needless to add that assessment of damages is a discretionary judicial function within the laid down settled principles. The court remaining faithful to the doctrine of *stare decis*, the assessed amount need only be reasonable in the circumstances of the case. In this case, the Plaintiff's evidence that the deceased supported his family was not controverted. Doing the best she could and considering all factors, she found that an award of Kshs.3,840,000/= for loss of dependency would suffice.

115. This award is challenged by the Appellants who fault the trial court's multiplier of Kshs.20,000/= without stating which regulation was relied on. Reliance was placed on the case of **Melbrimo Investment Company Ltd v Dinah Kemunto & Francis Sese (Suing as personal Representative of the Estate of Stephen Sinange alias Reuben Sinange (Deceased) (2022) eKLR** where Justice J. Kamau stated:

> ***"It was this court's position that where a business person's wage was unknown, the trial court could consider adopting the minimum wage of a deceased person's job prevailing at the time of his death. In this***

respect, this court was guided by the decision of the Court of Appeal in the case of Isaack Kimani Kanyangi & Anor (Suing as the legal representative of the estate of Loise Gathoni Mugo (Deceased) v Hellena Wanjiru Rukanga (2020) eKLR where it was held that a minimum wage ought to be adopted as a multiplicand where monthly income could not be ascertained"

116. The Appellants submitted that in this case, the deceased died on 23 /11/2017 and the letter from the Chief dated 17/01/2018 showed that the deceased was a resident in Karuri Sublocation. Therefore, the applicable minimum wage would be in relation to the one provided by the **Regulation of Wages (General) Citation (Amendment Order 2017)** which provided the minimum wage of a turnboy as **Kshs.7967.95** under column 4 for all areas.

117. I agree with the Appellants that the trial magistrate failed to state the Regulation she relied on in arriving at the multiplicand of Kshs.20,000/= and that the applicable Regulation was the **Regulation of Wages (General) Citation (Amendment Order 2017)** which provided the minimum wage of a turnboy as **Kshs.7,967.95**. Save for this, I find the multiplier of 24 years and the dependency ratio of 2/3 to be adequate. Thus, the award for loss of dependency is calculated as follows:- ,

Kshs.7,967.95 x 24 x 12 x 2/3 =**Kshs.1,529,846.40**

118. On the above award this court is guided by the principles applicable to an assessment of damages under the Fatal Accidents Act which were enunciated in the case of **Odera v Adoyo & another (Suing as the Legal Representatives of the Estate of Vincent Ochieng Adoyo - Deceased) (Civil Appeal 13 of 2020) [2023] KEHC 17962 (KLR) (30 May 2023) (Judgment)** which referred to the case of ***Richard Matheka Musvoka & another v Susan Aoko & (suing as the administrators ad litem of Joseph Onyango Owiti (Deceased)) (2016) eKLR*** where J. Ringera stated as follows:-

"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court

***should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants.*"**

119. Dependency is a matter of fact and must be proved by evidence as was held in **Abdalla Rubeya Hemed Vs Kayuma Mvurya & Another [2017] eKLR** as follows:-

> "***Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."***

120. This court is inclined to disturb the trial court's award under this head. The same too is set aside.

IV. Special damages

121. On special damages, the trial court awarded Kshs.20,841/= for medical expenses, Kshs.11,500/= for mortuary charges and Kshs.25,000/= for funeral expenses totalling to Kshs.57,341/=.

122. Th Appellants argued that whereas special damages for the medical expenses and the mortuary expenses awarded were proved, no receipts were produced for the funeral expenses hence the same were not proved.

123. Being guided by the case of **Premier Dairy Ltd v Amarjit Singh Sagoo & Another (2013) eKLR Civil Appeal No. 312 of 2009 (supra)** which was cited by the trial court, It is my view that the amount of **Ksh.57,341/=** was just and reasonable. I will not disturb this award.

124. However, I noted that special damages of **Ksh.57,341/=**awarded by the trial court were not included in the final award in the trial court's judgement, I will therefore correct and include the same.

125. It is my finding that the special damages are not subject to contribution. I agree with the holding of the court in **Hashim**

Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR where the court stated that special damages should not be subjected to the apportionment.

126. On whether the trial court erred in law and fact by failing to deduct the award under the Law Reform Act from the award made under the Fatal Accidents Act, the Appellants cited the cases **of Kemfro Africa Ltd t/a Meru Express Service Gathogo Kanini v Lubia & Anor (1982-88) 1 KAR 777 and Maina Kaniaru & Anor v Josephat Muriuki Wangóndu, Court of Appeal No. 14 of 1989 (unreported)** and invited this court to offset the award for loss of expectation of life from that of the loss of dependency since the same was made in respect of distinct heads.

127. It is trite law that the Law Reform Act and the Fatal Accidents Act are two separate and distinct heads and such deduction would be erroneous.
LRA covers non-pecuniary losses experienced by the deceased's estate, such as pain and suffering, while the FAA deals with the financial impact on dependents due to the death. So, claiming under both Acts doesn't duplicate compensation since they address distinct losses.

128. See **Crown Bus Services Ltd & 2others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased) [2020] eKLR** where justice Edward M. Muriithi referenced **KBT HCCA No. 1 of 2018, (Formerly NAKURU HCCA No. 147 *of* 2015) David Kenei Julius Cheretei v. Zipporah Chepkonga (suing as the Legal Representative of the estate of Wesley Chepkonga Chebii-Deceased),** affirming that there is no requirement for deduction of the one award under Law Reform Act from the other under the Fatal Accidents Act

129. See also the case relied on by the Respondents in **Nyeri COA No.22 of 2014 (2015) eKLR,_HELLEN WAMGURU WAWERU (Suing as the legal representative of Peter Waweru Mwenja – deceased) -Vs- KAIRU SHOES STORES LTD** an appeal against the judgment of Ongundi, J, sitting at the High Court in Nyeri dated 20/2/2010. The COA found that the words “taken into account at Section 4(2) of the Fatal Accidents Act do not amount to a requirement for the Court to engage in mathematical calculations of deduction whatsoever.

130. The request for this court to offset the award under the Law Reform Act from that under the Fatal Accidents Act is declined.

131. Accordingly, for the reasons set out above, the appeal herein is partly allowed in terms as follows:

a. *Liability* ***70%: 30%*** *in favour of the Respondent is upheld.*

b. *The award of* ***Ksh.100,000/-*** *for pain and suffering is upheld.*

c. *The award of* ***Kshs.150,000/=*** *for loss of expectation of life is upheld.*

d. *The award of Ksh.3,840,000/- for dependency under the Fatal Accidents Act is set aside and substituted with an award of* ***Kshs.1,529,846.40/=***

e. *The total award under orders b, c and d above is subject to 30% contribution (100,000 +150,000 + 1,529,846.40 ¿1,779,846.40) – 533,953.92)*

Total - ***Kshs.1,245,892.48/=***

f. *The award of Special Damages of* ***Ksh.57,341/=*** *is upheld and is to be included in the net award and shall not be subjected to apportionment.*

g. *The total net award is Kshs.1,303,233.48/= plus costs and interest at court rates awarded at the trial court.*

h. *The request for this court to offset the award under the Law Reform Act from that under the Fatal Accidents Act is declined.*

i. *Since the Appellant has succeeded partially, each party shall bear own costs of the appeal.*

j. *Stay of execution is granted for Thirty (30) Days.*

132. It is so ordered. This file is closed

JUDGMENT WRITTEN, DATED & SIGNED AT MACHAKOS THIS 28TH JANUARY 2026

NOEL I. ADAGI
JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 28TH JANUARY 2026

In the presence of :

Ms. Otieno..... for Appellant

Ms. Njoroge..... for Respondent

Millygrace..... Court Assistant