REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU

CIVIL CASE NO. E078 OF 2023

ONESMUS MUEMA MUINDE……1ST PLAINTIFF

VERONICA MBITHE MUINDE……2ND PLAINTIFF

(Suing as the legal Administrators of the estate of EVALINE KAMBUA MUTHOKA-DECEASED)

VERSUS

GIDEON WAMAE NGUMBA……1ST DEFENDANT

SWAN CARRIERS LTD……2ND DEFENDANT

JUDGMENT

THE ACTION

Onesmus Muema Muinde and Veronica Mbithe Muinde (hereinafter referred to as the 1st and 2nd plaintiffs respectively) bring this action against Gideon Wamae Ngumba and Swan Carriers Ltd (hereinafter referred to as the 1st and 2nd defendants respectively) as the Legal representatives of the estate of Evaline Kambua Muthoka, the deceased person herein. In a plaint dated 19/4/2023 but filed in court on 23/5/2023, the plaintiffs averred that on or about 30/12/2021 the deceased herein was a passenger in motor vehicle registration number GKB 761C along Mombasa-Nairobi road when at Kiboko area, the 1st defendant so negligently, recklessly and carelessly drove, controlled and/or managed motor vehicle

registration number KBK 801D/ZC 7813 that he lost control and caused the motor vehicle to collide with motor vehicle registration number GKB 761C, thereby causing fatal injuries to the deceased.

The 1st defendant was sued as the driver of motor vehicle registration number KBK 801D/ZC 7813 whereas the 2nd defendant was sued as the registered, beneficial and/or insured owner of the said motor vehicle at the material time. The plaintiffs pleaded the following particulars of negligence as against the 1st defendant:

a) Driving at an excessive speed or too fast in the circumstances;
b) Driving without due care and attention;
c) Failing to pay any or any sufficient regard to the presence of other road users;
d) Failing to have reasonable regard to the safety of other road users;
e) Failing to slow down, stop, swerve and or in any other reasonable way manage and/or control the motor vehicle registration number KBK 801D/ZC 7813 so as to avoid the collision;
f) Causing the accident.

The plaintiffs further pleaded the following particulars of negligence as against the 2nd defendant:

a) Failing to maintain in good condition the said motor vehicle registration No. KBK 801D/ZC 7813;
b) Allowing the 1st defendant to drive unroadworthy vehicle on a Highway contrary to the Traffic Act;
c) Employing and allowing motor vehicle registration No. KBK 801D/ZC 7813 to be driven by an unqualified driver;
d) Authorizing its driver to operate the motor vehicle registration No. KBK 801D/ ZC 7813 under the influence of alcohol and substances.

The plaintiffs further averred that at the time of her death, the deceased was aged 30 years, a mother of one and a business lady. That she enjoyed good health and was living a happy and vibrant life, which was considerably shortened and her estate has suffered

expenses, loss and damage. They pleaded the particulars of dependants, special damages and prayed for judgment against the defendants for:

a) General damages under the Fatal Accidents Act and Law Reform Act;
b) Special damages in the sum of Ksh. 331,423/=;
c) Costs of the suit;
d) Interest.

INTERLOCUTORY JUDGMENT

The record indicates that the defendants entered appearance on 19/6/2023 and filed a joint statement of defence on 20/6/2023. However, the plaintiffs filed a request for judgment on 29/6/2023 and on 3/7/2023 the court entered interlocutory judgment against the defendants on the ground that they had not entered appearance not filed a defence. The matter was then set down for what the court called formal proof. In the course of the proceedings, counsel for the defendants appeared and the matter proceeded as if nothing had happened. The parties as well as the then trial court did not address the issue of the interlocutory judgment. The same was not set aside, notwithstanding that it had been entered after the defendants had entered appearance and filed their statement of defence. Clearly, the interlocutory judgment was entered in error. I will invoke the court's inherent power and set it aside *ex debito justitiae*.

THE DEFENCE

As already pointed out, the defendants entered appearance on 19/6/2023 and filed a joint statement of defence on 20/6/2023 in which they denied that the plaintiffs were the legal representatives of the estate of the deceased herein. They further denied that the deceased was a passenger in motor vehicle registration number GKB 761C, denied all the particulars of negligence pleaded by the plaintiff, denied being negligent and denied the particulars of special damages. The defendants denied that the persons named in the plaint were dependants of the deceased and the damages claimed under both Acts amounted to double compensation. They prayed that the suit be dismissed with costs.

THE EVIDENCE

The Plaintiffs' Case

At the hearing of the suit, three witnesses testified on behalf of the plaintiffs. PW 1 was the 1st plaintiff. He adopted his statement filed in court as part of his testimony. The witness testified that the deceased herein was his wife. PW 1 did not witness the accident but was called on phone and informed about it. He stated that the deceased died after 32 days, while undergoing treatment. PW 1 stated that the deceased was a business lady and at the time of death, she was aged 30 years. That she had one daughter. The witness did not however state which business the deceased was involved in. He produced several documents in support of his case.

PW 2 was the 2nd plaintiff. She also adopted her statement filed in court as part of her testimony. Her evidence was that the deceased was her sister in-law. PW 2 did not also witness the accident but was informed about it. Her testimony was similar to that of PW 1. PW 3 Police Chief Inspector Peter Kinyua testified that he was the officer in charge of Traffic at Makindu Police station. The witness produced a police abstract on the accident herein and confirmed the occurrence of the accident. He further confirmed that the deceased herein was a passenger in the GK motor vehicle. According to PW 3, the 1st defendant was charged with the offence of driving without due care and attention whereupon he pleaded guilty and was convicted and sentenced.

The Defence Case

The defendants did not call any witness.

MAIN ISSUES FOR DETERMINATION

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

i. Whether an accident occurred on 30/12/2021 at Kiboko area along Mombasa-Nairobi road involving motor vehicles registration numbers GKB 761C and KBK 801D/ZC 7813;
ii. Whether the deceased was a passenger in motor vehicle registration number GKB 761C at the time of accident;
iii. Whether motor vehicle registration number KBK 801D/ZC 7813 belonged to the 2nd defendant at the material time;

iv. Whether the 1st defendant was the driver of motor vehicle registration number KBK 801D/ZC 7813 at the time of accident;

v. Whether the 1st defendant was negligent in the circumstances and therefore liable for the accident;

vi. Whether the 2nd defendant is vicariously liable for the accident;

vii. Whether the deceased died as a result of injuries sustained in the accident;

viii. Whether the estate of the deceased and her dependants are entitled to damages;

ix. If so, the nature and quantum thereof;

x. Who should bear the costs of this suit?

THE PLAINTIFFS' SUBMISSIONS

In their submissions, the plaintiffs urged the court to find the defendants 100% liable for the accident based on the evidence on record. For pain and suffering, the plaintiffs asked the court to award ksh. 400,000/=. They relied on the authority of ***Ngania & 2 others v Adulu (suing as the legal representative of the estate of Clinton Morgan Kiprotich [2024] KEHC 4005 (KLR)*** in which Ksh. 50,000/= was awarded where the deceased died on the spot. The plaintiffs also relied on the authority of ***Njogu & another v Mankone [2024] KEHC 10694 (KLR),*** which did not even involve death. I must say that on this, the plaintiffs relied on irrelevant authorities.

The plaintiffs proposed Ksh. 150,000/= for loss of expectation of life and relied on the authority of ***Ngania*** (*supra*) in which Ksh. 100,000/= was awarded for a deceased aged 29 years old. For loss of dependency, they urged the court to adopt a multiplicand of Ksh. 10,000/=, a multiplier of 30 years and dependency ratio of 2/3. This gives an award of Ksh, 2,400,000/=. The plaintiffs relied on the authorities of ***Ngania*** (*supra*) and ***Macharia & another v Undusu & Iganza (suing as Personal administrators and legal representatives of the estate of Mincelet Kavanyiri [2024] KEHC 11445 (KLR***). These too, were irrelevant since in the authorities, there was proof of earnings whereas in the instant case, there is absolutely no proof of earnings of the deceased prior to her demise. The plaintiffs the court to award special damages as pleaded as well as costs of the suit and interest.

THE DEFENDANTS' SUBMISSIONS

The defendants submitted that the police officer who testified in court was not the investigating officer in respect of the accident. That he did not produce sketch maps, motor vehicle inspection report or scene report to ascertain the clear circumstances of the accident. The defendants argued that occurrence of an accident is not *prima facie* proof of negligence. They relied on the authority of ***Farida Kimoth v Ernest Maina [2024] eKLR***. The defendants further argued that a traffic case, if any, cannot bind them in a civil suit without corroborating evidence of an eye witness. The defendants argued that since it was a head-on collision and in the absence of an eye-witness, direct or forensic evidence on the point of impact, speed, lane departure or evasive action by either driver, neither party can be exonerated or fully blamed.

The defendants relied on the case ***of Ouma (suing as the legal representative of the estate of the later Peter Ouma Ngada-deceased) v Wilson & another [2024] KEHC 16669 (KLR).*** The defendants relied on other authorities whose copies were not filed. The defendants argued that a criminal conviction cannot automatically bind a party or relieve the plaintiffs from proving negligence in civil proceedings. The defendants urged the court to either apportion liability equally or dismiss the suit for want of proof of negligence.

On quantum, the defendants submitted that for loss of dependency, the court must take into account damages awarded under the Law Reform Act. The defendants tend to suggest that damages under the Law Reform Act must be deducted from those awarded under the Fatal Accidents Act. The defendants argued that without proof of the deceased's earnings, the claim must fail. The defendants further argued that the 1st plaintiff had his own source of income and was therefore not dependent on the deceased. That the 2nd plaintiff was not a dependant of the deceased. They relied on section 4 of the Fatal Accidents Act. The defendants urged the court to adopt a multiplier of 9 years and a dependency ratio of 1/3 since the child was the only dependant of the deceased.

Surprisingly, the defendants later in their submissions proposed a multiplicand of 6,415.55/=, whose basis is unclear. Accordingly, loss of dependency would amount to Ksh. 230,959/=. The defendants alternatively proposed a global sum of Ksh. 500,000/= for loss of

dependency. They urged the court not to award under the Law Reform Act as there is already an award under the Fatal Accidents Act. For pain and suffering, the defendants submitted that there was no medical evidence to show that the deceased was unconscious or experienced pain during the period she was hospitalized. That it is speculative to assume that the deceased suffered prolonged pain and that the mere length of hospitalization does not entitle the estate to enhanced damages. The defendants proposed nominal damages of Ksh. 10,000/=.

At this point, I must say that the defendants' submissions under this head were quite insensitive. Where a person is involved in a road accident and is hospitalized for a long period owing to the injuries sustained, it would be unreasonable and insensitive, in my view, to expect or demand for medical evidence to prove that the victim suffered pain during the period of hospitalization. I will leave it at that. Even after urging the court to dismiss the claim under the Law Reform Act, the defendants later in their submissions proposed a sum of Ksh. 50,000/= for loss of expectation of life. It would appear that the defendants are not aware that damages for loss of expectation of life are the ones awarded under the Law Reform Act. For special damages, the defendants urged the court to award what was specifically proved, bearing in mind that no revenue stamps were affixed on the receipts produced in evidence. In summation, the defendants urged the court to dismiss the plaintiffs' suit with costs, for having failed to prove negligence.

ANALYSIS AND DETERMINATION

I have considered the evidence on record and given due regard to the submissions made by the parties. From the evidence on record, I have no doubt that an accident occurred on 30/12/2021 at Kiboko area along Mombasa-Nairobi road involving motor vehicles registration numbers GKB 761C and KBK 801D/ZC 7813. There is also uncontroverted evidence to show that the deceased was a passenger in motor vehicle registration number GKB 761C. The police abstract produced in evidence indicates that the 2nd defendant was the owner of the accident motor vehicle registration number KBK 801D/ZC 7813 at the material time.

The plaintiffs further produced in evidence copies of motor vehicle search certificates which indicate that the 2nd defendant was the registered owner of motor vehicle registration number KBK 801D and trailer registration number ZC 7813 as at 31/8/2023. There is no contrary evidence and as such, I find no difficulty in finding that the 2nd defendant was the owner of the accident motor vehicle at the material time. The police abstract produced in evidence indicates that the 1st defendant was the driver of motor vehicle registration number KBK 801D/ZC 7813 at the time of accident. No contrary evidence was given.

Liability

It is the duty of the plaintiff to establish or prove negligence on the part of 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 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."

Indeed, no eye-witness was called to testify on how the accident occurred. The plaintiffs did not witness the accident and neither did PW 3 investigate the same. Is there any evidence that would impute negligence on the driver of motor vehicle registration number KBK 801D/ZC 7813? PW 3 produced in evidence, a police abstract on the accident. The same indicates that the 1st defendant was charged with the offence of careless driving and that the case was finalized. In his testimony, PW 3 testified that the 1st defendant pleaded guilty and was fined Ksh. 10,000/=. The police abstract indicates that the 1st defendant was to be charged afresh with the offence of causing death by dangerous driving. The contents of the police abstract were not challenged at all by the defendants. Section 47A of the Evidence Act provides:

"A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged."

There is no indication that there was an appeal against the conviction in the traffic case. As already indicated, the deceased was a mere passenger in the accident motor vehicle and there is no evidence to show that she was negligent in any manner. The conviction of the driver of the accident motor vehicle is an indication that he was negligent. I rely on the Court of Appeal authority of ***Abdi Ali Dere v Firoz Hussein Tundal & 2 others [2013] KECA 167 (KLR).*** In the authority of ***Moses Theuri Ndumia v I G Transporters Limited & another [2018] KECA 297 (KLR)***, the Court of Appeal observed:

".....the Police Abstract form that indicated the driver of the 1st respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence..... In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondent."

Further, in ***David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] KECA 434 (KLR)***, the Court of Appeal had this to say:

"When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent.....In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases,

what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle."

31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the respondents did not lead any evidence to demonstrate that the 2nd respondent, as the driver of motor vehicle KAY 718S, was not negligent."

Similarly, in ***Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR***), the Court of appeal held:

"The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be relied upon. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision."

Being guided by the above authorities, I find that although the plaintiffs and PW 3 could not tell of their own knowledge, how the accident occurred, there is sufficient evidence to prove that the deceased was a passenger in one of the accident motor vehicles. There is no evidence to prove that she was negligent. The defendants did not take out third party proceedings against the driver or owner of motor vehicle registration number GKB 761C. No liability can be attributed to the deceased. In the same vein, no liability can be attributed to the driver of GKB 761C without evidence to show that he was negligent and without him being joined in the proceedings. Consequently, I find the 1st defendant **100%** liable for the accident. The defendants evidently misunderstood the authorities they relied upon.

Vicarious liability is a form of secondary liability that arises under the common law doctrine of agency, *respondeat superior*, the responsibility of the superior for the acts of

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

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

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

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

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

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

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

There is no evidence to rebut the fact that the 1st defendant was an agent of the 2nd defendant. Consequently, I find the 2nd defendant **100% vicariously liable** for the negligence of the 1st defendant.

Quantum

There is sufficient evidence from the post-mortem form and the certificate of death to prove that the deceased died as a result of injuries sustained in the accident. Having made a finding on liability, it follows that the estate of the deceased and her 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 32 or so days following the accident. She died while undergoing treatment. The deceased had sustained injuries in the accident. It goes without saying that she must have suffered pain during the time she was hospitalized. As already indicated, it would be unreasonable to insist on production of medical evidence to prove that the deceased was in pain or that she suffered before she died. 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. On my part, I have considered the following authorities:

a) <u>Damaris Wanjiru Muhoro v Joseph Kamau Njoroge & Another [2011] eKLR.</u>

The deceased herein died after three days following the accident. The court awarded Ksh. 150,000/= in 2011.

b) <u>Julian Njeri Muriithi v Veronica Njeri Karanja & Another [2015]eKLR.</u>

The deceased herein died after three days following the accident. The court awarded Ksh. 200,000/= in 2015.

Considering that the deceased herein died after more than a month while undergoing treatment, the age of most authorities coupled with the vagaries of inflation, I find that the award of **Ksh. 400,000/=** as proposed by the plaintiffs would be reasonable. I award the same.

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

The evidence on record indicates that the deceased died at the age of 30 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 ***Cornelia Elaine Wamba v Shreeji Enterprises Ltd & Others [2012] eKLR*** wherein the deceased died at the age of 31 years and Ksh. 150,000/= was awarded under this head on 21/9/2012. The plaintiff proposed a sum of Ksh. 150,000/=. I find the proposal reasonable and proceed to award **Ksh. 150,000/=** under this head.

3) **Damages for loss of dependency**

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

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

The plaintiffs listed the widower, two sisters (although it turned out that one was a sister in –law) to the deceased and a daughter who was a minor as the dependants of the deceased. The siblings or in-laws are not proper dependants under the Act. In the case of ***Beatrice Wangui Thairu v Hon. Ezekiel Barng'etuny & Another (Nairobi HCCC No. 1438 of 1998 (unreported),*** and referred to in ***Rev. Fr. Leonard O. Ekisa & Another v Major Birgen [2005] eKLR,*** Ringera J (as he then was) said, *inter alia* -

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

There is no evidence to show that the deceased's siblings or in-laws who were even adults, depended on her. In my view, where an alleged dependant does not fall under the categories listed in section 4(1) of the Fatal Accidents Act, there must be acceptable proof of dependency. Damages under this head cannot be awarded as a matter of course. There is

no evidence to show that the deceased's siblings or in-laws depended on her and in which manner. I find that the only dependants are the widower and child of the deceased.

The deceased died at the age of 30 years. The plaintiffs pleaded and testified that the deceased was a business lady. In cross-examination, it was indicated that the deceased operated a salon. There is absolutely no proof of the deceased's earnings prior to her death, if at all. In the case of ***Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR***, the Court of Appeal held as follows:

"We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things".

I have considered the parties' submissions on what should be awarded under this head. How then should the court award damages for loss of dependency. There are conflicting decisions particularly in the High court on how damages under this head ought to be awarded in the absence of proof of exact earnings of the deceased. Some Judges adopt the global award approach whereas others adopt the multiplier approach. I will highlight some of the authorities:

a) *Ann Njoki Njenga v Umoja Floor Mills & Another [2006] eKLR*.

In this case, the deceased was said to be a businessman at the time of his death. It was said that he earned about Ksh. 120,000/= per month. No documentary evidence was adduced to prove his earnings. Musinga J (as he then was) adopted a figure of Ksh. 10,000/= as the multiplicand.

b) *Mwita Nyamohanga & another v Mary Robi Moherai suing on behalf of the estate of Joseph Tagare Mwita (Deceased) & another [2015] eKLR*.

In this case, Majanja J held that proof of earnings by way of testimony was sufficient evidence. The court relied on the oral testimony of what was said to be the deceased's earnings.

c) ***Phillip Musyoka Mutua v Veronica Mbula Mutiso [2013] eKLR.***

In this case, the deceased was said to be a businessman at the time of death earning about Ksh. 40,000/= per month. There was no documentary proof of his earnings. Mutende J held that in the absence of evidence of monthly earnings of the deceased the estimate would be like for any unemployed person where the rate set is usually like for a wage of an unskilled employee.

d) ***Moses Mairua Muchiri v Cyrus Maina Macharia (Suing as the personal representative of the estate of Mercy Nzula Maina (deceased) [2016] eKLR*.**

In this case, the deceased was said to have been a businessman prior to his death. There was no documentary proof of his earnings. Ngaa J held as follows:

"It has been held elsewhere that where it is not possible to ascertain the multiplicand accurately, as appears to have been the case here, courts should not be overly obsessed with mathematical calculations in order to make an award under the head of lost years or loss of dependency. If the multiplicand cannot be ascertained with any precision, courts can make a global award, which by no means is a standard or conventional figure but is an award that will always be subject to the circumstances of each particular case".

The court proceeded to make a global award under this head.

e) ***General Motors East Africa Limited v Eunice Alila Ndeswa & another [2015] eKLR*.**

In this case, the deceased was said to be a mechanic at the time of death but there was no documentary proof of his actual earnings. Aburili J held as follows:

"There is an established formula for calculating loss of dependency and giving global figures is not one of them. On that basis, I fault the trial magistrate for applying wrong principles of law in assessing general damages for loss of dependency..... where there

is no documentary evidence of employment, the court would consider reasonable income for a casual labourers as a base for income because it would have been unreasonable not to allocate any sum of income to the deceased who used to go out and eke out a living daily. The case of WAMBUA VS PATEL AND ANOTHER, [1980] KLR 336 cited with approval in KIMATU MBUVI VS AUGUSTINE KIOKO CA203/2001 is clear that it is not just documentary evidence that can prove earnings and that to maintain that stand would do a lot of injustice to many illiterate Kenyans who do not keep records and yet earn livelihoods in various ways".

The court adopted the minimum wage of an ungraded mechanic artisan.

f) Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another.

In this case, which was quoted with approval in ***Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR***, Ringera J (as he then was) held as follows:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

g) Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR.

In this case, Nambuye J (as she then was) observed as follows:

"As regards the income of the deceased there are no bank statements showing his earnings. Both counsels have made an estimate of the same using no figures. In the courts opinion that will be mere conjecture. It is better to opt for the principle of a lump sum award instead of estimating his income in the absence of proper accounting books."

h) *Daniel Mwangi Kimemi & 2 others v J G M & another (the personal representatives of the estate of N K (DCD) [2016] eKLR*.

In this case involving a deceased minor, the trial court had estimated the expected earnings of the minor and applied the multiplier approach. On appeal, Gikonyo J held that in such circumstances, the court's obligation would have been to achieve the assessment of a fair award in the circumstances of the case for loss of dependency rather than courting an obsession to applying a multiplier to facts which are not apt. That the least income adopted by the trial magistrate lacked a foot on which to stand. The multiplier was also inappropriate in this case.

i) *Violet Jeptum Rahedi v Albert Kubai Mbogori [2013] eKLR*.

The deceased herein was said to be a business man but there was no clear evidence of his earnings. Hatari Waweru J made an estimate of the monthly earnings and adopted the multiplier method.

The existence of divergent views on the issue as highlighted herein above poses a dilemma especially on the lower courts who are bound to follow decisions of higher courts by virtue of the doctrine of *stare decisis*. While grappling with the issue, I came across the English decision of the House of Lords in the case of ***Gammel v Wilson [1981] 1 ALL ER 578*** wherein Lord Scarman observed as follows:

"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award

should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it".

I find that the multiplier approach would not be appropriate as the same would be speculative. In the circumstances, I will adopt the global sum approach. Considering the age of the deceased, the fact that he had two dependants, one who was a minor at the time of her death and the fact that the deceased was also expected to pay taxes and be subject to other statutory deductions, I find that a sum of **Ksh. 1,200,000/=** would be reasonable. I award the same. It is also a fact that human life is not permanent and the court has to take into account the vicissitudes of life. I am mindful of the principles applicable in assessing damages as espoused herein above. I have further taken consideration of the fact that the plaintiffs have already been awarded damages under the Law reform Act.

<u>The issue of double compensation</u>

The defendants suggested that the court should either not award damages under the Law Reform Act or should deduct the same from the total award so as to avoid double compensation. The law on this issue is settled. In the case of ***Kemfro Africa Limited t/a Meru Express Services (1976) & another v Lubia & another (No 2) [1985] eKLR***, Kneller JA observed as follows:

"Why do Kemfro and Kanini say the damages in Civil Suit 2381 should be reduced by Kshs 25,000" Because the Kshs 25,000 was awarded under the Law Reform Act and it should be subtracted from the amount awarded under the Fatal Accidents Act is their answer..... And did the Judge take account of the assessment for the estate under the Law Reform Act when it came to that for Lubia under the Fatal Accidents Act? He added all the assessments together, it is true, but, in my judgment, an arithmetical

deduction need not be set out as for an examination answer. The test is whether or not this Court can be satisfied the Judge remembered before he assessed the loss for Lubia at Kshs 150,000 that Lubia would inherit the Kshs 25,000 from Myra's estate. In my view he did and I base that on the way in which he directed himself and the sum he awarded Lubia under the Fatal Accidents Act which even if the Kshs 25,000 under the Law Reform Act were not taken into account was not manifestly excessive. Thus, I would dismiss the appeal from the award in Civil Suit 2381 of 1979".

Chesoni Ag. JA held as follows:

"In my view what section 2(5)of the Law Reform Act means is that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death. To be taken into account and to be deducted are two different things. The words used in s. 4(2) of the Fatal Accidents Act are "taken into account". The section says what should not be taken into account and not necessarily deducted. For me it is enough if the judgment of the lower Court shows that in reaching the figure awarded under the Fatal Accidents Act the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction as suggested by Mr Barasa". I agree with Mr Kwach that the award under the Law Reform Act, if any, is one of the factors to be taken into account, and the learned Judge took it into account. Had he not taken into account the Kshs 25,000 he had awarded under the Law Reform Act he might have awarded more than Kshs 150,000 under the Fatal Accidents Act: The Judge did what he was required to do and as I do not agree with the English authorities that suggest or say that there should be a mathematical deduction as opposed to mere taking into account the award under the Law Reform Act. I do not find any error in the approach by the learned Judge".

In the above case, the court unanimously dismissed the ground of appeal that the trial Judge should have deducted the award made under the Law Reform Act from the one made under the Fatal Accidents Act. The principle that was laid down in the case is that in awarding damages under the Fatal Accidents Act, what is required is that the trial court must take into account the award made under the Law Reform Act where the beneficiaries

of both awards are the same. The principle is premised on section 2(5) of the Law Reform Act which provides thus:

"The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Act (Cap. 32) or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this Part as relates to causes of action against the estates of deceased persons' shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1)".

The principle is also based on section 4(2) of the Fatal Accidents Act which stipulates that:

"In assessing damages, under the provisions of subsection (1), the court shall not take into account—

(a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act;

(b) any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph".

The Court of Appeal in the ***Kemfro*** case (*supra*) interpreted the provision to mean that an award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act and so it appears the Legislature intended that it should be considered. Indeed, the position was affirmed by the Court of Appeal on 14/10/2015 in the case of ***Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR*** wherein the court held as follows:

"This Court has explained the concept of double compensation in several decisions and it is surprising that some courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same, and consequently the

claim for lost years and dependency will go to the same persons. It does not mean that a claimant under the Fatal Accidents Act should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the Law Reform Act, hence the issue of duplication does not arise. The confusion appears to have arisen because of different reporting of the Kenfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as Kenfro Africa Ltd t/a Meru Express Services 1976 & Another -VS- Lubia & Another (No. 2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-

"6. An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.

7. The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.

8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute

on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction".

I will therefore not deduct any of the awards made under the Law Reform Act from the award made under the Fatal Accidents Act.

4) **Special Damages**

In their plaint, the plaintiffs pleaded special damages as follows:

a) Cost of obtaining Letters of Administration……Ksh. 50,000/=
b) Motor vehicle search……Ksh. 550/=
c) Death certificate fee……Ksh. 140/=
d) Mortuary expenses……Ksh. 12,220/=
e) Hospital bills……Ksh. 268,513/=

Total……Ksh. 331,423/=

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 no payment receipt for the copy of records. The rest of the items were supported by receipts. The defendants argued that the receipts produced in evidence were not supported by revenue stamps and as such, they should be disregarded. I am aware of the practice by some superior courts of disregarding receipts which do not bear revenue stamps and any sums claimed under such receipts are not awardable. The said authorities rely on the provisions of section 19 of the Stamp Duty Act. Is that the legal position? I have had occasion to peruse the Stamp Duty Act. Section 2 of the Act defines the term "instrument" as:

"instrument includes document."

The same section defines "receipt" as follows:

"receipt includes a printout from a cash register, or a teller machine showing a list of goods purchased and amount tendered or to be tendered for the goods being sold."

The foregoing illustrates that the term "instrument" as used in the Act does not include a receipt since the two are defined differently under the Act. This implies that section 19 and other sections of the Stamp Duty Act where reference has been made to instruments do not apply to receipts. Indeed, the provisions that apply to receipts are to be found in sections 86 to 88 of the Act. Section 86 provides as follows:

"For the purposes of this Act, "receipt" includes any note, memorandum or writing whereby any money amounting to one hundred shillings or upwards, or any bill of exchange, cheque or promissory note for money amounting to one hundred shillings or upwards, is acknowledged or expressed to have been received or deposited or paid, or

whereby any debt or demand, or any part of a debt or demand, of the amount of one hundred shillings or upwards is acknowledged to have been settled, satisfied or discharged, or which signifies or imports any such acknowledgment, and whether it is or is not signed with the name of any person."

Section 88 thereof provides that:

"(1) Any person receiving any money of one hundred shillings or upwards in amount, or any bill of exchange or promissory note for an amount of one hundred shillings or upwards, or receiving in satisfaction or part satisfaction of a debt any movable property of one hundred shillings or upwards in value, shall, on demand by the person paying or delivering the money, bill, note or property, give a duly stamped receipt for it.

(2) If any person—

(a) fails to give a receipt, as required by subsection (1); or

(b) gives a receipt liable to duty and not duly stamped; or

(c) in any case where a receipt would be liable to duty, refuses to give a receipt duly stamped; or

(d) upon a payment to the amount of one hundred shillings or upwards, gives a receipt for a sum not amounting to one hundred shillings, or separates or divides the amount paid with intent to evade the duty, he shall be guilty of an offence and liable to a fine not exceeding two thousand shillings."

From the foregoing, it is clear that it is the duty of the receiver of money to issue a duly stamped receipt and not the giver of the money. If the receiver fails to do so, he commits an offence. The section does not state that a receipt that is not duly stamped is inadmissible or that any sums claimed therein are not awardable. Some High Court Judges share this view. In the case of ***Milkah Wanjiku Muthea v Daniel Kipkirong Tarus & another [2015] eKLR***, Janet Mulwa J held as follows:

"Under the Stamp Duty Act Cap 480 Laws of Kenya, it is not specifically provided that payment receipts in respect of services rendered must be stamped. Section 88 of the Act in

my opinion, it is the duty of the receiver of payment who is under a duty to affix revenue stamps on the payment receipt, not the payee who should not be penalised for omissions of the receiver. I am guided by the cases Benedetta Wanjiku Kimani -vs- Changow Cheboi & another HCCC No 373 of 2008 and Irene Ngombo Mshingo -vs- Miriam Kadogo (2000) KLR where the learned judges of Appeal held that a document does not cease to be admissible for luck of affixation of a revenue stamp."

In the case of ***Crispus Karanja Njogu v Attorney General & Another [2008] eKLR***, Hatari Waweru J (as he then was) observed thus:

"The Plaintiff particularly pleaded legal fees of KShs. 240,000/00 and costs of attending court of KShs. 280,000/00. Of the legal fees, he has strictly proved only KShs. 51,000/00. I will award him this sum. I will not deny him this on account of the receipts issued to him by his lawyer not bearing revenue stamps as required under the Stamp Duty Act; it was not his duty to fix the stamps on the receipts but that of the person issuing them."

Similarly, in ***Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR***, Emukule J (as he then was) held as follows:

"I have indeed looked at the invoices, and receipts, and they indeed do not appear to bear any copy of a revenue stamp affixed to them. That does not however conclusively determine that the Plaintiff did not pay for the various services rendered in the course of the deceased's hospitalisation, or for his funeral expenses. In my view it is the duty of the receiver of the revenue and not the payer to affix the revenue to receipt of all the prescribed amounts. It is the receiver of such payments who should be interrogated and not the poor widow who would be mourning her husband and cannot be penalised for failing to ascertain whether the receipt she was receiving in acknowledgment of the payments she was making had a revenue stamp affixed them. Lastly having admitted the receipts by consent, the Defendant's counsel is estopped from challenging their admission by way of submission."

The receipts herein were admitted without any objection being made. In view of the legal provisions and case law illustrated herein above, it does not matter that the receipts were not duly stamped. It was not the duty of the plaintiffs to stamp the receipts. The

plaintiff can still claim the amounts paid. Consequently, I award a total of **Ksh. 330,873/=** as special damages.

DISPOSITION

In summary, I find that the plaintiffs have proven their case on a balance of probabilities against the defendants. As a result, I hereby make the following awards in favour of the plaintiffs and against the defendants:

a) Damages for pain and suffering.....Ksh. 400,000/=
b) Damages for loss of expectation of life.....Ksh. 150,000/=
c) Damages for loss of dependency.....Ksh. 1,200,000/=
d) Special damages.....Ksh. 330,873/=

Total.....**Ksh.2,080,873/=**

The plaintiffs are also awarded interest on the damages as well as costs of the suit. The guiding principles in respect of interest are set out in section 26 of the Civil Procedure Act which provides that:

"(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

(2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

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

"First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost

respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.

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

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

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

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

"It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that <u>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</u>……..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 special damages, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED VIA CTS THIS 17TH DAY OF MARCH, 2026.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.