Joan & another (Suing on their own Behalf and as Administrators of the Estate of the Late Josphat Mutuku Mwinzi alias Josephat Mutuku Mwinzi - Deceased) v Goldman Logistics Limited (Civil Case E044 of 2020) [2025] KEMC 291 (KLR) (25 November 2025) (Judgment)

Neutral citation: [2025] KEMC 291 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE E044 OF 2020

YA SHIKANDA, SPM

NOVEMBER 25, 2025

BETWEEN

DORCAS MBAIKA JOAN ..... 1ST PLAINTIFF

BONIFACE MWINZI MUTUNGI ..... 2ND PLAINTIFF

SUING ON THEIR OWN BEHALF AND AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOSPHAT MUTUKU MWINZI ALIAS JOSEPHAT MUTUKU MWINZI - DECEASED

AND

GOLDMAN LOGISTICS LIMITED ..... DEFENDANT

JUDGMENT

The Action

1. The plaintiffs herein Dorcas Mbaika Joan and Boniface Mwinzi Mutungi (hereinafter referred to as the 1st and 2nd plaintiffs respectively) bring this action against Goldman Logistics Limited (hereinafter referred to as the defendant) as the Legal representatives of the estate of Josphat Mutuku Mwinzi alias Josephat Mutuku Mwinzi, the deceased person herein. In a plaint dated 19/10/2020 but filed in court on 11/11/2020, the plaintiffs averred that on or about 28/10/2019, the deceased herein was lawfully riding motor cycle registration number KMCU XXXX along Kibwezi-Kitui road when at Kiaoni area, the defendant's driver so carelessly and negligently drove motor vehicle registration number KBT 535C that he lost control and caused the said motor vehicle to collide with motor cycle registration number KMCU XXXX, in consequence whereof the deceased sustained fatal injuries.

2. The defendant was sued as the registered owner of motor vehicle registration number KBT 535C/ ZE 1914 at the material time. The plaintiffs further averred that at the time of his death, the deceased was aged 30 years and was in good health and lived a happy life. That the deceased was a boda boda

operator who earned approximately Ksh. 30,000/= per month and contributed substantially to the maintenance of his dependants. The plaintiffs relied on the doctrine of Res ipsa loquitor and pleaded the following particulars of negligence against the defendant's driver:

a. Driving without due care and attention;

b. Creating circumstances that precipitated and caused the accident;

c. Failing to keep any or any proper look out;

d. Failing to have due regard to the well being and safety of riders lawfully using the said road and in particular the deceased;

e. Failing to have due regard to other traffic lawfully using the said road and in particular of motor cycle registration number KMCU XXXX;

f. Failing to exercise the care and skill reasonably expected of a driver in the circumstances;

g. Failing to brake in time or at all;

h. Failing to stop, to slow down, to swerve or in any other way so as to manage and/or control the said motor vehicle and avoid the accident;

i. Driving at an excessive speed in the circumstances;

j. Driving a defective motor vehicle.

3. The plaintiffs pleaded the particulars of dependant and those of special damages. They thus pray for judgment against the defendant for:

a. Special damages in the sum of Ksh. 66,700/=;

b. General damages for loss of dependency, loss of expectation of life and pain and suffering under the *Fatal Accidents Act* and the *Law Reform Act*;

c. Costs of the suit;

d. Interest on the above.

The Defence

4. The defendant entered appearance on 26/11/2020 and filed a statement of defence on 14/12/2020, in which it denied the plaintiffs' claim in toto. The defendant denied that they plaintiffs had capacity to sue, denied that it was the registered owner of motor vehicle registration number KBT 535C, denied that the said motor vehicle was being driven by its agent or authorized driver and denied being the registered owner of trailer registration number ZE 1914. The defendant further denied that the said trailer was being propelled by motor vehicle registration number KBT 535C, denied that the deceased was lawfully riding motor cycle registration number KMCU XXXX along Kibwezi-Kitui road, denied that motor vehicle registration number KBT 535C was driven negligently along the said road, denied the occurrence of the accident and denied that the deceased sustained fatal injuries.

5. The defendant denied the particulars of negligence pleaded by the plaintiff and averred in the alternative that if the alleged accident occurred, then the same was not caused by its negligence or that of its employee but was solely caused and/or substantially contributed to by the deceased's negligence. The defendant pleaded the following particulars of negligence against the deceased:

a. Without warning, mischievously rode into the path of motor vehicle registration number KBT XXXX/ZE XXXX;

b. Ignoring warning signs including hooting by the driver of motor vehicle registration number KBT XXXX/ZE XXXX;

c. Over speeding;

d. Failing to have regard for his own safety and life;

e. Failing to be on the lookout while on a busy road;

f. Riding in an unlawful, reckless and inappropriate manner;

g. Permitting the said accident to occur;

h. Causing the accident.

6. The defendant also relied on the doctrine of Res ipsa loquitor as well as the *Traffic Act* and the Highway Code. The defendant further averred that if the accident occurred, the same was an inevitable accident that was beyond its control. The defendant denied the particulars of loss and special damages pleaded by the plaintiff and averred that no cause of action had been established. It prayed that the plaintiffs' suit be dismissed with costs.

The Evidence

The Plaintiffs' Case

7. The plaintiffs' case was heard by another Magistrate who was subsequently transferred. When the matter was placed before me, parties agreed and the court directed that the matter proceeds from where it had reached. Three witnesses testified on the part of the plaintiff. PW 1 was the first plaintiff. She adopted her statement filed in court as part of her testimony. PW 1 testified that the deceased herein was her husband and that she was one of the legal representatives of the estate of the deceased. PW 1 stated that the deceased died on 3/11/2019 following injuries that he sustained in a road accident on 28/10/2019. The evidence of PW 1 indicates that the deceased was survived by a widow and three daughters. That he was a bodaboda operator who earned Ksh. 30,000/= per month and died at the age of 30 years. The witness produced several documents in support of the claim.

8. PW 2 Dennis Mutinda Mutiso testified that on 28/10/2019 at about 7:00 pm he was standing on a pavement at Kiaoni area along Kibwezi-Mutomo road when he saw the deceased riding his motor cycle registration number KMCU XXXX from Mutomo direction towards Kibwezi direction. That there was a speeding motor vehicle registration number KBT XXXX/ZE XXXX being driven from Kibwezi general direction. That the driver of the said motor vehicle lost control and collided with motor cycle registration number KMCU XXXX. The witness blamed the driver of the accident motor vehicle for the accident. PW 3 Police Corporal Timothy Kilonzo testified that he was a traffic police officer based at Makindu Police station. He confirmed that a report on the accident was made at the police station. The witness indicated that the investigating officer who visited the scene was unable to tell who between the deceased and the driver of motor vehicle registration number KBT XXXX/ZE XXXX was at fault. He produced the police abstract in evidence.

The Defence Case

9. The defendant called one witness. This was Police Sergeant Benson Muema from Makindu Traffic base. The witness confirmed the occurrence of the accident as well as the involvement of the motor vehicle and motor cycle as well as the deceased herein. The witness stated that the investigating officer blamed the deceased for the accident. He produced a police abstract as well as the inspection report for motor vehicle registration number KBT XXXX/ZE XXXX.

FACTS NOT IN DISPUTE

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

    a. An accident occurred on 28/10/2019 at Kiaoni area along Kibwezi-Kitui road;

    b. The accident involved motor vehicle registration number KBT XXXX/ZE XXXX and motor cycle registration number KMCU XXXX;

    c. The deceased herein was the Rider of motor cycle registration number KMCU XXXX at the time of accident;

    d. Motor vehicle registration number KBT XXXX/ZE XXXX belonged to the defendant at the material time;

    e. The deceased died as a result of injuries sustained in the accident.

Main Issues for Determination

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

    i. Who was to blame for the accident?

    ii. Whether the defendant is vicariously liable for the accident;

    iii. Whether the estate of the deceased and his dependants are entitled to damages;

    iv. If so, the nature and quantum thereof;

    v. Who should bear the costs of this suit?

The Plaintiffs' Submissions

12. In their submissions, the plaintiffs relied on the evidence on record and submitted that there were two accounts of how the accident occurred. The plaintiffs contended that their version was more plausible and had probative value. That the evidence adduced by the plaintiffs was consistent and supported by evidence whereas that of the defence was of no probative value, inconsistent and evasive. The plaintiffs argued that DW 1 was not involved in the investigations and merely relied on the OB records and police abstract. That his evidence was not direct and as such, little weight can be attached to it. The plaintiff relied on the authority of Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR) and other authorities. The plaintiff argued that DW 1's reliance on the OB and police abstract without further evidence cannot bolster his evidence.

13. The plaintiffs submitted that the evidence of DW1 was inconsistent. That the police abstract indicated that the deceased was to blame but also indicated that the matter was pending under investigations. That the police abstract was issued two days after the accident yet the one for the plaintiffs was issued after over a year from the date of the accident and it showed that the matter was pending under

investigations. The plaintiffs further submitted that DW 1 did not produce the sketch map nor results of the inquest file, and as such, there was no basis for the indication that the deceased was to blame for the accident. The plaintiffs contended that the defendant was being evasive by failing to call the driver of the accident motor vehicle. The plaintiffs relied on several authorities and urged the court to draw an adverse inference that had the driver been called, his evidence would not have been of any help or would have been prejudicial to the defendant's case. The plaintiffs urged the court to find the defendant 100% liable for the accident.

14. On quantum, the plaintiff proposed a sum of Ksh. 100,000/= for loss of expectation of life. For pain and suffering, the plaintiffs proposed a sum of Ksh. 200,000/= and relied on the authority of Mohamed Huka (Suing as a personal representative of the estate of Huka Wako) v Adan Kosi & 2 others [2017] eKLR, wherein Ksh. 200,000/= was awarded for a deceased who died after five days. On loss of dependency, the plaintiffs urged the court to adopt a multiplier of 30 years, a multiplicand of 30,000/= and dependency ratio of 2/3. Accordingly, loss of dependency would work out as follows:

$$30,000 \times 12 \times 30 \times 2/3 = 7,200,000/=.$$

15. On special damages, the plaintiff urged the court to award Ksh. 66,700/= as what had been pleaded and proved. The plaintiffs also prayed for costs of the suit and interest. They attached copies of authorities relied upon.

The Defendant's Submissions

16. The defendant also filed written submissions, albeit late. The defendant submitted that the plaintiffs had failed to prove that the defendant's driver was liable for the accident. That they failed to prove that the driver of motor vehicle registration number KBT XXXX/ZE XXXX lost control and rammed into another motor vehicle. The defendant contended that PW 1 did not witness the accident and as such, her evidence could only be relevant on the issue of quantum. The defendant argued that PW 2 who claimed to have witnessed the accident was not listed on the police abstract as one of the witnesses and there is no proof that he recorded a statement at the police station. That PW 2 failed to substantiate the allegation that the defendant's motor vehicle rammed into the motorcycle that was being ridden by the deceased.

17. The defendant argued that had the driver of KBT XXXX/ZE XXXX lost control and rammed into the motorcycle, evidence of the same would have been found at the scene. That the accident occurred at night and there is no evidence to show that the road was lit. In the circumstances, there is no way PW 2 could have been able to see how the accident occurred. The defendant submitted that PW 3 was unable to tell which of the two motorists failed to keep to their lane. The defendant argued that the accident most likely occurred at the centre of the road and there was no explanation as to why the deceased was riding so close to the centre. That it was the deceased who was not able to control the motorcycle. The defendant further submitted that there was no evidence to show that the driver of KBT XXXX/ZE XXXX was blamed for the accident and charged with a traffic offence.

18. The defendant urged the court to dismiss the suit and in the alternative, apportion liability at 80% against the deceased or in the worst case scenario, apportion liability equally, since there are two conflicting versions on how the accident occurred. The defendant argued that non-attendance by its driver to testify cannot be a basis for a finding of liability on their part. That DW 1 was able to give evidence on behalf of the defendant.

19. On quantum, the defendant proposed Ksh. 10,000/= for pain and suffering and Ksh. 50,000/= for loss of expectation of life. The defendant argued that there was no evidence to prove that the deceased operated a bodaboda business. That no driving licence was produced and the motorcycle was not

insured. The defendant further argued that no evidence was adduced to show that the deceased owned the motorcycle or that he drove it with the permission of the owner. That the deceased was not carrying passengers at the time of accident. The defendant proposed a lumpsum award of Ksh. 500,000/= for loss of dependency. In the alternative, the defendant submitted that if the multiplier method was to be used, the court should adopt the minimum wage of an unskilled labourer. The defendant proposed a multiplier of 10 years and a multiplicand of Ksh. 7,240.95. For special adamages, the defendant urged the court to award what was specifically pleaded and proved. On costs, the defendant submitted that the plaintiffs should bear the costs of the suit and in the event that the defendant is found liable, each party should bear their own costs.

Analysis and Determination

20. I have considered the evidence on record and given due regard to the submissions made by the parties. I have already pointed out the facts that are not in dispute.

Liability

21. The plaintiffs pleaded several particulars of negligence as against the defendant. It is trite law that it is not enough to adorn the plaint with particulars of negligence. The plaintiff must adduce evidence to prove such particulars of negligence and it is from the evidence that the court can make a finding on liability. The above position appears to be anchored on the provisions of sections 107 and 109 of the *Evidence Act* which basically provide that the burden of proof lies on the person who alleges the existence of facts upon which he desires the court to give judgment in his favour. In the case of Kirugi & Another v Kabiya & 3 Others [1987] KLR 347, the Court of Appeal held as thus:

> " The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof."

22. The issue that the court has to grapple with is whether the plaintiffs have established negligence against the defendant. The plaintiffs called PW 2 who claimed to have witnessed the accident. His evidence was that the accident motor vehicle and motorcycle were moving in opposite directions. That the defendant's motor vehicle was at a high speed. The driver lost control and rammed into the motorcycle which the deceased was riding. He blamed the driver of motor vehicle registration number KBT XXXX/ZE XXXX for the accident.

23. The plaintiff relied on the doctrine of Res Ipsa Loquitor. Is the doctrine applicable in this case? In the leading case of Scott v London and St Katherine Docks Co (1865) 3 H & C 596, Erle CJ at page 600 held as follows:

> " There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".

24. In Black's Law Dictionary 9th Edition page 1424, the principle is defined as follows:

> " Latin "the thing speaks for itself" Torts. The doctrine providing that, in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. Often shortened to res ipsa."

25. The Dictionary goes further to explain the circumstances the Court will infer negligence as follows:

> " The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."
>
> > "It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."
> >
> > > 'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved."
> > >
> > > Kennedy L.J. in Russel v. L. & S. W. Ry [1908] 24 T.L.R. 548 at p. 551 as follows:
> > >
> > > > " ...that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."

26. The Learned Judge then continued:

> " Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak,

eloquent of the negligence of somebody who brought about the state of things which is complained of."

27. In Henderson v Henry E Jenkins & Sons [1970] AC 282 at 301 Lord Pearson stated:

> " In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge had to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential of proof resting on the defendants..."

28. In the case of Embu Public Roads Services Ltd v Riimi (1968) EALR 22, the Court of Appeal held as follows:

> " The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident".

29. From the foregoing, it is clear that the doctrine of res ipsa loquitor applies only where circumstances are established which afford reasonable evidence, in the absence of explanation by the defendant, that the incident leading to the injuries arose from their negligence. In an appropriate case, the plaintiff establishes a prima facie case by relying upon the fact of the incident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the incident. Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a prima facie case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the prima facie case.

30. On the basis of the evidence on record, a prima facie case of negligence has been established against the driver of KBT XXXX/ZE XXXX. There is a causal link between the accident motor vehicle and the injuries that were sustained by the deceased. The plaintiffs' evidence established a prima facie case of negligence against the defendant's driver. In my view, the doctrine of Res ipsa loquitor would apply in the absence of any explanation from the defendant. The question that needs to be answered is whether the defendant has succeeded in rebutting the plaintiff's evidence.

31. The defendant submitted that PW 2 was not a truthful witness as his name did not appear on the police abstract and that there was no evidence to show that he had recorded a statement at the police station. This is a civil case which does not depend on what was said to the police. In my view, a police abstract is not a conclusive record of witnesses to an accident. PW 2 stated that he recorded a statement at the police station. There is no contrary evidence. I find no reason to disregard the evidence of PW 2. The defendant did not call the driver of the accident motor vehicle but relies on the testimony DW 1 whose role was to merely produce a police abstract and inspection report. DW 1 did not witness the accident and neither was he the investigating officer in respect of the accident.

32. Whatever DW 1 told the court was according to what was contained in the police abstract and the Occurrence book. No extract of the relevant entry in the occurrence book was produced in evidence. The testimony of DW 1 in cross-examination indicates that the occurrence book did not disclose who reported the accident to the police. It is thus not known who gave the narration to the police as to how the accident occurred. With all due respect to the defence, whatever DW 1 stated in court cannot qualify as a version as to how the accident occurred. The police abstract produced by DW 1 indicates that the deceased was to blame for the accident. I will start by addressing the issue of the police abstract. In my view, the information in the police abstract concerning who was to blame for the accident is of no probative value.

33. The police officer who produced the police abstract was not the investigating officer. In fact, he knew nothing concerning the accident. The information in the police abstract was not supported by any evidence. It is not known why the investigating officer found that the deceased was to blame for the accident. It is worth noting that the police abstract was filled a few days after the accident but before investigations were concluded. The police abstract indicates that the deceased was to blame but also indicates that the matter was pending under investigations. There is clearly no basis upon which whoever filled the police abstract found that the deceased was to blame. In a nutshell, no version was given by the defendant as to how the accident occurred.

34. No sketch maps were produced to show the point of impact. Without such evidence as indicated hereinabove, the police abstract has no probative value. The fact that the motor vehicle and motor cycle collided is not in dispute. It is also not in dispute that the collision occurred on the tarmac road. In the English case of Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR 1472, there was a collision in the centre of the road between two vehicles driven in opposite directions. In two hearings, judges had taken different views of the facts. The court was sympathetic to the judge who had found that the cause of the accident was so speculative on the meagre facts available that the plaintiff, who was an innocent third party, had failed to prove her case. However, the court took the view of the other judge that blame should be apportioned equally as between the two drivers. Romer L J stated that a finding to that effect was "the reasonable and probable inference to draw from the facts as found".

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

> "It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame.....I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. This problem does not arise on the present appeal and it is unnecessary for us to decide it."

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

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

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

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

39. I have no option but to go by the version given by PW 2. The version indicates that the driver of motor vehicle registration number KBT 535C/ZE1914 lost control of it and rammed into the motorcycle. A prudent driver is expected to drive at a reasonable speed and be mindful of any eventually that may occur on the road. I find that the evidence on record establishes a prima facie case of negligence against the driver of the accident motor vehicle as pleaded by the plaintiffs. No explanation was given by the defendant to exonerate the driver from culpability. There is absolutely no evidence to show that the deceased was negligent in any way. I find that the doctrine of Res ipsa loquitor applies to the circumstances of this case. The doctrine is a rule of evidence which need not be pleaded. Consequently, I find the driver of the accident motor vehicle 100% liable in negligence for the accident.

40. 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.

41. 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."

42. 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."

43. 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."

44. There is sufficient evidence on record to show that the defendant was the owner of the accident motor vehicle at the material time. The defendant did not attend court to deny that whoever drove the accident motor vehicle at the material time was acting as their agent. Consequently, I find the defendant 100% vicariously liable for the accident.

Quantum

45. Having made a finding on liability, it follows that the estate of the deceased and his dependants are entitled to damages. It is well established that the assessment of quantum of damages in a claim for general damages is a discretionary exercise and that such discretion must be exercised judicially having regard to the facts of the case within the context of existing legal principles. A case is decided purely on its own peculiar facts. This Court has to bear in mind the principles that guide assessment of damages as espoused in West (HI) and Sons Ltd v Shepherd [1964] AC 326 where Lord Morris said:

> " But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common constant, awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible, comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional".

46. 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."

47. 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.

48. I proceed to assess and award the damages payable as follows:

1. Damages for pain and suffering

The evidence indicates that the deceased died on 3/11/2019. This was after five days from the date of the accident. Damages under this head are awarded on the basis of the time the deceased suffered pain before death. The longer it took the deceased to die, the higher the damages. I have considered the authority relied upon the plaintiff and find it comparable. On my part, I have considered the following authorities:

a. Damaris Wanjiru Muhoro v Joseph Kamau Njoroge & Another [2011] eKLR.

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

b. Julian Njeri Muriithi v Veronica Njeri Karanja & Another [2015]eKLR.

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

Considering the age of most authorities coupled with the vagaries of inflation, I find that an award of Ksh. 200,000/= as proposed by the plaintiffs would be reasonable. I award the same. Damages for loss of expectation of life

The evidence on record indicates that the deceased died at the age of 30 years. This was indicated in the copy of the death certificate produced in evidence. The trend in the authorities indicates that the younger the deceased at the time of death, the higher the award. I have, on my part, 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. On the basis thereof,

I make an award of Ksh. 100,000/= under this head, as submitted by the plaintiffs. I would have awarded a higher figure had it been submitted.

2. 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".

49. The plaintiffs listed the widow and three daughters as dependants of the deceased. These are proper dependants under the Act. The deceased died at the age of 30 years. The plaintiffs pleaded and testified that the deceased was a bodaboda motorist earning Ksh. 30,000/= per month. No documents were produced to show the occupation of the deceased and what he earned.

50. 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".

51. No documentary evidence was adduced to prove the deceased's earnings prior to his death. I have considered the parties' submissions on what should be awarded under this head.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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".

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

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

58. 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".

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

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

60. 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.

61. 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.

62. 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.

63. 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.

64. 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".

65. 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 and number of her dependants, 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. 2,500,000/= 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 plaintiff has already been awarded damages under the *Law reform Act*.

Funeral and related Expenses

66. The plaintiffs pleaded a sum of Ksh. 55,000/= for funeral expenses under the head of special damages. In the case of Damaris Mwelu Kerewoi v Mbarak Kijan Ali, MOMBASA HCCC NO. 776 OF 1995 Hayanga J (as he then was) observed that the court can take judicial notice of the fact that funeral expenses are usually incurred and that where they are not proved, the court can award a nominal amount. In the case of Marion Njeri Kago- v - Kenya Railways Corporation [2014] eKLR, the court held as follows:

> " Funeral expenses, though usually claimed as special damages, are a proper claim under the *Law Reform Act*. That way the court is able to award a reasonable sum, depending on the Deceased's station in life and other factors, without the confines of strict proof."

67. Section 2(2) (c) of the *Law Reform Act* provides as follows:

> " Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—
>
> where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included".

68. Similarly, section 6 of the *Fatal Accidents Act* provides that:

> " In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought".

69. The above implies that funeral expenses can be awarded under the two Acts. This way, the court will assess the same depending on the circumstances of the case without insisting on strict proof as in special damages. The plaintiffs produced some receipts in evidence. I am aware of the nature of African funerals. I am of the opinion that more than Ksh. 55,000/= was spent during the funeral and burial. However, since that is all that the plaintiffs have pleaded and submitted, I award the same.

3. Special Damages

70. In their plaint, the plaintiffs pleaded special damages of Ksh. 11,700/= (apart from the funeral expenses) being treatment and medical expenses, letters of administration and obtaining copies of records for motor vehicles. 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"

71. 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."

72. 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."

73. The claim was sufficiently proven. I award special damages of Ksh. 11,700/=.

Disposition

74. In summary, I find that the plaintiffs have proven their case on a balance of probability against the defendant. Consequently, I hereby make the following awards as against the defendant:

    a. Damages for pain and suffering...Ksh. 200,000/=

    b. Damages for loss of expectation of life.....Ksh. 100,000/=

    c. Damages for loss of dependency....Ksh. 2,500,000/=

    d. Funeral expenses....Ksh. 55,000/=

    e. Special damages.....Ksh. 11,700/=

    Total.....Ksh.2,811,700/=

75. 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."

76. 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.

77. 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."

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

> It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that for special damages the interest is awarded from the date of the loss, and interest on general damages is to be awarded from the date of judgment...Therefore, the trial judge should have awarded the appellant interest on general damages at the court rate from the date of judgment." (Emphasis supplied)

79. 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).

80. 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 and funeral expenses, from the date of filing suit to the date of judgment/decree.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 25TH DAY OF NOVEMBER, 2025.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.