

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT ELDORET**  
**CIVIL SUIT NO. E001 OF 2022**

**WILLY CHERUIYOT CHELULE .....**  
**PLAINTIFF**

(Suing as legal representatives of the estate of **PETER KIPKIRUI**  
**CHERUIYOT - DECEASED)**

**=VERSUS=**

**MATHEW KIPRUTO ..... 1<sup>ST</sup>**  
**DEFENDANT**

**ELIJAH KIBIWOT ..... 2<sup>ND</sup>**  
**DEFENDANT**

**Coram: Hon. Justice R. Nyakundi**  
**Kirwa Koskei & Company Advocates**

**JUDGMENT**

1. This suit is here for the second time following an exparte judgment duly delivered by this Court on 10<sup>th</sup> May 2023. That time and now the Plaintiff instituted this suit vide a plaint dated 12<sup>th</sup> January 2022 seeking the following reliefs;
  - a. *General damages*
  - b. *Special damages (Kshs. 206,887/=)*
  - c. *Costs of the suit*
  - d. *Interest*
  - e. *Any other relief deemed fit to grant by this Honourable Court.*

2. The Defendants having been informed or notified of the judgment moved the Court by way of a Notice of Motion dated 7<sup>th</sup> December 2023 accompanied with an Affidavit seeking the following orders:
  - (a) The application be certified as urgent and be heard ex parte in the 1<sup>st</sup> instance and service be dispensed with.*
  - (b) That leave be granted to the Firm of Wesonga Wamalwa & Kariuki advocates to act on behalf of the Defendants/Applicants.*
  - (c) That the Process server be produced for purpose of cross examination on the contents of the Affidavit of service of the summons.*
  - (d) That the honourable Court be pleased to set aside the judgment entered against the Defendant on 10<sup>th</sup> May 2023 by the Hon. Justice R. Nyakundi.*
  - (e) That the Honorable Court be pleased to extend time for filing of pleadings and the Defendant be allowed to file its defence out of the prescribed time.*
  - (f) That costs of this application be provided for.*
3. The application is grounded on the following grounds:
  - (a) That judgment was entered on 10<sup>th</sup> May 2023.*
  - (b) That the Defendant was not properly served with the pleadings and summons herein.*
  - (c) That it is the interest of justice that the said judgment and orders be set aside and the Defendant be allowed to defend themselves.*
  - (d) That the Defendant has legitimate and triable defence to this suit.*
  - (e) That there has been no delay in making this application and no prejudice will be suffered by the Plaintiff if the matter is to proceed on merit.*
4. This Court in considering this Notice of Motion granted leave for the Defendants to be enjoined in the proceedings to challenge the claim by the Plaintiff. In the joint statement of defence, it was averred as follows:

- (a) *The Defendants deny and dispute the allegations contained in paragraph 5 of the plaint in so far as the Plaintiff (deceased) being a lawful rider of motor cycle KMDV662F on 20<sup>th</sup> December 2020.*
- (b) *The Defendant denies the allegations contained in paragraph 5 and in particular the careless and negligent driving of the motor vehicle registration No. KBK595E and the occurrence of an accident as averred and the Plaintiff shall be put to strict proof.*
- (c) *The Defendant further avers in response to paragraph 5 and 6 that in the event the alleged accident occurred as described, which averment is denied, then the Plaintiff is to blame for the same.*
- (d) *The Claim of negligence and particulars of the negligence as stated and particularized in paragraph 6 as stated are denied in toto and the Plaintiff shall be put to strict proof as to the following:*
- (i) The alleged excessive speed claimed.*
  - (ii) Alleged reckless and careless of motor vehicle KBK595E as claimed.*
  - (iii) Alleged failure to be on the proper lookout and driving without care and attention.*
  - (iv) Alleged veering off the lane and/or failure to prevent the accident.*
  - (v) Alleged failure to swerve, slow down or brake to avoid the accident.*
  - (vi) Alleged failure to have regards for other Road users.*
- (e) *The defendants further aver without prejudice that in the event the accident actually occurred as claimed, the Plaintiff (deceased) was the one who was negligent, responsible for it and largely contributed to the said accident:*

***Particulars of the Plaintiff's negligence;***

- (i) Failing to maintain proper look out on the Road.*
- (ii) Failing to observe the Road signs and rules*

- (iii) Ignoring other Road users*
- (iv) Voluntarily assuming risk, thus failing to avoid the accident*
- (v) Failing to wear protective gear.*
- (vi) Abruptly stopping in the middle of the Road without warning*
- (vii) Riding onto the path of motor vehicle KBK595E*
- (viii) Failing to give way to motor vehicle KBK595E*
- (ix) Failing to heed warning*
- (x) Dangerous overtaking*
- (xi) Riding a defective motor cycle*
- (xii) Lacking prerequisite licenses to operate motor cycle*
- (xiii) Lacking relevant documentation to operate motor cycle.*
- (xiv) Causing the accident*
- (xv) Failing to observe the highway code, Road signs, Road safety rules and regulations*
- (xvi) Voluntary assuming risk*
- (xvii) Failing to avoid injury*
- (xviii) Riding under the influence.*

5. The cause of action arose from an accident that occurred on 20<sup>th</sup> December of 2020. The Plaintiff claims that on the said date at 22.45hrs at Shell Petrol Station along Eldoret - Kapsabet Road, Dr. Peter Kipkirui Cheruiyot (deceased) was lawfully riding his motorcycle registration number KMDV 662F when the 1<sup>st</sup> Defendant, drove the said motor vehicle KBK 595E so negligently, recklessly and/or carelessly at a high speed without any due care, regard and/or attention that he caused the vehicle to lose control and caused an accident.
6. From the pleadings the case was set down for trial with the duty to discharge the burden of proof under Section 107(1), 108 & 109 of the Evidence Act vested with the Plaintiff albeit on a balance of probabilities.

## **Summary of the Plaintiff's Case**

7. As earlier reiterated, the Plaintiff **Willy Cheruiyot** gave evidence on oath relying on his witness statement filed in Court on 24<sup>th</sup> January 2022. According to PW1 this was a fatal accident incident which occurred on 20<sup>th</sup> December 2022 at Shell Petrol Station along Eldoret-Kapsabet Road in which the deceased Dr. Peter Kipkirui Cheruiyot was lawfully riding his motor cycle registration No. KMDV 662F while driving out of Moi Teaching and Referral Hospital after attending to his patients. In the testimony of PW1 the surrounding circumstances of this accident were that the Defendant negligently drove, managed and controlled motor vehicle registration No. KBK 595E Toyota Vitz as a result of his careless and reckless manner of driving he caused the collision with the

deceased's motor cycle. It was further the evidence of PW1 that following the accident the deceased who was aged 29 years and in good health at the time of his death practicing as a Medical Doctor at Moi Teaching and Referral Hospital and at the same time undertaking studies in Masters of Medicine, General Surgery passed on while undergoing treatment at the same hospital. It is as a result of his death the Plaintiff applied for Grant of Letters of Administration to file suit on behalf of the estate of the deceased which grant was admitted in evidence dated 24<sup>th</sup> January 2022. The witness further produced the Certificate of Death of the Deceased filed in Court on 24<sup>th</sup> January 2022 but was issued on 11<sup>th</sup> March 2021. It is also the evidence of PW1 that the deceased who was working as a Medical Doctor was at the time of death earning Ksh 254,560/= which earnings now have been lost due to death but recoverable under the Fatal Accident Act for loss of dependence. The Plaintiff further reiterated in his testimony that during the hospitalization of the deceased as an inpatient they incurred total cost of 186,587/= which money were due and payable to the estate of the deceased. It was also the case of the Plaintiff that the driver of the offending motor

vehicle was investigated and indicted before Court for the offence of causing death by dangerous driving.

8. The next witness for the Plaintiff happened to be **PC James Shiundu** who testified that on 23<sup>rd</sup> October 2020 he was attached to Langas Traffic Base being the Station which received a traffic accident report in which the victim was fatally injured along Eldoret-Kapsabet Road. He was able to identify the offending motor vehicle registration No. KBK 595E Toyota Vitz which was being driven by the 2<sup>nd</sup> Defendant Elijah Kibiwott. The witness further in his evidence produced the Police Abstract in regard to this accident.
9. The next witness for the Plaintiff was **PW3 Dr. Walter Nalianya** and his evidence centered on the postmortem report of the deceased following the fatal injuries which were suffered during the material day of the accident. According to PW3 the deceased suffered multiple external injuries to the right upper chest, left shoulder, posterior back wrist, dislocation of the right wrist, left upper limb, left thigh, left lower joint, the digestive system, fracture of the pubis, fracture of the sacro lower joints bilateral and laceration of the cord. As a result of examination PW3 formed the opinion that the cause of death of the deceased was severe pelvic injury due to road traffic accident. The aforesaid post mortem was admitted in evidence in support of the Plaintiff's case.
10. With that, the Plaintiff closed his case and it was now the turn for the defence to state their case in rebuttal.

### **Summary of the Defence Case**

11. The only witness who gave evidence was **Elijah Kibiwott** herein the 2<sup>nd</sup> Defendant and driver of motor vehicle KBK 595E. He told the Court that he is not the one to blame for the accident as for his assessment the motor cycle rider who happened to be the deceased drove at high speed and soon thereafter collided with his motor

vehicle. With closure of both the Plaintiff's and Defendant's case it was incumbent upon the respective legal Counsels to beef up their case through written submissions.

### **Summary of the Plaintiff's Submissions**

12. The lead Counsel for the Plaintiff was Mr. Too who relied on the submissions dated 4<sup>th</sup> April 2023 in which he demonstrated that the Plaintiff filed the suit on behalf of the estate of the deceased after securing Limited Grant of Letters of Administration admitted as Exhibit 1. Learned Counsel further submitted that from the documentary evidence produced by the Plaintiff more so the Police Abstract did confirm that an accident occurred on 20<sup>th</sup> December 2020 at 22.45hrs at Shell Petrol Station along Eldoret-Kapsabet Road. According to learned Counsel for the Plaintiff the driver of the offending motor vehicle was investigated and charged with the offence of causing death by dangerous driving and therefore the 1<sup>st</sup> Defendant became vicariously liable for the accident. Learned Counsel therefore invited this Court to make a positive finding on negligence as against the Defendant jointly and severally for the untimely death of the deceased. In so far as the assessment of damages is concerned, Learned Counsel submitted that this Court be guided by the principles in both the Fatal Accident Act and the Law Reform Act together with the dicta in the following cases:

*Elizabeth Chelagat Tanui & another v Arthur Mwangi Kanyua (2013) eKLR, Albert Odawa vs Gichumu Githenji Nku HCCA No. 15 of 2003 [2007] eKLR, Beatrice Wangui Thairu v Hon. Ezekiel Barngtuny & Another Nairobi HCCC No. 1638 OF 1988 (UR) (Unreported), West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba [2019] eKLR, Sukari Industries Limited v Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, Antony Nyaga Njagi vs*

*Mohamed Ibrahim Abdirahmed [2018] eKLR, and Bore vs Masika [2004] eKLR.*

13. It is the Plaintiff's case that the injuries sustained by the deceased as a result of the accident were severe and was rushed to Moi Teaching and Referral Hospital for treatment. The deceased, Dr. Peter Kipkirui Cheruiyot underwent several treatments in efforts to save his life but he succumbed to the injuries sustained and was pronounced dead at 10:30 am.
14. Learned Counsel for the Plaintiff submitted that the Plaintiff seeks the following in form of damages;
  - a) Damages under **Law Reform Act** and **Fatal Accidents Act**.
  - b) Special damages of Kshs 206,887/=.
  - c) Costs of the suit
  - d) Interest in a and b above
  - e) Any other further relief that the Court may deem fit and just to grant
15. Under the head of loss of expectation of life, Counsel submitted that the Defendant was 29 years old and prayed the Court award a conventional sum under this head. A sum of Kshs. 150,000.00/= reflects the current awards by the Courts. With respect to the special damages, Counsel submitted that the same were specifically proved and evidenced by the Plaintiff. In the Plaint, the Plaintiff had pleaded a total of Kshs. 206,887 and the same supporting documents produced by the Plaintiff. As for funeral expenses, Counsel submitted that the mourners had to be fed during the burial and assign a figure thereof of Kshs. 30,000.00. He cited the case of **Nore vs Masika (2004) eKLR** in support of this submission.
16. Learned Counsel for the Plaintiff submitted that the damages payable in this case should be general damages, special damages as claims under the Fatal Accident Act and Law Reform Act.

## **Summary of the submissions by the Defence**

17. Learned Counsel Mr. Wesonga relied on his submissions on behalf of the Defendant dated 8<sup>th</sup> April 2025. In terms of liability it was the case of the Defendant that the circumstances surrounding the accident as pleaded by both parties demonstrates that the Plaintiff in his evidence did not discharge the burden of proof on a balance of probabilities. According to Learned Counsel the deceased was all to blame for the accident and the injuries suffered. It was Learned Counsel's contention that even the investigation report did little to assist the Plaintiff's case for lack of a sketch map capturing the scene and the position of the motor cycle and the motor vehicle respectively. Learned Counsel in tandem with the provisions of Section 107, 108 & 109 of the Evidence Act urged this Court to dismiss the limb on liability. He also placed reliance on the following authorities:

*HCCC 3720/95 Frida Kimotho vs Ernest Maina, M'mbula Charles*

*Mwalimu v Coast BRoadway Company Limited [2012] eKLR, Grace Kanini Muthini vs Kenya Bus Services Ltd and Another HCC 4708 of 1989, Muthaita Ndiva v Father Rino Meneghello & another [2004] KLR, David Kajogi M'mugaa v Francis Muthoni, Florence Mutheu Musembi & Geoffrey Mutunga Kamiti v Francis Kareng'e, Irene Wairimu Muthee v Gitonga Mugambi Muketha & Another [2015] eKLR.*

18. With regard to quantum, Learned Counsel submitted and urged the Court to rely on the following case law to assess damages under the Law Reform Act, under the Fatal Accidents Act and special damages:

*Jackson Magati Kiritu vs Charles Cheruiyot Keter HCCC No. 437 of 1996, West Kenya Sugar Company Ltd v Phillip Sumba Julaya (Suing as administrator and/or personal representative of the estate of James Julaya Sumba) 2019 eKLR, Antony*

*Njoroge Ng'ang'a (legal representative of the estate of the later Fred Nganga Njoroge v James Kinyanjui Mwangi & 2 Others (2022) eKLR, Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR, Hyder Nthenya Musili & Another v China Wu Yi Limited & Another (2017) eKLR, Ainu Shamsi Hauliers Limited v Moses Sakwa & Another (Suing as the Administrators of the Estate of the Ben Siguda Okach (Deceased) (2021), Chunibhai J. Patel & Another vs P. F. Hayes and Others [1957] EA 748, 749, Mwangangi & Another v FKM (Suing as Legal representative of the Estate of the Late AMK) (Civil Appeal E11 of 2021) [2021] KEHC 291 (KLR) (22 November 2021 (Judgment), Easy Coach Bus Services & Another vs Henry Charles Tsuma & Another (Suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma - Deceased) [2019] eKLR & Albert Odawa v Githumu Githenji [2007] eKLR & Mwanzia v Ngalali Mutua, Kenya Bus Service Ltd & Another, Moses Mairua Muchiri v Cyrus Maina Macharia [2016] eKLR, Frankline Kimathi Maariu & Another v Philip Akungu Mitu Mborothi [2020] eKLR, Abdala Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR, Kenya Breweries Ltd v Saro [1991] eKLR, Emmanuel Wasike Wabukesa suing for BWW a Minor deceased v Munena Ndiwa Durman CA Eldoret CA No. 10 of 2017 [2019] eKLR and Zacharia Waweru Thumbi vs Samuel Njoroge Thuku [2006] eKLR.*

19. Learned Counsel's proposal on damages was to the effect that for pain and suffering it should be between Ksh 10,000 and Ksh 100,000. However, from the facts of this case, learned Counsel pitched for Ksh 10,000 as sufficient award under this limb. In so far as loss of expectation of life is concerned, learned Counsel submitted that an award of Ksh 80,000 should be considered adequate compensation for the estate of the deceased. Further, according to Learned Counsel's submissions damages under the

Fatal Accidents Act should range between Ksh 900,000 to Ksh 1.2 million. With that position taken by both parties it is now my singular duty to evaluate and re-examine the evidence to answer two fundamental questions whether liability lies wholly jointly and severally with the Defendants or is a question of contributory negligence or none of the two parameters. If the answer to these two questions is in the affirmative, or partially in the affirmative, then it will be incumbent about this Court to assess the measure of damages in favour of the estate of the Plaintiff.

### **Analysis & Determination**

20. This area of law on assessment of damages is often a principal issue in civil litigation because the primary objective of the Plaintiff or Claimant usually is to collect as much as possible and on the part of the Defendant is to pay as little as possible notwithstanding the gravity of the injuries. Accordingly, the adjudication of Road accident claims under the tort of negligence frequently devote substantial time and effort attempting to establish the level of harm because it has a link with the award of damages likely to be awarded by a trial Court. In light of this the question naturally arises concerning the underlying social purpose of accurate determination of the injuries sustained usually classified as pain and suffering and loss of amenities. In the first instance, accuracy in assessment of the nature of injuries, the post recovery harm suffered with a measure of permanence of the limbs which were more injured than the other parts of the body do pose a real challenge how to award fair and proportionate damages to that effect. This has remained an area left to the Courts to exercise judicial discretion by applying various factors and judicial precedents to reflect the magnitude of the potential harm individualized to every victim who approaches the Court for compensation. The issue supposedly is more complex when it comes to compensation under the Fatal Accident Act and the Law Reform Act as would be appreciated from the facts of this case.

21. First and foremost, the Plaintiff must satisfy the threshold set out under Section 107(1) of the Evidence Act which provides as follows:

*107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

*108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.*

*109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

22. *Where a person goes to court seeking its judgment against another on grounds that he has a legal right against the other or that the other is liable to him with regard to certain liabilities that are due to him, he will have to prove the existence of such rights or liabilities by way of evidence. Where such evidence comprises of facts which he relies on as proof, it is upon him to prove that those facts exist. Where he fails to prove the existence of such facts, his case cannot succeed and must fail. This proposition finds expression in the adage 'he who alleges must prove'. Since the person against whom allegations are made does not have to prove anything initially, the task or burden of having to prove is on the person alleging it and is known as the burden of proof. **(See A commentary on the Evidence Act Cap 80 Second Edition by Steve Ouma pg 47).***

23. This is a civil claim based on negligence and therefore the standard and burden of proof vested with the Plaintiff or Claimant is on a balance of probabilities and not that of beyond reasonable doubt

which is in the realm of criminal law. That is why the Learned Author Steve Ouma in his book on Evidence Act observed as follows:

*3. When the Court comes to the point of deciding on the issues after all the evidence has been adduced, the burden and standard of proof is crucial in determining by who and how far the court has to be persuaded that the facts are true. Who wins and who loses will depend on who has gone furthest in persuading the court that the facts on which he relies on to prove his allegation are true. The function of the rules on burden and standard of proof at this stage is to provide authoritative guidance for the resolution of uncertainty.*

*5. The rules on burden and standard of proof are important on appeal when an appeal court has to decide whether they were correctly applied at the trial. He who alleges must always be the one to prove unless exempted and this must be strictly observed during trial. Failure in this regard would mean that a party has been unfairly burdened with proof or benefited from not being called upon to prove. This goes to the root of the process. Where the rules are found to have been incorrectly applied, that will provide ground for setting aside the judgment of the trial court.*

24. This case is better described within the realm of the principles in the case of **Mary Wambui Kabugu vs Kenya Bus Services Ltd. Civil Appeal No. 195 of 1995** cited in the case of **Florence Mutheu Musembi and Geoffrey Mutunga Kimiti v Francis Karengu [2021] eKLR** where the Court stated:

*“The age long principle of law is that he who alleges must prove. The appellant’s case in the court below was that her husband was seriously injured in a Road traffic accident due to the negligence on the part of the respondent’s driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was*

*simply that she found him admitted at Kenyatta National Hospital with multiple injuries and in a critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion that he did that the Appellant did not, on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed.”*

25. So what is the load on the shoulders of the Plaintiff legally so to say in so far as his pleadings and cause of action is concerned to secure judgment on liability and award of damages as pleaded in the plaint? The answer is to be found in the case of **Eastern Produce (K) Limited v Christopher Atiado Osiro [2006] eKLR** where it was held that:

*“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence”.*

26. In the plaint before Court particulars of negligence were pleaded by the Plaintiff to demonstrate the tortious act which must apply to hold the driver of the offending motor vehicle registration No. KBK 595E vicariously liable to the claim raised by the Plaintiff necessitating the award of damages. Therefore, the question to be answered by dint of evidence offered by the Plaintiff is whether he has discharged the standard and burden of proof that the collision was caused by the

negligence of the defendants. This question can be answered by the statement of the law from the case of **Lloyd Bell v Alcar Construction & Haulage Company Limited** in which the Court held that prove negligence there are four requirements namely:

*(a) The existence in law of a duty of care situation, i.e., one in which the law attaches liability to carelessness. There has to be recognition by law that the careless infliction of the kind of damage in question on the class or person to which the claimant belongs by the class of person to whom the defendant belongs is actionable.*

*(b) Breach of the duty of care by the defendant, i.e., that he failed to measure up to the standard set by law.*

*(c) Casual connection between the defendant's careless conduct and the damage.*

*(d) That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote."*

27. From the evidence adduced before this Court by the Plaintiff and the Defendants certain facts are not disputed. First and foremost, a road traffic accident occurred on 20<sup>th</sup> December 2020 at 22.45hrs at Shell Petrol Station along Eldoret-Kapsabet Road involving the motor vehicle registration No. KBK 595E being driven by the 2<sup>nd</sup> Defendant and the motor cycle KMDV 662F being driven by the deceased. According to the evidence from both sides the deceased suffered serious fatal injuries arising out of the accident and he died soon thereafter at Moi Teaching and Referral Hospital while undergoing treatment. There is emphasis that the accident occurred at Shell Petrol Station along the Eldoret - Kapsabet Road, that is also not in dispute save that the level of encroachment by the Defendants' vehicle to the lane of the deceased is not crystal clear. Therefore, there are certain questions within the ambit of encroachment by these two drivers who found themselves at the same scene of the accident and the evidence tendered so demanded that there be an

explanation why was it not possible for either of them to switch the lanes to avoid the collision? This accident was fully investigated by the Traffic Base Commander at Langas and apparently as at the time processing this civil claim there was a pending criminal case of causing death by dangerous driving before the Magistrates Court at Eldoret but whose verdict still remains in the realm of unknown despite the length of time which has passed since the occurrence of the accident.

28. It is now settled law that the basis on which vicarious liability can be affixed upon the driver of an offending motor vehicle it must be shown that at the time of the accident the vehicle was being driven at the owner's request, instruction and authorization. In my view analyzing the evidence by the Plaintiff and the Defendants there is no dispute about authority to drive the subject motor vehicle by the 2<sup>nd</sup> Defendant to these proceedings. He was not on a frolic of his own when he was in control of the motor vehicle along Eldoret - Kapsabet Road. There was a master-servant relationship between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to this suit. There is no any other evidence to the contrary as to the application of the doctrine of vicarious liability to the facts of this case. True to this principle the Court in **Hilton v Thomas Burton (Rhodes) Ltd [1961] WLR 705 at 707** affirmed as follows:

*The true test can be expressed in these words: was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent or even fraudulent or contrary to express orders the master is liable. If, however, the servant is not doing what he is employed to do, the master does not become liable merely because the act of the servant is done with the master's knowledge, acquiescence or permission.*

29. In addressing this issue, the driver of the motor vehicle registration No. KBK 595E on 20<sup>th</sup> December 2020 committed the act of negligence in the cause of his duty and the basis upon which is criminally being prosecuted

for the traffic offence of causing death by dangerous driving. However, the substratum and indicators of that criminal offence seems not to have crystalized as at the time of authoring this judgment on the civil claim for damages against the defendants. The Court in **David Otieno v Dan Ogera Obonyo, Civil Appeal No. 53 of 2005** remarked as follows:

*The findings of guilt on the part of a person in a criminal charge or absence of it is not material to a finding on liability in a civil claim since the standard of proof in the latter is on a balance of probabilities, not beyond reasonable doubt as is the case of the former.*

30. This accident occurred in one of the major highways commonly known as Eldoret - Kapsabet Road but unfortunately the incident and its surroundings of the chronology of events took place at 22.45hrs meaning that it was not during broad daylight. The issue of liability therefore rests with the Plaintiff and from the record so far reliance was placed on the Police investigations as there was no appropriate eye witness summoned to attend Court for purposes of discharging the existence and non-existence of the facts on causation within the ambit of Section 107(1), 108 and 109 of the Evidence Act.
31. In this scenario the question then arises whether the Plaintiff can rely on the doctrine of *res ipsa loquitor* to affix liability on the part of the Defendants on the cause of the accident. This doctrine was eminently discussed by the Court in **Shtern v Villa Mora, Cottages Limited and Another [2012] JMCA Civ. 20**; Thus:

*“[57] Res ipsa loquitur therefore applies where (i) the occurrence is such that it would not normally have happened without negligence (the editors of Clerk & Lindsell, op. cit., para. 8-152 provide an illustrative short-list from the decided cases: “bales of sugar do not usually fall from hoists, barrels do not fall from warehouse windows, cranes do not collapse, trains do not collide and stones are not found in buns”); (ii) the thing that inflicted the damage was under*

*the sole management and control of the defendant; and (iii) there must be no evidence as to why or how the accident took place. As regards this last criterion, the editors of Clerk & Lindsell (op. cit. para. 8-154) make the important point, based on Henderson v Jenkins & Sons, that “Where the defendant does give evidence relating to the possible cause of the damage and level of precaution taken, the court may still conclude that the evidence provides an insufficient explanation to displace the doctrine.”*

32. The pleadings from both the Plaintiff and the Defendants as classified are very clear on blameworthiness as perceived from their perspectives. The pleadings remain pleadings or allegations until retested with the evidence from witnesses both direct and circumstantial. The issue the Court is looking for on both facts and law is whether the Defendants so negligently drove their vehicle in a manner which led to the collision without an iota of contributory negligence from the deceased while riding his motor cycle registration number KMDV 662F. This is an issue of evidence and the Plaintiff’s case cannot be said to have justly, correctly and legally placed culpability wholly at the doorstep of the Defendants. In Traffic Policy Guidelines each of the Road users has a duty of care towards himself or herself and other Road users including pedestrians. In the **Shtern Case** (Supra) the Court went further to state that:

*“As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof, on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case (see Clerk & Lindsell, op. cit., para. 8-149; see also, Ng Chun Pui v Lee Chuen Tat [1988] RTR 298, per Lord Griffiths at page 300). But the actual proof of carelessness may often be problematic and the question in every case must be “what is a reasonable inference from the known facts?” (Clerk & Lindsell, op. cit., para. 8-150).”*

33. As I have reiterated elsewhere in this judgment it is the duty of every driver in our Kenyan Roads may it be highways or feeder Roads or those

motorable rural Roads to maintain a proper lookout for the safety of other Road users. Essentially a driver who fails to observe in time and surroundings that another person's actions may create a potential risk is usually considered negligent. It is a universal duty under our statutory and regulatory framework in observation of the Traffic Act and Rules that a driver must be alert to other road users whether ahead, behind or alongside. The responsibility of a driver changing directions or lanes calls for even greater level of responsibility and accountability.

34. In the instant case the Plaintiff blames the 2<sup>nd</sup> Defendant on causation or what I describe as proximate cause of the accident. Whereas the 2<sup>nd</sup> Defendant blames the deceased alleging that he was riding under the influence of intoxication. Therefore, shifting blame from his backyard to the Plaintiff's doorstep. The unfortunate thing is, this Court had no medical evidence from the 2<sup>nd</sup> Defendant that the deceased was driving his motor cycle under the influence of alcoholic substances. That allegation therefore stands unproven in so far as rebuttal evidence is concerned as far as the deceased culpability is concerned.
35. I have had the advantage of presiding over these proceedings and listening to the oral testimonies on oath from both parties and their perspective on the accident. It is instructive to note that the evidence on record tilts the scale towards contributory negligence. It is now settled law on the guiding principles to guide trial Courts on apportionment of liability. The Court in **Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan**, the Court held as follows:

*"In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:*

*".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured*

*party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."*

36. The doctrine of contributory negligence is a common law principle stating that if a person is injured partly due to their own negligence, they may be barred from collecting any damages from the party who caused the accident. Historically, this meant that even a slight negligence by the Plaintiff could lead to partial or complete loss of the claim. It is a doctrine which is nuanced bearing in mind various factors in modern law in the tort of negligence.
37. In the case at bar as stated elsewhere occurrence of the accident is undisputed fact. The collision between the deceased and the 2<sup>nd</sup> Defendant who was the driver of the offending motor vehicle is also not disputed. The road traffic accident was investigated by Langas Police Station who came up with a recommendation that the 2<sup>nd</sup> Defendant was the one to blame for the death of the deceased. However, as of now the evidence of PW1 and PW2 who are the burden bearers must be tested within the discharge of evidential burden to prove the existence or non-existence of the facts in issue. In Kenyan law a person has a right to recover for negligence by proving four elements: duty, breach, causation and injury. Consider the law of contributory negligence in the following scenario deducible from the facts and evidence on record. The two motor vessels seem to approach this scene which is narrowed to the Shell Petrol Station. The Police who were invited to the scene set in motion the investigation duty of establishing blameworthiness. That criminal component of the case against the 2<sup>nd</sup> Defendant is still pending before

the Magistrates Court as per the last disclosures. In my considered view, neither of these two drivers could sue the other successfully even though an accident occurred and the deceased was fatally injured. My answer to the hypothesis on contributory negligence is that under Civil Law both drivers were negligent and the contributory negligence of each driver is capable of barring the deceased's estate to recover fully general damages or other damages which accrue from this accident wholly as against the Defendants jointly and severally. From the evidence adduced between the Plaintiff and Defendants witnesses it is almost impossible to ascertain which of the two drivers was at fault.

38. As a result of this I exercise discretion for the measure of contribution on causation be assessed at 50%:50% to be shouldered by each of the drivers motoring their vessels on the fateful day in which the deceased met his premature death. In a nutshell, on a weighted measure on a balance of probabilities, the win for the Plaintiff is at 50% ratio as against the Defendants on liability.

### **Quantum**

39. The next issue for determination is the quantum of damages.
40. *The damages available to the Plaintiff as in the case with all damaged materials should be such that the Plaintiff would be placed in the same position as he was before the damage was done to the vehicle, the measure of damage being the amount for the repair of the damaged property or in the presence case, the vehicle. See **Januario Ganafa v Baguma [1962] HCB 143.***
41. In the case of **David Gachiri Gacheru v Mary Wangari Mathenge Civil Appeal No. 90 of 2001** the Court held as follows:

*General damages are such as the law will presume to be direct natural probable consequence of the act complained of. The character of the acts themselves, which produce the damage, the*

*circumstance under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstance 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 and to insist upon more would be the vainest pedantry See **Storms Bruks Aktie Bolay v John and Peter Hatarison [1905] AC 515, Ouma v Nairobi City Council [1976] KLR 298.***

42. In summary the deceased was a qualified Medical Doctor by profession and at the time of accident in practice providing the necessary support in the health sector. He was at the time of the accident driving out of Moi Teaching and Referral Hospital where he had gone to attend to his patients. According to the postmortem report and the death certificate admitted in evidence his right to life was cut short at a very young adult age of 29 years. The deceased suffered multiple injuries in which he succumbed and died while undergoing treatment at the same facility where he was practicing his profession at Moi Teaching and Referral Hospital. He therefore suffered pain and suffering before taking the last breath. The law does not stop there in terms of compensation. It looks at the cumulative effect of the injuries suffered and the awards under the Fatal Accident Act and the Law Reform Act. The principles on which damages for lost years is assessed under the Law Reform Act falls within the rubric of what the deceased could have likely earned and available to save, spend or distribute after meeting the costs of his or her maintenance. See the principles in **Gammel v Wilson [1981] 1 All ER 578 at 593.**

43. The Court of Appeal in **Chunibhai J. Patel and Another v P. F. Hayes and Others [1957] EA 748, 749** stated the following succinct statement of law;

*“The court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his*

*dependents, the net earning power of the deceased (i.e his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependents will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the court should apportion among the various dependents”.*

44. In this same limb the law on the applicable formula on multiplier and multiplicand approach can be said to be settled with trial Courts left with the duty of balancing the scale underpinned on individual facts and circumstances of the deceased. This is what the Court had in mind in **Mwanzia v Ngalali Mutua Kenya Bus Ltd** and quoted in **Albert Odawa -Vs- Gichumu Githenji NKU HCCA NO.15 OF 2003 (2007), KLR**, when Justice Ringera, (as he then was) stated 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.”* The same Judge in **Beatrice Wangui Thairu v Hon. Ezekiel**

**Barngetuny & Another - Nairobi HCCC. No.1638 of 1988 (unreported)** at page 248 made the following observation:

*“The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature.”*

45. The deceased who was 29 years old at the time he met his premature death the multiplier is generally high for it ranges between 15 to 30 years. This was a qualified Medical Doctor. If the current retirement age in the Public Sector is to be applied, he could have worked for 31 years before exiting at the age of 60. This is also bearing in mind the vicissitudes of life together with all its uncertainties. It should also not be lost that retirement at 60 years is just a digit for certain professions their gainful employment like law, medicine, engineering none of these is tied to the retirement age of sixty years, whether part of the stint is in public service and partly thereafter his or her license has a lifetime time and season to practice the skills of the profession. The period of purchase under the Fatal Accident Act gives rise to what is referred to as a multiplier.
46. The second factor of significance is what is referred to as a multiplicand formula based on dependency. This is the net annual income multiplied by the dependency ratio usually 2/3 for a married person with children or where there is evidence that he or she was supporting the parents and

siblings from his or her lineage. There is jurisprudence out there that the multiplicand is likely less for a single person supporting parents. In the case of loss of expectation of life, these are generally low, fixed amounts commonly awarded at Ksh 100,000 while pain and suffering before death varies between Ksh 50,000 and Ksh 100,000. The interest on general damages is awarded from the date of judgment until payment in full whereas on special damages is from the date of filing the suit until payment in full. This case at bar is where high dependency calculation must be applied given the fact the deceased was a professional with a probability of career progression and salary increases. In the case of **Mano v Kenyatta National Hospital (Civil Appeal E164 of 2023 [2024] KEHC 1306)**: *The Court emphasized that the loss of a young person, regardless of immediate income, represents a significant loss to the parents/dependents, awarding substantial dependency damages.*

47. The uphill task of the Court is to be considered within the following principles:

*The court should find the age and expectation of working life of the deceased, and consider the ages and expectations of life of his dependents, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependents. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years of the deceased and the expectation of life and dependency of the widow and the children. The capital sum so reached should be discounted to allow for the possibility of probability of the re-marriage of the widow, and, and in certain cases, of the acceleration of the receipt by the widow of what the husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependents will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be lump sum the*

*Court should apportion among the various dependents. See **PF Hayes v Chunibhaai J Patel [1961] EA 129.***

48. The Court has to calculate the annual dependency on the deceased by the near relations and then determine the estimated years that the deceased could have supported that dependency under the Fatal Accident Act. That will be earnings of the deceased, less his personal and living expenses are multiplied by the multiplier. The balance will give effect to the basic figure which generally will be turned into a lumpsum by taking certain number of years of purchase. Therefore, the award of general damages under the Fatal Accident Act will take this trajectory:

The deceased was aged 29 years at the time of his death therefore, considering all vagaries and vicissitudes, he would have lived to a retirement age of 60 years thus putting the multiplier at 31 years. His annual net income, evidenced by his payslip was Kshs. 254,560 x 12 = 3,054,720/-. The dependency ratio as per the testimony of PW1 was 2/3. It follows that the award under the Fatal Accident Act would be calculated as follows;

$$3,054,720/= \times 31 \times 2/3 = 63,130,880/=$$

### **Special damages**

49. In the case of **Premier Dairy Limited vs Amarjit Singh Ssagoo & Another [2013] eKLR** the Court of Appeal took the view that:

*We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to or otherwise inter that their relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved. The*

*Learned Judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/- was pleaded in the plaint and witnesses who were the relatives of the deceased testified that they spent much more than this in preparing for and conducting a cremation, the learned Judge awarded a sum of Kshs. 150,000/ which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages.”*

50. It is trite law that special damages must be specifically pleaded and proved. The Plaintiff prayed for special damages amounting to Kshs. 206,887/=. The Plaintiff produced an in-patient invoice dated 28<sup>th</sup> December 2020 for Kshs. 186,587.00. There is also a receipt for mortuary and hearse services for Kshs. 20,200/=. There is a Police Abstract on record and therefore, it is my considered view that the special damages were pleaded and proved. The Plaintiff is entitled to special damages of Kshs. 206,887/=.
51. The Plaintiff claimed funeral costs of Kshs. 30,000/- being the cost of food for the mourners. I note that the same was not pleaded in the plaint. In the case of **JNK (Suing as the Legal Representative of the Estate of MMM (Deceased) vs Chairman Board of Governors Boys High School [2018] eKLR** Gikonyo J. held:

*In spite of lack of receipts, this Court ought not to turn a blind eye to the fact that there were funeral costs incurred as a result of the burial of the deceased.”*

52. The Court is therefore mindful that the Plaintiff may not be able to provide actual proof in relation to the issues on funeral expenses, but also at the same time I must take judicial notice that the African funerals by custom and culture are expensive they require huge sums of money to celebrate

the deceased together with the family, friends and the entire community in which he or she lived during his/her lifetime. As a matter of fact, there must be receipts from supermarkets, wholesalers or grocery shops but at that moment nobody of that lineage is thinking of compensation from a Court of law. There is no dispute that the deceased died and he was buried. There must have been a funeral service to inter the body in the presence of family, friends, colleagues and the local populace who knew and interacted with the deceased during his lifetime. In this context there will be no overreach in exercising discretion to award Ksh 30,000/= for funeral expenses which to me is a modest sum given the stature of the deceased as a professional Medical Doctor.

### ***Damages under the Law Reform Act***

53. Courts have often awarded a global sum for pain and suffering, premised on the time the deceased suffered before passing away. In Civil Case No. 56 of 2014 **Beatrice Mukulu Kang'uta & Another vs Silverstone Quarry Limited & Another (2016) eKLR** Hon. P. Nyamweya observed:

*As regards the damages for pain and suffering, even though the deceased died on the same day of the accident, the death was not instantaneous and PW2 and PW3 gave evidence as to the pain that the deceased was in after the accident as he awaited treatment. In this regard while the accident occurred at 6am, the deceased passed on at 11.40 am. I therefore award a sum of Kshs 200,000/= for pain and suffering for this reason."*

54. The Plaintiffs have proposed a figure of Kshs. 100,000/- and I accordingly award the same under this head.
55. On loss of expectation of life, the Plaintiff proposed a figure of Kshs. 150,000/-. In this regard, Courts often award a global sum of Kshs. 100,000/-. In **Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) eKLR** and in Civil Appeal No. 113 of 2012 **Makano Makonye**

**Monyanche v Hellen Nyangena (2014) eKLR** the Learned Judge R. N. Sitati held:

*I find no reason to interfere with the award on loss of expectation of life under [Law Reform Act](#) as the same is always awarded at Kshs. 100,000/- across the board and the same was eventually deducted to avoid double award to same beneficiaries." I have considered the circumstances of the case and the deceased being a medical doctor; and I find that an award of Kshs. 150,000/- shall suffice.*

56. It is well known that the calculation of damages arising from fatal accidents or wrongful tortious act under the cluster of negligence may by its very nature be a speculative exercise. Take for example an assessment of the limb on pain and suffering of the victim of the accident. Sometimes it is difficult to measure it in view of the absence of scientific devices which informs the Court what are the determinants of the various pain and sufferings experienced by different victims who find themselves to have been injured in an accident set up. I think this is the very reason why Lord Diplock in **Cookson v Knowles [1978] 2 All ER 604 at page 608** discussed the degree of speculation on which a Court must embark thus:

*"This kind of assessment, artificial though it may be, nevertheless calls for consideration of a number of highly speculative factors, since it requires the assessor to make assumptions not only as to the degree of likelihood that something may actually happen in the future, such as the widow's death, but also as to the hypothetical degree of likelihood that all sort of things might happen in an imaginary future in which the deceased lived on and did not die when in actual fact he did. What in that event would have been the likelihood of his continuing to work until the usual retiring age? Would his earnings have been terminated by death or disability before the usual retiring age or interrupted by unemployment or ill health? Would they have increased and if so, when and by how*

*much? To what extent if any would he have passed on the benefit of any increase to his wife and dependent children?"*

57. What has been seen from the above analysis is that the general conceptual legal framework that governs the assessment and calculation of damages is quite clear but eventually the outcome of a given case remains dependent on the facts and available evidence. In this setting the question of burden of proof and its standard as articulated in the Evidence Act is of importance to the Court. This standard is on a preponderance of evidence commonly known as balance of probabilities and not that of beyond all reasonable doubt standard. There were two striking core issues being liability and assessment of damages. The focus on liability by the nature of evidence examined and scrutinized and given the strength of proof the Plaintiffs must offer in order to successfully claim for damages it was found that the quotient of liability is that of apportionment at an equal percentage literally each to shoulder 50% of the blameworthiness of the breach of duty of care. As a consequence of these, the following orders shall abide:

Liability: 50% : 50%

- Special Damages: 206,887/=

Damages under the [\*Fatal Accidents Act\*](#);

- Loss of dependency 63,130,880/-

Damages under [\*Law Reform Act\*](#)

- Pain and suffering: 100,000/-
- Loss of expectation of life: 150,000/-
- Funeral expenses 30,000/-

The Sum Total of this being Ksh 63,617,767/= be subjected to 50% liability, giving rise to a net award of Ksh 31,808,883.50 together with costs and interest at 14% per annum from the date of Judgment for general damages and for special damages from the date of instituting the suit being on 12<sup>th</sup> January 2021 until payment in full.

**DELIVERED, DATED AND SIGNED THROUGH CTS AND EMAIL AT  
ELDORET ON THIS 2<sup>ND</sup> DAY OF APRIL 2026.**

.....

**R. NYAKUNDI**

**JUDGE**