

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIVASHA**  
**CIVIL APPEAL NO. E037 OF 2025**  
**ALEM CONSTRUCTION SERVICES (Sued as Firm)**  
**.....APPELLANT**

**VERSUS**

**JEREMIAH MWANGO OYUBO &**

**SYLVESTER MWANGO (Suing as the legal representative and  
administrators of the estate of Vincent Onyango Mwango -  
Deceased).....1<sup>ST</sup> RESPONDENT**

**OSERIAN DEVELOPMENT COMPANY LIMITED.....2<sup>ND</sup>  
RESPONDENT**

**(Being an appeal from the Judgment and Decree of the Hon. Alice C. Towett (PM)  
delivered on the 2<sup>nd</sup> day of April 2025 in Naivasha CMCC No. 12 of 2016)**

**JUDGEMENT**

**Background of the Appeal**

1. The matter before the trial court was initiated by the plaintiff in which it was pleaded that a fatal industrial accident occurred on February 5, 2013, claiming the life of Vincent Onyango Mwango (hereinafter referred to as “the deceased”). It was therein alleged that the deceased was at all material times, as an employee of the Appellant, engaged as a general worker in the maintenance of greenhouses.
2. On the fateful day, the deceased was deployed to work at the premises of the 2<sup>nd</sup> Respondent where he was tasked with repairing a central electrical line within one of the greenhouses. While the deceased was in the process of conducting the repairs, the electrical line, which was supposed to be disabled, abruptly activated and began rolling. The sudden movement caused the deceased’s clothing to be ensnared by the machinery, pulling

him into a column bar joint of the greenhouse and resulting in his death by strangulation.

3. At the ensuing full hearing only the Plaintiffs (now 2<sup>nd</sup> Respondents) gave evidence on behalf his co-plaintiff while the Defendants (now Appellant and 3<sup>rd</sup> respondent) opted not to call any witnesses. The effect of those proceedings is that no evidence was availed to support the pleading filed by the appellant and 1<sup>st</sup> respondent.

### **Summary of the Trial Proceedings**

4. The trial proceedings involved the oral testimony of one witness for the Plaintiffs, Sylvester Mwango (PW1). In his testimony recorded on the 28/11/2024, the witness identified himself as the brother of the deceased and confirmed that he, along with his father, Jeremiah Mwango Oyubo, had been granted letters of administration for the deceased's estate.
5. In his evidence-in-chief, PW1 stated that the deceased died while on duty in Naivasha on 5/02/2013. He clarified that while the deceased was employed by the Appellant, he was working at the 2<sup>nd</sup> Respondent's premises at the time of the accident. PW1 produced several documents as exhibits, including the employment contract, the death certificate stating the cause of death as strangulation, and the post-mortem report. He testified that the family had received no compensation from the employer or any insurance company following the death.
6. During cross-examination by Mr. Kaburu, for the Appellant, PW1 admitted that he did not witness the accident himself. He stated that he received a call informing him of the incident. He clarified that the deceased was 24 years old and unmarried at the time of his death. PW1 confirmed that both of his parents, aged 82 and 62 respectively, were dependent on the deceased's earnings. He acknowledged that he did not know the specific contractual relationship between the Appellant and the 2<sup>nd</sup> Respondent other than that the Appellant was contracted to maintain machines at the 2<sup>nd</sup> Respondent's facility.

7. In re-examination, PW1 reiterated that the deceased was on duty when he died and that the Appellant was his primary employer. He confirmed that him and the father had been issued an *ad litem* grant to represent the estate in the suit.
8. Although the said Jeremiah Mwango Oyubo did not testify orally, the court received and adopted his witness statement as evidence. In the statement, he recalled receiving the news of his son's death and travelled to Naivasha. He stated that information gathered from eye-witnesses at the scene indicated that the deceased was repairing a line that was supposed to be switched off. He alluded to the mechanical failure where the line activated abruptly, catching the deceased's clothes and strangling him against the greenhouse joint. He emphasized that there were no rescue mechanisms or other employees available to assist his son in the emergency.
9. In response to the suit, the Appellant filed Statement of Defense dated 12<sup>th</sup> May 2016 where it denied all allegations of negligence, maintaining that the deceased was either the sole author of his misfortune or that the accident was an unavoidable occurrence for which the Appellant could not be held liable. The Appellant also challenged the dependency of the claimants, requiring them to prove their status as dependants under the Fatal Accidents Act.
10. At trial however, the appellant never called any witness to give evidence hence his statement of defence remains but mere allegations with no probative value.
11. In its reserved judgment, the trial court found the appellant and respondent wholly liable for the injury and ensuing loss and assesses the damages in the sum of Kshs 1,596,600; being the aggregate of; Pains and suffering, Kshs 20,000, Loss of expectation of life, Kshs 100,000, Loss of dependency Kshs 1,296,000 and Special damages Kshs 180,000/
12. The judgment aggrieved the Appellant who then moved the Court by way of a Memorandum of Appeal dated 4/04/2025, asserting that the trial

court fell into grave error in both its findings of fact and its application of the law. The appeal challenges the finding of negligence, the admissibility of the evidence relied upon, and the quantum of the damages awarded. The four substantive grounds upon which the appeal is premised are as hereunder:

- a. **The learned trial Magistrate erred in fact and in law by holding that the Respondents had proved their case against the Appellant on the required standard of a balance of probabilities.**
  - b. **The learned trial Magistrate erred in on relying on hearsay evidence.**
  - c. **The learned trial court erred by shifting the burden of proof from the Plaintiffs to the Defendants.**
  - d. **The learned trial court erred in the assessment of damages.**
13. The Appellant challenge to the decision even when expressed on four grounds, essentially contend that the 1<sup>st</sup> respondent failed on its onus to prove the case on a balance of probabilities and that the award of special damages was erroneous. It thus prays for the setting aside of the trial court's judgment, the dismissal of the original suit, and an award of the costs of the appeal and the trial below.
14. The Court directed that the appeal be canvassed by way of written submissions and gave the parties herein timelines for filing their submissions. Both parties filed their respective submissions

### **The Appellant's Submissions**

15. The Appellant's submissions, dated 03/11/2025, are centred on the principle of the burden of proof in civil litigation. The appellant submits that the Respondents failed to satisfy the legal threshold to prove negligence stating that under Sections 107, 108, and 109 of the Evidence Act, the burden of proof lies squarely with the person who alleges a fact. Relying on the case of **Antony Francis Wareham t/a A.F. Wareham & 2 Others vs Kenya Post Office Savings Bank [2004] 2 KLR 91**, the

Appellant argues that in an adversarial system, if the evidence adduced does not support the facts pleaded, the claimant must fail.<sup>1</sup> Counsel emphasizes that this burden never shifts and that the trial court erred by effectively requiring the Appellant to prove that it was not negligent.

16. The Appellant further points out that PW1 explicitly stated, "*I did not witness the accident,*" and that the father's witness statement admitted to relying on information from the eye witness and the Company Management. The Appellant argues that because these alleged eyewitnesses were never called to testify, there was no direct evidence of the accident as required by Section 63 of the Evidence Act.
17. The Appellant further submits that the trial court's findings on the lack of protective gear and training were entirely speculative. That neither witness statement alleged a lack of training, and no oral evidence was led on the deceased's specific instructions or safety equipment. The Appellant argues that the Magistrate stepped into the witness box to imagine these failures, violating the principle that a court must decide only on the evidence before it.
18. On quantum, the Appellant argues that the special damages of Kshs. 180,000 were not strictly proved and cites the principle that special damages must be pleaded and proved with specificity, arguing that the Respondents failed to produce receipts for the bulk of their claim.

### **The Respondents' Submissions**

19. The 1<sup>st</sup> Respondents filed their written submissions on 29/08/2025, opposing the appeal on grounds that the trial Magistrate's decision was sound and based on uncontroverted evidence. The Respondents rely on the duty of the first appellate court as established in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123**, asserting that while the court must re-evaluate the evidence, it should not disturb the findings of the trial court unless they are clearly perverse or based on a misapplication of the law. They argue that the Appellant's failure to call

any witnesses left the Respondents' factual narrative regarding the accident unchallenged.

20. Citing **Acceler Global Logistics vs Gladys Nasambu Waswa & Another [2020] KEHC 9074 (KLR)**, the Respondent, argue that cross-examination alone is insufficient to rebut factual assertions; the defendant must lead its own evidence to undermine the plaintiff's case. They contend that because the Appellant offered no alternative explanation for the machine's activation, the trial court was correct to apply the doctrine of *Res Ipsa Loquitur*.
21. On the attack that the evidence was based on hearsay, the Respondents argue that the post-mortem report showing the cause of the death as strangulation by a machine provide sufficient circumstantial evidence from which negligence can be inferred. They invoke the *but-for* test, arguing that if not for the Appellant's failure to provide a safe system of work, the deceased would be alive.
22. On the issue of damages, the Respondents maintain that the awards were reasonable. The respondent supports the award of Kshs. 100,000 for loss of expectation of life for a 24-year-old and defend the 36-year multiplier, noting the parents' total reliance on the deceased. On special damages, they argue that funeral expenses often cannot be receipted in rural settings and that courts have the discretion to award reasonable sums for burial costs.

### **Issues, Analysis and Determination**

23. As a first appellate court, the Court is mandated by the principles set forth in **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123** to conduct a comprehensive re-evaluation of the evidence. This entails a fresh look at the trial record, the testimonies of the witnesses, and the legal principles applied, while bearing in mind the

trial court's unique position in observing the demeanour of the witnesses. In *Selle's case*, supra, the court held as follows:

**“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”**

24. The Court, has carefully perused the trial record, the Memorandum of Appeal, and the rival submissions of both the Appellant and the 1<sup>st</sup> Respondent and is satisfied that that the following issues fall for its determination: -

- (i) **Did the Respondents prove negligence and liability on the part of the Appellant on a balance of probabilities?**
- (ii) **Did the trial court correctly apply the doctrine of *Res Ipsa Loquitur*?**
- (iii) **(ii) Did the trial court improperly shift the burden of proof to the Appellant?**
- (iv) **(ii) Was the award of special damages by the trial court based on correct legal principles?**

**Whether the Respondents prove negligence and liability on the part of the Appellant on a balance of probabilities?**

25. The Appellant's primary contention is that the Respondents failed to provide an eyewitness account of the accident, thereby failing to prove negligence. However, the law of negligence in an industrial setting does not require an eyewitness to every act of omission. Negligence can be established through circumstantial evidence that leads to a reasonable inference of fault.<sup>1</sup>
26. The Occupational Safety and Health Act (OSHA), 2007, imposes a primary duty on every employer to ensure the safety, health, and welfare of all persons working in the workplace. Section 6(2) of OSHA specifically includes the duty to provide and maintain plant and systems of work that are safe and without risks to health. In the present case, the deceased was performing maintenance on an electrical line. It is an inherent requirement of a safe system of work that machinery under repair must be effectively isolated and locked out to prevent accidental activation. In addition, there ought to be a reasonable alarm system to warn of a threat at injury.
27. Whether such safety systems were installed and were in place on the material day can only be specially within the knowledge of the appellant and the 2<sup>nd</sup> respondent and not on the 1<sup>st</sup> respondents. Where a fact is specially within the knowledge of a party to the proceedings, by dint of section 112, Evidence Act, the burden of proving such facts rest on such a party. In this case therefore the 1<sup>st</sup> respondent having pleaded the fact that the deceased was fatally injured in the absence of all else, that the injury was as a result of failure to provide safe working conditions and relied upon the doctrine of *res ipsa loquitor*, the burden of proving that the system of work and the working environment was safe and the steps taken to ensure such safety remained rested upon the appellant and the 2<sup>nd</sup> respondent. Upon the choice not to lead evidence in that regard, their burden stood unmet with the inevitable consequence that an inference of

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<sup>1</sup> Joseph Wachira Kamau v EWO (Suing as Next Friend of a Minor COW) & Others [2018] eKLR

failure on their part was established by the evidence of death within the premises the deceased was deployed for duties.

28. The doctrine of *Res Ipsa Loquitur* applies where; the thing causing the accident was under the management or control of the defendant; the accident is such that, in the ordinary course of things, does not happen if those in control use proper care; and, the cause of the accident is unknown to the plaintiff.<sup>2</sup>
29. Here, the electrical central line was under the control of the Appellant and the 2<sup>nd</sup> Respondent. An industrial machine activating abruptly while a worker is performing repairs is a classic scenario where the thing speaks for itself. Negligence is inferred because machines do not typically activate spontaneously if proper lockout-tagout procedures and maintenance are followed.
30. In the court's mind, the Appellant's failure to call any witnesses or provide any technical explanation for the machine's activation is fatal to any defense it had filed which there remained mere allegations. The court holds that once a prima facie case of negligence is established via the circumstances of the accident, the evidential burden shifts to the defendant to provide an explanation that rebuts the presumption of fault. The Appellant remained silent, leaving the inference of negligence un rebutted.

**Whether the trial court err by relying on hearsay evidence or by improperly shifting the burden of proof to the Appellant?**

31. The Appellant argues that the trial court relied on hearsay and shifted the legal burden of proof. This Court must distinguish between the *legal* burden of proof and the *evidential* burden. Legal burden in simple terms is the obligation to prove the case on a balance of probabilities and which remains with the Plaintiff throughout the trial. On the other hand,

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<sup>2</sup> Acceler Global Logistics v Gladys Nasambu Waswa & another [2020] KEHC 9074 (KLR)

evidential burden is the duty to produce evidence to support or rebut a specific fact in issue. This can shift between parties during the trial. In **Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] KECA 290 (KLR)** the court while making reference to the Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14 stated as follows in line with the foregoing:

**“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus, a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues...**

**The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence...”**

32. In the instant case, the Respondents provided direct evidence of the deceased's employment, the location of the accident, and the cause of death being strangulation through the post-mortem report and PW1's testimony. These established facts, combined with the mechanism of injury, created a prima facie case of negligence. This court holds that the trial court did not shift the legal burden; rather, it correctly noted that the

Appellant failed to discharge its *evidential* burden to offer a non-negligent explanation for the machine's activation.

33. Regarding hearsay, while the father's statement included accounts from others, the *Res Ipsa Loquitur* doctrine allows the court to draw inferences from the known or established facts of the accident itself. The fact that the deceased was found strangled by a rolling machine he was supposed to be repairing is a real fact that is not hearsay. The trial court's finding of negligence was based on these actual realities and the Appellant's failure to provide any rebuttal.

**Was the award by the trial court based on correct legal principles and not inordinately high?**

34. The principles for disturbing an award of damages are well settled. This Court will only interfere if the award is so inordinately high or low as to be a wholly erroneous estimate, or if the court below took into account irrelevant factors or applied wrong principles. This was amplified by the Court of Appeal in *Kivati -vs- Coastal Bottlers Ltd* in the following words:-

**"The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate."**

35. The court notes that the trial court's awards of Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life under the Law Reform Act, the trial court have not been disputed. These are what the court considers as conventional nominal award in cases of near-instantaneous death. The evidence suggests the deceased succumbed almost immediately. The court holds that the same is consistent with judicial precedent and is thus upheld. The court further notes that the award of Kshs. 100,000 for loss of expectation of life is also a standard

conventional sum in Kenya, more justifiable in the circumstances where the deceased died aged 24-year-old. The same is left undisturbed.

36. The above appeal to the court as modest and comparable to previous decision. The court in particular finds the awards to conform with the holding in the case of **Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017] eKLR**, where the Court stated as follows as regards damages awardable under these two heads;

**“As regards damages awarded under the Law Reform Act, the principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.... The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs. 100,000/= while for pain and suffering the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”**

37. For Loss of Dependency, the Appellant rightfully challenges the 36-year multiplier and the 1/2 dependency ratio. The court holds that for an unmarried deceased aged 24, a multiplier of 36 years, representing the span from age 24 to the retirement age of 60 as the multiplier, is on the higher end of the spectrum for failure to take into account the vicissitudes of life and the fact of accelerated payment. That is an error in principle.
38. The Court of Appeal in **Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another [2014] eKLR**, quoting **Cornelia Eliane Wamba v Shreeji Enterprises Ltd (HCCC No. 754 of 2005)**, held that the choice of multiplier must be exercised judiciously and account for imponderables of life. The court observed that:

**“This court has given due consideration to the afore set out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles: -**

- a. The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.**
- b. It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.**
- c. The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.**
- d. Death through natural causes and departure for greener pastures elsewhere is also a factor.”**

39. The court is of the view that the trial court’s choice of 36 years as the multiplier, was not grounded on the realities of the Deceased’s form of employment, failed to consider possibilities of death before retirement and the fact that the payment is accelerated and in lumpsum. Given the deceased’s age and his informal employment, the court substitutes the multiplier of 36 years applied by the trial court by a multiplier of 30 years as more appropriate and realistic.

40. While the multiplier was high and deserve disturbance downwards, the court equally finds the choice of the multiplicand be unjustifiable. It is erroneous because the sum pleaded was clearly an underpayment and contrary to the law under the **Regulation of wages (General) (Amendment) Order, 2012**. A court off law cannot enforce an unlawful or illegal pact. It ought to have been brought to the attention of the court by counsel on both sides that the pleaded salary was an underpayment just as the court had the duty to apply the true wages applicable. In failing to do so, the court erred and that error fall for correction by this court on a first appeal.

41. The court has looked at the reigning Order on the date of the accident and noted that the minimum wage for general workers in all municipalities then was Ksh 7,915.90. That is the multiplicand the trial court failed to apply which this court must now apply. To that multiplicand, the court appreciates the deceased to have been single and uphold the  $\frac{1}{2}$  ration chosen by the trial court
42. In applying the applicable law, the award for loss of dependency calculates as follows: -

$$7,915.90 \times 12 \times 30 \times \frac{1}{2} = 1,424,862$$

43. On Special Damages, the court awarded Kshs. 180,000 for special damages. The general rule is that special damages must be strictly proved. However, in the context of funeral expenses, Kenyan courts have acknowledged the difficulty of obtaining receipts for all burial-related costs in rural settings. In **J N K (Suing as the Legal representative of the Estate of MMM (Deceased) v Chairman Board of Governors [...] Boys High School [2018] KEHC 7003 (KLR)**, the court stated as follows in line with the foregoing;

**“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. The court has awarded this where there were no receipts provided. In Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR the plaintiff was awarded Kshs. 30,000/- for funeral expenses. The Court of Appeal in the case of Jacob Ayiga Maruja & another vs Simeon Obayo [2005] eKLR awarded the plaintiff Kshs. 60,000/-. While in Lucy Wambui Kihoro (Suing as Personal Representative of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR the plaintiff was awarded Kshs. 50,000/-. I will take a big gamble in view of the circumstances of this case and award a sum of Kshs. 60,000 for**

**funeral expenses over and above the pleaded special damages of Kshs. 40,100.”**

44. In the instant given that the body was transported from Naivasha to Busia, and considering the costs of morgue charges and customary burial rites, the court considers an award of Kshs. 180,000 is reasonable and not excessive for the entire funeral expenses. That no receipts were provided should never be the only reason not to award a reasonable sum that was expected to have been spent. The court find no justification to interfere with that award.

45. On the last Appellant’s argument that there was double compensation. The law is that awards under the Law Reform Act (LRA) and Fatal Accidents Act (FAA) should not overlap if the beneficiaries are identical. The trial court awarded dependency under the FAA and non-pecuniary losses under the LRA. There is no evidence of a separate award for lost years under the LRA being added to the dependency award under the FAA. Therefore, there is no double compensation in the circumstances.

46. The upshot of the foregoing is that the court finds the appeal unmerited upholds the judgment on liability and award of damages for pain and suffering, loss of expectation of life but interferes with the award of loss of depend on the reasons disclosed above.

47. I summary, the judgment of the lower court is set aside and substituted with a judgment as follows: -

a) <b>Pains and suffering</b>	<b>Kshs 20,000/</b>
b) <b>Loss of expectation of life</b>	<b>Kshs 200,000/</b>
c) <b>Loss of dependency</b>	<b>Kshs 1,424,862/</b>
d) <b>Special damages</b>	<b>Kshs 180,000/</b>
e) <b>Total</b>	<b><u>Kshs 1,800,862/</u></b>

48. The special damages shall attract interests at court rates from the date of the suit while general damages shall attract interests from the date of judgment till payment in full.

49. Because costs must follow the events, the appellant has failed but the 1<sup>st</sup> respondent succeeded on a ground they never argued, each party shall bear own costs.

Dated, signed and delivered virtually this 6<sup>th</sup> day of March, 2026.



Patrick J O Otieno

Judge