



**REPUBLIC OF KENYA**

**IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT MAKINDU**

**CIVIL CASE NO. E174 OF 2023**

**MWALALE MUTEMI (Suing as the Administrator and/or Personal representative of the estate of NGUI MUTIA-DECEASED).....PLAINTIFF**

**VERSUS**

**BADAR HARDWARE LIMITED.....1<sup>ST</sup> DEFENDANT**

**SHUKRI SHEIKH SIYAI.....2<sup>ND</sup> DEFENDANT**

**MINT LOGISTICS LIMITED.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**THE ACTION**

Mwalale Mutemi (hereinafter referred to as the plaintiff) brought this action against Badar Hardware Limited, Shukri Sheikh Siyai and Mint Logistics Limited (hereinafter referred to as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) as the Legal representative of the estate of Ngui Mutia, the deceased person herein. In a plaint dated 18/9/2023 but filed in court on 20/9/2023, the plaintiff averred that on or about 30/7/2022 the deceased herein was a lawful pedestrian along Mombasa-Nairobi road when at Shell Petrol station within Mtito Andei area, motor vehicle registration number KCY 079J/ZE 9934 was carelessly and negligently driven at a high speed that it veered off the road and hit the deceased while he was off the road hence occasioning him fatal injuries.

The 1<sup>st</sup> defendant was sued as the beneficial owner of motor vehicle registration number KCY 079J/ZE 9934 whereas the 2<sup>nd</sup> defendant was sued as the registered owner of motor vehicle registration number KCY 079J and the 3<sup>rd</sup> defendant as the registered owner of trailer registration number ZE 9934, at the material time. The plaintiff further averred that at the time of his death, the deceased was aged 77 years and was a hardworking and creative man in good state of health with a promising prospect for the future. That prior to his death, the deceased was a farmer and a casual labourer, earning a minimum of Ksh. 10,000/= per month.

The plaintiff pleaded the particulars of loss and damage as well as those of the deceased's dependants. He relied on the doctrines of *Res ipsa loquitor* and vicarious liability and pleaded the following particulars of negligence against the defendants and their agent:

- a) Driving without due care and attention;
- b) Driving motor vehicle registration number KCY 079J/ZE 9934 at an excessive speed in the circumstances;
- c) Failing to stop, slow down, brake, swerve or in any other manner howsoever manage and/or control the motor vehicle registration number KCY 079J/ZE 9934 so as to avoid the said accident;
- d) Failing to take care and/or to be on the look out of the well-being of other road users, the deceased being one of them;
- e) Veering off the road;
- f) Hitting the deceased while he was off the road;
- g) Causing an accident and occasioning the deceased fatal injuries;
- h) Generally being negligent.

The plaintiff thus prays for judgment against the defendants for:

- a) General damages under the Fatal Accidents Act and Law Reform (wrongly indicated as Law Report) Act;
- b) Special damages in the sum of Ksh. 30,550/=;
- c) Costs of the suit;
- d) Interest.

## **THE DEFENCE**

The defendants entered appearance on 14/3/2024 and filed a joint statement of defence on the same day. The defendants denied that the 1<sup>st</sup> and 2<sup>nd</sup> defendants were the beneficial and registered owners respectively of motor vehicle registration number KCY 079J/ZE 9934 and KCY 097J and that the 3<sup>rd</sup> defendant was the registered owner of trailer registration number ZE 9934 and denied the particulars of negligence pleaded in the plaint. The defendants averred that if the accident occurred, which was denied, then the deceased was wholly or substantially to blame for the accident for his own negligence. They pleaded the following particulars of negligence against the deceased:

- a) Attempting to or crossing a highway without ascertaining it was safe to do so;
- b) Failing to notice motor vehicle KCY 079J in time or at all so as to avoid the accident;
- c) Failing to exercise due care and attention expected of an adult in crossing the road;
- d) Exposing himself to the danger of being knocked by vehicles lawfully using the road at the time;
- e) Crossing the highway when his faculties were not fully functional;
- f) Causing the said accident.

The defendants relied on the doctrine of *Volenti non fit injuria* and prayed that the plaintiff's suit be dismissed with costs.

## **THE EVIDENCE**

### **The Plaintiff's Case**

At the hearing of the suit, two witnesses testified in support of the plaintiff's case. PW 1 was the plaintiff. She adopted her statement filed in court as part of her testimony. The witness was not at the scene at the time of accident but was only informed of it. She stated that she was the deceased's daughter. That the deceased was in good health and died at the age of 77 years. That he was a farmer and casual labourer earning a minimum of Ksh. 10,000/= per month and that his three children depended on him. The plaintiff produced in evidence, documents in support of the case. PW 2 Police Constable Nicholas Kamwerengo testified that he was the investigating officer in respect of the accident.

The witness confirmed the occurrence of the accident and the involvement of motor vehicle registration number KCY 079J/ZE 9934 as well as the deceased. PW 2 testified that he visited the scene after the accident and drew a sketch map. That the impact was on the pedestrian lane. According to PW 2, the driver of the accident motor vehicle was to blame but his superior instructed him to indicate that it was the deceased to blame. That he would have charged the driver of the accident motor vehicle but could not go against the instructions of the Base Commander. The witness produced the police abstract, OB extract and the sketch map that he drew at the scene.

### **The Defence Case**

The defendants did not call any witnesses.

### **MAIN ISSUES FOR DETERMINATION**

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

- i. Whether an accident occurred on 30/7/2022 at Mtito Andei area along Mombasa-Nairobi highway involving motor vehicle registration number KCY 079J/ZE 9934 and the deceased herein;
- ii. Whether motor vehicle registration number KCY 079J/ZE 9934 belonged to the defendants at the material time;
- iii. Whether the driver of the accident motor vehicle was negligent in the circumstances and therefore liable for the accident;
- iv. Whether the defendants are vicariously liable for the accident;
- v. Whether the deceased died as a result of injuries sustained in the accident;
- vi. Whether the estate of the deceased and his dependants are entitled to damages;
- vii. If so, the nature and quantum thereof;
- viii. Who should bear the costs of this suit?

### **THE PLAINTIFF'S SUBMISSIONS**

In his submissions, the plaintiff relied on the evidence of PW 2 and urged the court to find the defendants 100% liable for the accident. That the defendants did not call any evidence to controvert that of PW 2. The plaintiff relied on the authorities of:

- a) *Moses Muriithi Njagi v Joseph Njuguna Macharia & 2 others [2016] eKLR;*
- b) *Richa Elvis v Mohamed Ibrahim [2017] eKLR;*
- c) *Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR;*
- d) *Re Estate of Alfred Mutuku (Deceased) [2020] KEHC 3617 (KLR);*
- e) *Peter Ngigi Kuria & another (suing as the legal representatives of the estate of Joan Wambui Ngigi) v Thomas Ondili Oduol & another [2019] eKLR;*
- f) *Clean View Limited v Kahuthu [2025] KEHC 5794 (KLR).*

On quantum, the plaintiff proposed Ksh. 300,000/= for pain and suffering and relied on the authority of *Beatrice Mukulu Kang'uta & another v Silverstone Quarry Limited & another [2016] eKLR*, wherein Ksh. 200,000/= was awarded for a deceased who died after over five hours following the accident. For loss of expectation of life, the plaintiff proposed a sum of Ksh. 300,000/= and relied on the authority of *Wanderi & another v Nyambura & another [2023] KEHC 2873 (KLR)*, wherein Ksh. 200,000/= awarded on 31/10/2018 was affirmed on appeal on 28/3/2023.

For loss of dependency, the plaintiff proposed a multiplier of 10 years, a dependency ratio of 2/3 and a multiplicand of 10,000/=. The plaintiff urged the court to award special damages as pleaded and proved as well as costs of the suit and interest. Copies of all the authorities relied upon were attached to the submissions.

### **THE DEFENDANTS' SUBMISSIONS**

The defendants submitted that the claim by PW 2 that he had been coerced by the Base Commander to blame the deceased was not substantiated as no evidence of such communication was adduced. That PW 2 did not witness the accident and did not produce the police file nor investigation diary during the hearing. The defendants argued that PW 2's evidence was unreliable. The defendants further argued that there was no direct evidence as to how the accident occurred and no evidence to prove that the driver of the accident motor vehicle was to blame for the accident. The defendants thus contended that the plaintiff had not proven his case on a balance of probabilities. They urged the court to dismiss the suit with costs.

The defendants relied on the following authorities:

- a) *In re estate of M'Mugambi M'Mbiro- Deceased [2022] eKLR;*
- b) *Palace Investments Limited v Geoffrey Kariuki Mwenda & another [2015] eKLR;*
- c) *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute [2016] eKLR.*

On quantum, the defendants proposed a sum of Ksh. 10,000/= for pain and suffering. They relied on the authority of *Harjeet Singh Pandal v Hellen Aketch Okudho [2018] eKLR*, in which an award of Ksh. 30,000/= was reduced to Ksh. 10,000/=. For loss of expectation of life, the defendants proposed a sum of Ksh. 80,000/=. They relied on the authorities of *Hyder Nthenya Musili & Patricia Mutile Mbindyo (Suing as the Legal Representatives of the Estate of Collins Mumo Mbundyo) v China Wu Yi Limited & Wilson Githu [2017] KEHC 3063 (KLR)* and *Florence Awuor Owuoth v Paul Jackton Ombayo [2020] eKLR*.

For loss of dependency, the defendants argued that the plaint and Chief's letter did not disclose the relationship of the alleged dependants with the deceased. The defendants submitted on the mistaken belief that the plaintiff had indicated that they were sisters to the deceased and argued that they would not qualify as dependants under section 4(1) of the Fatal Accidents Act. That there is no evidence to prove dependency. They relied on the authority of *Justo Mungathia Mwithalie & another v Joseph Maore Angacia & another (suing as the legal representatives of the estate of EKM-Deceased) [2022] eKLR*. The defendants proposed a dependency ratio of 1/3 in the event that the court finds proof of dependency. The defendants proposed a multiplier of 3 years and a multiplicand of Ksh. 7,544.65/= as per the Regulations of Wages Order, 2022 for an unskilled labourer.

For special damages, the defendants submitted that only Ksh. 550/= had been proven. That the amount for Ksh. 30,000/= could only be claimed as part of the costs of the suit.

### **ANALYSIS AND DETERMINATION**

I have considered the evidence on record and given due regard to the submissions made by the parties. From the material evidence on record, I have no doubt that an accident occurred on 30/7/2022 at Mtito Andei area along Mombasa-Nairobi highway involving motor vehicle registration numbers KCY 079J/ZE 9934 and the deceased herein. The police abstract produced in evidence indicates that the 1<sup>st</sup> defendant was the owner of KCY 079J at the time of accident. The plaintiff produced in evidence motor vehicle copies of records

which indicate that the 2<sup>nd</sup> defendant was the registered owner of motor vehicle registration number KCY 079J as at 30/11/2022 and that trailer registration number ZE 9934 was registered in the name of the 3<sup>rd</sup> defendant as at 26/4/2023. There is no contrary evidence. My finding is that the plaintiff has proven on a balance of probabilities that the defendants were the owners of the accident motor vehicle and trailer at the material time.

### **Liability**

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

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

Indeed, no eye-witness was called to testify on how the accident occurred. The plaintiff as well as the police officer who testified as PW 2 did not witness the accident although PW 2 testified that he investigated the accident. I have considered the submissions by the parties on the issue of liability as well as the authorities relied upon. Given the circumstances of the case, can it be said that in the absence of an eye-witness, the plaintiff has failed to prove his case? I must emphasize that standard of proof is on a balance of probabilities. Mere proof of occurrence of an accident does not impute negligence. There must be acceptable evidence to show that the party being blamed was negligent.

Is there any evidence that would impute negligence on the driver of the accident motor vehicle? PW 2 produced in evidence, a police abstract on the accident. The same indicates that the deceased was blamed for the accident. PW 2 was the investigating officer in respect of the accident. He explained why he indicated in the police abstract that the deceased was

to blame. His testimony is that the driver of the accident motor vehicle was to blame. Other than the police abstract, PW 2 produced the sketch map.

In the authority of **Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)**, Mativo J (as he then was) observed as follows:

*“As stated earlier, the Respondent’s case in the lower court rested on two witnesses who were not at the scene. The Police officer testified that a report was received at the Police Station. He was not at the scene. His testimony on how the accident occurred is not direct evidence but secondary evidence. Similarly, PW2, only learnt about the accident and went to the hospital only to find that the deceased had died. He was not at the scene. None of the two witnesses could give an account on how the accident occurred. None of them could give an eye witness account. Eyewitness testimony is critical in both criminal and civil trials, and is frequently accorded high status in the courtroom.....The evidence tendered by the Respondent in the lower court is not direct evidence. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the Magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant. In fact, the Magistrate other than saying the appellant never adduced evidence, he never explained whether the evidence before him discharged the evidential burden of prove. Had the trial Magistrate appreciated that the initial evidential burden rests upon the Plaintiff, and had he carefully applied his mind to the law, he would have held that there was nothing for the appellant to rebut since the Respondent had not discharged the legal burden of prove. However, he was blinded by the mere fact that the appellant never called evidence and overlooked binding decisions cited by the appellant before him. At that point it was irrelevant that the appellant never adduced evidence at all because there was nothing to rebut. On this ground alone, I allow this appeal in its entirety.”*

The above finding was upheld by the Court of Appeal in the authority of **Wayo & another (Suing on Behalf of the Estate of Benjamin Wayo Sailoki - Deceased) v Bwire [2025] KECA 866 (KLR)**, wherein the Court of Appeal observed that where there is no

information regarding the outcome of the investigations which were indicated to have been still pending, the police abstract cannot therefore be the basis of finding liability on the part of a party.

In the authority of *Equator Distributors v Joel Muriu & 3 others* [2018] KECA 53 (KLR), the Court of Appeal held:

***“The issue for us to determine is the probative value of a police sketch map. A police sketch of a scene of accident depicts the overall layout of the location and the relationship of evidentiary items to the surroundings. A police sketch of the scene of accident is evidence tending to show the relative position of vehicles immediately after the accident and this tend to throw light on the issue of speed and direction of the vehicle movement prior to and at the time of, the accident.....On probative value to be given to a police sketch map, we are aware that a police sketch map for a road traffic accident is prepared after the event, it is not an eye witness account. However, it carries some probative value. The sketch map is not binding on the trial court and it is upon the court to establish facts from all the evidence on record. A police sketch map is just but an item of evidence to be considered. In this appeal, the appellant has not demonstrated to us that the trial court acted on wrong material in giving credence and weight to the police sketch map. In our view, the map has a probative value as it shows the relative positions of the two motor vehicles immediately after the accident. We find no reason to fault the judge for giving weight to the police sketch map.”*** (Emphasis supplied)

I have looked at the sketch map. From both the rough and fair the sketch maps, it would appear that the point of impact was off the tarmac, on the pedestrian lane. Sketch maps are usually drawn when the police visit the accident scene and depict the scene as the police officer finds it. The sketch map indicates that both the accident motor vehicle and the body of the deceased were found off the tarmac. This is an indication that the accident motor vehicle veered off the tarmac where is knocked down the deceased. A copy of the relevant Occurrence Book extract was also produced in evidence. It is the report that was made by the investigating officer upon visiting the scene. The report contained in the extract supports the testimony of PW 2 as well as the sketch map.

In the authority of *Moses Muriithi Njagi v Joseph Njuguna Macharia & 2 others* [2016] KEHC 3763 (KLR), relied upon by the plaintiff, the court held:

***“Any police officer who investigates a case relies on what he is told by the witnesses. He also observes the circumstances of the incident and forms his own opinion. Such an officer takes his own line of thought. He can decide to disagree with the statements given to him by the witnesses if he is satisfied that that evidence is insufficient or false. When testifying in court, such an officer will be telling the court his own perception of the matter in dispute. That evidence cannot be dismissed as hearsay.”***

Similarly, in *Richa Elvis v Mohamed Ibrahim* [2017] KEHC 4862 (KLR), also relied upon by the plaintiff, the High court upheld the decision of a Magistrate’s court that relied on the testimony of the police officer who visited the scene shortly after the accident and conducted investigations. In the authority of *Mwangi & another v Wambugu* [1984] KECA 13 (KLR), the Court of Appeal accepted the testimony of a police officer who visited the scene and investigated the accident in the following words:

***“For all the foregoing reasons, I am compelled to the conclusion that the appellants are right in their main grounds of appeal, that the learned judge was wrong to reject the evidence of Inspector Muli and his sketch plan as to the point of impact. Unless there was good reason for rejecting the evidence of Inspector Muli as to the point of impact, it was clearly the best evidence on that issue.”***

The foregoing illustrates that the evidence of the police officer who investigates an accident has probative value, particularly where it is supported by documents such as sketch maps and motor vehicle inspection reports which would assist the court in ascertain the point of impact. In the instant case, the evidence of PW 2 and in particular the sketch map, shows that the point of impact was off the tarmac. Motor vehicles are supposed to be driven on the road and on the tarmac where one exists. If a motor vehicle veers off the tarmac and causes an accident, there is *prima facie* evidence that the driver of the accident motor vehicle was to blame. It is my finding that the plaintiff has been able to establish a *prima facie* case of negligence against the driver of the accident motor vehicle.

The defendants did not call any witness to rebut the evidence of the plaintiff. Instead, they belaboured on the frail argument that there was no evidence to show that PW 2 had been coerced by the Base Commander to indicate that the deceased was to blame for the accident. The report in the OB as well as the sketch map support PW 2's contention that the driver of the accident motor vehicle was to blame. The only way the opinion of PW 2 could be defeated would have been by adducing contrary evidence, not engaging in arguments. There is absolutely no evidence to show that the deceased was negligent or contributed to the accident in any manner. Consequently, I find the driver of the accident motor vehicle 100% liable for the accident.

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

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

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

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

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

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

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

There is no evidence refuting the fact that the driver of motor vehicle registration number KCY 079J/ZE 9934 drove the said motor vehicle in the course of his employment with the defendants. As a result, I find the defendants jointly and severally **100% vicariously liable** for the negligence of their driver.

#### **Quantum**

There is sufficient and irrefutable evidence indicating that the deceased herein died as a result of injuries sustained in the accident. Having made a finding on liability, it follows that the estate of the deceased and 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”***.

I am also guided by Lord Denning's decision in *Kim Pho Choo v Camden & Islington Area Health Authority*, [1979] 1, ALL ER 332 which was adopted in the case of *Nancy Oseko v Board of Governors Masai Girls High School* [2011] eKLR where Wendoh, J stated that:

*"In assessing damages, the injured person is only entitled to what is in the circumstances, a fair compensation, for both the plaintiff and the defendant. ....the plaintiff cannot be fully compensated for all the loss suffered but the court should aim at compensating the plaintiff fairly and reasonably but in the process should not punish the defendant."*

The following principles are germane in assessing damages for personal injury claims:

- i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;
- ii. The award should be commensurate to the injuries suffered;
- iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;
- iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;
- v. Awards should not be inordinately too high or too low.

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

#### **1) Damages for pain and suffering**

The evidence indicates that the deceased died on the same day of the accident. The plaintiff indicates that the deceased died after four hours. There is an indication that the deceased was taken to hospital. The copy of the post mortem form produced in evidence indicates that the deceased could have died on the spot or soon thereafter. 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. In most authorities, an award of between 10,000/= and 50,000/= was made for persons who died on the spot. In the case of *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others* [2013] eKLR, the deceased died on the spot following an accident and Ksh. 50,000/= was awarded. In *Evanson Ndungu Mukunya v JNM & MWN (Suing as the legal representatives of JMN*

[2022] eKLR, an award of Ksh. 100,000/= was upheld where the deceased died after 30 minutes from the time of the accident. Considering the age of most authorities coupled with the vagaries of inflation, I find that an award of **Ksh. 100,000/=** would be reasonable. I award the same.

## 2) Damages for loss of expectation of life

The evidence on record indicates that the deceased died at the age of 77 years. This was indicated in the copy of the certificate of death produced in evidence. The trend in the authorities indicates that the younger the deceased at the time of death, the higher the award. From the authority relied upon by the plaintiff, the age of the deceased was not disclosed. On my part, I have considered the authority of **China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] KEHC 359 (KLR)**, wherein the deceased died at the age of 79 years and Ksh. 100,000/= was awarded under this head. I award **Ksh. 100,000/=** under this head.

## 3) Damages for loss of dependency

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

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

The plaintiff listed names of dependants without indicating their relationship to the deceased. This style of pleading must be discouraged. The relationship to the deceased must be indicated as it is an important factor to consider when awarding damages under this head. However, the plaintiff indicated in her evidence that she was a daughter of the deceased. The letter from the Chief indicated that the listed dependants were the children

of the deceased. Children are proper dependants under the Act. The deceased died at the age of 77 years. The plaintiff pleaded and testified that the deceased was a farmer and casual labourer earning a minimum of Ksh. 10,000/= per month.

No documentary evidence was adduced to show where the deceased worked and how much he earned. There is no evidence to show that such earnings were ever realised by the deceased. In the case of *Jacob Ayiga Maruja & another v Simeon Obayo [2005] eKLR*, the Court of Appeal held as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*"The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammell's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammell's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it".*

In the authority of *Silverstone Quarry Limited & another v Beatrice Mukulu Kang'uta & another (suing as Administrators of the Estate of Philip Musyoka Muthoka [2020] KECA 867 (KLR)*, the Court of Appeal was faced with a similar situation. The court held that:

*“The evidence that was adduced by the respondents that the deceased was working as a mason was not disputed. What the applicant took issue with, was the alleged daily income of Kshs. 800. No documents were adduced nor was the court informed where the deceased was working. In the circumstances, although the appellants were not obliged to produce documents to confirm the deceased’s employment and income, it was reasonable that the court applies the gazetted minimum wage for masons, as there was nothing to substantiate the allegation that the deceased was earning more than the minimum provided by law. We concur with the appellant that the minimum wage of Kshs. 11,831.20 should have been used as the multiplicand.”*

There is no contention in the form of contrary evidence that the deceased was a casual labourer. Both parties agree that the court could adopt the multiplier method. Lord Wright in *Davies v Powell Duffryn Associated Collieries Limited [1942] 1 ALL ER 65*, had this to say:

*“There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages that the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a ‘datum’ or ‘basic’ figure which will generally be turned into a lump sum by taking a certain ‘number of years purchase’. That sum, however, has to be tasked down by having due regard to the uncertainties...”*

Lord Wright’s rule, which was applied by other decided cases, was admirably summarized in *Charlesworth on Negligence (3rd Edition)*, pp 560 & 561, para. 909 as follows: -

*“Method of calculating damages: When the income of the deceased is derived from his own earnings, ‘it then becomes necessary to consider what, but for the accident which terminated his life, work and remuneration, and also how far these, if realized, would have conduced to the benefit of the individual claiming compensation.’ The manner of arriving at the damages is; (a) to ascertain the net income of the deceased available for the support of himself and his dependants; (b) (i) to deduct there from such part of his income as the deceased was accustomed to spend upon himself, whether for maintenance or pleasure, or (ii) what should amount to the same thing, to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependents, and then; (c) to capitalize the difference between the sums (a) and (b) (i) or (b) (ii) (sometimes called the ‘lump sum’ or the ‘basic figure’) by multiplying it by a figure representing the proper ‘number of years’ purchase arrived at having regard to the deceased’s expectation of life, the probable duration of his earning capacity, the possibility of his earning capacity being increased or decreased in the future, the expectation of life of the dependents and the probable duration of the continuance of the deceased’s assistance to the dependents during their joint lives. From the sum thus ascertained must be deducted any pecuniary advantage received by the dependents in consequence of the death.”*

In the authority of *Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR)*, the court observed that in determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependents, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum. Being guided by the above Court of Appeal decision of *Silverstone Quarry Limited*, it would imply that where it is established that the deceased was in employment and there is no proof of earnings, the court may adopt the Regulation of Minimum Wages Order applicable at the time of the deceased’s death, to calculate the award for loss of dependency. Based on the evidence on record, I have no reason to doubt that the deceased herein was a casual labourer. The only issue is his earnings.

In my view, and based on the evidence on record, the multiplier approach would be viable in the circumstances of this case. I say so because there is uncontroverted evidence to show that the deceased was a casual labourer. However, I will not adopt the earnings of

Ksh. 10,000/= per month since there is no evidence of the same. The most appropriate multiplicand is that which is provided by the The Regulation of Wages (General) Order. The deceased died in July, 2022. The applicable Order then was the Regulation of Wages (General) (Amendment) Order, 2022. According to the Order, the minimum wage for a casual labourer was **Ksh. 8,109.90/=**. I will adopt it as the multiplicand. This applied to persons working outside cities and designated former municipalities and town councils. The deceased was from Mtito Andei.

The deceased was survived by three children, one being a minor at the time of the deceased's death. The plaintiff testified that it was her sisters who depended on the deceased more as she was married and working. I will adopt a dependency ratio of **2/3**. 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. It is also a fact that human life is not permanent and the court has to take into account the vicissitudes of life. Given the age of the deceased and the vicissitudes of life, I adopt a multiplier of **7 years**. The award works out as follows:

$$8,109.90 \times 12 \times 7 \times 2/3 = 454,154.40/=$$

**4) Special Damages**

In her plaint, the plaintiff pleaded special damages as follows:

- a) Obtaining a grant *ad litem*.....Ksh. 30,000/=
- b) Motor vehicle copy of records.....Ksh. 550/=

It is trite law that special damages must be specifically pleaded and strictly proved. In ***Nizar Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** the court said:-

***"It has time and again been held by the Court in Kenya that a claim for each particular type of special damage must be pleaded"***

In ***Ouma- v - Nairobi City Council [1976] KLR 304*** after stressing the need for a plaintiff in order to succeed on a claim for specified damages, Chesoni J (as he then was) quoted in

support the following passage from Bowen L.J's Judgment on page 532 and 533 in *Ratcliffe-v- Evans [1832] 2Q.B. 524* an English leading case on pleading and proof of damage:

*" The character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

Similarly, in the case of *Hahn v Singh [1985] KLR 716*, it was held that:

*"... special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the act themselves."*

The claim was sufficiently proven by production of receipts. I will thus award **Ksh. 30,550/=** as special damages.

**DISPOSITION**

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

- a) Damages for pain and suffering.....Ksh. 100,000/=
- b) Damages for loss of expectation of life.....Ksh. 100,000/=
- c) Damages for loss of dependency.....Ksh. 454,154.40/=
- d) Special damages.....Ksh. 30,550/=
- Total.....**Ksh.684,704.40/=**

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

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

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

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

***“First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See *New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd* [1988] KLR 380.***

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

- a. The period from the date the suit is filed to the date when the Court gives its judgment; and***
- b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the court may, in its discretion fix.”***

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

*“It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that 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)

From the foregoing expositions of the law on this point, it is clear that much as the award of interest is discretionary, interest rates on special damages should be with effect from the date of the loss till payment in full while with regard to general damages this should be from the date of judgement as it is only ascertained in the judgement-see *Jane Ovuyanzi Raphael (Suing as Legal Representative of Estate of Japheth Amaayi v Salina Transporters [2020] KEHC 618 (KLR)*.

Consequently, interest on the damages for pain and suffering, loss of expectation of life and loss of dependency shall accrue at court rates from the date of judgment/decree until payment in full and on special damages, from the date of filing suit to the date of judgment/decree.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 31<sup>ST</sup> DAY OF MARCH,  
2026.**

**Y.A. SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**