



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. E117 OF 2023**

**CATHERINE NTHENYA MUTUNGA.....1<sup>ST</sup>  
PLAINTIFF**

**MUTHOKA NDELEVA.....2<sup>ND</sup> PLAINTIFF**

**(Suing as the Legal representatives of the estate of JAMES MUSYOKA MUTUNGA-  
DECEASED)**

**VERSUS**

**MENENGAI OIL REFINERIES  
LIMITED.....DEFENDANT**

**JUDGMENT**

**THE ACTION**

In an amended plaint dated 27/11/2023 which was deemed duly filed upon the court allowing the application for amendment on 20/5/2024, Catherine Nthenya Mutunga and Muthoka Ndeleva (hereinafter referred to as the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) brought this action against Menengai Oil Refineries Limited (hereinafter referred to as the defendant) as the Legal representatives of the estate of James Musyoka Mutunga, the deceased person herein. The plaintiffs averred that on or about 12/7/2020 the deceased herein was lawfully and keenly cycling off Mombasa-Nairobi road when at Songea area,

motor vehicle registration number KCN 909F/ZE 6238 was so negligently, recklessly and/or carelessly driven by the defendant's authorized driver that it was allowed to move at a high speed and violently knock the sack the deceased was ferrying, subsequently causing him to fall off the said bicycle and hitting the pavement, thereby occasioning the deceased fatal injuries.

The defendant was sued as the registered owner of motor vehicle registration number KCN 909F/ZE 6238 at the material time. The plaintiffs further averred that at the time of his death, the deceased was aged 15 years and was a student. The plaintiffs relied on the doctrine of *Res ipsa loquitor*, the Traffic Act and the Highway Code. They pleaded the particulars of dependants, special damages as well as the following particulars of negligence against the driver of motor vehicle registration number KCN 909FC/ZE 6238:

- a) Driving at an excessive speed in the circumstances;
- b) Failure to observe well known road traffic rules and regulations;
- c) Failure to have due regard for the other road users especially the deceased herein;
- d) Failing to heed the presence of the deceased on the said road;
- e) Driving a defective motor vehicle;
- f) Failing to hoot/holler and/or act in any other manner so as to alert the deceased of the impending danger;
- g) Failure to stop, brake, slow down and/or act in any manner possible to control the said motor vehicle so as to avoid causing the accident.

The plaintiffs thus pray for judgment against the defendant for:

- a) General damages for pain, suffering and loss of amenities;
- b) Special damages in the sum of Ksh. 150,100/=;
- c) Costs of the suit;
- d) Interest.

### **THE DEFENCE**

The defendant entered appearance on 21/7/2023 and filed a statement of defence on the same day. However, following the amendment of the plaint, the defendant later filed an amended statement of defence on 27/5/2024. The defendant denied being the registered

owner of motor vehicle registration number KCN 909F/ZE 6238, denied that the accident occurred involving the motor vehicle, denied that the deceased was cycling along the said road, denied that motor vehicle registration number KCN 909F/ZE 6238 was driven negligently and denied that the deceased was knocked down and sustained fatal injuries. The defendant denied the particulars of negligence pleaded by the plaintiffs and further denied the applicability of the doctrine of *Res ipsa loquitur*, the Traffic Act and the Highway Code.

The defendant averred in the alternative that the alleged accident was wholly caused and/or materially contributed to by the gross negligence of the deceased in the manner he rode the bicycle thereby causing it to collide with motor vehicle registration number KCN 909F/ZE 6238. The defendant pleaded the following particulars of negligence against the deceased:

- a) Entering the Mombasa-Nairobi highway from a minor side road without ensuring that there was no approaching vehicular traffic on the main road;
- b) Riding across Mombasa highway without due care and attention to other motor vehicles on the said road and in particular riding into the direct path of motor vehicle registration number KCN 909F/ZE 6238;
- c) Recklessly riding into the direct path of motor vehicle registration number KCN 909F/ZE 6238 suddenly and without warning and thereby causing the said motor vehicle to be unable to avoid the ensuing collision;
- d) Illegally riding the said bicycle on a major highway;
- e) Riding the said bicycle without proper reflective clothing and at an excessive speed in the circumstances;
- f) Riding in breach of the provisions of the Traffic Act and rules and regulations made thereunder and in breach of the Highway Code;
- g) Failing to slow down, stop, swerve, brake and/or manage the said bicycle in any other way so as to avoid the said collision;
- h) Causing the accident.

The defendant denied that the deceased was 15 years old, denied that the deceased was in good health and/or was a student and denied that the deceased left behind the mentioned dependants. The defendant prayed that the suit be dismissed with costs.

## **THE EVIDENCE**

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

At the hearing of the suit, two witnesses testified in support of the plaintiffs' case. PW 1 was the 1<sup>st</sup> 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 mother. The witness produced in evidence, the documents in support of the claim. PW 2 Peter Mutunga also adopted his statement filed in court as part of his testimony. His evidence was that the deceased was his brother and that on the material day, they were both cycling bicycles off the Mombasa-Nairobi road. That upon reaching Songea area, motor vehicle registration number KCN 909F/ZE 6238 which was being driven at a high speed, veered off the road and hit the sack that the deceased was ferrying. The witness stated that as a result, the bicycle and deceased toppled over and the deceased fell on the tarmac and hit his head. That the deceased sustained fatal injuries. The witness blamed the driver of motor vehicle registration number KCN 909F/ZE 6238 for causing the accident.

### **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 12/7/2020 at Songea area along Mombasa-Nairobi highway involving motor vehicle registration number KCN 909F/ZE 6238 and the deceased herein;

- ii. Whether motor vehicle registration number KCN 909F/ZE 6238 belonged to the defendant at the material time;
- iii. Whether the driver of motor vehicle registration number KCN 909F/ZE 6238 was negligent in the circumstances and therefore liable for the accident;
- iv. Whether the defendant is 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 PLAINTIFFS' SUBMISSIONS**

In their submissions, the plaintiffs relied on their evidence and submitted that the same was unchallenged. They urged the court to find the defendant 100% liable. On quantum, the plaintiff's proposed Ksh. 300,000/= for pain and suffering. For loss of expectation of life, the plaintiffs proposed a sum of Ksh. 500,000/=. For loss of dependency, the plaintiffs proposed a global sum of Ksh. 1,500,000/=. The plaintiffs relied on the following authorities:

- a) *Stella Nasimiyu Wangila & another v Rapahel Oduro Wanyamah [2016] eKLR*, wherein Ksh. 500,000/= was awarded as damages for pain and suffering for a deceased who died a day after the accident and Ksh. 500,000/= for loss of expectation of life for the same deceased who died at the age of 38 years;
- b) *Mercy Muriuki & another v Samuel Mwangi Nduati & another [2019] eKLR*, wherein a global sum of Ksh. 1,000,000/= was awarded for loss of dependency.

The plaintiffs urged the court to award special damages as pleaded and proved.

### **THE DEFENDANT'S SUBMISSIONS**

The defendant did not file submissions.

### **ANALYSIS AND DETERMINATION**

I have considered the evidence on record and given due regard to the submissions made by the plaintiffs. From the testimony of PW 2 and the police abstract produced in evidence, I

have no doubt that an accident occurred on 12/7/2020 at Songea area along Mombasa-Nairobi highway involving motor vehicle registration number KCN 909F/ZE 6238 and the deceased herein. The police abstract produced in evidence indicates that the defendant was the owner of motor vehicle registration number KCN 909F/ZE 6238 at the time of accident. The plaintiffs produced in evidence motor vehicle copy of records which indicated that the defendant was the registered owner of motor vehicle registration number KCN 909F as at 1/10/2021. There is no contrary evidence. I am thus satisfied that the defendant was the owner of the accident motor vehicle at the material time.

### **Liability**

It is the duty of the plaintiffs 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."***

There is only one version as to how the accident occurred. The version was given by PW 2 who claimed to have been in the company of the deceased at the material time. The evidence of the plaintiffs is that the deceased was cycling his bicycle off the tarmac when the accident motor vehicle veered off the road and hit the sack that the deceased was ferrying. In the process, the deceased was thrown off his bicycle and he hit his head on the tarmac. The plaintiffs relied on the doctrine of *Res ipsa loquitur*. In the leading case of ***Scott v London and St Katherine Docks Co (1865) 3 H & C 596***, Erle CJ at page 600 held as follows:

***"There must be reasonable evidence of negligence. But, where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use***

*proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care".*

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

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

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

*"The phrase 'res ipsa loquitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for the defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury, in light of common sense and past experience, in inferring that the accident was probably the result of the defendant's negligence, in the absence of explanation or other evidence which the jury believes."*

*"It is said that res ipsa loquitur does not apply if the cause of the harm is known. This is a dark saying. The application of the principle nearly always presupposes that some part of the causal process is known, but what is lacking is evidence of its connection with the defendant's act or inference that the defendant's negligence was responsible. It must of course be shown that the thing in his control in fact caused the harm. In a sense, therefore, the cause of the harm must be known before the maxim can apply."*

*'Res ipsa loquitur is an appropriate form of circumstantial evidence enabling the plaintiff in particular cases to establish the defendant's likely negligence. Hence the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability ... The doctrine implies that the court does not know, and cannot find out, what actually happened in the individual case. Instead, the finding of likely negligence is derived from knowledge of the causes of the type or category of accidents involved.'*

Kennedy L.J. in *Russel v. L. & S. W. Ry* [1908] 24 T.L.R. 548 at p. 551 as follows:

*"...that there is, in the circumstances of the particular case, some evidence which, viewed not as a matter of conjecture, but of reasonable argument, makes it more probable that there was some negligence, upon the facts as shown and undisputed, than that the occurrence took place without. The res speaks because the facts stand unexplained, and therefore the natural and reasonable, not conjectural, inference from the facts shows that what has happened is reasonably to be attributed to some act of negligence on the part of somebody; that is some want of reasonable care under the circumstances."*

The Learned Judge then continued:

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

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

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

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

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

From the foregoing, it is clear that the doctrine of *res ipsa loquitur* applies only where circumstances are established which afford reasonable evidence (in the absence of explanation by the defendant) that the incident leading to the injuries arose from their negligence. In an appropriate case, the plaintiff establishes a *prima facie* case by relying upon the fact of the incident. If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the incident.

Loosely speaking, this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case. On the basis of the evidence on record, a *prima facie* case of negligence has been established as there is a causal link between the driver of the accident motor vehicle and the injuries that were sustained by the deceased. The doctrine, in my view, will thus apply. It is reasonably possible to decide on the evidence on record as to who is to blame for the accident. A motor vehicle that is being driven by a prudent driver does not just veer off the road and cause an accident. There is absolutely no evidence to show that the deceased was negligent. In the presence of *prima facie* negligence on the part of the driver of the accident motor vehicle and there being no explanation from the defendant, I find the driver of motor vehicle registration number KCN 909F/ZE 6238 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 the accident motor vehicle registration number KCN 909F/ZE 6238 was driving in the course of his employment with the defendant. Consequently, I find the defendant **100% vicariously liable** for the negligence of its 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 18/7/2020 while undergoing treatment. This was after about six (6) days from the date of the accident. Damages under this head are awarded on the basis of the time the deceased suffered pain before death. The longer it took the deceased to die, the higher the damages. I have considered the authority relied upon by the plaintiffs and further considered the following authorities:

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

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

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

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

Considering that the deceased herein died after about six days while undergoing treatment, the age of most authorities coupled with the vagaries of inflation, I find that an award of **Ksh. 300,000/=** as proposed by the plaintiffs 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 15 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. The authority relied upon by the plaintiff is not comparable as it related to a person who died at the age of 38 years. I have considered the authority of ***Cherangany Hills Ltd & another v Wanyama (Suing as the Administrator to the Estate of Brian Khisa Wanyama)***

[2025] KECA 1030 (KLR), in which an award of Ksh. 200,000/= made by the Magistrate's court on 27/5/2017 for a deceased aged 18 years was affirmed by the Court of Appeal on 5/6/2025. Given the age of the deceased herein, I award a sum of **Ksh. 300,000/=** under this head.

### 3) Damages for loss of dependency

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

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

The plaintiffs listed the parents and eight siblings as the dependants of the deceased. Siblings are not proper dependants under the Act. My view is buttressed by the authority of *M'bagine v Nyaga [2026] KECA 335 (KLR)*, wherein the Court of Appeal held:

***"Section 4 of the FAA limits the beneficiaries of a dependency claim to a wife, husband, parent and child of the deceased. The claimant bears the burden of proving the qualifying relationship and the fact of dependency."***

The only proper expected dependants are parents of the deceased.

The deceased died at the age of 15 years and was said to be a student although no documentary evidence was adduced. It is clear that the deceased was not earning any income. The plaintiffs proposed a global award. 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 earnings and where the deceased was a minor. Some Judges adopt the global award approach whereas others adopt the multiplier approach. However, the Court of Appeal appears to have settled the issue, particularly where the deceased is said to be a

minor and not earning any income. For instance, in the authority of *M'bagine (supra)*, the Court of Appeal held:

***“Where the deceased was a minor or a young person with no proven earnings, this Court has recognised that strict application of the multiplier/multiplicand method may be impracticable and may lead to undue speculation. In such situations, courts may adopt a global or conventional award, but the court must still be guided by evidence of education, prospects, and the nature of the dependency. The discretion must be exercised judiciously and with reasons.”***

Similarly, in *Waweru (Suing as the Legal Representative and Administrator of the Estate of Brian Waweru Mwaura (Deceased)) v Bonafide Clearing and Forwarding Company Limited & another [2025] KECA 620 (KLR)*, the Court of Appeal while dealing with a case where the deceased was a student observed that under the circumstances where the multiplier approach was not supported by evidence, the trial court was correct in adopting a global figure in arriving at the loss of dependency.

Furthermore, in *Cherangany Hills Ltd (supra)*, the Court of Appeal held:

***“We have on our part considered the deceased age, that he was a student in Form Two, the vagaries and vicissitudes of life and the authorities cited above and we are persuaded that the multiplicand of Kshs.9,000/=, which is essentially an issue of fact, which must be proved, was not supported by evidence and it ignored the vicissitudes of life. Further, the multiplier of 30 years ignored the vagaries of life. Guided by the earlier cited decisions in which the trial courts awarded a global sum for comparable ages, we are persuaded that a global sum is the justifiable way to go in the circumstances of this case.”***

Being guided by the above authorities, I will adopt a global sum as proposed by the plaintiffs. In *Cherangany Hills Ltd (supra)*, the Court of Appeal awarded Ksh. 1,600,000/= for a deceased aged 18 years. In *Muli & another v Nzioka & another (Suing as the Administrators of the Estate of the Late Michael Makau Nzioka) [2022] KEHC 224 (KLR)*, the deceased was aged 17 years old and a Form 4 student. Muigai, J. reduced a global award of Kshs.3, 000,000/= under loss of dependency to Kshs.1, 500,000/=. The proposal by the plaintiffs is reasonable. I thus award **Ksh. 1,500,000/=** under this head.

**Funeral and related Expenses**

The plaintiffs pleaded for mortuary and funeral expenses of Ksh. 148,550/= under the head of special damages. In the case of *Damaris Mwelu Kerewoi v Mbarak Kijan Ali, MOMBASA HCCC NO. 776 OF 1995* Hayanga J (as he then was) observed that the court can take judicial notice of the fact that funeral expenses are usually incurred and that where they are not proved, the court can award a nominal amount. In the case of *Marion Njeri Kago v Kenya Railways Corporation [2014] eKLR*, the court held as follows:

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

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

***“Where a cause of action so survives for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person—***

***where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included”.***

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

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

The above implies that funeral expenses can be awarded under the two Acts. This way, the court will assess the same depending on the circumstances of the case without insisting on strict proof as in special damages. However, the plaintiffs appear to have mixed the claim for medical expenses together with that of funeral expenses. The medical expenses incurred while the deceased was still under treatment ought to have been pleaded separately and not part of funeral expenses. The receipts for funeral expenses amount to Ksh. 54,800/=

only. I am aware of the nature of African funerals and I am sure that more than Ksh. 54,800/= must have been spent during the funeral. However, since the plaintiffs did not properly plead for funeral expenses, I will award **Ksh. 54,800/=**..

#### 4) Special Damages

In their plaint, the plaintiffs pleaded special damages (apart from the funeral expenses) as follows:

- a) Motor vehicle search fee.....Ksh. 550/=
- b) Letters of administration.....Ksh. 1,000/=

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 way of receipts. I will thus award **Ksh. 1,550/=** as special damages.

**DISPOSITION**

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

- a) Damages for pain and suffering.....Ksh. 300,000/=
- b) Damages for loss of expectation of life.....Ksh. 300,000/=
- c) Damages for loss of dependency.....Ksh. 1,500,000/=
- d) Funeral and related expenses.....Ksh. 54,800/=
- e) Special damages.....Ksh. 1,550/=
- Total.....**Ksh.2,156,350/=**

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

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

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

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

***“First, at all times a trial court has wide discretion to award and fix the rate of interests provided that the discretion must be used judiciously. Given this discretion, an appellate***

*Court is, therefore, enjoined to treat the original decision by a trial court with utmost respect and should refrain from interference with it unless it is satisfied that the lower court proceeded upon some erroneous principle or was plainly and obviously wrong. See New Tyres Enterprises Ltd v Kenya Alliance Insurance Company Ltd [1988] KLR 380.*

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

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

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

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

*“It is well settled that the award of interest is in the discretion of the court. The determination of the rate of interest is also in the discretion of the court. I think it is also trite law that 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 funeral expenses and special damages, from the date of filing suit to the date of judgment/decree.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKINDU THIS 24<sup>TH</sup> DAY OF MARCH,  
2026.**

**Y.A. SHIKANDA**

**SENIOR PRINCIPAL MAGISTRATE.**