Raeli & another (Suing as the Administrators and/or Personal Representatives of the Estate of Muoki Kioko-Deceased) v Ali & another (Civil Case E097 of 2021) [2026] KEMC 81 (KLR) (24 March 2026) (Judgment)

Neutral citation: [2026] KEMC 81 (KLR)

REPUBLIC OF KENYA

IN THE MAKINDU LAW COURTS

CIVIL CASE E097 OF 2021

YA SHIKANDA, SPM

MARCH 24, 2026

BETWEEN

CHRISTINE MBULWA RAELI ..... 1ST PLAINTIFF

DOMINIC MUNYAO KIOKO ..... 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS AND/OR PERSONAL REPRESENTATIVES OF THE ESTATE OF MUOKI KIOKO-DECEASED

AND

IDRIS ABDALLAH ALI ..... 1ST DEFENDANT

BLUEJAY INVESTMENT LTD ..... 2ND DEFENDANT

JUDGMENT

The Action

1. In an amended plaint dated 9/6/2021 and filed on 14/6/2021, Christine Mbulwa Raeli and Dominic Munyao Kioko (hereinafter referred to as the 1st and 2nd plaintiffs respectively) brought this action against Idris Abdallah Ali and Bluejay Investment Ltd (hereinafter referred to as the 1st and 2nd defendants respectively) as the Legal representatives of the estate of Muoki Kioko, the deceased person herein. The plaintiffs averred that on or about 10/9/2020 the deceased herein was lawfully driving motor vehicle registration number KCW 176Z along Mombasa-Nairobi highway when at Kiboko area, motor vehicle registration number KAU 270C/ZE 7049 was carelessly and negligently driven that it caused an accident hence occasioning the deceased fatal injuries.

2. The 1st defendant was sued as the driver of motor vehicle registration number KAU 270C/ZE 7049 whereas the 2nd defendant was sued as the registered owner thereof at the material time. The plaintiffs further averred that at the time of his death, the deceased was aged 33 years and was working as a lorry

driver earning Ksh. 35,000/= per month. The plaintiffs relied on the doctrines of Res ipsa loquitor and vicarious liability. They pleaded the particulars of dependants, special damages as well as the following particulars of negligence against the defendant and driver of motor vehicle registration number KAU 270C/ZE 7049:

a. Driving at an excessive speed in the circumstances;

b. Driving without due care and attention to the deceased and other road users;

c. Failing to brake, stop and swerve and/or slow down so as to avoid causing the accident;

d. Failing to keep a proper lookout for the safety of the deceased and his other passengers;

e. Failing to care about the well-being of other road users, the deceased included;

f. Causing the accident herein;

g. Hitting the vehicle registration number KCW 176Z;

h. Occasioning the deceased fatal injuries.

3. The plaintiffs thus pray for judgment against the defendants for:

a. General damages under the *Fatal Accidents Act* and *Law Reform Act*;

b. Special damages in the sum of Ksh. 82,100/=;

c. Costs of the suit;

d. Interest.

The Defence

4. The defendants entered appearance on 6/9/2021 and filed a joint statement of defence on the same day. They denied that they were driver and owner respectively of motor vehicle registration number KAU 270C/ZE 7049, denied that the said motor vehicle was carelessly and negligently driven and denied that it caused an accident that occasioned the deceased fatal injuries. In the alternative, the defendants averred that if the accident occurred, which was denied, and if the plaintiffs sustained any loss or damage, then the same was solely caused by the deceased's (wrongly indicated as plaintiff) negligence.

5. The defendants pleaded the following particulars of negligence as against the deceased (wrongly indicated as plaintiff):

a. Failing to adhere to the warning signs given by motor vehicle registration No. KAU 270C/ ZE 7049 and/or failing to adhere to road traffic rules generally and the Highway Code in particular;

b. Failing to give way to other road users especially motor vehicle registration No. KAU 270C/ ZE 7049;

c. Failing to have regard to oncoming motor vehicles and specifically motor vehicle registration No. KAU 270C/ZE 7049;

d. Overspeeding;

e. Being generally careless and negligent;

f. Volenti no fit injuria.

6. The defendants denied that the deceased's estate suffered loss and damage, denied that the deceased was 33 years old, denied that the deceased earned Ksh. 35,000/= per month and denied that the deceased left behind the mentioned dependants. The defendants prayed that the suit be dismissed with costs.

The Evidence

The Plaintiff's Case

7. At the hearing of the suit, two witnesses testified in support of the plaintiffs' case. PW 1 was the 1st 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 widow. That they had two children who were minors. PW 1 stated that the deceased was a driver earning Ksh. 35,000/= per month. She produced several documents in support of the case. PW 2 Police Constable Joseph Mwaura testified that the accident herein was reported at Emali Police station. The witness stated that there was a head-on collision between KCW 176Z and KAU 270C/ZE 7049. PW 2 was not the investigating officer in respect of the accident. He produced the police abstract, sketch map and investigation diary.

The Defence Case

8. The defendants did not call any witnesses.

Main Issues For Determination

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

    i. Whether an accident occurred on 10/9/2020 at Kiboko area along Mombasa-Nairobi highway involving motor vehicles registration numbers KCW 176Z and KAU 270C/ZE 7049;

    ii. Whether the deceased was the driver of motor vehicle registration number KCW 176Z;

    iii. Whether motor vehicle registration number KAU 270C/ZE 7049 belonged to the 2nd defendant at the material time;

    iv. Whether the 1st defendant was the driver of motor vehicle registration number KAU 270C/ZE 7049 at the time of the alleged accident;

    v. Whether the 1st defendant was negligent in the circumstances and therefore liable for the accident;

    vi. Whether the 2nd defendant is vicariously liable for the accident;

    vii. Whether the deceased died as a result of injuries sustained in the accident;

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

    ix. If so, the nature and quantum thereof;

    x. Who should bear the costs of this suit?

The Plaintiffs' Submissions

10. In their submissions, the plaintiffs relied on the evidence of PW 2 and in particular the police abstract, investigation diary and sketch map 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.

11. On quantum, the plaintiff's proposed Ksh. 350,000/= for pain and suffering and relied on the authorities of Letayoro & another v JK (Suing as the Legal Representative of the Estate of the C K (Deceased) [2022] KEHC 10309 (KLR), wherein Ksh. 150,000/= awarded on 19/2/2020 for a deceased who died on the spot was affirmed on appeal on 28/6/2022 and 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 plaintiffs 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.

12. For loss of dependency, the plaintiffs proposed a multiplier of 37 years, a dependency ratio of 2/3 and a multiplicand of 35,000/=. The plaintiffs argued that the global sum approach was not appropriate in the circumstances of this case. They relied on the authority of CWW (Suing as personal representative of the estate of PWK v Mark Kahenya & another [2020] eKLR. The plaintiffs 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

13. The defendants submitted that to establish liability in a claim founded on negligence, a claimant must prove, on a balance of probabilities, the existence of a duty of care owed by the defendant, breach of that duty, and resultant damage. The defendants relied on the authority of Equator Flowers (K) Ltd vs. Omari Nyaboga [2019] KEHC 5621 (KLR) to buttress this point. The defendants argued that PW 1 did not witness the accident and as such, her testimony on the occurrence of the accident amounts to hearsay and an affront to Section 63 of the *Evidence Act*. The defendants further argued that the testimony of the police officer was inadmissible as it lacked credibility and relevance. They relied on the authority of Pesa Hamisi v P. N. Mashru Limited [2020] eKLR.

14. The defendants submitted that the Police Abstract produced by the Plaintiffs notably did not apportion blame but rather marked the matter as pending investigations. That a Police Abstract does not serve as proof of negligence on the part of the defendants but it merely confirms that an accident occurred and a report made. The defendants relied on the authority of Peter Kanithi Kimunya v Aden Guyo Haro [2014] eKLR. The defendants argued that the testimonies of the plaintiffs' witnesses on the circumstances of the accident is at best hearsay. As such it cannot be relied upon to make any inferences or reasonable conclusions on the occurrence of the accident and who is to blame. They relied on the authority of Bwire v Wayo & Sailoki [2022] KEHC 7 (KLR).

15. It was submitted by the defendants that the plaintiffs failed to establish causation and injury. The defendants argued that in light of their failure to call any eyewitnesses or even the investigating officer, the plaintiffs are not entitled to any relief against the defendants, having failed to discharge their burden of proof. That the defendants' failure to present any witnesses does not elevate the plaintiffs' allegations into uncontroverted truth. The burden at all times remained with the plaintiffs and only after discharging it would the onus fall on the defendants. That failure to call eyewitnesses or the investigating officer militates against liability in favour of the plaintiffs. The defendants proposed that liability should be shared equally between the deceased and the Defendants. They relied on the Court of Appeal decision in Hussein Omar Farar v Lento Agencies [2006] eKLR.

16. On quantum, the defendants proposed a sum of Ksh. 20,000/= for pain and suffering. They relied on the authorities of Sukari Industries Limited v Clyde Machimbo Juma [2016] eKLR and Mburu & another (Suing as the Legal Administrators of the Estate of Sarah Wangui Thuku) v Bobe [2025]

KEHC 11902 (KLR). For loss of expectation of life, the defendants proposed a sum of Ksh. 100,000/=. 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), Mogusu & Another (Suing as the Legal Representatives of the Estate of Peter Isoe Oyugi - Deceased) v Nganga & another [2024] KEHC 2656 (KLR) and Ndeti & Another (Suing on their own behalf and as administrators of the estate of Gerald Ndeti Mutua (Deceased) v Mwangangi & another [2022] KEHC 15732 (KLR).

17. For loss of dependency, the defendants argued that there was no proof of earnings and as such, a global sum approach would be appropriate. They relied on the authority of Mary Khayesi Awalo & Another v Mwilu Malungu & Another [1999] eKLR. The defendants proposed a sum of Ksh. 1,500,000/= and relied on the authorities of Frankline Kimathi Baariu & another v Philip Akungu Mitu Mborothi (suing as the Administrator and Personal Representative of Antony Mwiti Gakungu Deceased) [2020] KEHC 5897 (KLR), Kimathi v Kithinji & another [2024] KEHC 14533 (KLR) and Mwangi & another v Muya & another (Suing as legal representatives of the Estate of Samuel Mutunga Mutua (Deceased)) [2023] KEHC 24032 (KLR). For special damages, the defendants submitted that only Ksh. 32,050/= had been proven.

Analysis And Determination

18. 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 10/9/2020 at Kiboko area along Mombasa-Nairobi highway involving motor vehicles registration numbers KCW 176Z and KAU 270C/ZE 7049. The police abstract produced in evidence indicates that the deceased was the driver of motor vehicle registration number KCW 176Z at the material time. The plaintiffs produced in evidence motor vehicle copy of records which indicated that the 2nd defendant was the registered owner of motor vehicle registration number KAU 270C and trailer registration number ZE 7049. The police abstract indicates that the 1st defendant was the driver of motor vehicle registration number KAU 270C/ZE 7049 at the time of accident. There is no contrary evidence.

Liability

19. 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."

20. Indeed, no eye-witness was called to testify on how the accident occurred. The 1st plaintiff as well as the police officer who testified as PW 2 did not witness the accident and neither did PW 2 investigate the same. I have considered the submissions by the parties on the issue of liability as well as the authorities relied upon. I agree with the defendants that since PW 2 neither visited the scene nor conducted investigations into the accident, he cannot be in a position to narrate how the accident occurred. His testimony on how the accident occurred would at best be hearsay. 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.

21. Is there any evidence that would impute negligence on the 1st defendant? PW 2 produced in evidence, a police abstract on the accident. The same indicates that there was an intention to prefer the charge of causing death by dangerous driving against the 1st defendant. Paragraph 7 of the police abstract indicates that the matter was still pending under investigation (PUI). This implies that the investigations had not been completed as at the time of issuance of the police abstract. The police abstract was issued on 3/10/2020. The police officer testified herein on 22/7/2025 and upon being cross-examined by counsel for the defendants, he stated that the investigations had since been completed. However, he did not inform the court of the results of such investigations. There is no evidence to show whether the 1st defendant was eventually charged with the intended offence.

22. I agree with the defence that from the contents of the police abstract, there is no conclusive evidence to show who was to blame for the accident. In the authority of Moses Theuri Ndumia v I G Transporters Limited & another [2018] KECA 297 (KLR), the Court of Appeal observed:

> "…….the Police Abstract form that indicated the driver of the 1st respondent's motor vehicle was to blame for the accident. The respondents did not call any evidence to counter this evidence…… In the absence of any evidence from the defence, we are persuaded there was preponderance of evidence by the appellant that amounted to a prima facie case and it required to be countered by the respondent."

23. Further, in David Onchangu Orioki (Suing as personal representative of Anthony Nyabondo Onchangu (Deceased) v Ismael Nyasimi & Charles Michieka Nyoungo [2019] KECA 434 (KLR), the Court of Appeal had this to say:

> "When a collision occurs between two vehicles, as between them, the issue of contributory negligence and apportionment may arise. However, as between a passenger and the owners/drivers of the two vehicles involved in the accident, liability on the part of the owners is 100% joint and several and no question of apportionment arises unless it is proved the passenger was negligent……In the instant matter, the respondents pleaded negligence on the part of the deceased. No evidence was led to prove the alleged negligence. The doctrine of res ipsa loquitor applies in cases where the deceased or an injured person is a passenger in a motor vehicle involved in an accident. In such cases, what must be proved is the occurrence of the accident and that the person injured or deceased was a passenger in vehicle."
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> 31. In this matter, we are satisfied that PW1 testified and tendered in evidence a police abstract proving the occurrence of the accident and establishing that the deceased was a passenger in the motor vehicle. We are fortified in our finding when we consider that the respondents did not lead any evidence to demonstrate that the 2nd respondent, as the driver of motor vehicle KAY 718S, was not negligent."

24. Similarly, in Orioki v Kevian Kenya Limited [2025] KECA 780 (KLR), the Court of appeal held:

> "The police abstract, though not conclusive, supported the finding that the appellant's actions caused the accident. Furthermore, the evidence showed that the appellant did not maintain a safe distance, which contributed to the collision. In Kenya Ports Authority v East African Power & Lighting Co. Ltd, (supra), it was held that a police abstract is prima facie evidence of facts reported to the police, and in the absence of contrary evidence, it can be

relied upon. In this case, the appellant failed to adduce any compelling evidence to counter the police abstract or to disprove the causal link between his actions and the damage. The police abstract, while not conclusive, indicated that the appellant was at fault for the rear-end collision."

25. The above authorities can be distinguished from the circumstances of the instant case. I say so because according to the police abstract herein, the matter was still pending under investigation and there is no express indication of who was to blame according to the investigating officer. 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."

26. 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.

27. 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."

28. Other than the police abstract, PW 2 produced in evidence copies of the investigation diary and a sketch map. The investigation diary merely contained the report that was made by the police when they returned from the scene. It also indicates that the matter was pending under investigation. I have looked at the sketch map. From the sketch map, the accident appears to have involved three motor vehicles. The same shows that motor vehicle registration number KCW 176Z moved from the left lane facing Mombasa general direction for a distance of 25 metres. The last resting place was off the tarmac across the opposite lane. There are skid marks showing how the motor vehicle moved. On the other hand, KAU 270C/ZE 7049 appears to have emerged from the right lane facing Nairobi general direction (same lane where KCW 176Z moved from) and cut across the road on the opposite lane.

29. Motor vehicle registration number KCW 176Z appears to have been moving from Nairobi general direction towards Mombasa general direction while KAU 270C/ZE 7049 appears to have been moving from Mombasa general direction towards Nairobi general direction but was on the overtaking lane. There are skid marks showing that motor vehicle registration number KCW 176Z moved for 25 metres away from what appears to have been its rightful lane. A skid mark is made by a tyre that is sliding without rotation on a road or other surface. The sliding may be caused by braking, collision damage or some other reason. Usually, it is caused by braking. The abrupt endpoint of a skid mark is important because it almost always ends either at the point where the vehicle stops or where the collision begins. Skid marks can, inter alia, tell investigators whether a car was braking, accelerating, or sliding. Therefore, skid marks can indicate who might be at fault for driving recklessly.

30. Debris left in the road can also be a telling piece of evidence. Debris can help indicate where the collision actually occurred, which is useful. The sketch map further shows motor vehicle body debris of both motor vehicle on the left lane towards Mombasa general direction. The officer who drew the sketch map indicated that where the debris was found could have been the point of impact or collision. The skid marks for both accident motor vehicles lead away from the possible point of impact. The ones for KCW 176Z begin shortly before the possible point of impact and then lead away. Those for KAU 270C/ZE 7049 begin before the possible point of impact and lead away onto the opposite lane.

31. Ordinarily, skid marks lead towards the point of impact, not away from it. In most cases, skid marks are created when a driver applies brakes and the tyres lose traction, sliding along the road surface. This typically happens in the moments immediately before a collision, as the driver attempts to stop or avoid impact. Therefore, the marks usually start where braking begins and end near (or at) the point of impact. However, after collision, a vehicle may continue moving due to momentum or be deflected or pushed or rotate or spin. During this phase, tyres can still be locked or partially braked, leaving marks away from the impact point. If the sketch is anything to go by, then the marks appearing would be post-impact movement marks.

32. One thing that worries me is that the skid marks are in a straight line for both motor vehicles. If the skid marks depict the movement of both motor vehicles, then it would be difficult to establish how both motor vehicles could have collided at the point of impact and turned only to land elsewhere on the opposite lane. Furthermore, from the sketch map, it would appear that motor vehicle registration number KAU 270C/ZE 7049 rammed into motor vehicle registration number KAY 456H/ZC 6621 first while attempting to return to its rightful lane. If that is the case, there is no way the point of impact

would be as shown on the sketch map. The position of the three motor vehicles as portrayed on the sketch map as well as the skid marks do not support the opinion of the police officer who drew the sketch map that the possible point of impact was where the debris was found. Given the circumstances, it would be difficult to tell who was to blame for the accident. It is worth noting that no eye-witness was called to testify.

33. What happens in circumstances where the court is unable to ascertain which of the two drivers was to blame for the accident? In the case of Mwatha v Owuor [2024] KEHC 4489 (KLR), the court was faced with a similar situation. Aburili J held as follows:

> " The law is also trite as established by a line of authorities that where the court is unable to determine who is to blame for the accident, liability is apportioned equally. In the case of Platinum Car Hire Limited v Samuel Arasa Nyamesi and Another, Majanja J, vide Kisii HCC.A 29/2016 cited with approval the Court of Appeal decision in the case of Berkly Steward Limited v Waiyaki [1982-1988] KAR where it is cited with approval the decision in Baker v Market Harborough Industrial Co-operative Society Ltd (1953) 1 KLR 1472, 1476 where Lord Denning LJ observed inter-alia that-
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> 'Every day proof of collision is held to be sufficient to call on the dependants for an answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the court had nothing by which to drawn any distinction between them.'

34. The learned Judge in the above case stated that where the court is unable to determine who is to blame, it apportions liability equally as illustrated by the Court of Appeal in Hussein Omar Farar v Lento Agencies C.A Nairobi, Civil Appeal No.34/2005 [2006] eKLR where it was observed that –

> 'In our view it is not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who is to blame for the accident. In this state of affairs, the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame.'
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> In the end he held that –
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> 'I too come to the conclusion that following the collision, the appellant and the second respondent must share culpability in the absence of any other evidence exonerating one or either party.'
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> In the instant case, it is clear that an accident occurred on the 20.3.2019 but the parties herein do not agree on how the accident occurred as they both give different versions of the accident. The appellant claims that the respondent collided with him from the front while the respondent claimed that he was hit from behind. No sketch plan of the accident scene was produced and apart from the statement of the appellant and the respondent, no other person testified on how they saw the accident happen. Obviously, it is not always the case that there are eye witnesses to an accident and I take cognizance of that fact. It is also a well settled principle that an appellate court will not interfere with findings of fact by the trial court unless it is proved that there was an error in principle or the finding is outright wrong.....I set aside the finding on liability and as there were different versions of how the accident occurred, thereby making it impossible for the court to find with certainty that one party was more to blame than the other, I find and hold that each of the parties was equally to blame for the accident".

In the English case of Baker v Market Harborough Co-operative Society Ltd [1953] 1 WLR 1472, there was a collision in the centre of the road between two vehicles driven in opposite directions. In two hearings, judges had taken different views of the facts. The court was sympathetic to the judge who had found that the cause of the accident was so speculative on the meagre facts available that the plaintiff, who was an innocent third party, had failed to prove her case. However, the court took the view of the other judge that blame should be apportioned equally as between the two drivers. Romer L J stated that a finding to that effect was "the reasonable and probable inference to draw from the facts as found".

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

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

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

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

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

38. The court further held that where it is proved by evidence that both parties to the accident are to blame and there is no means of making a reasonable distribution, the blame can be apportioned equally on

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

39. The fact that the two motor vehicles collided is not in dispute. There is however no evidence to show or establish how they collided and who was to blame. The sketch map shows that the two motor vehicles were not found on their rightful lanes and were in a position depicting a collision. It is probable, from the sketch map, to infer that the collision occurred off the tarmac at the position where the motor vehicles were found. Given the difficult circumstances of the case, I would agree with the defence and apportion liability equally between both drivers. There is no acceptable evidence upon which the court can conclude that one of the drivers was to blame. Consequently, the 1st defendant is held 50% liable.

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

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

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

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

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

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

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

44. There is no evidence refuting the fact that the 1st defendant was driving motor vehicle registration number KAU 270C/ZE 7049 in the course of his employment with the 2nd defendant. Consequently, I find the 2nd defendant 50% vicariously liable for the negligence of the 1st defendant.

Quantum

45. 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".

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

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

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

    i. An award of damages is not meant to enrich the victim but to compensate such a victim for the injuries suffered;

    ii. The award should be commensurate to the injuries suffered;

    iii. Awards in decided cases are mere guides and each case should be treated on its own facts and merit;

    iv. Where awards in decided cases are to be taken into consideration then the issue of or element of inflation has to be taken into consideration;

    v. Awards should not be inordinately too high or too low.

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

    1. Damages for pain and suffering

       The evidence indicates that the deceased died on the spot or soon after 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. In most authorities, an award of between 10,000/= and 50,000/= was made for persons who died on the spot. Considering the age of most authorities coupled with the vagaries of inflation, I find that an award of Ksh. 80,000/= would be reasonable. I award the same. 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.

2. Damages for loss of expectation of life

The evidence on record indicates that the deceased died at the age of 33 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. On my part, I have considered the authority of Cornelia Elaine Wamba v Shreeji Enterprises Ltd & Others [2012] eKLR wherein the deceased died at the age of 31 years and Ksh. 150,000/= was awarded under this head on 21/9/2012. I award Ksh. 200,000/= under this head.

3. Damages for loss of dependency

49. 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".

50. The plaintiffs listed the widow and two children who were minors as the dependants of the deceased. These are proper dependants under the Act. The deceased died at the age of 33 years. The plaintiffs pleaded and testified that the deceased was a lorry driver earning Ksh. 35,000/= per month. No documentary evidence was adduced to show where the deceased worked and how much he earned. Not even his employer was mentioned in the plaint and testimony. There is no evidence to show that such payment was ever made to the deceased.

51. 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".

52. 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.

53. 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.

54. 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".

55. 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."

56. Being guided by the above Court of Appeal decision, 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. The 1st plaintiff testified that the deceased was a Lorry driver. A copy of his driving licence was produced in evidence. The license shows that he was authorized to drive Lorries, among other cars. The police abstract shows that motor vehicle registration number KCW 176Z was a Mitsubishi FH. That is a lorry. Based on the evidence on record, I have no reason to doubt that the deceased herein was employed as a Lorry driver. The only issue is his earnings.

57. 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 employed as a Lorry driver at the time of his death. However, I will not adopt the earnings of Ksh. 35,000/= 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 September, 2020. The applicable Order then was the Regulation of Wages (General) (Amendment) Order, 2018. According to the Order, the minimum wage for a driver of a medium-sized motor vehicle such as the one the deceased was driving was Ksh. 18,881.21/=. This applied to persons working outside cities and designated former municipalities and town councils. The deceased was from Emali.

58. The deceased had a wife and two children who were minors. 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 plaintiffs have 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 25 years. The award works out as follows:

> 18,881.21 × 12 ×25 × 2/3 = 3,776,242/=

59. It should be remembered that the deceased's earnings were expected to be subject to taxes and other statutory deductions. Consequently, I award Ksh. 3,000,000/= under this head.

Funeral and related Expenses

60. The plaintiffs pleaded for mortuary and funeral expenses of Ksh. 51,000/= under the head of special damages. Receipts amounting to Ksh. 50,500/= were produced in evidence. 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."

61. 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".

62. 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".

63. 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. I am aware of the nature of African funerals and I am sure that more than Ksh. 50,500/= must have been spent during the funeral. The expenses mentioned in the plaint are related to the funeral. I would have awarded a higher figure had the plaintiff properly pleaded the same. However, since the plaintiffs have asked for a specific nominal figure, I will award Ksh. 51,000/= as prayed.

Special Damages

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

    a. Obtaining a grant ad litem.....Ksh. 30,000/=

    b. Motor vehicle search certificate.....Ksh. 1,100/=

65. 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"

66. 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."

67. 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."

68. There is no payment receipt(s) for the letters of administration ad litem. I will thus award Ksh. 1,100/= only as special damages.

Disposition

69. 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. 80,000/=

b. Damages for loss of expectation of life.....Ksh. 200,000/=

c. Damages for loss of dependency.....Ksh. 3,000,000/=

d. Funeral and related expenses.....Ksh. 51,000/=

e. Special damages.....Ksh. 1,100/=

Total.....Ksh.3,332,100/=

Less 50% contribution.....Ksh. 1,666,050/=

Balance due to the plaintiffs.....Ksh. 1,666,050/=

70. The plaintiffs are also awarded interest on the damages as well as HALF the 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."

71. 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.

72. 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."

73. 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)

74. 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).

75. 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 24TH DAY OF MARCH, 2026.

Y.A. SHIKANDA

SENIOR PRINCIPAL MAGISTRATE.