Elease Limited v Kithaka & Kithaka (Suing as Administrators of the Estate of the Late Timothy Mwaniki Kithaka) & another (Civil Appeal E156 of 2023) [2025] KEHC 14428 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 14428 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL E156 OF 2023

NIO ADAGI, J

MARCH 10, 2025

BETWEEN

ELEASE LIMITED ..... APPELLANT

AND

PAULINO KITHAKA & JACKLINE MWENDE KITHAKA (SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE TIMOTHY MWANIKI KITHAKA) ..... 1ST RESPONDENT

LIQUID TELECOM ..... 2ND RESPONDENT

(Being an Appeal from the Judgment of Hon. B. Ojoo (CM) in Mavoko MCCC. No. E228 of 2021delivered on 31/5/2023)

JUDGMENT

Brief Facts

1. The Respondents (Plaintiffs before the trial court) instituted a suit as the legal Administrators of the Estate of the late Timothy Mwaniki Kithaka (deceased) vide a Plaint dated 07/4/2021 for damages, costs and interest for fatal injuries sustained in a motor vehicle accident that occurred on 26/11/2019.

2. The Respondents averred that on 26/11/2019, the deceased was lawfully and carefully crossing Nairobi-Mombasa Highway within Mlolongo at a pedestrian point, when motor vehicle registration number KCN XXXX was so recklessly and carelessly driven, controlled and/or managed that the same was allowed to knock down the deceased and the result was fatal as the deceased succumbed to the injuries.

3. By an Amended Statement of Defence dated 06/09/2021, the Appellant (Defendant before the trial court) denied the Claim and pleaded contributory negligence against the deceased.

4. The matter proceeded for hearing.

5. Upon considering the parties pleadings, evidence and submissions, the Trial Court entered judgement in favour of the Respondents and against the Appellant in the following terms;

    a. Liability 70:30 in favor of the plaintiff against the defendant

    b. Pain and suffering Ksh.200,000.00/ =

    c. Loss of expectation of life Ksh.200,000.00/ =

    d. Loss of dependency Ksh.3,000,000.00/ =

    e. Special damages Ksh.117,420.00/ =

    f. Total Ksh.3,517,420.00/=

    g. Less 30% contribution

    Total award Ksh.2,462, 194.00/ =

6. The Appellant being aggrieved by the whole of the said judgment lodged this appeal raising 9 grounds of appeal basically challenging liability and quantum.

7. The appeal was canvassed through written submissions. The Appellant's submissions are dated 26/4/2024 whilst the Respondents submissions are dated 14/10/2024.

Appellant's Submissions

8. On the issue of liability, the Appellant submitted that, in her testimony, DWI, Jackline Mwende stated that the deceased was crossing the road at Nairobi-Mombasa Road when he was knocked down.

9. The investigation report produced by the Appellant indicated at page 3 of the said report that 120 meters from the scene of the accident was a pedestrian crossing from which the deceased and PW2 would have crossed the road. The said report at page 11 further indicated that no charges had been preferred against the driver of KCN XXXX in relation to the said accident.

10. Notably, there was no zebra crossing or indication to show that the area was a legally designated crossing path for pedestrians. From the DWI testimony, it was clear that the deceased crossed and/or attempted to cross at an undesignated place where there was no zebra crossing.

11. The deceased, being a pedestrian, owed a duty of care to himself and other road users for ensuring the road was clear before crossing the road, a duty which he breached.

12. The Appellant reiterated the position on page 157, paragraph 20 of the record of appeal wherein the trial magistrate, while quoting the case in Zarina Akbarali Shariff &another vs Noshir Pirosesha Senthna & Others (1963) opined that:

> " it is expected that Pedestrians would exercise precaution while crossing or walking on the road. "

13. That it is evident that there were no negligent actions and or commissions attributable to the Appellant. If anything, the Respondent could not pin point any evidence to support their averments that the Appellant was driving at an excessive speed, negligent or any other allegations as in the plaint.

14. From the foregoing, the Appellant invited this court to find that the trial magistrate erred in apportioning liability at 70:30 against the Appellant. In the circumstance, such apportionment is too high noting that the deceased disregarded his own safety and causing the said accident.

15. The Appellant invited the court to be guided by the case of Machira Joseph & 2 others v Hannah Wangui Makumi & another (2021] eKLR where the court stated:

> " As a first appellate court, this court's role is to subject the whole of the evidence to afresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 12."

16. The Appellant further submitted that there was no prima facie case established by the 1st Respondent to warrant her attribute the alleged acts of negligence to the Appellant.

17. The Appellant referred to the decision of the court in Midans Services Limited & another v Ronald Kapute (2022) eKLR quoting the case of Gideon Ndungu Nguribu & another v Michael Njagi Karimi (2017) eKLR where the Court of Appeal stated that:

> " Determination of liability in a road traffic case is not a scientific affair"
>
> and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) C 1953] A.C. 663 at p. 681 as follows:
>
> > "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a Properly instructed and reasonable jury would decide it

18. The Appellant stated that it is from this premise that the Respondent failed to prove that the Appellant was to blame for the accident.

19. On the issue of quantum, the Appellant submitted that general damages are arrived at as a matter of discretion as was held by the Court in the case of Kimaru Maina vs Boniface Onyango Aliwa (2021) eKLR. This discretion must be exercised judiciously.

20. The Appellant cited the case of Taita Taveta University College v Rugut & Maritim (Suing on their own behalf and as the administrators of the estate of the late Cosmas Kipserem Kipkoech) (Civil Appeal E009 of 2021) KEHC 12772 (KLR) where the Court stated:

> " Award of damages is an exercise of discretion of the trial court but the same should be within limits set out in decided case law and must not be inordinately so low or so high as to reflect an erroneous figure. The award must also take into account the Prevailing economic environment."

21. The court goes on further to state:

> " Some of the uncertainties or questions asked are;
>
> a. For long would the deceased have continued to live if he had not met this particular accident?

b. For much working life did he have? This second question brings into focus the deceased's state of health and age.

c. Some of the uncertainties taken into account in rolling down the amount are: the deceased may not have been successful in business in the future as he had been in the past. He might have been taken ill and become bedridden and thus incapable of earning income. Where plaintiff are young widows, the possibility of re-marriage in the shortest possible time."

22. The Appellant cited the Ghanian case of Mensah v Amakom Sawmill, Apaloo, J. (as he then was) articulated how difficult the subject of assessment of damages is and turned to the judgment of Lord Wright in Davies v Powell Duffryn Associated Collieries Limited for support. This case is regarded as a pointer to the practical way in which assessment of damages should be ascertained. Lord Wright said: -

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

Pain and suffering

23. On pain and suffering, the Appellant invited the court to be guided by the case of Mwihaki (Suing as the personal representative of the Estate of Brian Ngure Ndung'u (Deceased) v Lengete (Civil Appeal E071 of 2022) (2023) KEHC 26603 (KLR) (8 December 2023) (Judgment) where the court awarded the Respondent Ksh.20,000 for pain and suffering. The court stated:

> " Based on the above authority very minimal damages are awarded if the death followed immediately after the incident. In the instant case the trial court took into consideration that fact. Considering that I have been invited to exercise my discretion, in the circumstances I am not persuaded that the trial court erred in awarding Kshs.20,000/= for pain and suffering as the deceased died 9 hours after the accident. "

24. It was the Appellant's submission that the award of Ksh.200,000/ = for pain and suffering as awarded by the trial court is excessively high and the same be substituted with Ksh.50,000/=

Loss of expectation of life

25. On the award of Loss of expectation, the Appellant invited the court to be guided by the decision in Philip Kiprotich Kimeto & another v Tomas Raisi Matayo & Kennedy Bahati Matayo (Both Suing as Legal Representatives of the Estate of Fred Morara Nyarudi (Deceased) (2021) eKLR in which the court held that:

> " The trial court's award of Ksh.100, 000/=for loss of expectation of life was thus conventional and Proper. "

26. The Appellant submitted that the trial court's departure from the conventional award, was erroneous and therefore, invited the court to assess the award for loss of expectation of life at Ksh.100,000/=.

Loss of Dependency

27. The 1st Respondent averred that the deceased died at the age of 37 years and was a father to a 7-year-old son.

28. Save for the age of the deceased at the point of his death and the date of death, there is no cogent evidence of income of the deceased person. In view of the foregoing, the Appellant invited the court to find that there is no evidence of income and the court is free to resort to the minimum wage.

29. Reliance is placed on the case of Veronica Nduta Maina & Another (suing as the personal representatives of the estate of Paul Maina Mungai (deceased) v Hobra Manufacturing Co. Ltd (2021] eKLR where the court of appeal held:

> " the trial court also in the absence of Proof of earnings rightly considered the minimum wage regulations. The appeal on quantum is disproved and is rejected."

30. Consequently, the Appellant relied on the basic wage set out in the Regulation of Wages (General) (Amendment) Order for 2018 which cites the minimum wage at Ksh.7,240.95. They invited the court to adopt the same as the multiplicand.

31. The Appellant cited the case of Mary Ambeva Kadiri suing as the administrators of estate of Saleh Juma Kadiri (Deceased) v Country Motor Limited [2017] eKLR where the court reiterated the position in Board of Governors of Kangubiri Girls School & Another vs Jane Wanjiku & Another (2014) eKLR where the court held that:

> " The choice of a multiplier is a matter of court's discretion which discretion has to be exercised judiciously within reason.

32 The Appellant also relied on the case of Jane Wangui Kamau and 2 Others v Alice Atandi & Another (2004) eKLR and Lawrence Theuri Mwangi (Suing as the personal representative of the estate of the late Benson Mwangi Theuri(Deceased) v Thomas Mutunga Musau t/a Tenoji Motors Ltd & Another [2019) eKLR, Mildred Aori Odunga vs. Hussein Daisy Limited (2010) eKLR, and prayed that a multiplier of 12 years be adopted.

33. The Appellant invited the court to assess the dependency ratio at 1/3 as per Section 4 (1) of the *Fatal Accidents Act* and Section 3 of the *Law Reform Act* and submit that loss of dependency be calculated as follows;

Multiplier x multiplicand x annual income x dependency ratio

24 x7240.95 x12 x

1/3=Ksh.695,131.20

Special damages

34. On special damages, the Appellant submitted that the principal is that they must be pleaded and proved. The trial court awarded the 1st Respondent Kshs.117,420.00. Lord Goddard C.J in Bonham Carter vs Hyde Park Ltd C 1948] 64 TLR 177 opined that:

> " ... Plaintiff must understand that if they bring actions for damages, it is not enough to write particulars and so to speak, throw them at the court, saying this is what I have lost, I ask you to give these damages, they have to be proved."

35. The Appellant submitted that of the documents filed, only the payment of motor vehicle search and costs of ad litem has met the threshold of proof as per the *Stamp Duty Act*, Cap 48 Laws of Kenya as read with section 12 of the VAT Act, and Regulation 4(1) which makes it the mandatory requirement that ETR Receipts should be attached to invoices for the same top be proved as paid.

36. Consequently, they submitted that only the amount of Ksh.65,945.00 being proof of special damages has been proved to the threshold set out in statute and the above-cited precedent.

37. The Appellant submitted that the Respondents failed to prove negligence on the part of the Appellant and this court finds the appeal merited.

38. However, should this Court be inclined to find otherwise, and based on their submissions, they invited the court to find as follows;

    i. Liability be apportioned at a ratio of 50:50

    ii. The 1st Respondent is only eligible for special damages of Ksh.65,945

    iii. The 1st Respondent be awarded Ksh.50,000 for pain and suffering

    iv. The 1st Respondent be awarded Ksh.100,000 for loss of expectation of life;

    v. The 1st Respondent is only eligible to Ksh.695, 131.20 for the award of loss of dependency;

    Total award=sh.911,076.20

    Less 50% = 455,539.10

39. In concussion, the Appellant prayed that the appeal be allowed.

Respondents' Submissions

40. On the issue of liability, the 1st Respondent submitted that when the matter came before the learned magistrate for hearing three (3) witnesses were called being PW1, PW2 and PW3, in support of the 1st Respondent case on the occurrence and circumstance of the accident.

41. In his testimony before court the 1st Respondent (PW1) confirmed the following on oath;That on 26/11/2019 she received a call from her cousin informing her that her brother (the deceased) was involved in a road traffic accident while crossing Mombasa Road at a usual pedestrian crossing point at Mlolongo and had been rushed to Athi River Shalom Community Hospital for treatment.That she rushed to hospital and found the deceased undergoing treatment after which the deceased was transferred to Machakos Level 5 Hospital where he was admitted and unfortunately succumbed to the injuries.That she later went to the Police station where the accident was reported and was issued with a police abstract.That they organized for the burial of the deceased which cost them Kshs.200,000.That the deceased was aged 37 years old at the time of his death and worked as a businessman selling vehicle

appliances and used to earn Kshs.1000 per day with which he used to provide for his family, pay school fees for his son and financially assist his elderly parents.She blamed the driver of motor vehicle registration number KCN XXXX for carelessly and recklessly driving the said vehicle and causing the death of the deceased.

42. In his testimony before court PW2 (Mr. Mike Macharia) testified and confirmed the following on oath;That indeed on 26/11/2019, the deceased was involved in a fatal road traffic accident while crossing Mombasa Road at a usual pedestrian crossing point at Mlolongo.That the accident occurred along Mombasa Road at a usual pedestrian crossing point at Mlolongo when motor vehicle registration number KCN XXXX which approached at such a high speed, failed to stop /slow down to give the deceased ample time to cross the road thereby knocking him down.He blamed the driver of motor vehicle registration number KCN XXXX for carelessly and recklessly driving the said vehicle and causing the death of the deceased.

43. In his testimony before court PW3 (Traffic Police officer) testified and confirmed the following on oath;

> That indeed there was a road traffic accident on 26/11/2019, involving the deceased (pedestrian) and motor vehicle KCN XXXX driven by the Appellant's driver, agent and/or servant.

44. The 1st Respondent submitted that on the other side, the defence called one (1) witness being DW1 who testified before court. In his testimony DW1 confirmed the following before court;

• He confirmed that indeed the subject accident occurred on 26/11/2019.

• He confirmed that he did not have a licence for the year the investigation report was made and further, he had not availed any proof of authorization from the investigating agency to produce the said report.

45. The 1st Respondent submitted that, from the above testimonies both from the 1st Respondent side and from the Appellant's side the following facts are not in conflict.That indeed there was a road traffic accident on 26/11/2019 involving the deceased (pedestrian) and the Appellant's motor vehicle.That the Appellant's driver failed to slow down/stop and permitted his driven vehicle KCN XXXX to knock down the deceased and the result was fatal.

46. The 1st Respondent further submitted that, on the foregoing regard, it is crystal clear that the Appellant's driver was carelessly and recklessly driving the said motor vehicle.

47. That the Appellant's driver had a chance of slowing down/braking/stopping the vehicle to avert the accident but he failed to do so and instead speedily and without due care and attention sped off and knocked down the deceased at a usual pedestrian crossing point.

48. The same was in total violation of the traffic rules and as such the Respondents find no error in the learned trial magistrate's decision holding the Appellant to blame for the accident. They further find no reason to blame the deceased (pedestrian) herein, as he was crossing the road at a usual pedestrian crossing point.

49. The 1st Respondent cited Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that;

> " Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

50. This is called the legal burden of proof. There is however evidential burden of proof which is captured in Sections 109 of the same Act as follows:

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

51. The 1st Respondent relied on the case of Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, in which the Court of Appeal held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

52. It was the 1st Respondent submission that they had proven their case on a balance of probability and the evidence before court is that the Appellant is wholly liable for the subject accident.

53. On the issue of quantum, the 1st Respondent submitted that the trial court awarded the Respondents Kshs.3,400,000/= as general damages for pain and suffering, and Kshs.117,420/= as special damages, less 30% contribution. It is not in dispute that the Respondent suffered fatal injuries as per the filed Plaint. The particulars of injuries in the Plaint were supported by police abstract and death certificate produced by before the learned trial magistrate.

54. In the 1st Respondent's submissions before the trial court the 1st Respondent suggested an award of:

a. Kshs.600,000 for pain and suffering, the deceased having passed on 28 days after the accident. The Respondent relied on the following authority;

   Authority of Hon. Janet Mulwa, in the case of Stella Nasimiyu Wangila & Another v Raphael Oduro Wanyamah [2016] eKLR, Civil Suit 186 of 2011, where court awarded Kshs. 500,000/ =under this head for a deceased aged 38 years at the time of death.

b. Kshs.500,000 for Loss of expectation of life and relied on the following authority;

   Authority of Hon. Janet Mulwa, in the case of Stella Nasimiyu Wangila & another v Raphael Oduro Wanyamah [2016] eKLR, Civil Suit 186 of 2011, where court awarded Kshs.500,000/ =under this head for a deceased aged 38 years at the time of death.

c) Compensation for Loss of Dependency and relied on the following authorities;

   Civil Appeal No. 167 of 2002 Jacob Ayiga Maruja & Another V Simeon Obayo [2005] eKLR where the Court of Appeal held as that: "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".

55. Here the Respondent persuaded court to adopt Ksh.30,000 as the deceased monthly income as per his testimony.

Mwita Nyamohanga & Another V Mary Robi Moherai Suing On Behalf Of The Estate Of Joseph Tagare Mwita (Deceased) & Another [2015], where Hon. Justice Majanja held that:

> " As concerns the Estate of Stephen Nyamohanga, the learned magistrate relied on the Regulation of Wages (General Amendment) Order to determine the multiplicand. In my view, this was an error as the deceased's wife testified that he earned Kshs.9,000/= per month. The learned magistrate in relied on the case of Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita and Another Kisii Civil Appeal No. 68 of 2005 [2011] eKLR where Asike-Makhandia J, stated, "In absence of proof of income, the Trial Magistrate ought to have reverted to Regulation of Wages (General Amendment) Order, 2005 ...." [Emphasis mine] I agree with this statement of principle but in the case under consideration there was proof of income by way of the deceased's wife testimony which was sufficient to prove income hence there was no need to fall back to the Regulation of Wages Order."
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> Here the Respondent urged court to fall back to the regulation of Wages order in the alternative, if it found that proof of income was not sufficiently proved.
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> In Violet Jeptum Rahedi v Albert Kubai Mbogori (2013), Civil Suit No. 676 of 2009, the court noted that employment in the private business cannot be limited by the formal retirement age.

56. The 1st Respondent urged this court to find that considering that the deceased herein was in private business, the deceased would have continued working up to the age of 65 years. In this regard, the Respondent proposed a multiplier of 26 for lost years as fair and reasonable.

57. In further reliance on paragraph 30 of the foregoing case, the 1st Respondent urged the court to adopt a dependency ratio of 2/3 following that the deceased took care of his son and elderly parents.

58. The 1st Relied on the case of Mutua Kaluku v Muthini Kiluto [2018], Civil Appeal 180 of 2008, Hon. Justice P. Nyamweya while upholding the judgment of the trial court he stated that;

> " I am guided by the legal principles that apply to an award of damages in such circumstances, which are that a sum should be awarded which is in its nature of a conventional award, in the sense that awards for comparable injuries should be comparable, and the amount of the award is influenced by the amounts of awards in previous cases in which the injuries appear to have been comparable, and is adjusted in light of the fall in the value of money since such awards were made. See in this regard Kemp & Kemp on The Quantum of Damages, Volume 1 paragraphs 1-003. In my view to be comparable, the previous cases must have been made at the time or close to the time the injuries were suffered by a claimant, hence the provision for adjustment."
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> Further In Civil Appeal 132 of 2012, Peter Namu Njeru v Philemone Mwagoti [2016] eKLR, Hon. Justice P.J.O. Otieno stated that;
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> > "In order for an appellate court to interfere with an exercise in discretion by a trial court in assessing damages, it must be demonstrated that the award was inordinately too high or too low as to present an entirety erroneous estimate of compensation to which the respondent was entitle or that the court took into account irrelevant factors or failed to take into account relevant factors and that the exercise of discretion was wholly injudicious not expected of a reasonable adjudicator".

He further stated that; "This court takes notice that no two cases are of precise similar injuries hence the decided cases are merely but a guide as much as they would be of binging nature on the trial court being a subordinate court. However, the duty to assess damages remains a discretionary factor and there must be a clear and demonstrable show that there was an error to invite interference by an appellate court".

59. The 1st Respondent submitted that, it is clear from the above analysis, available evidence and cited authorities that the learned trial magistrate did not err in any law or principle in making awards in this head and the said awards cannot be termed as inordinately high as to present an entirety erroneous estimate of compensation to which the respondent was entitled. The learned trial magistrate had considered all the relevant factor, including the injuries sustained by the respondent, relevancy of the cited legal authorities and the settled principles on the award of damages and monetary inflation trend of the Kenyan currency.

60. In the upshot, the 1st Respondent urged this court to dismiss the Appellant's appeal as the same is not sustainable and uphold the learned trial magistrate's decision as the same remains sacrosanct and takes its way.

Analysis and determination

61. This being a first appeal, the duty of this court is as re- stated in the case of Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR, where it was held in part that:-

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

62. I have perused the Record of Appeal, considered and weighed the evidence that was adduced and rival submissions on the appeal and I now proceed to determine the appeal herein.

63. The issues for determination in this appeal are as follows:

> Whether the trial learned magistrate applied the correct principles of law and available facts in apportioning liability.
>
> Whether the learned trial magistrate applied the correct principles of law and available facts in assessment on damages payable to the Respondent.

Determination on liability

64. The claim herein being an action for negligence, like in all civil litigation, the burden is always on the Claimant to prove that the Respondent was negligent.

65. I have considered the record and at paragraph 7 of the Amended Statement of Defence, the Appellant pleaded and contended that the accident was caused solely or substantially contributed to by the deceased and the particulars are set out thereof. The Appellant also denied the claim for the reasons that it is the deceased who was inattentively crossing the road at undesignated crossing area for pedestrians without taking any reasonable steps or measure to ensure his safety.

66. PW2 testified that indeed on 26/11/2019, the deceased was involved in a fatal road traffic accident while crossing Mombasa Road at a usual pedestrian crossing point at Mlolongo. That the accident occurred along Mombasa Road at a usual pedestrian crossing point at Mlolongo when motor vehicle registration number KCN XXXX which approached at such a high speed, failed to stop /slow down to give the deceased ample time to cross the road thereby knocking him down. He blamed the driver of motor vehicle registration number KCN XXXX for carelessly and recklessly driving the said vehicle and causing the death of the deceased.

67. DW1 testified stating how the accident occurred and the element of contributory negligence clearly comes out.

68. In the case of Wayne Ann Holdings Limited (T/a Superplus Food Stores) v Sandra Morgan, the Court held as follows:

> " In this case contributory negligence was raised as a defence. When such a defence [sic] is raised, it is only necessary for a defendant to show a want of care on the part of the claimant for his own safety in contributing to his injury. In Nance v British Columbia Electric Rly [1951] AC 601, at page 611, Lord Simon said:
>
> > ".....When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full."

69. On whether the deceased is liable for contributory negligence. The law on contributory negligence is to apportion proximate cause and blameworthiness where appropriate. In De Frias v Rodney 1998 BDA LR 15 it was held as follows:

> " Contributory negligence required the foreseeability harm to oneself. A person is guilty of contributory negligence, if she ought reasonably to have foreseen that if she did not act as a reasonable prudence person she might be hush and in reckoning must take into account the possibility of others being careless. All that is required here is that the plaintiff should have failed to take reasonable care for her own safety. I do not find that the plaintiffs conduct was in any way contributory negligence. In the agony of the circumstances, she made an unsuccessful attempt to avoid the collusion."

70. What the above principle attempts to explain is that the negligence calculus is a framework for a trial court faced with such situational analysis to decide what precautions the reasonable person would have taken to avoid the harm. The classic definition of negligence given by Alderson B in Blyth vs Birmingham Waterworks Co. [1843 – 60] ALL ER 478

> " Negligence is the omission to do something which a reasonable man, guided upon those considerations with ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

71. In my view negligence and contributory negligence comes in infinite forms and would therefore depend on a case-to-case basis. Furthermore, once the Plaintiff has established a prima facie case showing the Defendant is guilty of negligence the onus to discharge that burden in rebuttal rests with the defendant.

72. In the instant case the Defendant/Appellant pleaded and contended that the claim was denied for the reasons that the Appellant who was inattentively crossing the road at undesignated crossing area for pedestrians without taking any reasonable steps or measure to ensure his safety. The Appellant also testified stating how the accident occurred and the element of contributory negligence clearly comes out.

73. Pursuant to the foregoing, this court does not find any reason to disturb the finding of the trial court on contributory negligence at 70% against the Appellant and 30% against the Deceased.

Determination on quantum

74. The fact of the matter of assessment of damages is purely at the discretion of the trial court of facts. The idea that an appellate Court would fundamentally differ with the trial Court is neither here nor there. That is the attention of the principle in Loice Kagunda v Julius Gachau Mwangi CA 142 OF 2003 the Court of Appeal held that:-

> " We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence a appellate Court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons make a wholly erroneous estimate of the damages suffered. The question is not what the appellate Court would award but whether the lower Court acted on the wrong principles." (See Mariga v Musila {1984} KLR 257).

75. Under the *Law Reform Act*, the Respondent adduced evidence that the deceased was aged 37 years old and had a young child aged 7 years. That he was in good health and provided for his family physically, emotionally and materially. According to PW1, the family has been robbed of a central pillar and the deceased's child has lost the opportunity to enjoy nurture by his father. That barring the oddities in life, the deceased still had many more productive years.

I. For pain and suffering

76. Pain and suffering is an award meant to compensate for pain endured by a person before death. On pain and suffering, the trial court awarded Kshs.200,000/=. The Respondent proposed Kshs.600,000/= whilst the Appellant proposed Kshs.50,000/=. There is no dispute that the accident occurred on 26/11/2019 and the deceased died on 14/12/2019 about 28 days after which was a prolonged period and must have endured immense pain.

77. I will therefore not disturb the trial court's finding under this head.

78. I am persuaded by the finding in the case of Mercy Muriuki & Another vs Samuel Mwangi Nduati & Another (suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR where Muchemi J. stated: -

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Kshs.100,000 while for pain and suffering

the awards range from Kshs.10,000 to Kshs.100,000 with higher damages being awarded if the pain and suffering was prolonged before death".

II. Loss of expectation of life

79. The Respondent trial court awarded Kshs.200,000/= under this head and relied on the case of Moses Akumba & Another v Hellen Karisa Thoya (2017) eKLR where the court held that an award of Kshs.200,000/= for loss expectation of life for a deceased who was a fisherman was not inordinately high, in the cases of Patrick Kariuki Muiruri & 3 Others v AG (2018) eKLR the court made an award of Kshs.200,000/= under this head and in Vincent Kipkorir Tanui (Suing as the personal Representative of the Estate of SKT(Deceased) v Mogogosiek Tea Factory Co. Ltd & Anor (2018) eKLR an award of Kshs.200,000/= was made.

80. I have considered the authorities that were relied upon by the trial court under this head and I find them to be applicable and persuasive to the instant case. Similarly, I will uphold the award of Kshs.200,000/= under this head.

III. Loss of dependency

81. Under the Fatal Accident Act, the deceased was aged 37 years old and had a young child aged 7 years. That he was in good health and provided for his family physically, emotionally and materially. According to PW1, the family has been robbed of a central pillar and the deceased's child has lost the opportunity to enjoy nurture by his father. That barring the oddities in life, the deceased still had many more productive years. The Respondents' counsel submitted that the deceased would have worked up to the age of 65 years and longer noting he was working in a private setting.

    They relied on the case of Melbrimoinvestment Company Ltd vs Dinah Kemonto & Anor (2022) eKLR.

82. The 1st Respondent submitted that the deceased was aged 37 years old and was a businessman making Kshs.30,000/= per month though no document was adduced to support the claim. That he would have worked up to the age of 65 years. The 1st Respondent relied on a multiplicand of Ksh.30,000/= and a multiplier of 26. It was thus proposed that loss of dependency should be calculated as follows:

    Kshs.30,000 x 26 x12 x 2/3 = Ksh.6,240,000/=.

83. On the other hand, the Appellant placed reliance on *Labour Institutions Act* Regulation Wages (General) (Amendment) Order, 2018 which provided for monthly minimum wage for general labour outside the municipalities as Ksh.7,240.95. It was thus proposed that loss of dependency should be calculated as follows:

    Kshs.7,240.95 x 13 x 12 x 1/3 =Ksh.376,529.40

84. The Appellant further submitted that in view of the passage of time on the precedent they had cited, the evidence on record and taking into account considerations of vastitudes of life and inflation, Kshs.426,529,40. Would be commensurate and substantive compensation.

85. I note that the Appellant did not show how he arrived at the proposed award of Kshs.426,529.40 as loss of dependency. It is my view that the same was misplaced and unsubstantiated.

86. The Appellant proposed a dependency ratio of 2/3. On multiplicand, the Appellant proposed Kshs.7,240.95 as per the Regulation of Wages (General) (Amendment) Order 2018 for a general laborer. On multiplier, the Appellant submitted there was no evidence to show the deceased was in good health. They therefore proposed 20 years taking into account the uncertainties of life relying on

the case of Mariera vs Nzuki & Anor (2021) KEHC and Haji Ashraf & Anor vs Sidi Masha Kalama & Another (2021) eKLR.

87. On this head of damages, the trial magistrate stated that as regards assessment of loss of dependency where proof of earning is non-existent the emerging jurisprudence is as was illustrated in the Court of Appeal decision of Jacob Ayiga v Simon Oboyo (2005) eKLR where the court stated as follows:

> " We do not subscribe to the view that the only way to prove the profession of a person must be by 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 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. In this case, the evidence of the Respondent and the widow coupled with the production of school reports was sufficient material to amount to strict proof for the damages claimed"

88. The trial magistrate also cited the case of Joseph Mwangi Wanyeki v Alex Muriithi Muchoki & Anor (2019) eKLR where R. Nyakundi enunciated the principle thus:

> " The mere fact that the deceased earnings from farming activities and boda boda business was not supported by actual receipts and other accountable documents does not mean it is a speculative compound as an estimate of the loss suffered by virtue of his death. I do not subscribe to the narrative that an approach on assessment on damages on loss of dependency is a question of mathematical precision."

89. Therefore, in determining the loss of dependency, lack of proof of deceased's earning is not fatal to the claim as the court has discretion to apply the above principles to base such calculations on global sum approach to award what is appropriate. Needless to add that assessment of damages is a discretionary judicial function within the laid down settled principles. The court remaining faithful to the doctrine of stare decis, the assessed amount need only be reasonable in the circumstances of the case. In this case, the Plaintiff's evidence that the deceased supported his family was not controverted. On the other hand, the 1st Plaintiff's claim that the deceased supported her and their father, 2nd Plaintiff, was outrightly unsupported. The Plaintiff would have adduced such evidence such as documents like Mpesa statement to make the claim believable. All the same, in an African set up, children as expected to take care of their old or aging parents and younger siblings by providing for them materially from time to time. That would have been the likely scenario here. In the upshot, the trial magistrate observed that this was a fit case to apply the global sum approach. Doing the best she could and considering all factors, she found that an award of Kshs.3,000,000/= for loss of dependency would suffice.

90. I have considered the trial court's judgment under the head of loss of dependency. The court applied the global approach and awarded a figure of Kshs.3,000,000/= but did not elaborate on the global approach. She did not give any multiplicand or cite any cases that guided her in reaching the finding save for the authorities she cited which basically dealt with instances where no proof of earning was available at all. The trial court's finding on loss of dependency was therefore erroneous estimate of compensation and has to be disturbed

91. On the above award this court is guided by the principles applicable to an assessment of damages under the *Fatal Accidents Act* which were enunciated in the case of Odera v Adoyo & another (Suing as the Legal Representatives of the Estate of Vincent Ochieng Adoyo - Deceased) (Civil Appeal 13 of 2020) [2023] KEHC 17962 (KLR) (30 May 2023) (Judgment) which referred to the case of Richard Matheka

Musvoka & another v Susan Aoko & (suing as the administrators ad litem of Joseph Onyango Owiti (Deceased)) (2016) eKLR where J. Ringera stated as follows:-

> " The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants."

92. Dependency is a matter of fact and must be proved by evidence as was held in Abdalla Rubeya Hemed Vs Kayuma Mvurya & Another [2017] eKLR as follows:-

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

93. I find that the dependency ratio of 1/3 is reasonable considering that the deceased died at the age of 37 years and was not married although he left behind a young child of tender age and elderly parents who relied on him for care. The Respondent submitted that the deceased was a businessman making Kshs.30,000/= per month though no document was adduced to support the claim. I will thus adopt a multiplicand of Ksh.30,000/= per month. I am guided by the case of Mwita Nyamohanga & Another V Mary Robi Moherai Suing on Behalf of The Estate of Joseph Tagare Mwita (Deceased) & Another [2015], where Hon. Justice Majanja (as he then was) held that:

> " As concerns the estate of Stephen Nyamohanga, the learned magistrate relied on the Regulation of Wages (General Amendment) Order to determine the multiplicand. In my view, this was an error as the deceased's wife testified that he earned Kshs.9,000/= per month.

94. The multiplier is the number of years that the deceased would have gainfully income earning engagement. The deceased was engaged in private business would have been expected to be so engaged up to the age of about 65 years. In this case, I find it prudent to apply a multiplier of 23 years.

95. This court is inclined to disturb the trial court's award under this head by adopting a multiplier of 23 years as opposed to the trial court's blanket award of Kshs.3,000,000/= as follows;

Kshs.30,000 x 12 x 23 x 1/3=Kshs.2,760,000.00

96. As regards the award special damages, the trial court awarded Kshs.117,420/= which amount was pleaded and proven by receipts in the same amount. These include:

a. Motor vehicle Search Ksh. 500.00

b. Letters of Administration Ad Litem Ksh. 15,000.00

c. Hospital and Funeral expenses Ksh.100,195.00

Total Ksh.117,500.00

97. The trial magistrate stated that, Advocate fees and hospital expenses, the Respondent adduced receipts. For funeral expenses, PW1 admitted that they did not have all the receipts. However, it is not disputed

that the deceased was buried. In deed, in spite of lack of receipts, this court ought not to turn a bling eye to the fact that there were funeral costs incurred as a result of the burial of the deceased and the magistrate cited the case of Estate of MMM (Deceased) v Chairman Board of Governors [xxx] Boys High School (2018) eKLR. The question rather was whether the amount claimed was reasonable which the magistrate was of the considered opinion was just and reasonable for burial expenses.

98. On special damages, the Appellant relied on the case of Bonham Carter (supra) and submitted that of the documents filed by the Respondent, only the payment of motor vehicle search and costs of ad litem has met the threshold of proof as per the *Stamp Duty Act*, Cap 48 Laws of Kenya as read with section 12 of the VAT Act, and Regulation 4(1) which makes it the mandatory requirement that ETR Receipts should be attached to invoices for the same top be proved as paid.

100. Consequently, they submitted that only the amount of Ksh.65,945.00 being proof of special damages had been proved to the threshold set out in statute and the above-cited precedent.

101. I have perused the record and just as the trial magistrate, I am persuaded that the Plaintiff proved the special damages as pleaded. Further, on the funeral expenses, it is my view that the amount of Ksh.117,420/= was just and reasonable. I will not disturb this award. However, it is my finding that the special damages are not subject to contribution. I agree with the holding of the court in Hashim Mohamed Said & another v Lawrence Kibor Tuwei [2018] eKLR where the court stated that special damages should not be subjected to the apportionment.

102. Accordingly, for the reasons set out above, the appeal herein is allowed in terms as follows:

a. Liability 70%: 30% in favour of the Respondent is upheld.

b. The award of Ksh.200,000/- for pain and suffering is upheld.

c. The award of Kshs.200,000/= for loss of expectation of life is upheld.

d. The award of Ksh.3,000,000/- for dependency under the *Fatal Accidents Act* is set aside and substituted with an award of Kshs.2,760,000/=

e. The total award under orders b, c and d above is subject to 30% contribution (200,000 + 200,000 + 2,760,000 =3,160,000) – 948,000)

Total - Kshs.2,212,000

f. The award of Special Damages is Ksh.117,420/= is upheld and shall not be subjected to apportionment.

g. Since the Appellant has succeeded partially, each party shall bear own costs of the appeal.

h. The Appellant shall have half the costs of this appeal.

i. The Appellant shall have half the costs of the appeal.

j. Stay of execution granted for Thirty (30) Days.

Order accordingly.

JUDGMENT WRITTEN, SIGNED & DATED AT MACHAKOS THIS 10TH MARCH 2025

NOEL I. ADAGI

JUDGE

DELIVERED VIRTUALLY ON TEAMS AT MACHAKOS THIS 10TH MARCH 2025

In the presence of:

.....for Appellant

.....for Respondent

.....Court Assistant