REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

APPELLATE SIDE

CIVIL APPEAL NO. 69 OF 2016

MAYFAIR HOLDINGS LIMITED.....APPELLANT

-VERSUS-

CHRISTINE RUTTO (suing on her own behalf and on behalf of the dependants of

the estate of CHRISTOPHER KIBITOK, Deceased).....RESPONDENT

(Being an appeal from the Judgment and Decree in Kapsabet PMCC No. 5 of 2015 delivered on 5 April 2016 by Hon. E.A. Obina, SRM)

JUDGMENT

[1] The respondent, **Christine Rutto**, filed the lower court suit, being **Kapsabet Principal Magistrate's Civil Case No. 5 of 2015,** on her own behalf and on behalf of the depedants of the estate of her late father, **Christopher Kibitok**, (the deceased). She sued the appellant, **Mayfair Holdings Limited**, for general and special damages, interest and costs in respect of the injuries sustained by the deceased on **16 December 2013,** from which the deceased succumbed on **25 December 2013.**

[2] According to the respondent, the deceased was lawfully walking on the left side of the Kabsabet-Kobujoi road at A.I.C Chebisaas area when the appellant's driver, servant or agent so negligently managed, controlled and/or drove **Motor Vehicle Registration No. KBU 496X, Hyundai Lorry,** that it lost control, veered off the road and violently hit the deceased; thereby occasioning him fatal injuries. Thus, the lower court suit was filed by the respondent for compensation pursuant to the **Law Reform Act, Chapter 26** of the **Laws of Kenya** and the **Fatal Accidents Act, Chapter 32** of the **Laws of Kenya**. Particulars of the dependants and of special damages were duly supplied by the respondent at paragraphs 8 and 10 of the Plaint dated **17 July 2014**.

[3] The appellant resisted the claim and filed its Defence on **21 August 2015**. It particularly denied that it was the owner of the **Motor Vehicle Registration No. KBU 496X**, **Hyundai Lorry,** and put the respondent to strict proof thereof. It also denied that an accident occurred on **16 December 2013** in the circumstances that were alleged by the respondent before the lower court in which the deceased suffered fatal injuries. It denied all the allegations of negligence attributed by the respondent to it or its servants, agents and/or employees. To the contrary, it was the contention of the appellant, vide paragraph 7 of its Defence that, if an accident did occur as alleged, then the same was as a result of the sole and/or contributory negligence of the deceased; particulars whereof were supplied in that paragraph. Accordingly, it prayed for the dismissal of the respondent's suit with costs.

[4] After hearing the parties, the learned trial magistrate apportioned liability in the ratio of 80:20 in favour of the respondent, and made an award in the sum of **Kshs. 901,396.80,** together with interest and costs, in a Judgment delivered on **5 April 2016.** In summary the awards were as hereunder:

[a] Pain and suffering	**Kshs. 100,000**
[b] Loss of dependency	**Kshs. 720,000**
[c] Loss of expectation of life	**Kshs. 100,000**
[d] Special damages	**Kshs. 206,000**

[5] Being dissatisfied with the decision of the Learned Trial Magistrate, the Appellants filed the instant appeal, raising the following grounds

of appeal:

[a] That the trial magistrate erred in law and fact in finding the appellant liable for the accident in the absence of evidence to that effect;

[b] That the finding of the trial magistrate on liability was unreasonable and unsupported by evidence;

[c] That the trial magistrate erred in law in awarding damages that were too high in the circumstances of the matter;

[d] That the trial magistrate erred in law in failing to appreciate the principles applicable in the award of damages;

[e] That the trial magistrate erred in law in applying a multiplier in awarding damages to the respondent without any justification or basis of the same;

[f] That the trial magistrate erred in law in failing to appreciate the principles applicable in applying the multiplicand in the award of damages to the respondent under the head of loss of dependency;

[g] That the trial magistrate misapprehended the evidence tendered in the matter thereby arriving at an excessive and/or erroneous award to the respondent;

[h] That the trial magistrate erred in law and in fact by taking into account irrelevant and extraneous factors leading to an excessive award to the respondent;

[i] That the trial magistrate erred in law in relying heavily on the respondent's evidence and ignoring the appellant's submissions;

[j] That the trial magistrate erred in fact in failing to take into account the authorities cited on behalf of the appellant with regard to the damages awardable to the respondent;

[6] In the premises, it was the appellant's prayer that the appeal be allowed, and that the Judgment and Decree of the lower court be set aside and be substituted with a proper finding/Judgment of this Court; that the respondent's suit be dismissed in its totality. In the alternative, the appellant prayed that this Court makes a proper finding on quantum; and that the costs of the appeal be awarded to it.

[7] Thereafter, the respondent moved the Court, vide her Notice of Motion dated **24 June 2016**, seeking leave to file her cross-appeal out of time. She expressed her dissatisfaction with the decision of the trial court and explained, in her Supporting Affidavit, sworn on **14 June 2016**, why she was unable to file her appeal within the prescribed period. That application, being unopposed, was allowed on **27 September 2019**. Thereafter, the respondent filed her Memorandum of Cross Appeal on **12 October 2016**, contending that:

[a] The trial magistrate erred in holding that that the deceased was 80% liable in negligence when there was no basis for such a conclusion;

[b] The trial magistrate misdirected himself on the issues and failed to consider that the deceased could not have contributed to the occurrence of the accident;

[c] The trial magistrate erred in law and fact by not considering the authorities cited by her advocate and therefore applied the wrong multiplicand and multiplier.

[8] Hence, it was likewise the prayer of the respondent that the trial magistrate's holding on liability and quantum be set aside, and that an order be made that the appellant is 100% liable to the estate of the deceased. It was further prayed that the damages payable be assessed upwards and judgment entered accordingly together with costs.

[9] The appeal was canvassed by way of written submissions, pursuant to the directions issued herein on **25 June 2019**. Thus, Counsel for the respondents filed written submissions herein on **30 July 2019,** while the appellant's written submissions were filed thereafter on **7 August 2019**. On liability, counsel for the appellant submitted that the deceased was under obligation to be on the lookout and had a duty of care to safeguard his own life. Counsel pointed out that although the driver is said to have hooted, and that **PW2** heeded the warning and move out of the road, the deceased did not.

[10] Counsel relied on **Peter Okello Omedi vs. Clement Ochieng** [2006] eKLR to support his submission that a pedestrian owes other road users a duty of care to walk in such a manner that does not endanger the safety of other road users. He also relied on the above authority for the proposition that, where both the driver and the victim are proved to have failed to observe their respective obligations, then the option left to the trial court is to apportion liability on 50:50 basis. Counsel further faulted the trial court for having ignored the fact that the deceased was walking on the left side of the road as opposed to the right; and that he was therefore not in a position to see the lorry that approached him from behind. He relied on the Highway Code and the case of **SAA (minor suing through the father and next friend ML vs. Agroline Hauliers Ltd and Another** [2015] eKLR and urged the Court to find that the deceased deliberately exposed himself to danger.

[11] Counsel for the appellant impugned the evidence of **PW3** before the lower court, contending that, whereas it was his evidence that he commenced investigations into the alleged accident with a view of prosecuting the driver for careless driving, he did not give the outcome of the prosecution, if any; or avail a certified copy of the proceedings and judgment to prove that the driver was indeed charged with a traffic offence and found guilty thereof. Counsel therefore took the view that the respondent failed to discharge the burden of proof as required by

Section 107 of the **Evidence Act, Chapter 80** of the **Laws of Kenya**.

[12] Further to the foregoing, counsel for the appellant pointed out that it was imperative for the respondent to prove that the subject motor vehicle belonged to the appellant; which, in his view, was not done. He relied on **Thuranira Karauri vs. Agnes Ncheche** [1997] eKLR to support the assertion that, where ownership is disputed as was the case before the lower court, it is incumbent on the plaintiff to place before the court a Certificate of Search signed by the Registrar of Motor Vehicles showing the particulars of the owner. Counsel added that a Police Abstract would not suffice; and that, in any case, the Police Abstract did not point to the appellant as the owner of the subject motor vehicle.

[13] Another key omission, in the eyes of learned counsel for the appellant, is the failure by the respondent to demonstrate a connection between the appellant and the driver of the subject motor vehicle. Counsel took the posturing that, in the absence of a copy of the records held by the Registrar of Motor Vehicles, a reference to the appellant in the Police Abstract, or any evidence pointing to the appellant as the owner of the motor vehicle, no foundation was set for vicarious liability. In his view, this was a fatal omission that goes to the very root of the respondent's suit and therefore, the lower court ought to have dismissed the same. He relied on **Bouchard International (Services) Ltd vs. Philip Mionki M'mereria,** Civil Appeal No. 37 of 1985.

[14] Lastly, on the issue of liability, it was the submission of counsel for the appellant that, whereas a Certificate of Death was produced by the respondent before the lower court, no nexus was made between the deceased's death and the accident. According to him, the respondent ought to have availed a postmortem report to demonstrate that the cause of death was directly linked to the road traffic accident in question. Counsel urged the Court to be persuaded by the holding in **Walker vs. Grasgaw Corporation** [1919] 35 TLR 214 in this regard.

[15] On quantum, counsel pointed out that the deceased was said to be 76 years old at the time of his death; and that he used to earn a gross of **Kshs. 33,000/=** per month, yet no receipts were produced to support that assertion; or the conclusion of the trial magistrate that the deceased would, after paying taxes, remain with a net income of **Kshs. 15,000/=.** Accordingly, he was of the view that the lower court ought to have used the applicable minimum wage as the multiplicand. To that end, counsel referred the Court to **Legal Notice No. 197 of 2013** in which the applicable minimum wage was set at **Kshs. 5,218/=**; and the cases of **Julius Mokua Onaera vs. Esther Njoki Gicharu** [2006] eKLR, and **Mombasa Millers Limited vs. W I M (suing as the representative of J A M (Deceased)** [2016] eKLR, to support his arguments.

[16] In terms of the dependency ratio, counsel for the appellant submitted that the learned trial magistrate erred in applying the ratio of 2/3 instead of 1/3, granted that all of the deceased's children, except one, were grown up men and women who in turn had children of their own to look after and fend for. Counsel further submitted that there was no proof that the deceased used his earnings to support his family. The cases of **Securicor Security Services Ltd vs. Joyce Kwamboka Ong'ong'a suing as the legal representative of Francis Ong'ong'a Mogire (Deceased)** [2014] eKLR and **Chania Shuttle vs. Mary Mumbi** [2017] eKLR, were cited in support of the submission that dependency is a matter of fact and must be proved on a balance of probabilities.

[17] Thus, counsel for the appellant urged the Court to allow the appeal, set aside the decision of the lower court and replace it with a proper finding of this Court on both liability and quantum. He also prayed for the dismissal of the Cross Appeal.

[18] Counsel for the respondent defended the decision of the lower court in terms of its conclusions both on liability and quantum. He proposed the following four issues for determination and fashioned the respondent's submissions along those lines:

> **[a]** Whether the learned magistrate properly considered the evidence that was adduced before the trial court;
>
> **[b]** Whether the learned magistrate erred in making a determination on liability;
>
> **[c]** Whether the learned magistrate erred in applying the law on the multiplicand and multiplier; and,
>
> **[d]** Whether the learned magistrate erred in assessing the damages payable.

[19] Counsel pointed out that, since the appellant opted to call no evidence before the lower court, the respondent's case remained unchallenged; and therefore that the learned trial magistrate erred in placing reliance on the appellant's averments in its Defence. Counsel cited **National Bank of Kenya Ltd vs. Ebenezer Electronics & Communications Ltd & 3 Others** [2008] eKLR, **Mary Njeri Murigi vs. Peter Macharia & Another** [2016] eKLR and **Odunga's Digest on Civil Case Law and Procedure**, for the proposition that, without proof, the averments in the Statement of Defence remained mere allegations on paper.

[20] It was further the contention of counsel for the respondent that, since no evidence was adduced by the appellant, there was no other explanation for the accident other than that which was given by the respondent's witnesses, particularly **PW2** and **PW3**. It was on this basis that counsel urged the court to fix liability at 100% against the appellant. The respondent relied on **Mulwa Musyoka vs. Wadia Construction** [2004] eKLR, and **Luisa Marigu vs. Nguyo Joseph Kingori & Another** [2019] eKLR to shore up his argument that where no rebuttal evidence is called, the trial court has no option but to fix liability at 100% against the defendant.

[21] On the multiplicand and the multiplier, counsel for the respondent took the posturing that, since the deceased was still active and in good health, he would have lived longer and continued to supervise farming activities in his tea plantation. He therefore submitted that the learned trial magistrate erred in using a multiplier of 6 years. He proposed that a multiplier of 22 years is reasonable in the circumstances, and relied, *inter alia*, on **Nairobi HCCC No. 3334 of 1994: Constance Kanyarota Ngugi vs. Coast Bus & Another** wherein a multiplier of 14 years was adopted for a 51-year-old victim. Counsel urged the position that it is not uncommon to find persons of over 75 years actively engaged in income generating activities, including small scale farming. He therefore postulated that the deceased would have provided for his family for another 22 years.

[22] In terms of pain and suffering and loss of expectation of life, counsel for the appellant took the view that the awards made by the lower

court were far too low, considering that the deceased died 8 days after the accident while undergoing treatment at St. Luke's Orthopaedic & Trauma Hospital in Eldoret Town. He therefore proposed an award of **Kshs. 250,000/=** for pain and suffering on the authority of **Mariam Maghema Ali vs. Nyambu T/A Sisera Store** [1990] eKLR in which **Kshs. 250,000/=** was awarded for pain and suffering. In the same vein, counsel proposed an award of **Kshs. 505,300/=** for special damages, contending that this is the sum that was pleaded and proved by the documentation presented before the lower court. He therefore concluded his submissions by urging the Court to find that the respondent had made a good case for enhancement of the quantum due to the respondent.

[23] This is a first appeal, and therefore it is the duty of the Court to re-evaluate the evidence adduced before the lower court with a view of coming to its own findings and conclusions on the basis thereof, while bearing in mind that it did not have the advantage of seeing or hearing the witnesses. The holding in **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123,** is instructive, namely:

> **"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."**

[24] The respondent testified before the lower court on **29 September 2015** as **PW1**. Her evidence was that she was called on **16 December 2013** and informed that her father, the deceased herein, had been knocked down by **Motor Vehicle Registration No. KBU 496X** while walking to Serem. It was the testimony of **PW1** that the deceased was taken to St. Luke's Hospital in Eldoret and was admitted there while undergoing treatment up to **23 December 2013,** when he died. She added that, at the time of his death, the deceased was 74 years old; and that he was a farmer, looking after his tea farm; and that he would also buy and sell cows. Thus, it was the evidence of **PW1** that the deceased's monthly earnings would be in the region of **Kshs. 33,000/=** from tea alone; and that after taxes, he would remain with **Kshs. 15,000/=;** and that from cattle selling he would make approximately **Kshs. 5,000/=.** She further testified that the deceased left behind his widow, **Loice Rutto**, and nine sons and daughters whose names she furnished the lower court with; and that the last born, **Emmanuel Bitok,** was then in Form Four.

[25] PW1 also produced several documents before the lower court in proof of the deceased's income, the expenses incurred by the family in the treatment of the deceased, as well as mortuary expenses. She also produced the Burial Permit, Grant of Letters of Administration Ad Litem she was issued with, as well as a Certificate of Death in respect of the deceased, as exhibits before the lower court. **PW1** also stated that they incurred funeral expenses to the tune of **Kshs. 65,000/=.** She accordingly urged the lower court to find in her favour.

[26] Lynda Chelangat Kalya (PW2) was then a student at **Mt. Kenya University**. She told the lower court that she had gone to Kobujoi to visit her grandparents. That on **16 December 2013**, while walking to Kobujoi Centre with the deceased, **Christopher Kibitok,** who was ahead of her by about 10 to 15 metres, she received a telephone call and stopped to check who it was from. While so doing, a motor vehicle came from behind them at a high speed which passed her and knocked and crushed the deceased on the right side of his body, thereby seriously injuring him. **PW2** explained that she knew the deceased because he was a neighbour to her grandparents; and added that he was immediately taken to hospital.

[27] The respondent also called **PC Erick Odhiambo Obeto (PW3),** who was then attached to Nandi Hills Traffic Base. It was his evidence that a report was made on **16 December 2013** at 3.00 p.m. involving **Motor Vehicle Registration No. KBU 496X Hundai Lorry**, belonging to **Mayfair Holdings Ltd**, Kisumu. He further told the lower court that the motor vehicle was then being driven by **Isaac Odhiambo Opaka** and that the victim was a pedestrian walking off the road on the left side of the tarmac. He produced the Police File as an exhibit before the lower court and added that the driver was charged with the offence of causing death by dangerous driving.

[28] The deceased's widow, **Loyce Rutto (PW4),** also testified before the lower court. She confirmed that the deceased was her husband; and that he was hit by a motor vehicle on **16 December 2013**. She further told the lower court that she went to the scene and caused the deceased to be rushed to **Kobujoi Dispensary**, from where he was transferred to **St. Luke's Hospital,** Eldoret. **PW4** confirmed that the deceased died after about one week while undergoing treatment; and that she used to depend on him for financial support and upkeep. She also mentioned that she had authorized her daughter, **Christine Rutto (PW1)** to file the lower court suit on her behalf and on behalf of their 9 children with the deceased who were all dependent on him for their education and maintenance.

[29] As the appellant opted to present no evidence, directions were thereafter given by the lower court for the filing of written submissions. Thus, it was on the basis of the respondent's evidence and the parties' written submissions that the trial magistrate apportioned liability at 80:20 against the appellant and assessed damages at **Kshs. 1,126,746/=,** which he then subjected to 20% contribution, to come up with the figure of **Kshs. 901,396.80** aforementioned.

[30] Thus, having re-evaluated and reconsidered the evidence adduced before the lower court, there is no dispute that an accident occurred on **16 December 2013** involving the lorry **Registration No. KBU 496X** in which the deceased, **Christopher Kibitok**, was injured. There is, likewise, no dispute that the deceased suffered severe injuries for which he was hospitalized at St. Luke's Orthopaedic & Trauma Hospital in Eldoret. The documents exhibited before the lower court by the respondent, whose copies are at pages 42, 43, 45-47, 50-54 of the Record of Appeal all go to confirm this fact, which was, in any event, not disputed.

[31] It is also not in dispute that the deceased succumbed to his injuries on **23 December 2013** while undergoing treatment at St. Luke's Hospital. The respondent produced not only the Permit for Burial No. 561443 but also a Certificate of Death No. 285765 confirming the fact of death as well as the date of the deceased's death. Copies of the said documents are at pages 38 and 41 of the Record of Appeal. She also produced a copy of Grant of Letters of Administration *Ad Litem*, authorizing her to bring the action before the lower court. A copy thereof was exhibited at page 40 of the Record of Appeal.

[32] Having given due consideration to the Grounds of Appeal set out in the appellant's Memorandum of Appeal dated **3 May 2016** and the Respondent's Memorandum of Cross-Appeal dated **11 October 2016**, as well as the written submissions filed herein, and in particular the proposed issues set out at paragraph 5 of the written submissions dated **16 July 2019** and filed on **30 July 2019** (see paragraph 14 herein

above), the main issues that fall for re-evaluation and determination centre on **liability** and **quantum**. This Court must come to its own conclusion on the evidence, whether indeed, the appellant is in any way liable for the death of the deceased; and if so, what would be reasonable recompense in terms of quantum of damages payable?

[33] In terms of liability, the respondent had alleged negligence in paragraph 5 of her Plaint dated **17 July 2014**, contending that the driver of **Motor Vehicle KBU 496X Hyundai Lorry** was to blame for the accident in that:

> **[a]** He was driving carelessly and recklessly in the circumstances;
>
> **[b]** He failed to brake, slow down or act in any other way to prevent the occurrence of the accident;
>
> **[c]** He failed to adhere to traffic rules and regulations;
>
> **[d]** He was driving at an excessive speed in the circumstances;
>
> **[e]** He was driving in a zigzag manner;
>
> **[f]** He was driving without proper care and attention;
>
> **[g]** He caused the suit motor vehicle, **Registration No. KBU 496X Hyundai Lorry**, to veer off the road, thus knocking down the deceased;
>
> **[h]** He was driving a defective motor vehicle.

[34] Although neither the respondent nor her mother, **Loyce Rutto (PW4),** personally witnesses the accident, an eye witness testified, namely, **Lynda Chelangat Kalya (PW2).** Her testimony was that, on the **16 December 2013**, she was walking to Kobujoi Centre and that the deceased, **Christopher Kibitok,** a person well known to her as a neighbour of her grandparents, was ahead of her by about 10 to 15 metres. They were both on the left side of the road, and were going towards the same direction. **PW2** stated how the subject motor vehicle, **Registration No. KBU 496X** came from behind them at a high speed, passed her before veering off the road, thereby knocking the deceased before crushing him on the right side of the body.

[35] The evidence of **PW2** was corroborated by the evidence of **PW3**, who confirmed the occurrence and also testified that the scene was visited and it was ascertained that the accident happened off the road on the left side, facing Kobujoi from Kapsabet direction. He produced a copy of the Police Abstract as **the Plaintiff's Exhibit 6(a),** and a bundle of documents comprising the police file, as **the Plaintiff's Exhibit 6(c);** adding that the driver was charged with causing death by dangerous driving.

[36] Thus the sum total of the evidence of **PW2** and **PW3** was that the driver of the subject motor vehicle was driving at an excessive speed in the circumstances; and therefore was unable to brake, slow down or act in any other way control the motor vehicle so as to prevent the accident from occurring; an indication of careless or reckless driving. As the appellant opted to adduce no evidence, there was no other explanation before the lower court, as to why the motor vehicle, **Registration No. KBU 496X Hyundai Lorry**, veered off the road and knocked the deceased, who was walking off the road on the left side.

[37] It is a cardinal principle, embodied in the *res ipsa loquitor* maxim, that accidents do not just happen. There is always some explanation for each accident. Thus, in **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22,** the East African Court of Appeal held that:

> **"The doctrine of res ipsa loquitor is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. … Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."**

[38] Likewise, in **Kenya Bus Services Ltd vs. Dina Kawira Humphrey Civil Appeal No. 295 of 2000,** the Court of Appeal, it was observed that:

> **"Buses, when properly maintained, properly serviced and properly driven do not just run over bridges and plunge into rivers without any explanation."**

[39] In the premises, the respondent having demonstrated, through **PW2** and **PW3,** that the subject motor vehicle veered off the road and knocked the deceased, the evidential burden shifted to the appellant to explain the occurrence and prove to the lower court that its driver was not at all negligent. In **Daniel Kaluu Kieti vs. Mutuvi Ali Nyalo & another [2016] eKLR,** it was held that:

> **"There must be some explanation as to why a vehicle which is well driven and which is well serviced must refuse to go**

forward and instead reverse on its own as per the driver's own testimony. Section 112 of the Evidence Act is clear that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings the burden of proving or disproving that fact is upon him. In this case, the 1st respondent claimed that the motor vehicle (bus) was well serviced and therefore it had no defects. But they did not produce any inspection report to prove that the motor vehicle was mechanically sound and or defective as contended by the appellant that it had worn out tires and that the exhaust pipe was even tied with a rope. The mechanical condition of the motor vehicle was a matter within the knowledge of the 1st respondent. The appellant having alleged that the vehicle was faulty, it therefore follows that the burden of proving that the vehicle was not faulty lay with the 1st respondent who was in possession and use of the motor vehicle. He did not discharge that burden. Accordingly, I find that the appellant proved on a balance of probabilities that the bus was faulty and it is that mechanical fault that could have caused the mishap of reversing on the hill on its own since the driver stated that he engaged the No. 1 gear but the vehicle was unable to go uphill. Instead, it went back and rested on a tree on the side of the road.

[40] The same position was taken in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council, Civil Appeal No. 252 of 1998,** wherein the same Court held that:

> **"It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was prima facie evidence of negligence and the onus lay on the defendant to rebut that prima facie case. It means the plaintiff prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety… *Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."**

[41] In the premises, I am satisfied that there was sufficient material for the lower court to base a finding that the driver of the subject motor vehicle**, Registration No. KBU 496X** was blameworthy for the accident in which the deceased was injured. As to whether the deceased was equally responsible for or contributed to the accident, the appellant had set out to prove this by alleging in paragraph 7 of the Defence that the deceased:

[a] was walking on a busy part of the road without due care of other road users;

[b] failed to observe the road traffic rules;

[c] failed to stop or give way to an oncoming motor vehicle **Registration No. KBU 496X, Hyundai Lorry;**

[d] was jaywalking on the road;

[e] was reckless on a busy highway while knowing or ought to have known that was dangerous in the circumstances to do so;

[f] was walking absent mindedly on a busy highway;

[g] failed to keep a safe distance from the said road;

[h] caused the accident.

[42] As no evidence was called by the appellant, the particulars aforementioned remained mere allegations. The appellant had also alleged that, in so far as the deceased kept his left and not the right side of the road as is required by the Highway Code, the lower court ought to have found him fully liable for the accident. I have no quarrel with the conclusion reached in **Peter Okello Omedi vs. Clement Ochieng** (supra), namely, that a pedestrian owes other road users a duty of care to walk in such a manner as would not endanger the safety of other road users; and that, where both the driver and the victim are proved to have failed to observe their respective obligations, then the option left to the trial court is to apportion liability on both, in accordance with the degree of their respective blameworthiness. It is noteworthy however that in that case, the victim was crossing the road when he was knocked down. In this case, there is uncontroverted evidence that the deceased was completely off the road, albeit on the left side.

[43] While I agree that he would have been safer walking on the right side of the road where he would have been in a better position to see oncoming traffic, there was no justification at all for the fact that the lorry veered off the road and landed into a ditch. It matters not that in her evidence **PW2** mentioned that she heard the motor vehicle hoot before veering off the road. There is no indication that, aside from stopping to take a call, **PW2** did anything else to avoid being hit. Thus, in **Mulwa Musyoka vs. Wadia Consstruction** [2004] eKLR in which the plaintiff was standing at the edge of the road preparing to cross the road when was hit by the defendant's motor vehicle, which appeared to have lost control defence called no evidence, the defendant was held 100% liable.

[44] In the premises, in the absence of an explanation from the driver as to why the motor vehicle veered off the road, as was the case before the lower court, I am satisfied that the driver was entirely to blame for the accident; and that no fault can be attributed to the deceased in the circumstances. I would accordingly fix liability in this matter at 100% against the appellant.

[45] Having so found, the next question to pose is whether it was proved that the motor vehicle belonged to the appellant and that the driver was its employee, servant or agent so as to attract vicarious liability on the part of the appellant. As was correctly pointed out by counsel for the appellant, the respondent did not produce a Certificate of Search from the Registrar of Motor Vehicles to prove the ownership of **the Motor Vehicle Registration No. KBU 496X**, Hyundai Lorry, as at **16 December 2013**. Counsel relied on **Thuranira Karauri vs. Agnes Ncheche** (supra) in which it was held that:

> **"As the defendant denied ownership, it was incumbent on the plaintiff to place before the Judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."**

[46] However, there has been a shift, in recent times, from that position. It is now recognized that other forms of proof, such as a police abstract, are equally acceptable. Hence, in **Nancy Ayemba Ngana vs. Abdi Ali** [2010] eKLR**, Hon. Ojwang, J,** (as he then was), took the following stance:

> **"There is no doubt that the registration certificate obtained from the Registrar of Motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is cognizant of the fact that a different person, or different other persons, may be the *de facto* owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership; actual ownership, beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the *matatu* in question…"**

[47] The Court of Appeal also weighed in on the matter in **Joel Muga Opija vs. East African Sea Food Limited** [2013] eKLR in which it held that:

> **"…in our view, an exhibit in evidence and in this case, the appellant's evidence that the police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on a point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied."**

[48] In this instance**, PW3,** a police officer, testified that, according to their investigations, the motor vehicle belonged to the appellant and that the driver was **Isaac Odhiambo Opaka,** Indeed, the abstract he produced does give the name of the driver as **Isaac Odhiambo Opaka,** albeit in the space intended for the name and address of the owner, though it was made clear that the driver was under the care of **Mayfair Holdings Ltd, Kisumu,** whose address was also provided therein. Hence, granted the clear evidence of **PW3** that the motor vehicle belonged to the appellant, and the details set out in the Police Abstract, which the appellant opted not to controvert, I am satisfied that the respondent proved on a preponderance of the evidence, that the subject lorry did belong to the appellant as at the **16 December 2013** when the accident occurred; and that it was being driven by its employee by the name **Isaac Odhiambo Opaka** in the lawful course of his employment. In the circumstances, the appellant was correctly held vicariously liable for its driver's negligence. It is, in my view, inconsequential that the outcome of the traffic case was not made known to the lower court by way production of a copy of the proceedings and judgment thereof, for, it is now settled that the mere fact of conviction or acquittal is not absolute proof of liability given the disparate standards of proof in criminal and civil matters. Thus, in **Michael Hubert Kloss & another v David Seroney & 5 others** [2009] eKLR, the Court of Appeal held that:

> **"The acquittal of Kloss in the traffic case would, of course not be binding on a civil court subsequently considering the issue of negligence on a standard of proof which is lower than "proof beyond reasonable doubt". As this Court stated in Robinson v Oluoch [1971] EA 376:**
>
> > **"It is quite proper for a person who has been convicted of an offence involving negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident."**
>
> **The converse is also true where there is an acquittal."**

[49] Turning now to the issue of quantum, I have reminded myself that assessment of damages is a matter of discretion; and therefore, that an appellate court ought not to disturb an award made by a trial court unless sufficient cause is shown to warrant such interference. In **Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja vs. Kiarie Shoe Stores Limited [2015] eKLR** the Court of Appeal restated this principle as follows:

> **"As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an erroneous estimate. It must be shown that the Judge proceeded on wrong principles or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low. The Court must be satisfied that either the Judge, in assessing the damages,**

took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages."

[50] And, in **Peters vs. Sunday Post Limited** [1958] EA 424, it was held that:

> **"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion..."**

[51] With the foregoing principles in mind, I note that the evidence presented before the lower court by both **PW1** and **PW4** was that the deceased was 74 years old at the time of his death; and that he was in good health generally and was still actively pursuing his tea farming activities. Thus, the approach adopted in **Chunibhai J. Patel and Another vs. P.F. Hayes and Others** [1957] EA 748, by the Court of Appeal for East Africa, and which I find useful, was that:

> **"The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power of the deceased (i.e. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase."**

[52] Whereas counsel for the respondent proposed a multiplier of 22 years, no justification was made for that proposal. The deceased was 74 years old; and whereas there is uncontroverted evidence that he was in good health, it is unlikely that he would have engaged in farming activities, or even the stock trade he was said to be engaged in, beyond 80 years of age. In **Hardev Kaur Dhanoa vs. Multiple Hauliers (E.A.) Limited [2017] eKLR,** for instance, in which the deceased died at the age of 61 years, a multiplier of 6 years was employed. I therefore would agree with the lower court that a multiplier of 6 is reasonable in the circumstances, taking into consideration the vicissitudes and imponderables of life.

[53] The appellants took issue with the 2/3 dependency ratio adopted by the trial court, contending that all of the deceased's children, except one, were grown up men and women who in turn had children of their own which they were providing for in their own right. Counsel further submitted that there was no proof that the deceased used his earnings to support his family. I would agree fully with the proposition that dependency is a matter of fact that must be proved on a balance of probabilities. I therefore have no quarrel with the positions taken in this regard in the cases of **Securicor Security Services Ltd vs. Joyce Kwamboka Ong'ong'a suing as the legal representative of Francis Ong'ong'a Mogire (Deceased)** [2014] eKLR and **Chania Shuttle vs. Mary Mumbi** [2017] eKLR.

[54] It is noteworthy, from paragraph 8 of the Plaint that the respective ages of the dependants of the deceased were not pleaded; and while the evidence of **PW1** was that **Emmanuel** was the last born and was under 18 years of age, in the Plaint his name is listed among the grandchildren of the deceased. It is manifest from the lower court record that there was no proof of dependency in any form. I take the view that, in those circumstances, the ratio of 1/3 was the most reasonable measure**.**

[55] As regards the multiplicand, documents were produced before the lower court by the respondent to confirm that the deceased was a tea farmer and that on the average, he would earn **Kshs. 33,000/=** per month from selling tea leaves. There was no rebuttal evidence and therefore there is no basis for disturbing the finding of the trial court that **Kshs. 15,000/=** was the deceased's net income. In the premises, the proposal by the counsel for the appellant, that the minimum wage in force at the time be applied, is clearly untenable herein, granted that there was credible and uncontroverted evidence to guide the lower court in determining the multiplicand**.** In any event, the minimum wage is inapplicable where the victim is beyond the employment age. (see **Beatrice Murage vs. Consumer Transport Ltd & Another** [2014] eKLR)

[56] For pain and suffering, the trial court awarded the deceased's estate **Kshs. 100,000/=,** which the respondent took issue with, contending that it is on the lower side. Counsel for the respondent urged the Court to enhance that sum to **Kshs. 250,000/=,** granted the pain and suffering the deceased must have suffered after the accident and for the one week that he was hospitalized. He relied on **Mariam Maghema Ali vs. Nyambu T/A Sisera Store** [1990] eKLR wherein Kshs. 250,000/= was awarded for pain and suffering.

[57] Credible and uncontroverted evidence was adduced before the lower court by **PW1, PW2** and **PW4** that the deceased suffered crush injuries on the right side; and that he was admitted at St. Luke's Hospital from **16 December 2013** to **23 December 2013,** when he passed away. **PW1** also produced the Certificate of Death before the lower court. It gave the date of her death as **23 December 2013,** as well as the cause of death as severe chest injury due to road traffic accident. And, although counsel for the appellant took the view that the postmortem report was not produced, it was one of the documents produced by **PW3** before the lower court and it was marked **the Plaintiff's Exhibit 6(b)**. It confirms that the deceased suffered severe chest injuries due to a road traffic accident, which ended up costing him his life. They included:

[a] fractured right femur which were fixed internally with plates;

[b] fractured right clavicle which was also internally fixed;

[c] fracture of 3rd to 8th right ribs,

[d] bruising of the right lung.

[58] It is however my view that the two authorities cited by counsel for the respondent are not at all comparable to the facts of this case in

which the injuries were fatal. In the case of **Miriam Magema** (supra) the victim received severe injuries and was hospitalized for 3 ½ months during which she underwent several operations to correct the crush injuries and for skin grafting. She was therefore awarded **Kshs. 250,000/=** for her pain, suffering and loss of amenities, including loss of marriage prospects. Similarly, in **Bildad Mwangi Gichuki vs. TM-AM Construction Group (Africa)** [2002] eKLR, the appellant suffered serious injuries while in the course of employment with the respondent that rendered him incapable of continuing with his employment. The trial court's award of **Kshs. 250,000/=** as general damages for pain and suffering and loss of amenities was set aside on appeal and substituted with an award of **Kshs. 400,000/=.**

[59] Clearly, the two authorities are not comparable. I instead found the following authorities pertinent to the facts hereof:

[a] Bon Ton Limited v Beatrice Kanaga Kereda suing as Administrators of Estate of Richard Alembi Ochenga (Deceased) [2018] eKLR in which the deceased sustain severe injuries after being knocked down while riding a motorcycle which he succumbed. He was hospitalized for one week. An award of **Kshs. 200,000/=** was made by the trial court for pain and suffering which was upheld on appeal. The High Court, on appeal, held that:

> **"…the deceased died after a week in hospital. According to the death certificate, he had suffered a fractured femur and for that week, he must have suffered considerable pain. Thus, the award of Kshs. 200,000/- cannot be said to be excessive. I also find and hold that the award of Kshs. 100,000/- set out in the judgment for loss of expectation of life was reasonable…"**

[b] In **Mohammed Huka (suing as personal representative of the Estate of Huka Wako) v Adan Kosi & 2 others** [2017] eKLR the deceased who was involved in accident and as a result of which he sustained fatal injuries. Under the head of pain and suffering, the plaintiff had claimed a sum of **Kshs. 2,000,000/=** on the basis that the deceased died after 5 days. There was sufficient proof that the deceased also underwent two surgeries before his demise. The court awarded **Kshs. 200,000/=** for pain and suffering.

[60] In the premises, there is sufficient cause for enhancing the lower court's award for pain and suffering from **Kshs. 100,000/=** to **Kshs. 200,000/=.** In respect of loss of expectation of life, the lower court awarded **Kshs. 100,000/=;** and no issue was taken with that sum by counsel for the appellant. I note too that, although counsel submitted that there was double compensation under both the **Fatal Accidents Act** and the **Law Reform Act**, this

[61] The respondent also challenged the special damage component of the lower court's award. The lower court made an award of **Kshs. 206,746/=** under the special damages head. It is however not decipherable how that figure was arrived at, noting that the respondent had pleaded sum of **Kshs. 505,300/=** in her Plaint, made up as hereunder:

[a] Medical expenses - Kshs. 428,000/=

[b] Postmortem and mortuary fees - Kshs. 12,300/=

[c] Funeral expenses - Kshs. 65,000/=

[62] That the special damage award is erroneous is evident in the fact that the single receipt exhibited at page 46 of the Record of Appeal accounts for **Kshs. 246,500/=;** an amount in excess of the total award made by the lower court under special damages. There is no explanation or discounting undertaken as to how the ultimate figure for special damages was computed. Hence, having looked at the bundle of the original receipts produced before the lower court, it is my finding that the sum total of the hospital expenses, including the mortuary fees, add up to **Kshs. 434,200/=** as detailed hereunder:

No.	Receipt No.	Date	Amount	Issued by
1.	4346	16.12.2013	5000	St. Luke's Hospital
2.	4364	17.12.2013	30,000	St. Luke's Hospital
3.	989725/2013	17.12.2013	6500	Mediheal Hospital
4.	1417	27.12.2013	246,500	St. Luke's Hospital
5.	1547	29.12.2013	100,000	St. Luke's Hospital
6.	0740207	30.12.2013	6,200	MTRH
7.	4867	29.1.2014	20,000	St. Luke's Hospital
8.	5219	17.2.2014	20,000	St. Luke's Hospital

[63] Then there was the funeral expenses component pleaded at **Kshs. 65,000/=** but for which no receipt was produced by the respondent. I am guided by the Court of Appeal decision in **Premier Dairy Limited vs. Amarjit Singh Ssagoo & Another** [2013] eKLR that:

"We do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with the issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved."

[64] I therefore find no reason to disturb the award on this head of **Kshs. 65,000/=.** Thus, in total, the special damages due ought to be **Kshs. 499,200/=.** In the result, I would re-calculate the quantum of damages due to the estate of the deceased as follows on the basis of 100% liability:

Under the Law Reform Act:

- Loss of Expectation of life - **Kshs. 100,000**
- Pain and suffering - **Kshs. 200,000**

Under the Fatal Accidents Act

- Loss of dependency Kshs. 15,000 x 1/3 x 6 x 12= **Kshs. 360,000**
- Special damages - **Kshs. 499,200**

Total - Kshs. 1,159,200/=

[65] In the result, it is my finding that the appellant's appeal is completely devoid of merit and is hereby dismissed with costs. The respondent's cross-appeal is allowed to the extent aforestated. The Judgment and Decree of the lower court are hereby set aside and substituted with the Judgment of this Court in favour of the respondent against the appellant in the total sum of **Kshs. 1,159,200/=** together with interest and costs; the interest being payable from the date of the lower court Judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 22ND DAY OF MAY 2020

OLGA SEWE

JUDGE