



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 81 OF 2008**

**MNK.....1<sup>ST</sup> PLAINTIFF**

**IMK.....2<sup>ND</sup> PLAINTIFF**

**(Suing as the administrator ad litem of the estate of AKK-Deceased)**

**-VERSUS-**

**BOLPACK TRADING CO. LIMITED.....1<sup>ST</sup> DEFENDANT**

**JAMES MWARANIA.....2<sup>ND</sup> DEFENDANT**

**KILEA MUTHUKA.....3<sup>RD</sup> DEFENDANT**

**JESSE NGETA KARIUKI.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiffs herein and the administrators of the estate of AKK (“the deceased”) lodged a suit against the defendants by way of the plaint dated 6<sup>th</sup> March, 2008 and sought for general damages under the Fatal Accidents Act and the Law Reform Act, special damages in the sum of Kshs. 117,420/, costs of the suit and interest thereon.

2. The 1<sup>st</sup> defendant on the one part is sued in its capacity as the registered owner of motor vehicle registration number KAP 170F Toyota Hiace Matatu (“the matatu”) while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are sued in their respective capacities as the beneficial owner and driver of the matatu at all material times. On the other part, the 4<sup>th</sup> defendant is sued in his capacity as the registered owner and driver of motor vehicle registration number KAQ 376X Toyota (“the wagon”).

3. The plaintiffs pleaded in their plaint that on or about the morning of 28<sup>th</sup> February, 2006 the deceased was waiting for a matatu at a designated bus stage along Kangundo Road near Hurlingham Slaughter House when the matatu and the wagon violently collided and knocked down the deceased, causing him to sustain fatal injuries.

4. The plaintiffs attributed the accident and resultant death of the deceased to negligence on the part of the 3<sup>rd</sup> and 4<sup>th</sup> defendants by setting out its particulars in the amended plaint. The plaintiffs also deemed the 1<sup>st</sup> and 2<sup>nd</sup> defendants vicariously liable for the negligence of the 3<sup>rd</sup> defendant.

5. It was also pleaded in the plaint that at the time of his death, the deceased was a vigorous man aged 36 years and has now left behind the following dependants:

- (i) MNK                      Widow                      Adult
- (ii) SKK                      Son                              8 years
- (iii) BMK                      Son                              6 years

6. Upon being served with summons, the defendants entered appearance and filed separate statements of defence.

7. The 1<sup>st</sup> defendant in its statement of defence dated 25<sup>th</sup> June, 2015 denied the averment that it is vicariously liable for the accident and pleaded that it is the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who ought to be held liable, and further denied ownership of the matatu as at the date of the accident.

8. In their joint statement of defence dated 15<sup>th</sup> April, 2008 the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acknowledged the occurrence of the accident on the date and at the place pleaded in the plaint but denied the particulars of negligence pleaded in the plaint. The said defendants averred that the accident was purely the result of negligence on the part of the 4<sup>th</sup> defendant and set out its particulars in their defence.

9. On his part, the 4<sup>th</sup> defendant who filed his statement of defence on 16<sup>th</sup> December, 2008 admitted to his ownership of the wagon but denied *inter alia*, any involvement in the accident or the particulars of negligence laid out in the plaint.

10. Following the 4<sup>th</sup> defendant's application dated 16<sup>th</sup> September, 2008, it was agreed by consent of the parties that the present suit would serve as the test suit and that the judgment on liability in this case would bind all cases filed and arising out of the same cause of action, including:

a) MILIMANI SRMCC NO. 9338 OF 2007 (Jesse Ngeta Kariuki v J.M. Mwarania t/a Amwars Investments Limited)

b) MILIMANI CMCC NO. 638 OF 2008 (Ruth Wangari Kimani & Another (Suing as administrators of the estate of the late Paul Kimani Githuka v Bolpack Trading Limited & 3 others)

c) MILIMANI CMCC NO. 1032 OF 2009 (Agnes M. Therero v Bolpack Trading Limited & 3 others)

11. At the hearing, the plaintiffs summoned three (3) witnesses while the 1<sup>st</sup> and 4<sup>th</sup> defendants each called one (1) witness. Going by the record, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not participate at the hearing.

12. Antony Rugutt who was PW1 stated that he worked at the National Transport and Safety Authority at all material times, as a clerical officer in the Department of Registration and Licensing. The witness referred to two (2) copies of the motor vehicle records as at 28<sup>th</sup> February, 2006 bearing different registration details for the matatu. That on the one hand, the records show that the matatu was at all material times registered in the name of the 1<sup>st</sup> defendant while on the other hand, separate records show that the said matatu was at all material times registered in the name of Bolpak Motors Limited which is a different entity from the 1<sup>st</sup> defendant.

13. The witness testified that it is not possible to have two (2) motor vehicles bearing similar registration details and clarified that the copy of records dated 5<sup>th</sup> April, 2006 reflects the current position regarding registration details of the matatu. The witness then proceeded to produce the copy as P. Exh 1.

14. In cross examination, it was the evidence of PW1 that the 1<sup>st</sup> defendant and Bolpak Motors Limited are not one and the same company.

15. In re-examination, the witness stated that as at 3<sup>rd</sup> June, 2006 the records show that the matatu was registered in the name of Bolpak Motors Limited but that the records do not show who the registered owner of the matatu was as at 28<sup>th</sup> February, 2006 which is the date of the accident.

16. The first plaintiff who was PW2 stated that she was married to the deceased and that they were blessed two (2) children. The 1<sup>st</sup> plaintiff went on to produce her marriage and birth certificates as P. Exh 2, 3(a) and (b).

17. She further stated that she did not witness the occurrence of the accident but was informed of the same by a neighbour who was at the stage together with the deceased. According to the 1<sup>st</sup> plaintiff, she immediately rushed to the scene and found that the matatu and wagon had collided.

18. It was the testimony of the 1<sup>st</sup> plaintiff that soon thereafter, she received a call that the deceased had passed away on arrival at the hospital, and produced a copy of the death certificate as P. Exh 4.

19. It was also her testimony that burial arrangements were made and the funeral cost a total of Kshs. 106,030/ as shown in the receipts produced as P. Exh 5.

20. The 1<sup>st</sup> plaintiff gave evidence that the accident was reported at Kayole Police Station and that she was issued with a police abstract which she produced as evidence in court. The 1<sup>st</sup> plaintiff went on to state that criminal charges were later preferred against the 3<sup>rd</sup> defendant in relation to the accident and that he was eventually found guilty and convicted for the same.

21. In her oral testimony, the 1<sup>st</sup> plaintiff sought to amend the plaint to read funeral expenses incurred at Kshs. 106,030 in place of Kshs.46,000/ and special damages to read Kshs.177,420/ in place of Kshs.117,420/. In the absence of any objection from the defendants, the amendment was allowed by this court.

22. In cross examination, the 1<sup>st</sup> plaintiff averred *inter alia*, that whereas the copy of records produced by PW1 indicate Bolpak Motors Limited as the owner of the matatu, the company has not been made a party to the suit.

23. During re-examination, it was the evidence of the 1<sup>st</sup> plaintiff that going by the copy of records, it is clear that the 1<sup>st</sup> defendant is listed as the registered owner of the matatu which was involved in the material accident.
24. Patrick Gitonga Gathuma in his evidence as PW3 adopted his signed witness statement and stated that he was a witness to the accident which claimed the life of the deceased.
25. In cross-examination, the witness testified that he is not the one who reported the accident to the police, neither did he testify as a witness in the traffic case involving the 3<sup>rd</sup> defendant.
26. At the point of re-examination, the witness stated that in his view, the driver of the matatu was to blame for the accident since his attempts to make a U-turn are what resulted in the accident. This marked the close of the plaintiffs' case.
27. For the 1<sup>st</sup> defendant, Henry Kibunja being DW1 adopted his witness statement and testified that he has worked for the 1<sup>st</sup> defendant as a motor graving supervisor since 2008 and that the 1<sup>st</sup> defendant has its headquarters at Mombasa with a branch in Nairobi.
28. The witness asserted that the registered owner of the matatu in question is Bolpack Motors Limited and not the 1<sup>st</sup> defendant. He went ahead to produce the copy of records to that effect as D. Exh 1 together with a certificate of incorporation for the 1<sup>st</sup> defendant as D. Exh 2 and a copy of the court order made on 2<sup>nd</sup> November, 2011 in HCCC NO. 465 OF 2011 as D. Exh 3.
29. In cross examination, DW1 stated that he did not have any evidence to show who the owner of the matatu was as at the date of the accident.
30. Upon re-examination, it was the testimony of the witness that the matatu has never been registered in the name of the 1<sup>st</sup> defendant.
31. To follow was the 4<sup>th</sup> defendant who upon adopting his witness statement and producing his bundle of documents as exhibits, averred that he was not to blame for the accident but that it is the matatu that hit the wagon which he was driving at the time.
32. The 4<sup>th</sup> defendant further averred that he was never charged with any traffic offence in relation to the accident, though he testified as a witness in the traffic case, in which case the 3<sup>rd</sup> defendant was found culpable.
33. In cross examination, the 4<sup>th</sup> defendant testified that on the material date, he was driving from Ruai to town and that visibility was good. He went on to testify that the 3<sup>rd</sup> defendant then made a sudden U-turn, hitting the wagon and pushing it off the road.
34. The 4<sup>th</sup> defendant also gave evidence that the accident occurred on a straight stretch and acknowledged that the bus stop was well designated. He stated that he was driving carefully and keeping a safe distance between his vehicle and the vehicle that was in front of him.
35. It was his evidence at the point of re-examination that he did not at all contribute to the accident.
36. Upon close of the trial, this court gave directions for the parties to file written submissions. From the record, all parties put in their respective submissions, save for the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
37. On liability, the plaintiffs through their joint submissions dated 11<sup>th</sup> March, 2020 submitted that they have brought evidence to show that the deceased passed away as a result of the material accident and that the said accident involved the matatu and the wagon. The plaintiffs further submitted that there is evidence on record to show that the aforementioned motor vehicles were registered in the respective names of the 1<sup>st</sup> and 4<sup>th</sup> defendants.
38. The plaintiffs went ahead to contend that going by the copy of records produced in court, it is clear that the 1<sup>st</sup> defendant was the registered owner of the matatu as at the date of the accident and that it is probable that the matatu had changed hands as at the time it was shown to have been registered in the name of Bolpack Motors Limited.
39. It was the argument of the plaintiffs that the evidence of the eye witness (PW3) discloses that just before the accident, the matatu while being driven by the 3<sup>rd</sup> defendant made a sudden U-turn upon approaching the Ruai bus stop and collided with the wagon being driven by the 4<sup>th</sup> defendant at a high speed, hence both the 3<sup>rd</sup> and 4<sup>th</sup> defendants ought to be held liable.
40. In reply to the position taken by the 4<sup>th</sup> defendant that he cannot be held liable by virtue of the conviction of the 3<sup>rd</sup> defendant in the criminal proceedings, the plaintiffs have contended that a finding of guilty in a criminal case is not conclusive evidence of liability in a civil case and hence the 4<sup>th</sup> defendant cannot be exonerated solely on that ground. To buttress their point, the plaintiffs cited the case of **Fal Azad & another v Peter Mubua Karanja & 2 others [2016] eKLR** where the court held the following:

***“It is the court's considered view that whether or not a party is convicted under the above provision in a criminal case, that alone cannot be conclusive evidence of guilty in a civil case as the burden of proof in both are different, the proof in a criminal case being higher, and beyond reasonable doubt whereas it is on a balance of probability in a civil trial.”***

As well as the case of **Platinum Car Hire and Tours Limited v Samuel Arasa Nyamesa & another [2019] eKLR** in which the court in

echoing the above sentiments, succinctly stated that:

***“Before I consider the evidence, I wish to point out that it was not disputed that the third party driver was charged and convicted of the offences of driving a defective vehicle and causing death by dangerous driving. By reason of section 47A of the Evidence Act (Chapter 80 of the Laws of Kenya), the 2<sup>nd</sup> respondent could not deny that there was negligence on the part of his driver. However, it was still open for the court to apportion liability between the parties. In other words, the court could still find contributory negligence against the appellant (see Robinson v Oluoch [1971] EA 376 and Queens Cleaners & Dyers Limited v East Africa Community & Others [1972] EA 376).”***

41. According to the plaintiffs, an apportionment of liability between the 3<sup>rd</sup> and 4<sup>th</sup> defendants in the ratio of 50:50 is the most reasonable step to be taken since the evidence shows that both the parties did not exercise due care and consider the wellbeing of fellow motorists and other road users. The plaintiffs supported their submission with the following holding borrowed from the case of **Welch vs. Standard Bank Limited [1970] EA 115** and cited in **LWK (A minor suing through father and next friend SKD) v Kirigu Stanley & another [2019] eKLR**:

***“There being nothing to enable the court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The court does hold so in this case.”***

42. On the question of damages, the plaintiffs proposed a sum of Kshs. 150,000/ on pain and suffering, arguing that the deceased died within hours of the accident. Reliance was placed on the case of **David Kahuruka Gitau & another v Nancy Ann Wathithi Gitau & another [2016] eKLR** wherein an award of Kshs. 100,000/ was made to the estate of a deceased person who died 30 minutes following the accident.

43. The plaintiffs suggested an award of Kshs. 450,000/ on general damages for loss of expectation of life and cited the authority of **Jonnes Eshapaya Olumasayi & Another v Minial H Lalji Koyedia & Another [2008] eKLR** where an award of Kshs. 300,000/ was made, as well as the case of **Purity Karimi Njoroge & 2 others v Alice Wangui Ndungu & 3 others [2016] eKLR** in which the court awarded a sum of Kshs. 200,000/ under a similar head.

44. In respect to general damages for loss of dependency, the plaintiffs made a proposal for this court to apply a multiplier of 24 years, a multiplicand of 25,598.20 being the deceased's net salary at the time of his death, and a ratio of 2/3 to be tabulated as hereunder:

Kshs. 25,598.20 x 24 x 12 x 2/3 = Kshs. 4,914,854.40

45. The plaintiffs drew support from the case of **Stella Kanini Jackson & Another v Kenya Power & Lighting Company Limited [2012] eKLR** and the case of **Judy Njura Kathuri & another (suing as the legal representative and administratrix of the estate of Thomas Vuhiru Agade v Kenya Power & Lighting Company Limited [2017] eKLR** in which both courts applied respective multipliers of 24 years and dependency ratios of 2/3 in the instance of deceased persons aged 36 years, similar to the deceased herein.

46. The plaintiffs further sought for the special damages pleaded in the plaint and amended orally before this court.

47. The 1<sup>st</sup> defendant in its submissions dated 18<sup>th</sup> June, 2020 began by contending that the arrest, criminal proceedings and conviction of the 3<sup>rd</sup> defendant is conclusive evidence that he is liable for the accident and the death of the deceased. The 1<sup>st</sup> defendant made reference to the provisions of **Section 47A of the Evidence Act Cap. 80 Laws of Kenya** which read as follows:

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

48. The 1<sup>st</sup> defendant further contended that it was a wrong party in the suit by virtue of the fact that it is not one and the same entity with Bolpack Motors Limited being the registered owner of the matatu at all material times, according to the copy of records tendered in evidence. The 1<sup>st</sup> defendant added that neither one of the companies can and should be held vicariously liable for the acts committed by the other and that in any case, the plaintiffs have neither shown any nexus between the 1<sup>st</sup> defendant and Bolpack Motors Limited nor shown that the 1<sup>st</sup> defendant was the registered owner of the matatu on the date of the material accident.

49. For the foregoing reasons, the 1<sup>st</sup> defendant urged this court to dismiss the plaintiffs' case against it with costs and to further dismiss the suit against the 4<sup>th</sup> defendant with costs.

50. The 4<sup>th</sup> defendant submitted that no liability should be apportioned to him for the reason that on the material date, he was driving within a reasonable speed and in compliance with the traffic rules. The 4<sup>th</sup> defendant also submitted that he did his level best to avert the impact/collision between the wagon and the matatu but the accident was inevitable as the wagon lost control.

51. In his submissions, the 4<sup>th</sup> defendant echoed the sentiments of the 1<sup>st</sup> defendant that owing to the conviction of the 3<sup>rd</sup> defendant in relation to the material accident, there is no doubt that the 3<sup>rd</sup> defendant is the person who ought to be held liable in the present case.

52. The 4<sup>th</sup> defendant therefore urged this court to absolve him of any liability in the matter and that should this court find otherwise, then the

liability apportioned to him should be minimal, say 10% contributory negligence.

53. On quantum, the 4<sup>th</sup> defendant suggested the respective awards of Kshs. 100,000/ and Kshs. 30,000/ on general damages for loss of expectation of life, and pain and suffering. The 4<sup>th</sup> defendant relied upon the case of **Mary Chepkemoi Cheruiyot & another v Andrew Mwangi & another [2019] eKLR** where the court awarded similar sums under the two (2) heads to the estate of a 21-year old deceased person whose time of death was unclear.

54. For loss of dependency, the 4<sup>th</sup> defendant proposed a multiplier of 20 years and urged this court to consider the judicial authority of **Pleasant View School Limited v Rose Mutheu Kithoi & another [2017] eKLR** in which the court applied a multiplier of 20 years in the instance of a deceased of similar age to the deceased herein. The 4<sup>th</sup> defendant found a dependency ratio of 2/3 to be reasonable and further urged this court to apply a multiplicand of Kshs. 17,820/ constituting the deceased's basic pay, to be tabulated as follows:

Kshs. 17,820 x 20 x 12 x 2/3 = Kshs. 2,851,200/

55. On special damages, it was the submission of the 4<sup>th</sup> defendant that the same should be awarded on the basis of what was pleaded and proved.

56. I have considered the contending submissions and various authorities cited in support thereof. I have also examined both the pleadings and evidence tendered before this court. From the pleadings and evidence, I have identified the following as the issues for determination:

*(i) Whether the 1<sup>st</sup> defendant is a proper party to the suit;*

*(ii) Whether the plaintiffs have made out a case for negligence against the defendants herein; and*

*(iii) Whether the plaintiffs are entitled to the reliefs sought.*

57. Under the first issue which was primarily raised by the 1<sup>st</sup> defendant, I note that the 1<sup>st</sup> defendant is of the view that it was wrongly enjoined in the suit yet it was not shown to be the registered owner of the matatu and also by virtue of the fact that there is a moratorium in place staying all proceedings against it.

58. Upon considering the evidence tendered before this court, I established that the copy of records relating to the matatu offered showed two (2) separate entities as being the registered owners of the said matatu. On the one hand, the copy of records which was produced by the plaintiffs indicate the 1<sup>st</sup> defendant as being the registered owner of the matatu as at 28<sup>th</sup> February, 2006 while that produced by the 1<sup>st</sup> defendant indicate an entity known as Bolpack Motors Limited as being the registered owner as at 3<sup>rd</sup> July, 2006.

59. From the foregoing, I am able to tell that while it is apparent that the matatu bears different registered owner details and there is nothing to clarify the position on whether the owners are related, it is also apparent that the periods of ownership differ between the copies adduced, as seen above.

60. On the subject of the moratorium, I considered the police abstract tendered as evidence which indicates that the 1<sup>st</sup> defendant was at all material times insured by Blue Shield Insurance Company Limited. I also considered a copy of the order made by the court on 28<sup>th</sup> October, 2011 in HCCC NO. 465 OF 2011 in essence staying all proceedings against Blue Shield or its policyholders during the currency of the moratorium.

61. Be that as it may, it is noteworthy that the aforesaid order was issued way back in 2011 and the 1<sup>st</sup> defendant did not avail any evidence by way of a court order show that there is currently in place an extension of the stay order or to show that the moratorium is still in place.

62. From the foregoing, I am not convinced that the 1<sup>st</sup> defendant is an improper party in the suit and I hesitate to issue an order dismissing the case against it on that basis.

63. This brings me to the second issue for determination which constitutes the crux of the case. On the subject of ownership of the motor vehicles which were involved in the material accident, the plaintiffs produced a copy of records as evidence, indicating the 1<sup>st</sup> and 4<sup>th</sup> defendants as being the registered owners of the matatu and wagon respectively.

64. Going by the evidence, I note that the issue of ownership of the matatu was brought to question, to a point an employee of the registrar of motor vehicles (PW1) had to be brought in to clarify the position. From his evidence, I established that it was not adequately explained how a motor vehicle bearing the same registration details could have different owners. However, upon looking at the respective dates therein, in my view it is plausible that the matatu changed hands at one point, which might explain the conflicting names in ownership.

65. I established that going by the copy of records produced by the plaintiffs dated 5<sup>th</sup> April, 2006 and which copy was not deemed inauthentic or inaccurate by PW1, it is apparent that the 1<sup>st</sup> defendant was the registered owner of the matatu as at 28<sup>th</sup> February, 2006 which is the date of the accident. In any event, the copy of records adduced by the 1<sup>st</sup> defendant shows the registered owner as at 3<sup>rd</sup> June, 2006. In my view, the contents of the copy of records are deemed to be prima facie evidence of ownership pursuant to the provisions of **Section 8 of the Traffic Act, Cap. 403 Laws of Kenya** which stipulates that the person whose name appears on the registration document in respect to a motor vehicle will be considered its owner.

66. Furthermore, the 1<sup>st</sup> defendant in its pleadings and through its evidence at the trial took the position that the matatu is insured by Blue Shield Insurance Company Limited, as I had mentioned earlier on. The police abstract produced by the plaintiffs echoes this position. In the circumstances, I am satisfied that the plaintiffs have proved that the 1<sup>st</sup> defendant was at all material times the registered owner of the matatu.

67. As concerns the wagon, the plaintiffs also produced a copy of records indicating the 4<sup>th</sup> defendant as its registered owner. This position was further indicated in the police abstract and in any case, the 4<sup>th</sup> defendant in his oral evidence acknowledged that he was the owner of the wagon and its driver on the material date.

68. Suffice it to say that the plaintiffs did not bring any evidence to link the 2<sup>nd</sup> defendant to ownership of the matatu and going by the evidence and submissions, it is apparent that the plaintiffs did not pursue any line of argument associating the 2<sup>nd</sup> defendant with the said matatu or with the accident in question.

69. Going by the legal positions above and my examination of the evidence produced in court, I am thus satisfied that the plaintiffs have proved on a balance of probabilities that the 1<sup>st</sup> and 4<sup>th</sup> defendants were at all material times the registered and/or beneficial owners of the subject motor vehicles.

70. In regards to the question of negligence, I examined the evidence of PW3 who was a witness to the accident and who blamed the drivers of both the matatu and the wagon for the accident. I also examined the contents of the police abstract adduced as evidence and which place the 3<sup>rd</sup> defendant at the scene of the accident as the driver of the matatu, while the wagon was being driven by the 4<sup>th</sup> defendant, admittedly so.

71. According to the evidence, the matatu made a sudden U-turn and knocked the wagon which then lost control and hit a few pedestrians, including the deceased. The police abstract indicates that criminal charges were preferred against the 3<sup>rd</sup> defendant. In that respect, I looked at the file in the criminal proceedings which confirms that a traffic case was lodged against the 3<sup>rd</sup> defendant vide Makadara Traffic Case No. 2070 of 2006 in which he was charged with the offence of causing death by dangerous driving. Upon hearing the parties, the traffic court found the 3<sup>rd</sup> defendant guilty on all counts and convicted him under the provisions of Section 215 of the Criminal Procedure Code. There is nothing to indicate that the conviction was ever appealed against. The proviso of **Section 47A of the Evidence Act Cap. 80 Laws of Kenya** goes on to stipulate that:

***“A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.”***

72. In the present instance, it is clear that the 3<sup>rd</sup> defendant did not at all testify or participate at the hearing to counter the allegations of negligence made against him. In the absence of any contrary evidence to the plaintiffs' averments of negligence therefore, I am satisfied that the 3<sup>rd</sup> defendant ought to be held liable for the accident.

73. It is known to the parties that the standard of proof in criminal cases is much higher than that in civil cases. That notwithstanding, this does not automatically mean that a conviction is conclusive evidence of liability in a civil claim. This position was succinctly stated in the case of **Fal Azad & another v Peter Mubua Karanja & 2 others [2016] eKLR** and **Platinum Car Hire and Tours Limited v Samuel Arasa Nyamesa & another [2019] eKLR** both quoted in the plaintiffs' submissions.

74. I note the 4<sup>th</sup> defendant's evidence that the 3<sup>rd</sup> defendant is solely to blame by virtue of his conviction in the criminal proceedings. However, upon examining the evidence on record, I note that while the 3<sup>rd</sup> defendant did make a U-turn and ended up hitting the 4<sup>th</sup> defendant's wagon, the witness account of PW3 is such that the 4<sup>th</sup> defendant was driving at a high speed and hence the loss of control.

75. To my mind, had the 4<sup>th</sup> defendant been driving at a reasonable speed, he would have been able to apply emergency brakes upon realizing the matatu approaching him and it is plausible that the impact of collision would not have been as serious. I say this in due consideration of the fact that the evidence shows that the road was straight and that visibility was clear according to the 4<sup>th</sup> defendant. Further to this, the 4<sup>th</sup> defendant produced an inspection report which indicates that the wagon had no pre-accident defects which therefore means that the accident was, in my view; preventable or at least, controllable.

76. Put another way, this court is not restricted to the findings in the criminal case and can apportion liability in this case where the circumstances call for it. In the present instance and going by the evidence presented to me, I find some degree of fault on the part of the 4<sup>th</sup> defendant though I would largely blame the 3<sup>rd</sup> defendant for causing the accident, since an inspection report also shows that the matatu on its part had no pre-accident defects.

77. Returning to the 1<sup>st</sup> defendant, having found that the matatu was registered in its name as at the time of the accident coupled with the evidence to show that the 3<sup>rd</sup> defendant was its driver on the material date, I am inclined to find the 1<sup>st</sup> defendant vicariously liable.

78. I am satisfied that the plaintiffs have proved their case against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Consequently, I will apportion liability amongst the defendants in the ratio of 80% against the 1<sup>st</sup> and 3<sup>rd</sup> defendants jointly and severally, and 20% against the 4<sup>th</sup> defendant.

79. Having found so, I will now address the reliefs sought in the plaint under the heads to follow.

**a) General damages**

**(i) Pain and suffering**

80. Under this head, I examined the evidence of the 1<sup>st</sup> plaintiff that the deceased was pronounced dead on arrival at the hospital. A copy of the death certificate which was tendered as P. Exh 4 confirms that the deceased passed away on the date of the accident.

81. I considered the suggestions on awards as cited by the plaintiffs and the 4<sup>th</sup> defendant, in the absence of any proposals by the 1<sup>st</sup> defendant. Going by the evidence, it remains unclear how much time had passed between the period in which the deceased was hit and his demise. There is however nothing to indicate that the deceased died immediately after the accident.

82. From the foregoing, I find the proposal of and authorities cited by the plaintiffs to be on the higher side in terms of awards made. I however find relevance in the case of **Mary Chepkemoi Cheruiyot & another** (supra) cited by the 4<sup>th</sup> defendant and in which the court, while faced with a similar situation, decided to award a sum of Kshs. 30,000/ under this head. I therefore find a sum of Kshs. 30,000/ to be reasonable in the circumstances.

**(ii) Loss of expectation of life**

83. Under this particular head, I equally took into account the awards proposed by the respective parties. In my view, the award proposed by the plaintiffs is quite high.

84. Courts have been known to award a conventional sum of Kshs. 100,000/ under this head, as proposed by the 4<sup>th</sup> defendant as seen in the case of **Mary Chepkemoi Cheruiyot & another** (supra). I also considered that a similar award made in the case of **Mumias Sugar Company Limited v Henry Olukokolo Ashuma (suing as the legal representative in the estate of Patrick Kweyu Ashuma (Deceased) & another [2018] eKLR**. As such, I am convinced that an award of Kshs. 100,000/ would constitute adequate damages for loss of expectation of life.

**(iii) Loss of dependency**

85. I will address the award under this head in three (3) parts, beginning with the multiplier. A copy of the death certificate which was produced confirms that the deceased was aged 36 years at the time of his death. There is evidence adduced that he was in good health.

86. The plaintiffs on the one part urged that I apply a multiplier of 24 years while the 4<sup>th</sup> defendant proposed a multiplier of 20 years. I considered the authorities cited by the parties side by side. I also considered the more recent case of **Elite Earthmovers Ltd v Kiilu Masenge & 2 others [2019] eKLR** whereby the court applied a multiplier of 20 years in the instance of a deceased of 36 years old. Upon weighing the respective multipliers applied in the cases cited before me, I will settle for a multiplier of 20 years.

87. On the dependency ratio, the plaintiffs produced evidence by way of a copy of a marriage certificate to show that the 1<sup>st</sup> plaintiff was married to the deceased. Copies of birth certificates for the children borne in the marriage were also produced. Both the plaintiffs and the 4<sup>th</sup> defendant suggested a ratio of 2/3 which I find to be reasonable.

88. Concerning the multiplier, I examined a copy of the pay slip for the deceased for the month of February, 2006 adduced as P. Exh 6. The same confirms that the deceased served as an internal auditor and that he was earning a gross salary of Kshs. 29,065/ at the time of his death. Upon statutory deductions, the net salary would come to Kshs. 25,589.20. This would constitute the applicable multiplicand. Accordingly, the award under this head is to be tabulated as follows:

Kshs. 25,589.20 x 20 x 12 x 2/3 = Kshs. 4,094,272/

**b) Special damages**

89. The law on special damages is well settled in the sense that damages of this nature must be specifically pleaded and strictly proved. Going by the evidence adduced, I concluded that the plaintiff was able to prove by way of receipts the sum of Kshs. 89,630 on funeral related costs; Kshs. 70,010/ in legal fees and other costs relating to the succession case; and Kshs. 1,000/ in cost of obtaining the copy or records for the subject motor vehicles. These sums come to a total of Kshs. 160,640/ being the special damages pleaded and proved by way of evidence.

90. Accordingly, I hereby enter judgment in favour of the plaintiffs and against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as follows:

**Liability - 80% to be borne by the 1<sup>st</sup> and 3<sup>rd</sup> defendants and 20% to be borne by the 4<sup>th</sup> defendant**

**a) General damages**

<b>(i) Pain and suffering</b>	<b>Kshs. 30,000/</b>
<b>(ii) Loss of expectation of life</b>	<b>Kshs. 100,000/</b>
<b>(iii) Loss of dependency</b>	<b>Kshs. 4,094,272/</b>

