



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL SUIT NO. 130 OF 2012**

**JEFFREY L. BROWN**

*(Suing on his own behalf and as Administrator of the Estate of*

*Sharon Mary Brown and MCB) ..... PLAINTIFF*

**VERSUS**

**CASTLE FOREST LODGE LIMITED.....1<sup>ST</sup> DEFENDANT**

**KENYA WILDLIFE SERVICE.....2<sup>ND</sup> DEFENDANT**

**KENYA FOREST SERVICE.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**1. Pleadings:**

[1] The plaintiff initially sued the 1<sup>st</sup> defendant together with one of its directors for general damages for pain and suffering and loss of dependency. He also sought for special damages in the sum of US\$ 2,644,505 or an equivalent amount in Kenya shillings as at the date of payment or enforcement of the judgment should his suit succeed. He has prayed for interest on the special damages calculated at court rates accruing from the date the cause of action arose to such a date as the payment is made.

[2] Although the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have also been sued, it is only the 1<sup>st</sup> defendant company which is targeted. To be precise, the plaintiff has prayed for judgment against the 1<sup>st</sup> defendant only although he has, erroneously in my view, phrased his prayers as being ‘jointly and severally’ sought.

I take it that the plaintiff has deliberately overlooked the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in his claim because they were brought in this suit at the instance of the 1<sup>st</sup> defendant who sought indemnity or contribution against them for the accident that is the subject of this suit. I shall address their entry to this suit at length at a later stage.

[3] The genesis of the plaintiff’s claim is an accident that occurred in Mt Kenya reserve on 4<sup>th</sup> January, 2010. On the material date, the plaintiff, his wife and their infant daughter together with his brother and sister-in-law were on a nature walk deep in the forested area of the reserve when suddenly they encountered an elephant; the entire group was then under the guidance of the 1<sup>st</sup> defendant’s agent, servant or employee whose duties included guiding the 1<sup>st</sup> defendant’s guests on such walks.

Except for the plaintiff’s wife and daughter, the rest of the group including the tour guide escaped from the irate elephant; it caught up with the two plaintiff’s family members and gored or trampled them to death.

[4] Prior to the nature walk and, in particular, on 3<sup>rd</sup> January, 2010, the plaintiff and his family had checked in the 1<sup>st</sup> defendant’s lodge which, was located within the Mt Kenya forest reserve; as it turned out at the hearing, it was so strategically located because the nature walks and bird watching within and outside the lodge’s precincts were its main attractions. The plaintiff avers that by virtue of this fact, the 1<sup>st</sup> defendant was an ‘occupier’ as understood under section 3 of the Occupiers Liability Act, cap. 34 and for this reason, it owed the plaintiff, his deceased wife and daughter a duty of care.

[5] The plaintiff also contends that were it not for breach of this duty by the 1<sup>st</sup> defendant, its servants or agents, the accident would not have arisen. He has particularised the injuries sustained by his deceased wife and daughter and the negligence of the 1<sup>st</sup> defendant.

[6] As it is in the reliefs sought so is it in the body of the plaint; there is no suggestion by the plaintiff that 2<sup>nd</sup> and 3<sup>rd</sup> defendants are liable in any manner whatsoever save to say that the 2<sup>nd</sup> defendant's mandate is to manage and conserve wildlife in Kenya while that of the 3<sup>rd</sup> defendant is to manage the forest resources.

[7] In its amended defence dated 12<sup>th</sup> May, 2012, the 1<sup>st</sup> defendant denied that it owed the plaintiff a duty of care either under the Occupiers Liability Act or under the common law. It contended further that at the time of the accident, the deceased were engaged in an outdoor activity beyond the 1<sup>st</sup> defendant's boundaries. The accident, so it has pleaded, occurred within the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' geographical jurisdiction and thus it was these two defendants who owed the deceased persons the duty of care.

[8] The 1<sup>st</sup> defendant also pleaded that it had brought to the attention of its guests including the plaintiff and the deceased persons sufficient notice of a disclaimer to the effect that it was not responsible for any liability of personal injury of any nature arising out of attacks by wild animals.

[9] According to the 1<sup>st</sup> defendant, the killer elephant was managed and controlled by the 2<sup>nd</sup> defendant in Mt Kenya National Park and Reserve which was also under its control or management. Accordingly, it was not only not liable but also that if there was any compensation due to the plaintiff as a result of the elephant attack, payment of such compensation was subject to the provisions of the **Wildlife (Conservation and Management) Act, cap. 376**.

[10] Although the deceased were attacked outside the area within which the 1<sup>st</sup> defendant had been licensed to operate, the 1<sup>st</sup> defendant nevertheless admitted that they were in the company of its employee who, as it contended, was not only a licensed tour guide but was also registered as such by the 2<sup>nd</sup> defendant. He was, therefore, apparently, in the course of his employment.

[11] The 1<sup>st</sup> defendant denied it was negligent but instead attributed the accident to the negligence of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants together with the plaintiff together with his family members. In particular, it blamed the deceased and the plaintiff for not heeding its guide's concern against pressing further with the nature walk when it was dangerous to do so and for ignoring its warnings conspicuously erected within the lodge.

The plaintiff and his deceased wife are also blamed for carrying along their infant daughter to the nature walk when it was not safe to do so. It is the 1<sup>st</sup> defendant's contention that the plaintiff and the deceased either caused the accident or they substantially contributed to it.

[12] The 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed their respective statements of defence the tenor of which is largely against the claims made against them by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant denied specifically that the plaintiff was in the company of a guide registered or licensed by the Mt Kenya National Reserve. It denied further that it at any one time assumed the responsibility of the safety of the plaintiff and his deceased family members. It attributed the accident to the negligence of the 1<sup>st</sup> defendant, its servants or employees. In the alternative, the 2<sup>nd</sup> defendant contended that the plaintiff was equally liable for the accident.

[14] Similarly, the 3<sup>rd</sup> defendant contended that it is a stranger to the plaintiff's allegations. It also denied that the 1<sup>st</sup> defendant is entitled to any sort of indemnity from it. It admitted the 1<sup>st</sup> defendant was its licensee who had its permission to operate a lodge within Mt Kenya forest but that at the time of the elephant attack the plaintiff and the deceased were outside the licensed boundaries and without the 3<sup>rd</sup> defendant's guide. In any event, the plaintiff and the deceased entered the forest without the 3<sup>rd</sup> defendant's consent or knowledge; neither did they seek protection from the 3<sup>rd</sup> defendant during their nature walk. The 3<sup>rd</sup> defendant pleaded further that if there was any loss or damage suffered by the plaintiff, the 1<sup>st</sup> defendant bore the sole responsibility for such eventuality and denied any negligence on its part.

[15] Finally, the 3<sup>rd</sup> defendant denied that this court has jurisdiction to determine the dispute between it and the 1<sup>st</sup> defendant because both parties had bound themselves to refer any dispute arising out of the 1<sup>st</sup> defendant's licence to operate the lodge within Mt Kenya forest to an arbitrator. This objection was, however, not taken up at any stage of the proceedings and so nothing turned on it.

## 2. Evidence:

[16] The plaintiff testified that he is a resident of New Hampshire state in the United States of America. On 3<sup>rd</sup> January, 2010 he, along with his wife, their daughter together with his brother Richard Levert and his wife Elizabeth Carton were booked in at the 1<sup>st</sup> defendant's lodge. Amongst the information he was asked to provide before checking in were such details as the number of guests he was with and the period they intended to stay. According to his testimony, the 1<sup>st</sup> defendant's employees implored them to take a nature walk on the material day; however, he opted to pitch a tent within the lodge compound where he spent the rest of the afternoon with his wife and daughter. While having dinner on the same day, the subject of a nature walk cropped up again and this time they agreed that they could all take this walk the next day. On the material date, the 4<sup>th</sup> January, 2010, at about 10.30 AM, they met the 1<sup>st</sup> defendant's tour guide and informed him they would prefer a short walk of about an hour or so; they could not walk longer because they had an infant with them; as matter of fact, the baby was mounted on a pram that was then being pushed by the plaintiff's wife.

[17] The party then left the lodge using the access road or what I understood to be a nature trail; they walked for fifteen to twenty minutes before they diverted from this course into the forest. It was drizzling but the rain gathered intensity forty or so minutes into the walk. They walked in a single file with the guide at the front while the plaintiff was behind at the farthest end. Suddenly, the guide came running in the opposite direction. The plaintiff stopped him to inquire what the problem was but all he did was to shout back "run". Everybody else turned and started running. The plaintiff diverted from the path into the forest but slipped and fell just after about five metres. As he arose he saw an elephant with its young behind. He then heard his wife scream. She was then flung into the air at least twice before the elephant trampled on her abdomen. As soon as the elephant disappeared into the forest the plaintiff and his brother went to the scene and found the baby sitting; she was breathing lightly. His wife's body was 10 metres further down the path. She had sustained multiple injuries and her body looked

lifeless. The guard reappeared soon thereafter. They then all followed him back to the lodge.

[18] The 2<sup>nd</sup> defendant's ranger accompanied by the plaintiff went back to the forest to retrieve the body. By this time the infant had also died. The two bodies were taken to Nairobi in the 2<sup>nd</sup> defendant's helicopter piloted by Simon Gitau; the plaintiff accompanied them and took the bodies to Lee Funeral Home. Later, the bodies were flown to the United States via a British Airways flight on 7<sup>th</sup> January, 2010.

[19] As a result of his wife's and daughter's death the plaintiff testified that he incurred expenses of approximately US\$ 10,000.00. It was also his evidence that his wife was aged 38 at the time of her demise and she was a salaried employee earning approximately US\$ 54,000/= a year. She would have retired at the age of 65 years which is the retirement age in her country, the United States of America.

[20] The plaintiff holds the 1<sup>st</sup> defendant and its director Melia Van Laar wholly responsible for the accident; according to him, the accident would not have occurred if they had exercised some duty of care. He also came to learn that theirs was not an isolated incident as a similar attack had happened before; Van Laar herself alluded to this attack in her evidence and therefore the 1<sup>st</sup> defendant ought to have been more cautious to avoid such attacks in future.

[21] The plaintiff's brother, Richard Levert (PW2) and his wife Elizabeth Carton (PW3) testified in support of his case. It was Richard's evidence that they intended to stay at the lodge for two days. According to him, they heard of the nature walk while at the lodge and that they were encouraged to take it along with their infant child. The incident happened one hour into the walk. In his view, the accident would not have happened if they had not diverted from the nature trail into the forest. His wife testified that he was right behind the tour guide though the latter would at times proceed further ahead and come back for them. The attack occurred thirty to forty minutes into the forest. Both of them testified that they paid for the nature walk.

[22] **Dr Peter Muriuki (PW4)** performed a postmortem examination on the deceased's bodies the day after the accident. His observation of Sharon's body revealed that blood oozed from both her ears. She had also sustained external injuries on the left thigh all the way to the hip joint exposing the muscle tendons. The left anterior abdominal wall with bowels protruded. There were bruises on the groin area and on the anterior chest wall. She sustained a deep stab wound on the right shoulder. The sternum was also fractured. All the ribs were fractured and the lungs were lacerated. The heart had multiple bruises with blood in the pericardial sac. The intestines were bruised. The liver and the spleen were ruptured. The head sustained bruises on the frontal and right temporal scalp. There were multiple linear fractures of the skull with diffuse intercranial haemorrhage. The base of the skull was also fractured. The spinal column was fractured. Similarly, the cervical spinal cord was also fractured. The pathologist opined that the cause of death was multiple organs' injuries due to trauma consistent with an animal attack.

[23] As far as the body of Margaux is concerned, the pathologist observed that blood also oozed from her ears. There were bruises on the head and the upper part of the body. Multiple depressed fractures of the skull could also be seen. There was cranial haemorrhage. The base of the brain was sculptured. The cause of her death, according to the pathologist, was severe head injury due to blunt trauma consistent with animal attack.

[24] **Ms Melia Van Laar (DW1)** testified on behalf of the 1<sup>st</sup> defendant and acknowledged that she is the managing director of the 1<sup>st</sup> defendant which is licensed by the 3<sup>rd</sup> defendant to operate a lodge on the southern slopes of Mt Kenya. The actual area covered by the license is approximately 10 ½ hectares. She met the plaintiff at the lodge on 4<sup>th</sup> January, 2010. **Anthony Kethi (DW2)** was the lodge's duty manager when the plaintiff's team arrived. According to her, the duty manager informed the plaintiff's party of what was expected of them while at the lodge. They were, for instance, warned of wild animals straying and roaming into the lodge compound since it was not fenced. Further, they were warned against venturing outside the cleared area into the forest unaccompanied. She testified also that she met the plaintiff's party the same afternoon they arrived and discussed, among other things, the elephant behaviour. Van Laar also testified that when her guests sought to know whether they could take a nature walk the following day, she informed them she could get them a guide for that purpose; however, she discouraged them from carrying the baby along because she would restrict their movement and, in any event, the baby was not going to appreciate the nature walk. The witness testified that the lodge was willing to provide a baby sitter but when Mrs. Brown insisted that she wanted to carry the baby along, she could not stop them. Later in her evidence, Van Laar denied having spoken to Mr. and Mrs. Brown about the nature walk because in her own words she did not find it prudent to do so.

[25] Van Laar came to know of the accident at 11 AM; she got the information from **Mr Ibrahim Maina**, the guide who had been put at the plaintiff and the rest of his family members' disposal to lead them during the walk. As he talked to her, the plaintiff, Mr Levert and his wife arrived at the lodge. The plaintiff was carrying the baby who had apparently passed on. She accompanied the plaintiff and Mr Gitau, the 2<sup>nd</sup> defendant's employee and other members of staff to the scene from where they collected the plaintiff's wife's body.

[26] Van Laar testified further that there are two large signs within the lodge compound; the first one is at the entrance of the camp while the other one is near the forest. The signs warn the guests of wild animals and also notify them that the lodge does not accept liability for accidents arising from attacks by wild animals. There are also such notices in the rooms. Apart from those notices, there is also disclaimer on the cards which the guests sign whenever they check in the lodge absolving the 1<sup>st</sup> defendant from any liability.

[27] She testified that Ibrahim Kariuki Maina, the tour guide who led the plaintiff and his family into the forest was registered with the 2<sup>nd</sup> defendant and that he was an experienced guide. According to her, the 1<sup>st</sup> defendant always ensured that its guides were duly registered before employing them in such capacity. In her view, guides did not require any formal training; it is enough that they live near a forest and appreciate its flora and fauna. Maina, according to her, was best suited for the job because he used to walk through the forest on his way to school and for this reason he was more familiar with the behaviour of elephants.

[28] Van Laar also admitted that the guides, including Maina, are the 1<sup>st</sup> defendant's employees and the manager on duty would ordinarily engage any of them whenever their services are required; crucially, she admitted that, as their employer, the 1<sup>st</sup> defendant is responsible for their acts or omissions.

[29] Although Van Laar was satisfied that Maina was a qualified guide and that he was also registered with the 2<sup>nd</sup> defendant, she admitted that she did not have any proof in that regard. Contrary to her earlier assertion, she admitted that the 1<sup>st</sup> defendant does not normally check the background of its guides to confirm their status with the 2<sup>nd</sup> defendant. Even then, she believed that Maina, by himself, provided sufficient protection to the plaintiff and the rest of the team that took the nature walk.

[30] **Anthony Njeri Kethi (DW2)** testified that he worked as a waiter and duty manager at the 1<sup>st</sup> defendant lodge at the material time. He attended to the plaintiff and his family when they checked into the lodge on 3<sup>rd</sup> January, 2010 and he is the person who directed them where to pitch their tent. Before then, the plaintiff signed guest registration card. He told him about the tourist attractions in the lodge including such features as the water falls and excursions such as bird watching and the nature walks. On this latter activity, he advised them to restrict themselves within castle lodge if they were going to move about with their child. Like Van Laar, he alluded to warning posts erected within the lodge.

[31] On 4<sup>th</sup> January, 2010, Mr. Kethi arranged for a guide to take the plaintiff and his party for the nature walk. On the material day, he led them from the campsite well aware that the plaintiff's child was part of the party. According to him, the walk was supposed to be within the lodge area though the boundaries were not physically defined. Later, he got information that one of the people in the team had been killed by an elephant.

[32] His explanation for lack of security for the team was that they were not expected to walk outside the lodge's premises even though the lodge itself is not fenced. Ordinarily, the 1<sup>st</sup> defendant would provide the guides with security equipment but on this particular occasion none was given to Maina. He admitted that Maina took the guests outside the lodge's boundaries into the forest where they encountered the killer elephant that was obviously in its natural habitat. He also admitted that the guide and the guests knew that there were chances that there were wild animals in the forest. As far as Maina's experience in such excursions is concerned, he testified that Maina was brought up in the forest and for that reason he would know his way around it. He admitted however, that even with that sort of experience the guide was not capable of protecting the 1<sup>st</sup> respondents' guest from wild animals.

[33] **Maina (DW3)** himself testified that indeed he was born in Kamweti village which happens to be within the Mt Kenya forest. He was engaged by the 1<sup>st</sup> defendant as a guide and also as a carpenter. He testified that, as a guide, he was registered with the 2<sup>nd</sup> defendant but that he did not have the registration card that would ordinarily show that he was duly registered.

[34] His version of the events was that on 4<sup>th</sup> January, 2010, he was tasked to guide the plaintiff and his party on a walk around the castle. However, when he went to brief them about the walk, they informed him that they had walked around the lodge area and all they wanted was to venture into the forest. He advised them to leave the child behind or to have the group split into two. They did not opt for any of these options and since they insisted on carrying their child along, he took what he described as a 'simple path'. However, he diverted into the forest after about 300 meters' walk. It started raining after about 30 minutes, and in the guide's view, this should have been a reason enough for them to turn back but the party insisted on continuing with the walk because, so he testified, they had no other time and, in any event, the walk was scheduled for two hours.

[35] Somewhere along the path, they encountered a fallen tree which, somehow, blocked their view. He decided to lead the group around it. It is then that he encountered the charging elephant. He quickly turned and screamed for everybody to run for their lives. In his bid to escape he collided with the person who was immediately behind him. He could not recall who it was but he remembered that the plaintiff's wife to have ran into the path of the elephant. The elephant which was initially charging at him, turned towards her; the guide saw it catch up with her and toss her into the air.

[36] Upon cross-examination, the guide testified that he went through formal training as a guide though to his knowledge, he was not aware of any institution that offered this training. As a guide he understood that he had to lead the way and direct their guests on the nature walk whenever they took such an excursion and in it is in this regard that he chose the path for the guests to take on the material date. The guide admitted that he was aware of the possibility of encountering wild animals when he diverted his guests deep into the forest. As a matter of fact, he remembered of a previous incident when an elephant killed a guest at the lodge in, apparently, similar circumstances. When cross-examined by counsel for the 3<sup>rd</sup> defendant, the tour guide admitted that he pressed on with the walk rather than go back because it was easier to reach the main road leading back to the lodge rather than go back the same way they had come.

[37] **Mr. Simon Gitau Ngugi (DW4)** testified on behalf of the 2<sup>nd</sup> defendant. At the time of his testimony, he was an assistant director of the 2<sup>nd</sup> defendant in charge of maintaining conservatories. Previously, and in particular in January, 2010 he was a mountain rescue officer. He had also been a senior warden in charge of Mt Kenya National Park and Reserve. His duties involved rescue missions for those people in danger while in the park. He also supervised other rescue teams. On the material date which is the 4<sup>th</sup> January, 2018, he received a call from a mountain guide called Mary Kariuki who informed him that a woman and a child had been attacked by an elephant at the mountain lodge. He called for help, apparently of air rescue, from one Jammy Roberts because he was informed that the child was still alive. He then proceeded to the lodge in a helicopter. Once there he asked to be led to the scene of the attack. He described the scene as off the trail; between 300 to 400 meters deep inside the forest. He assisted in airlifting the bodies to Nairobi.

[38] The witness testified that there are various types of guides; for instance, there are mountain guides and naturalists. In order for one to qualify as a guide he or she must apply through their club in which the prospective guide is presumably a member. The club has to approve the application before it is submitted to the applicant's area chief. The applicant then obtains a certificate of good conduct. It was his evidence that the clubs and not the 2<sup>nd</sup> defendant train their members. Ibrahim Maina, according to him, was not a trained guide at the material time because his application for registration was dated 16<sup>th</sup> February, 2010, more than a month after the incident. The witness testified further that the area where the incident happened is within the jurisdiction of both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

[39] In these circumstances, it was necessary for the 1<sup>st</sup> defendant to alert the two institutions before they took any visitors there. It was his evidence that if visitors have to go off the trails, which happens to have been the case here, they have to be accompanied by an armed ranger

and only after the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have been informed. As far as he was aware, the 1<sup>st</sup> defendant never informed the 2<sup>nd</sup> defendant of the victims' presence in the forest; neither did it ask for any security despite the fact that both the lodge proprietor and Ibrahim Maina had his phone contacts.

[40] **Laura Yego (DW5)** testified on behalf of the 3<sup>rd</sup> defendant and was categorical that the area in which the attack took place was within the jurisdiction of the 2<sup>nd</sup> defendant; however, she admitted during cross-examination that the area is a dual gazetted area meaning that the 3<sup>rd</sup> defendant had control over the forest while the 2<sup>nd</sup> defendant was in charge of the animals within it.

[41] The 3<sup>rd</sup> defendant's forest station manager where the 1<sup>st</sup> defendant is located and in whose jurisdiction the scene of the attack fell, **Emmanuel Mulu (DW6)** testified that the scene of the attack was outside the licensed zone of the 1<sup>st</sup> defendant. He stated that visitors could not venture to such a place as the scene of the attack without armed security. He confirmed that the 3<sup>rd</sup> defendant was not informed of the 1<sup>st</sup> defendant's guests' excursions.

### 3. Liability:

[42] From the foregoing evidence, there is no doubt that the plaintiff's wife and daughter were attacked and fatally wounded by an elephant in Mt. Kenya Forest Reserve on 4<sup>th</sup> October, 2010. The nature and extent of the injuries were established by a pathologist who also certified the deceased person's death. The question that logically follows is who, amongst the three defendants is liable for the tragic accident. In analysing the evidence, this question presents itself as the appropriate point from which to commence in resolving the present dispute.

[43] As I have noted at the beginning of this judgment, as much as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have been named as such in the plaintiff's amended plaint, the plaintiff has no cause of action against them; no liability has been attributed to the either of them and, for avoidance of any doubt, the judgment sought is specifically against the 1<sup>st</sup> defendant only. The plaintiff's evidence also shows that it is consistent with the pleadings and no attempt has been made to suggest that any of the two defendants could have been liable.

[44] The only reason why the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were sued is because of the order made by this Honourable Court (Wakiaga, J) on 29<sup>th</sup> May, 2013 allowing the 1<sup>st</sup> defendant's application to join the two parties as defendants in the suit. This application, made by way of chamber summons is dated 4<sup>th</sup> June, 2012 and was filed in court on 15<sup>th</sup> June, 2012. It first sought to have the name of Melia Van Laar (PW1), who was initially sued as the 2<sup>nd</sup> defendant, struck out from the suit on the basis that she was a director of the 1<sup>st</sup> defendant; second, the 1<sup>st</sup> defendant sought to include Kenya Wildlife Service and Kenya Forest Service as defendants respectively. Its prayers were granted accordingly and it is for this reason that the two parties appear in this suit as the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively.

[45] In striking out the name of Melia Van Laar and adding the names of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants the court, no doubt, invoked the provisions of Order 10 Rule 2 of the Civil Procedure Rules which states:

*The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

[46] The record shows that the next step that the 1<sup>st</sup> defendant took was to file a notice of claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. This notice dated 26<sup>th</sup> November, 2013 was filed on 29<sup>th</sup> November, 2013; it is stated to have been taken out under Order 1 rule 24(1) of the Civil Procedure Rules and in compliance with the order of the Court made on 5<sup>th</sup> November, 2013.

[47] I gather from the record that the case was fixed for full hearing on this particular date; however, when parties appeared before court, Mr Mugambi for the 2<sup>nd</sup> defendant informed the court that the 1<sup>st</sup> defendant who was the only defendant then had not laid a claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Counsel is recorded to have cited Rule 21 though the specific order under which this rule falls was not stated. Mr Kimondo for the 1<sup>st</sup> defendant explained that the matter had been fixed for hearing, apparently prematurely, by the plaintiff before the 1<sup>st</sup> defendant had taken out proceedings against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Against this background, the court ordered the 1<sup>st</sup> defendant to take out the necessary proceedings against the rest of the defendants within 30 days of that date.

[48] **Order 1 Rule 24** which, no doubt, took the centre stage during the proceedings of 5<sup>th</sup> November, 2013 provides as follows:

*(1) Where a defendant desires to claim against another person who is already a party to the suit—*

*(a) that he is entitled to contribution or indemnity; or that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or*

*(b) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and the defendant and such other person or between any or either of them, the defendant may without leave issue and serve on such other person a notice making such claim or specifying such question or issue.*

***(2) No appearance to such notice shall be necessary but there shall be adopted for the determination of such claim, question or issue the same procedure as if such other person were a third party under this Order.***

***(3) Nothing contained in this rule shall operate or be construed so as to prejudice the rights of the plaintiff against any defendant to the action.***

[49] The question that immediately arises is whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were party to the suit as at 29<sup>th</sup> November, 2013 when the 1<sup>st</sup> defendant took out a notice of claim against them under this particular order. The relevance of this question is not only rooted in Order 24 Rule 1 which presupposes that one must be a party to a suit before a notice of claim can issue against him but it has also a basis in Order 1 Rule 10(4) of the Rules which is to the effect that once an order has been made under order 1 Rule 10(2) to join a defendant or defendants to a suit, the plaint must be amended accordingly and copies of the amended plaint together with the summons to enter appearance served on the new defendants; the existing defendant may also be served if the court directs so. For better understanding it is necessary that I reproduce the relevant rule here; it states:

***10(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.***

[50] It follows that according to order 1 Rule 10 sub-rule (2) as read with sub-rule (4), the 2<sup>nd</sup> and 3<sup>rd</sup> defendants could only be deemed to be parties to the suit once the plaint had been amended to include them in their respective capacities.

[51] Now, it is apparent from the record that the plaint was not amended until the 17<sup>th</sup> March, 2016; it was eventually filed on 31<sup>st</sup> March, 2016, almost three years after the notice of claim had been issued against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and the hearing taken off. What this means is that the notice of claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was issued before they were joined to the suit; in effect, the notice was issued against them before they were sued. This is a clear case of putting the cart before the horse. Suffice it to say, to the extent that it is in breach of Order 1 rule 24 (1), the notice has no legal effect and thus the 1<sup>st</sup> defendant's claim for indemnification from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants has no proper foundation in law. Consequently, the incidence of liability remains a question for determination as between the plaintiff and the 1<sup>st</sup> defendant only.

[52] But even if one was to assume that the two defendants were properly joined, there is one more step that the 1<sup>st</sup> defendant appears to have overlooked. Order 1 rule 24 which formed the basis of a notice of claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants further provides in sub rule (2) thereof that the procedure for determination of the claim shall be the same procedure adopted in third party proceedings; in other words, once included in the suit, the defendants ought to have been treated as third parties as understood under Order 1 Rule 15(1) of the Rules. The specific procedure is found in Order 1 rule 22 which is to the effect that where a third party enters appearance pursuant to a third-party notice, the defendant giving the notice may apply to court by summons in chambers for directions on determination of the question of liability as between the defendant and the third party. In the instant case no application was made or directions issued for determination of the question of liability between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. This omission though is of no consequence having come to the conclusion that liability for the deceased's death is an issue between the plaintiff and the 1<sup>st</sup> defendant.

[53] Although the 1<sup>st</sup> defendant was categorical in its amended statement of defence that it did not owe the plaintiff together with deceased members of his family a duty of care, the testimony given in its behalf was consistent that indeed it owed them such a duty.

[54] To begin with, the 1<sup>st</sup> defendant's own director, Melia Van Laar (DW1) started her testimony by admitting that the plaintiff, his immediate family together with his brother Richard Levert (PW2) and his sister in law, Elizabeth Carton(PW3) were booked in the 1<sup>st</sup> defendant's lodge on 3<sup>rd</sup> January, 2010. She was aware that that they were staying overnight and were expected to take a nature walk in forest the following day. It is therefore not in dispute, and there is no evidence to the contrary, that at the time the accident happened, the plaintiff and his family members were the 1<sup>st</sup> defendant's guests.

[55] As far as the ill-fated nature walk is concerned, Van Laar also admitted that she discussed the excursion with the plaintiff's brother and sister-in-law the evening before the trip. She testified that she warned them against venturing into the forest unaccompanied, thereby implying that they could enter the forest as long as they were accompanied. As a matter of fact, she told them that if they wanted to walk to the forest she could provide them with a tour guide. It was also her testimony that she cautioned, not the plaintiff or his wife, but the plaintiff's brother and his sister-in-law against taking the walk with their infant daughter. In her own words, she did not find it prudent talking to the plaintiff and his wife about the dangers of taking the child with them.

[56] True to her word, the 1<sup>st</sup> defendant offered Ibrahim Maina Kariuki (DW3) as the guide to lead the plaintiff and his party in their nature walk on the material day. She described the tour guide as one who was experienced in this field and who was, in any event, duly registered with the 2<sup>nd</sup> defendant as such a guide. It was her word that she wouldn't task any of the 1<sup>st</sup> defendant's employees with the duties of a guide unless he was duly registered.

[57] Up to this point, my assessment of Van Laar's evidence leads me to the conclusion that the 1<sup>st</sup> defendant assumed, as it ought to, the responsibility of the safety of the plaintiff and his family the moment they were booked in the lodge. It is apparent from her testimony that the 1<sup>st</sup> defendant was all along cautious of its common duty of care towards the its guests for the entire period they remained such guests. As I understand it, the 1<sup>st</sup> defendant was not relieved of this responsibility if the guests ventured outside the lodge on outdoor activities, such as nature walks, for which the 1<sup>st</sup> defendant was famous and which it offered for a fee. As long as its guests remained under its care, it did not matter that they were outside the lodge; the 1<sup>st</sup> defendant remained as much responsible for their safety outside the lodge as much as it bore this responsibility inside the lodge. I suppose it is for this reason that the lodge had, or ought to have had, qualified tour guides at its disposal to guide its guests into the forest for a variety of activities which, no doubt, constituted expeditions available for offer to its adventurous

clients such as the plaintiff and his family.

[58] Van Laar herself alluded to this thought when in answer to questions put to her during cross-examination, she admitted that the 1<sup>st</sup> respondent assumes responsibility for its guests while at the lodge but when out there, the tour guide, in her view, guarantees their security. She was obviously mistaken on this because as long as the tour guide is in the course of his employment, it does not matter that he is within or outside the lodge; the 1<sup>st</sup> defendant is vicariously liable for the guide's acts or omissions in these circumstances. In any case, she admitted that nature walks are amongst the outdoor activities which the 1<sup>st</sup> respondent is popularly known for and which are offered for a fee. The tour guides, she testified, are paid for their services during such excursions. It would be difficult to fathom how the 1<sup>st</sup> defendant can skirt its responsibility of duty of care towards its guests in these circumstances. It is noteworthy that both Anthony Kethi (DW2) and Ibrahim Kariuki (DW3) admitted as much; that they owed the plaintiff and his entourage a duty of care.

My conclusion on this question is that the 1<sup>st</sup> defendant owed the plaintiff and his deceased wife and daughter a common duty of care. Simply put, having embraced the plaintiff and his family as its guests who accepted its offer of a nature walk and for which the guests paid, the 1<sup>st</sup> defendant was under a legal duty to take care of them.

[59] The next question that logically follows is whether the 1<sup>st</sup> defendant was in breach of this duty. I would think that it was. I say so because the available evidence points to this conclusion.

Looking at the 1<sup>st</sup> defendant's testimonies, and in particular the evidence of Van Laar, Anthony Kethi and Ibrahim Maina, it is clear that they were under no illusion of their guests' intentions as soon as they checked in the lodge. They were all aware that the plaintiff and his entourage were intent on taking a nature walk on 4<sup>th</sup> January, 2010. Again, this was not anything out of the ordinary because nature walks and birdwatching were some of the activities included in the packages on offer for their guests. Taking them at their word, such walks into the forest were available as long as their clients paid for them and were accompanied by the 1<sup>st</sup> respondent's guides. In other words, nature walks were part of the 1<sup>st</sup> defendant's business.

[60] Van Laar discussed the prospects of this venture with the Richard Levert and his wife Elizabeth Carton on the evening of 3<sup>rd</sup> January, 2010; of particular relevance, they discussed the behaviour of elephants and their frequency to areas that they could easily be seen. She testified that she warned the couple against taking a nature walk with the plaintiff's baby but somehow, left them to their own devices when they insisted that the plaintiff's wife would be carrying her baby along.

[61] I found this part of Van Laar's testimony intriguing because first, this information was not included in her witness statement; I doubt she could have left out such vital information from her statement considering the allegations against the 1<sup>st</sup> defendant and which, by and large, were the basis of the action against it. Secondly, the explanation given why she did not share with the baby's parents the information on the dangers of carrying her along cannot make sense. According to her, she did not find it 'prudent' to share the information with them; yet she found it necessary to share the same information with people who, naturally, would not be as much concerned about the baby's safety as her own parents. It's worth noting she met the baby's father and in fact the two of them had a conversation soon before the nature walk but she still found it 'imprudent' not to warn him of the danger of carrying the baby. My assessment of Van Laar's evidence is that she did not warn anybody against taking the plaintiff's daughter along during the nature walk.

[62] For the same reasons, I do not accept Anthony Kethi's evidence that the plaintiff and his family members were specifically warned of walking beyond the lodge's boundaries with their baby. I reject his evidence for a further reason that Kethi himself admitted that he arranged for a guide who, according to Ms Laar's evidence was necessary if the party was to take a trip to the forest, outside the undefined territory of the lodge. If her evidence is anything to go by, he could not have engaged the guide if the movement of their guests was restricted to the lodge only. In any event, their guests told them that they had already taken a walk around the lodge by themselves. A guide could not have been engaged when Kethi himself reiterated that a guide is only necessary if the guests went beyond the territory within which the 1<sup>st</sup> defendant was licensed to operate. To quote him, he said that "*whenever our guests venture outside the premises, a guide accompanies (them).*" Such a guard, so he testified, is provided with security equipment; however, no such equipment was given to Ibrahim Maina Kariuki, who was put at the plaintiff's and his family's disposal as their guide.

[63] It also turned out that said Ibrahim Maina Kariuki was, for lack of a better word, a quack, in the sense he was not a duly registered tour guide. Van Laar and Anthony Kethi had all along presented him as a person who was duly qualified for the job he was tasked with. According to Van Laar, the guide was "*registered with KWS and he is an experienced guide.*" She testified further that "*we confirm the guides are registered before we allow them to operate as guides;*" she, later in her evidence, contradicted herself and stated that in fact the 1<sup>st</sup> defendant does not check whether the guides are registered but rather, it relied on the '*documents they produce*'. She did not however produce any document that the 1<sup>st</sup> defendant could possibly have relied upon to satisfy itself of Maina's ability to lead a tour party in the forest or anywhere else for that matter.

[64] As far as she was concerned, a guide was qualified as such if "*he lived near a forest and they knew the flora and fauna*". Further, she assumed that Maina was familiar with elephants because the path to his school, which he always used as a student, was through the forest. She couldn't, however, provide any evidence that Maina was licensed as a guide and duly registered either with the 2<sup>nd</sup> defendant or the 3<sup>rd</sup> defendant.

[65] Maina himself testified that he was a guide because of the experience he had in the forest. In his own words, he "*was born in the forest*". He was, however, aware that one has to apply for registration as a guide with the 2<sup>nd</sup> defendant before he can be tasked with the duties of a guide. He was also aware that, once registered, one is issued with an identification card as a proof of this registration. He could not produce such a card though; he claimed that he had lost it. As it turned out he could not have had this card because he was not registered. To claim that he had been duly registered when he wasn't and that he had the requisite registration card when he had none, goes to show that the 1<sup>st</sup> defendant's witnesses were not credible.

[66] Mr Gitau(DW4), the Assistant Director with the 2<sup>nd</sup> defendant confirmed that Maina was not a licensed guide; however, he provided proof that Maina had applied to be a guide on 16<sup>th</sup> February, 2010 long after the accident had happened.

What comes out of this evidence is that Ibrahim Maina was not a qualified guide as at the time he purported to guide the plaintiff and his family into the forest. It is also apparent that although the 1<sup>st</sup> defendant was aware that only qualified guides duly registered with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants could lead its guests within and outside the lodge, it tasked a non-qualified person with this responsibility and thereby exposed them to danger.

[67] This danger was inevitable and it eventually manifested itself when the purported guide literary led the 1<sup>st</sup> defendant's guests into an elephant's habitation; it turned out to be a death trap. His testimony proved his lack of knowledge and inexperience in handling the task that he ought not to have been entrusted with in the first place. When he met the guests for briefing before the nature walk, they told him that they had walked around the lodge area and they wanted to venture into the forest. He was thus aware from the very start that the nature walk was inside the forest. Because they had a child with them, he took what he described as a 'simple path', an option that his guests agreed to. Despite the reasons that informed this option, Ibrahim deviated from the path after a distance of about 300 metres and ventured into the forest. They walked for about half an hour before it started raining. Although it was his testimony that he advised his entourage to go back to the lodge because of the rains, his later testimony would suggest that it was in fact his idea that the party should proceed with the nature walk. In the first place he admitted during cross-examination by the 3<sup>rd</sup> defendant's counsel that he is the one who led the guests into the forest away from the 'simple path' he had opted for earlier. He testified that after walking for an hour into the undesignated route he had to make a judgment and his decision was "to proceed rather than go back because the main road was closer" apparently from the point where they had reached. Accordingly, in his judgment it was easier for them to go ahead rather than go back. This decision turned out to be calamitous because they encountered a charging elephant soon thereafter.

[68] In these circumstances, there are sufficient reasons, in my humble view, to hold the 1<sup>st</sup> respondent negligent and therefore solely liable for the accident that occurred. It did not bother to ascertain whether Ibrahim Maina was a qualified guide; and even then, it did not provide him with any protective gear or security when it released him to guide its guests. It was also negligent because it simply failed to provide a qualified guide to its guests. It was responsible for the guide's acts of negligence of deviating from the nature trails to the forest and thereafter carrying on with the walk when it was not safe to do so.

[69] In reaching this conclusion I have to echo the words of Lord Atkin in the *locus classicus* case of Donoghue versus Stevenson (1932) A.C. 562 at page 580 on the twin issues of what 'duty of care' entails and when it is deemed to have been breached. The learned judge said:

***In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books instances. The liability for negligence, whether you style such or you treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot, in a practical world, be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and to the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. (Underlining mine)***

[70] There is no doubt that being the 1<sup>st</sup> defendant's guests, the plaintiff and his family were persons who were 'so closely and directly affected' by the 1<sup>st</sup> defendant's acts or omissions that it reasonably ought to have had them in contemplation when it led them to a nature walk deep inside the forest. In taking such action, the danger to which the 1<sup>st</sup> defendant exposed the plaintiff his wife and daughter was foreseeable. In my humble view, it failed to take such reasonable care to avoid it.

#### **4. Contributory negligence.**

[71] The 1<sup>st</sup> defendant contended that the plaintiff and the deceased contributed to the accident. For reasons I have given, I cannot find any basis for contributory negligence from either the plaintiff or the deceased members of his family who were fatally wounded by the elephant.

[72] I understand both Van Laar and Anthony Kethi to have stated that the 1<sup>st</sup> defendant had at its disposal baby sitters who would have been available to take care of the plaintiff's daughter. No proof of the existence of such workers was provided and, in any event, the witnesses' statements did no bear such information. The plaintiff and the deceased members of his family cannot therefore be said to have contributed to the accident because they failed to take the advantage of what in my view, were non-existent baby sitters. It must be remembered that the elephant attacked not because there were baby sitters who were not utilized but simply because the tour guide led his party to its habitat. Put differently, there is no evidence that the fatal elephant attack would not have happened if the child had been left behind.

#### **5. Indemnity:**

[73] As far as the indemnity sought against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is concerned, I have already noted that there was no legal basis for attributing liability to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. And even if there was such basis, it was not proved on a balance of probabilities that either of them was liable to any extent.

[74] The 1<sup>st</sup> defendant produced an agreement executed between the 3<sup>rd</sup> defendant and the 1<sup>st</sup> defendant itself giving the latter the exclusive right to manage and operate a lodge in Mt Kenya Forest Reserve in an area of approximately 10.5 hectares. Amongst the terms of this license was clause 10. (a) which provided that:

*The licensee shall:*

*a) Ensure that visitors who visit the forest or site of interest within the forest reserve are accompanied by a guide registered at the Forester's office, Castle Forest Station, whose services shall be paid for by the visitors.*

[75] The 1<sup>st</sup> defendant did not comply with this condition; as noted, Ibrahim Maina was not registered with the 3<sup>rd</sup> defendant and according to Laura Yego, the 1<sup>st</sup> defendant did not inform the 3<sup>rd</sup> defendant of the presence of the guests in the forest. In any case, according to the terms of the licence, the 3<sup>rd</sup> defendant was not liable for injury or loss of any sort caused to the 1<sup>st</sup> defendant's guests while in the forest.

[76] As for the 2<sup>nd</sup> defendant, it had not licensed the 1<sup>st</sup> respondent's agent to perform the duties of a guide at the material time. Like the 3<sup>rd</sup> defendant, it was also not aware of the presence of the 1<sup>st</sup> defendant's guests in the forest. According to Mr Gitau, it was necessary that the 1<sup>st</sup> respondent informs the 2<sup>nd</sup> and 3<sup>rd</sup> defendants if they intended to take their guests off hiking tracks or trails. If they had been informed, they would have provided armed escort. Mr Gitau also testified that both Melia Van Laar and Maina had his contact and they ought to have called him to provide armed rangers but they never did. His evidence was not controverted; as matter of fact, the 1<sup>st</sup> defendant's witnesses admitted that they did not alert either of the two defendants of their intention to venture into the forest.

I cannot see how negligence can be attributed to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in these circumstances. In the same breath there would be no basis for indemnity against them.

## **6. Quantum of Damages:**

[77] The final question for determination is the quantum of damages payable. In determination of this question I have to be guided by the respective party's pleadings, evidence and submissions. The plaintiff in particular sought for the judgment against the defendant in the following terms:

*Reasons wherefore the plaintiff prays for judgment against the first defendant jointly and severally for:*

*a) The equivalent of Kshs of 2,644,505.00 US Dollars at the rate prevailing on the date of payment or enforcement of the judgement.*

*b) Interest on (a) at court rates from the date of cause of action arises(sic) until the date of payment or enforcement of the judgment.*

*c) General damages for pain and suffering and loss of dependency.*

*d) Costs.*

[78] Claimants in fatal accident claims would ordinarily sue for damages under the Law Reform Act (cap 26) and the Fatal Accidents Act (cap 32); section 2 (1) of the former Act follows section 1 of the England's Law Reform Miscellaneous Provisions Act 1934 that abolished the old rule *action personalis moritur cum persona* and provides for survival of causes of action in tort for the benefit of the victim's estate. It says: -

*2.(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate:*

*Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.*

[79] On the other hand, under section 4 (1) of the Fatal Accidents Act, proceedings may be brought for the benefit of the deceased's dependants to recover the loss caused to them by the death of their breadwinner. This provision of the law states as follows: -

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

*Provided that not more than one action shall lie for and in respect of the same subject matter of complaint and every such action shall be commenced within three years after the death of the deceased person.*

[80] Damages under the heads of loss of earnings, pain and suffering and loss of expectation of life are usually grouped under the Law Reform Act. The only head of damages under the Fatal Accidents Act is the loss of dependency though its assessment will invariably involve reference to the loss of earnings for the years the deceased would have worked (the lost years).

[81] The plaintiff brought this claim in his capacity as the administrator of the deceased persons' estate and to that extent he has the legal basis for a claim under all or any of the heads of damages accruing from the **Law Reform Act**.

[82] I must mention here that counsel for the 2<sup>nd</sup> defendant questioned his capacity to bring such suit apparently because the letters of administration which he obtained from the Probate Court of the District of Marlboro in the United States had not been resealed in this Court. There does not appear to be any merit in this objection because there is evidence that the grant was duly resealed on 20<sup>th</sup> April, 2011; a notice to that effect was issued by this court to the applicant. I also note that none of the defendants contested the validity of the grant of letters of administration. I would also suppose that if there was any substance in the 2<sup>nd</sup> defendant's objection then it ought to have been raised *in limine* and not after the conclusion of the hearing. Suffice it to say, the plaintiff has the necessary legal authority to pursue damages on behalf of the deceased persons' estate under the Law Reform Act.

(a) Lost years:

[83] Lest we forget, general damages for lost years are awarded to the estate of a deceased person so as to compensate the estate for the loss in income it would have benefited from the deceased had he lived.

There is a string of decisions which provide a useful guide in assessment of damages under this head. **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters & 4 Others (1986) KLR 457** is such a decision and it is recognised as the first local decision where an award for lost years was made when the victim died before instituting a suit. (See the Judgment of Kneller JA at page 466). It is also in this case that the English decisions in **Picket versus British Rail Engineering Ltd (1980) AC 136** and later **Gammel versus Wilson (1981) 1 ALL ER 578** were first applied; in these decisions, the House of Lords held that a living plaintiff was entitled to damages for lost years and that these damages are recoverable by and for the benefit of the estate of a victim who dies before the action is instituted.

[84] As far as the particular issue of assessment of damages under this head is concerned, Lord Scarman's speech in the **Gammel versus Wilson** is of particular relevance; he said as follows:

*The correct approach in law to the assessment of damages in these cases presents, my Lords, no difficulty, though the assessment itself often will. The principle must be that the damages should be fair compensation for the loss suffered by the deceased in his lifetime. The appellants in Gammel's case were disposed to argue, by analogy with damages for loss of expectation of life, that, in the absence of cogent evidence of loss, the award should be a modest conventional sum. There is no room for a 'conventional' award in a case of alleged loss of earnings for the lost years. The loss is pecuniary. As such, it must be shown, on the facts found, to be at least capable of being estimated. If sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach a mathematical certainty, the court must make the best estimate it can. In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime age of five, might have a claim; it would depend on the evidence. A teenage boy or girl, however, as in Gammel's case may well be able to show either actual employment or real prospects, in either of which situation there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence on which a fair estimate of loss can be made. A man well established in life, like Mr Picket, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based on it. (See page 593)*

[85] The present case is about two deceased persons; one aged 38 and the other an infant of barely a year old. This excerpt from Lord Scarman's speech addresses, in a very direct way, how the question of assessment of damages in respect of these departed souls should be approached. I see no reason to look any further for the appropriate answer; I will, like the Court of Appeal in **Sheikh Mushtaq Hassan versus Nathan Mwangi Kamau Transporters & 4 Others** adopt the formula postulated by Lord Scarman in resolving this question here.

[86] As far as Sharon Mary Brown is concerned, it is not in dispute that she was aged 38 at the time of her demise; she was a holder of a Master of Science degree in library and information science from Long Island University in the United States. Prior to her death, she was on a two-year contract as a teacher at the International School of Kenya; her annual salary was established to be US\$ 54,081. The contract in issue, together with payslips and a letter from her employer in support of her employment and earnings were admitted in evidence. No evidence was produced to the contrary.

[87] These facts appeal to me to be what Lord Scarman regarded as facts sufficient enough to enable the court to make a near accurate, though not with a mathematical precision, of an award under this head. At the very least, they are sufficient enough to 'avoid fancies of speculation' and in my humble view, they are the sort of facts that provide a firm basis upon which this court can make the best estimate of what the deceased would have earned had she lived to her full age.

[88] I will therefore adopt a multiplicand of US\$ 54,081 as the annual salary. As far as her working life is concerned, counsel for the plaintiff urged me to consider statistics by the United States Department of Health and Human Services for the year 2010 which put the life expectancy for an average white American female at 81.3 and that the retirement age in America is 67 years. Taking these factors into consideration, counsel urged that the deceased must have been expected to work for at least 29 years. He, however, urged that the court should adopt a multiplicand of 20 years.

[89] I did not have the benefit of the 1<sup>st</sup> defendant's counsel's opinion on quantum of damages payable since he did not make any submissions in that regard; rather, he restricted his submissions to liability only. The multiplier suggested by the plaintiff was thus not contested. In any event, a multiplier of 20 for an adult of 38 years looks to me to be reasonable. Considering that the deceased lived a healthy and happy life, there is every reason that she would have had a longer working life subject, of course, to the imponderables and vicissitudes that come with it; however, it is prudent to stick to the multiplier proposed by the plaintiff. I will therefore adopt a multiplier of 20.

[90] I have to consider that the deceased would have not expended her entire income on herself though I am minded that the plaintiff never suggested that the family relied on her for their upkeep. However, since she was part of the plaintiff's young family, it is logical to conclude that she would probably have spent, at most, two thirds of her income on her family. Taking all these factors into account, the best estimate I can make in the circumstances under this head is as follows:

US\$(54,081 x 20 x 1/3) = 360,540

[91] As for MCB, she was only a year old and going by the House of Lord's decision in *Gammel versus Wilson*(supra) her estate is not eligible for an award under this head. As noted, Lord Scarman was specific that:

***In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award, not even a 'conventional' award should ordinarily be made.***

The child does not fall into any of the exceptions that the learned judge made reference to where an award for lost years would be made though the deceased may be a child.

**(b) Loss of expectation of life:**

[92] Damages under this head are more or else an estimate of the quality of the deceased's future but for the accident that terminated his or her life. The award has been described as 'unreal' or 'arbitrary' but all the same, it is usually made in deserving cases. **In *Kemfro Africa Limited t/a Meru Express Service, Gathogo Kanini versus A.M. Lubia & Olive Lubia (1982-88)* 1KLR 727 Kneller said of this award in the following terms:**

***"What has to be valued is the loss of the victims' prospective happiness which Viscount Simmonds in *Benham versus Gambling (1941)* AC 157 said 'might seem more suitable for discussion in an essay on Aristotelian ethics than in a judgment in a court of law' and because it is an unreal arbitrary award it usually is the current conventional sum...It was £200 in 1941 and £500 in 1968."*** (See page 730)."

[93] The award made here is always conventional in the sense that it is pegged on similar awards that have been made in the past. As noted it is an award that is ordinarily made on the assumption that the deceased had the prospects of a happy life. For a long time in this country, this award has always been in the region of Kshs 100,000 to Kshs 150,000. For instance, in **HCCA No. 52 of 2001, *Salim Golamali T/A Kalenjin Auto Hardware versus Lucas Nyongesa*** where **Kshs. 120,000/=** was awarded as general damages for loss of expectation of life and in **Civil Appeal No. 144 of 1990 *Kenya Breweries versus Ali Kahindi Saro*** where an award of **Kshs 100,000/=** was made under this head. In **High Court Civil Appeal No. 15 of 2003, *Albert Odawa versus Gichimu Gichenji*** an award of Kshs 100,000/= was made in compensation for loss of expectation of life; and in **Nakuru High Court Civil Case No. 437 of 1996, *Jackson Magata Kuritu versus Cheruiyot Keter*** the sum of Kshs. 150,000/= was awarded under this head.

[94] There was no evidence that the deceased's future was grim; she together with her child lived a healthy and happy life. Speaking of Sharon Mary Brown, she had a prospect of a happy life. It may well be that her excursion at the 1<sup>st</sup> defendant's lodge together with her family reflected, in a way, her state of life. Following the precedents where such awards have been given, I will make an award of Kshs. 150,000/= under this head. As far as her daughter is concerned, she was, as noted only a year old and that age it is always difficult to make of what would have become of her life. However, it does not always follow that no award in respect of an infant of MCB's age can be made under this head. In the High Court case of ***Luduwa (Suing by her next friend) and Another -Vs- Ayuku & Another (1986) KLR, 394***, Apaloo, J. (as he then was) made an award of Kshs.8,000/- for loss of expectation of life for a minor who was a month old and who had died alongside her mother in a road traffic accident; the learned judge opined that having lived for one month only, the prospects of the infant for a happy life were less certain than her mother's. The judge was, however, careful not to make any award for lost years or loss of dependency in respect of this minor. The point is, an award in respect of an infant can be made though to a lesser extent than that of an adult. I would, in the circumstances, consider the sum of Kshs 50,000 to be a reasonable award for loss of expectation of life in respect of the minor.

**(c) Pain and Suffering:**

[95] According to pathologist's reports in respect of the death of the two deceased's persons, they both died of animal attack; in particular, Sharon Mary Brown is stated to have died of '*multiple organ injuries due to blunt and sharp force trauma consistent with animal attack*'. The cause of death of MB, on the other hand, was '*severe head injury due to blunt force consistent with an animal attack*.'

[96] From the available evidence, Sharon Mary Brown died immediately after she was flung in the air and trampled upon by the elephant; she suffered horrendous injuries that possibly led to instant death. In the absence of any evidence to the contrary, I am not prepared to make any award for Sharon Mary Brown under this head. As for MB, there was evidence that she was seated at the time she was picked and that she was breathing, she even coughed at one point but soon thereafter she also succumbed to her injuries and died. It is evident therefore that prior to her death, there was some moment within which she endured some pain and suffering, albeit for a short while. I will therefore make an award of Kshs. 10,000/= for pain and suffering in respect of MB.

**(d) Special damages:**

[97] The plaintiff produced receipts showing that he had spent US\$ 9,235 in funeral expenses on Sharon Mary Brown and US\$ 650 on MB. I will therefore make an award of US\$ 9,885 in special damages.

[97] In summary, my final award is broken down as follows:

1.

**(a) Sharon Mary Brown**

(i) Lost years

360,540

(ii) Loss of expectation of life	150,000
(iii) Pain and suffering	00
(iv) Special damages	9,295

(The amounts in United States Dollars except for the award for loss of expectation of life which is in Kenya Currency)

**(b) MB**

(i) Lost years	00
(ii) Loss of expectation of life	50,000
(iii) Pain and Suffering	10,000
(iiv) Special damages	650

(The amounts in Kenya Currency except for Special damages which is in United States Dollars)

2. Interest at court rates from the date of filing suit till payment in full.

3. The plaintiff shall have costs of the suit. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall also have the costs of the suit against the 1<sup>st</sup> defendant.

**[99]** The awards made in United States dollars may be paid in that currency or, in the alternative, shall be converted to Kenya currency at the Central Bank of Kenya rates prevailing at the time of payment or at the execution of the judgment. (See *Beluf Establishment versus Attorney General (1993) eKLR*).

**[100]** The plaintiff did not plead for any damages under the Fatal Accidents Act. And although he prayed ‘general damages for loss of dependency’ there was no proof that the plaintiff’s relied on any part of his deceased’s wife income for his own upkeep. I am not inclined to make any award on dependency in the absence of any pleading or evidence in support of such a prayer. Needless to reiterate that a party is bound by its pleadings; if any authority is necessary for this position, then the Court of Appeal decision in **Galaxy Paints Co Ltd versus Falcon Guards Ltd LL. No. 942 (CAK)** comes in handy; the court said as follows:

*It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court by dint of the provisions of order XX, Rule 4 of the aforesaid Rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the Courts determination.*

**[100]** Orders XIV and XX which the court cited have now been renumbered as Orders 15 and 21 respectively in the Civil Procedure Rules, 2010. The Court cited the decisions in **Gandy v Caspair (1956) EAC A 139** and **Fernandes V People Newspapers Ltd (1972) EA 63** in support of this position.

In the ultimate, the plaintiff’s suit succeeds to the extent I have stated. It is so ordered.

**Dated, signed and delivered in open court this 22<sup>nd</sup> June, 2018**

**Ngaah Jairus**

**JUDGE**