REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO.350 OF 2008

JANET NJOKI KIGO (Suing as the personal

representative of the estate of the late

BENSON IRUNGU WANJOHI)…….PLAINTIFF

VERSUS

DANIEL KARANI GICHUKI ….……...……..DEFENDANT

JUDGMENT

1. This case was heard by Honourable D. Onyancha J and both parties' cases closed. They also filed written submissions. Honourable Onyancha J was then transferred from the Nairobi station to Kabarnet High Court before he could write and deliver the judgment. My duty in this respect has been to read the record and write the judgment based on the evidence on record, both parties having agreed and the court having made an order that judgment be delivered based on the clear and legible record left behind by Honourable D. Onyancha J.

2. The plaintiff Janet Njoki Kigo instituted this suit as the personal representative of the estate of the late Benson Irungu Wanjohi. In her plaint dated 23rd July 2008 and filed in court on 30th July 2008, it was alleged that on or about the 19th day of August 2007, the late Benson Irungu Wanjohi was lawfully walking along Komarock Road in Nairobi while the defendant was driving motor vehicle registration No. KAT 940L when the defendant recklessly/negligently drove or failed to manage/control the said motor vehicle causing the same to violently hit the said Benson Irungu Wanjohi occasioning him fatal injuries. The plaintiff enumerated particulars of negligence attributed to the defendant as follows:-

a) Driving at a speed that was manifestly high in the circumstances.

b) Failing to adhere to traffic rules.

c) Failing to keep a look out or have regard for other road users and pedestrians, particularly the deceased herein.

d) Failing to hoot, swerve or in any other manner control, manage the motor vehicle so as to avoid the accident.

e) Failing to drive within the road and hence hitting the pedestrian.

f) And the plaintiff relied on the doctrine of Res Ipsa Loquitur for its full tenor and effect.

3. It was claimed that the deceased was a young man full of enterprise with a promising future and that the defendant's acts of negligence deprived him of a prosperous future hence the claim for loss of expectation of life.

4. The deceased was survived by the plaintiff who was his mother. The plaintiff claimed for both general and special damages to wit, mortuary charges shs 4150 and accident abstract shs 200.

5. The defendant Daniel Karani Gichuki entered an appearance and filed defence on 20th August 2008 through the law firm of Auta Nyakundi & Company Advocates filed on the same day. However, by a letter dated 13th October 2009 and filed in court on 16th October 2009, the firm of Auta Nyakundi & Company Advocates repudiated ever taking instructions from the defendant and or filing any pleading or document in court on his behalf. The letter also called on the defendant to call on the said advocates for clarification but there appear to have been no response from the defendant.

6. In the defence dated 20th August 2008 filed on the same day, the defendant denied the plaintiff's claim as pleaded. He also denied that the plaintiff had the capacity to bring the suit, or that he was the registered owner of the accident motor vehicle no. KAT 940 L or that it was ever driven, managed or controlled by the defendant in the manner described by the plaintiff and put the plaintiff to strict proof thereof. The defendant also denied the manner in which the accident was alleged to have occurred and particulars of damage. He also pleaded in the alternative, that the deceased was negligent and therefore solely and or substantially contributed to the occurrence of the accident in that:

a) He attempted to jump into a moving vehicle when it was unsafe to so hence exposing himself to what befell him.

b) Conducting himself without due regard to his own safety and safety of other road users in particular, motor vehicle registration No. KAT 940L.

c) Causing him to be injured while under the influence of alcohol.

d) Attempting to board motor vehicle registration No. KAT 940L without first ascertaining that it was safe to do so.

e) Attempting to forcefully board motor vehicle registration No. KAT 940L at a place where there is no stage contrary to the traffic rules and the highway code.

f) Failing to heed to the warning and signs given to him by the driver of motor vehicle registration No. KAT 940L.

7. The defendant further denied all other allegations against him and contended that the deceased had no source of income to support the plaintiff and that to the contrary the deceased depended on the plaintiff. He prayed for dismissal of the plaintiff's suit against him with costs.

8. On 25th May 2011 the plaintiff filed the list of documents to be relied on and on 25th May 2011 she filed agreed issues. She also complied with pretrial requirement under the new 2010 rules and filed a further list of documents on 28th November 2012 as well as her written witness statement. Pre-trial directions were given on 21st October 2013 by Honourable Waweru J who allowed the plaintiff to fix a hearing date after the defendant failed to comply with Order 11 of the Civil Procedure Rules despite several reminders and indulgence by the court.

9. The hearing commenced on 7th April 2014 before Honourable Onyancha J. The plaintiff Janet Njoki Kigo testified on oath as PW1. She stated that the deceased Benson Irungu Wanjohi was her son who was knocked down by a motor vehicle on 19th August 2007 at Kariobangi in Nairobi. That in the evening

of that date she telephoned him at about 8pm-9pm but he did not answer. She then telephoned his sister Milkah Muthoni to find out if the deceased was in his house as he was not responding to her phone calls. Milkah told the plaintiff that Benson had gone to the plaintiff's house. The next morning there was still no answer from his phone. That he worked in a garage at Kariobangi. The plaintiff sent Monica to check at his place of work but he was not found there so she went to report at Buruburu Police station where she found that the police had the deceased's identity card and she was informed by the police that the deceased had been knocked and killed on the night of 19th August 2007. She went to the City Mortuary and identified his body. They buried him on 25th August 2007 and paid shs 4150 being preservation charges. She got a burial permit; Police abstract and death certificate all which were produced as plaintiff's exhibits 1-4.

10. The plaintiff then consulted an advocate and were assisted to file for and obtain a grant of letters of administration Ad Litem produced in evidence as P exhibit 5 she also obtained search at Kenya Revenue Authority for the killer motor vehicle KAT 940L which showed the owner thereof as being the defendant. She produced search certificate as P exhibit 6 and paid shs 500/- for it. The plaintiff also produced demand notice send to the defendant as P exhibit 7 and notice to INVESCO Insurance Company Ltd the defendant's insurers as P exhibit 8.

11. The plaintiff testified that the deceased was a mechanic and earned kshs 15000 per month at a Jua Kali garage and used to give her kshs 5000/- monthly to assist her meet her needs. She stated that he used to drink alcohol but was a careful person who cared about his life hence he could not have carelessly jumped into the road where he could be knocked by a motor vehicle. She stated that the driver of the accident/offensive vehicle must have been negligent or reckless to know and kill the deceased. She therefore claimed for damages stating that her deceased son was 26 years old at the material time and was single.

12. The plaintiff closed her case without calling any other witness albeit she had intended to call the police who investigated the accident. The defence was locked out of presenting their case by non availability of their defence witness on 9th March 2015 even after being granted several adjournments by the court to call their witnesses but to no avail.

13. The parties were therefore directed to file their written submissions to enable the court write a judgment by which time Honourable D. Onyancha J had already been transferred out of Nairobi station hence my writing of this judgment, with the consent of both parties advocates that I proceed from where Honourable Onyancha J left the matter.

14. In their written submissions dated 24th March 2015 and filed in court on 25th March 2015, the plaintiff's counsel submitted that the evidence of the plaintiff on how the accident took place and hence on liability of the defendant was not controverted and urged the court to find, like was in the case of **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] e KLR** that ***" where no witness is called on behalf of the defendant, and no evidence is adduced by the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted."*** Counsel also relied on **Molo Mount Mineral Water Limited V Industrial and Development Bank Limited Nakuru High Court Civil Case No. 113 of 2004 {2012] e KLR** to support the proposition that under Section 107(1) of the Evidence Act, whoever desires any court to give judgment as to any legal liability dependent on the existence of facts which he asserts must prove the existence of those facts.

15. According to the plaintiff's counsel, the plaintiff had proved all the particulars of negligence pleaded in her plaint. She had also proved ownership of the offensive motor vehicle by the defendant; relied on the doctrine of Res Ipsa Loquitur and relied on the case of **Msuri Muhiddin V Nazzor Bin Self Elkassaby and Another [1960] EA 20T** wherein it was held:

> ***" Where there is a plea for Res Ipsa Loguitur the respondent could avoid liability by showing either that there was no negligence on their part which contributed to the accident or that there was a probable cause of the accident which did not connote negligence of their part or that the accident was due to the circumstances not within their control. The speed of***

the vehicle in relation to the particular road condition was of most material factor and one which normally within the control of the driver of the vehicle, and there was certainly a duty on the driver to keep a proper look out to ascertain the condition of the road to adopt a speed of the vehicle to it."

16. The plaintiff also cited the following holding in **Wing V London General Omnibus Company [1909] 2 K.B. 652** cited in the Msuri Muhiddin (supra) case that:

"Without attempting to lay down any exhaustive classification of cases in which the principle of Res Ipsa Loquitur applies, it may generally be said that the principle of accident and so much of the surrounding circumstances as was essential to its occurrence where within the sole control and management of the defendants, or their servants so that it is not unfair to attribute to them a prima facie responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such conditions of things. Every vehicle has to adopt its own behavior of other persons using the road and over the actions those in charge of the vehicle have control……"

17. On quantum of damages payable under the Fatal Accidents Act, the plaintiff submitted that she was entitled to loss of dependency and relied on the Regulation of Wages(General Amendment) Order 2013 LN 197 made under the Labour Institutions Act No. 12 of 2007 that a minimum monthly wage of a vehicle service worker (petrol and service stations) is kshs 12,654.90 and the deceased having been a mechanic aged 26 years, applying dependency ratio of 2/3 and retirement age of 60 years, the plaintiff is entitled to kshs 3,442,132-8 made up as follows: 12,654.90 x 12 x 34 x 2/3 . Reliance was placed on the case of **Berly Bertha Malowa Were(Administrators V Kenya Ports Authority HCC 246/2009 – Mombasa** where Ojwang J (as he then was) found that :

" Whereas no justification is given for placing the retirement age at 54 years , placing it at 60 years, quite apart from its attribution to a government position on labour matters is , in my opinion, to be judicially recognized as fair and common place for a person of the status of the deceased….."

18. Further reliance was placed on **Radha krishen M Khenmaney V Mrs Lachaba Murlidhar [1985] EA 268** where the court, citing with approval **Pegy Frances & Others V Chunibhai J Patel &Another CC 173** that:

" The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (that is, his income less tax) and the proportion of last net income which he would have made available for his dependants."

19. Under the Law Reform Act (Cap 26) Laws of Kenya it was submitted that the deceased was pronounced dead on arrival at the hospital and therefore an award of kshs 100,000/- was proposed for pain and suffering.

20. For loss of expectation of life the plaintiff submitted a figure of kshs 100,000/- relying on Mushtaq **Hassan** case.

21. The plaintiff also prayed for reasonable funeral expenses of kshs 200,000/- relying on the cases of **Leaonard O. Ekisa & Another V Major K. Birgen [2005] e KLR Petronilla Ojiambo Odori V Peedle Building Limited Mombasa HCC 561/1990** (unreported) and **Jones Eshapaya Olumasayi & Another V Minial H. Halji Koyedia & Another [2008] e KLR .** The plaintiff also prayed for costs of the suit and interest at court rates from the time of filing suit.

22. In his opposing submissions filed on 20th April 2015, the defendant submitted that on liability, the plaintiff had failed to discharge the burden of proof; that she was not an eye witness to the accident; she gave hearsay evidence; and did not state how the accident occurred and the hearsay evidence gathered from Milkah Muthoni who was not an eye witness was inadmissible. Further that

failure to call Milkah and the investigating officer to corroborate the plaintiff's evidence on what transpired on the said date was fatal but that should the court find liability against the plaintiff then it should apportion it at 50:50.

23. On quantum of damages, it was submitted that the expected dependency was not proved, no document was produced to show the amount of income earned by the deceased and that there was a contradiction in the figures claimed per month in oral evidence and according to the submissions by the plaintiff's counsel. It was also submitted that there was no evidence that the deceased was infact working. The defendant's counsel relied on **Nairobi HCC 1484 of 1993 Lucy M. Njeri V Fredrick Mbuthia & Another**. In the alternative, the defendant submitted that there was no known monthly earning and so proposed a minimum wage of shs 3000 for a general labourer. He also urged the court to adopt a multiplier of 10 years, at retirement age of 50 years and a dependancy ratio of 1/3 bringing the figure to kshs 120,000.

24. Under the Law Reform Act, the defendant proposed shs 5000/- for pain and suffering relying on the **Lucy M. Njeri Fredrick Mbuthia & another** (supra); **Ngigi Kimani V George Ikonya Thuo HCC 1300/1998 Nairobi** and **Nyeri HCCA 76/2013 James Mugo Manyara V James Gitu Wambugu.**

25. For loss of expectation of life the defendant proposed a sum of kshs 70,000/- relying on the **Lucy M. Njeri V Fredrick Mbuthia & another** (supra). He also relied on **D.T. Dobie & Company (K) Ltd V Wanyonyi Wafula Chebu Kati MBS HCCA 88/2009; Rev Francis Muchee Nthiga V Bohop N. Waweru Muranga HCCA 161/2010.**

26. On specials the defendant urged the court to disregard any other claim other than what was pleaded and proved by the plaintiff amounting to kshs 4350.

27. The plaintiff filed a response to the defendant's submissions on 20th June 2015 and on the question of liability, she maintained that her evidence was uncontroverted hence her case stood proven on a balance of probabilities in that she had proved that the defendant owned the offensive motor vehicle at the material time of the accident relying on **Joel Mugo Opija V EA Sea Food Ltd [2013] e KLR**. Secondly, that the doctrine of Res Ipsa Loquitur was applicable in the circumstances and relied on **Anastacia Kamene Chege V Lawrence Nduati Giguta Nairobi HCC 1786/84.** She also reiterated the case of **Linus Nganga** Kiongo **& 3 Others** (supra) that her evidence stood uncontroverted as the defendant called no witness to rebut the evidence.

28. On quantum of damages, the plaintiff maintained that the death certificate indicated that the deceased's occupation was a mechanic and that under Cap 149, such entity of facts and dates cannot be challenged and shall be received as evidence without any proof of such entry. She relied on **Joachim Ndaire Macharia V Mary Wangare Ndaire & Another [2008] e KLR.**

29. On loss of dependancy it was submitted that the evidence by the plaintiff was not in contradiction to the statutory minimum wage of kshs 12,654 per month but that since she is bound by her testimony she would adopt the kshs 15,000/- monthly income thus making the claim kshs 4,080,000. She also maintained her claim on the multiplier and multiplicand.

30. On proof of income and occupation of her deceased son, the plaintiff submitted that her evidence was not denied or controverted by the defendant. She relied on **Esther Nyambura V Carnos Rashid Chepaurence & Another [2008] e KLR** where it was held:

> ***"……..oral evidence is the testimony of a living person examined in court or before commissioner appointed by …….. Oral evidence if credible is sufficient to prove a fact. It is only where there are contradictions in oral evidence which occurs in most cases that documentary evidence must be looked for in order to see on which side the truth lies."***

31. The plaintiff further cited Makau J in **David Kimathi Kaburu V Gerald Mwobobia Murungi**(

suing as a legal representative of the estate of James Mwenda Mwobobia (deceased) [2014] e KLR where it was held that :

> ***"…….there was no evidence to controvert the respondent's evidence that the deceased made additional earnings from bodaboda business and farming. There was evidence of the deceased being a skilled worker and trial court took that fact into account……." "……the court is alive of the fact that in Kenyan society, most of the individuals earnings need not be proved by production of documents such as banking statements or payment vouchers or pay slips.***
>
> ***Further to the above with the modern technological in whichever payments are to be effected through use of mobile phones or were payments can be made by cases without requirement of payments by cheques or execution of documents to confirm payments s it is not necessary to produce documentary proof."***

32. The plaintiff further cited Civil Appeal decision in **Jacob Ayiga Maruja V Simeon Obayo [2005] e KLR** that:

> ***" In our view, there was more than sufficient material on record from what the learned judge was entitled to and did draw the conclusion that the deceased was a carpenter and that his monthly earnings were about kshs 4,000/- per month. We do not subscribe to the view that the only way to prove the profession of a person must be by the production of certificates and that the only way of proving earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate keep no records and yet earn their livelihoods in various ways. If documentary evidence is available, that is well and good. But he rejects any contention that only documentary evidence can prove these things."***

33. On the claim under the Law Reform Act, it was submitted that shs 100,000/- for pain and suffering was justified. She relied on **Benedeta Wanjiku Kimani V Chaigwon Cheboi & Another [2013] e KLR** where it was held inter alia that the amount ranging from 10,000-100,000 under this head was a conventional sum.

34. On loss of expectation of life it was contended that the authority relied on by the defendant was decided 22 years ago in 1993 hence the court should award no less than shs 500,000/- under this head on the claim for general damages. On (reasonable funeral expenses) of shs 200,000 the plaintiff maintained that the same is reasonable and had not been disputed by the defendant on his submissions hence it matters not that no receipts were produced as was held in **Jonnes Eshapaya Olumasayi** (supra) made 7 years ago.

35. On special damages it was submitted on behalf of the plaintiff that she had produced all receipts as per her list and further list of documents filed in court including copy of limited grant of letters of Administration Ad Litem relying on **Jonnes Eshapaya Olumasayi** (supra) case.

36. Based on the pleadings before the court, oral and documentary evidence adduced, the rival submissions by both parties' advocates and the authorities cited, I am now called upon to determine this case but I must first make it clear that I never had the opportunity to hear or see the witness as she testified in court albeit she was never cross examined by the defence hence the issue of demeanor and credibility of the witness cannot be subject of this judgment.

37. From the pleadings, evidence and submissions on record, the following issues emerge for determination.

1. Whether the defendant was the owner of the accident motor vehicle.

2. Who was to blame for the material accident?

3. Is the plaintiff entitled to any damages both under the Fatal Accidents Act and Law Reform Act and or special damages and if so, how much?

4. What orders should this court make?

5. Who should bear the costs of the suit?

38. On the first issue of ownership of the accident motor vehicle, the court must however first determine whether any accident occurred involving the material motor vehicle and the deceased at the material place and on the material date.

39. The police abstract produced by the plaintiff shows that on 19th August 2007, at 9.30 pm along Komarock road, an accident was reported to have occurred along the said road and time involving motor vehicle KAT 940L Isuzu Minibus and the deceased Benson Irungu Wanjohi who was classified as an ***"intending passenger."*** The police abstract shows that the accident was reported at Buruburu police station vide IAR/137/07 OB 16 of 19th August 2007. As at 7th September 2007 when the police issued abstract No. 0042370, ***the case was still pending under investigations.***

40. That evidence of the occurrence of the accident involving the deceased and motor vehicle KAT 940L Isuzu Minibus was therefore unrebutted and hence the answer to the question of occurrence of the pleaded accident is in the affirmative.

41. On the question of who was the owner of the accident motor vehicle, the said police abstract as issued and produced by the plaintiff shows that the subject motor vehicle was owned by one Daniel Karani Gichuki of P.O. Box 346, Nyeri. Though the defendant in his defence denied owning the accident motor vehicle the plaintiff did produce a certificate of registration issued by Kenya Revenue Authority on 21st May 2008 showing that Gichuki Daniel PIN No A0027057305 was the owner of motor vehicle KAT 940L. There was no contrary evidence as to the ownership of the accident motor vehicle hence the defendant, unchallengeably was the owner thereof.

42. The next issue is who was to blame for the material fatal accident involving the deceased Benson Irungu Wanjohi and the defendant's motor vehicle registration no. KAT 940 L Isuzu Minibuses?

43. In her pleadings, the plaintiff averred that the defendant was wholly to blame for the material accident in that:

a) He drove at a speed that was manifestly high in the circumstances.

b) He failed to adhere to the Traffic Rules.

c) He failed to keep a look out or have regard for other road users and pedestrians, particularly the deceased.

d) He failed to hoot, swerve or in any other manner control or manage the motor vehicle so as to avoid the accident.

e) He failed to drive within the road and hence hitting a pedestrian.

44. As a consequence, it was averred that the deceased who was lawfully walking along Komorock Road in Nairobi was fatally injured. The defendant filed a defence dated 20th August 2008 denying all the above averments and contending that if the accident pleaded occurred then it was solely caused by hand or substantially contributed to by the deceased subject of this suit in that :

a) He attempted to jump into a moving motor vehicle when it was unsafe to do so hence exposing himself to what befell him.

b) Conducting himself without due regard to his own safety and or other road users in particular motor vehicle registration no. KAT 940L.

c) Causing him to be injured while under the influence of alcohol.

d) Attempting to forcefully board motor vehicle registration number KAT 940L at a place where there is no stage contrary to the Traffic Rules and the Highway Code.

e) Failing to heed to the warning and signs given to him by the driver of motor vehicle registration number KAT 940L.

45. It is however important to note that indeed the plaintiff was not an eye witness to this fatal accident. Neither did she call any eye witnesses or the police who were ***"still investigating the accident"*** as at the time of the hearing of this suit as per the police abstract produced in court. The defendant too never called any evidence to shed light on how the deceased might have been responsible for or contributed to the occurrence of the material fatal accident. He maintained that the burden of proof lay on the plaintiff to proof acts of the defendant's negligence as pleaded and that the plaintiff gave hearsay evidence as to what she was told by her sister Milkah who traced the deceased's steps to Buruburu police station who informed her that the deceased had been knocked by a motor vehicle and died and that his body lay at the City Mortuary. The police abstract show that the deceased was an "***intending passenger."*** The plaintiff maintained in her submissions that even though she did not call an eye witnesses to the fatal accident, the evidence she adduced was not rebutted or controverted by the defendant and therefore her evidence on oath that the deceased was a careful person who could not have jumped into the road must be taken to be credible evidence and therefore the truth.

46. On the other hand, the defendant maintained that in the absence of the evidence of Milkah Muthoni or the investigating officer of the accident, the evidence as given by the plaintiff was hearsay and therefore inadmissible. Both parties' advocates relied on persuasive authorities which I have considered carefully including **D.T. Dobie & Company (K) Ltd V Wanyonyi Wafula Chebukati** (supra) citing **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] e KLR** (supra) where the defendant filed defence and did not testify the court held that the plaintiff's case stood unchallenged and further that the claims made by the defendant in his defence and counterclaims were unsubstantiated. The court in the **D.T. Dobie** (supra) case referred to many other decisions including **Trust Bank V Paramount Universal Bank Ltd & 2 Others Nairobi Milimani HCC 1243/2001; and found that** where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. Further that the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

47. I have no reason to depart from the above persuasive holdings of the learned Judges. However, that acceptance does not mean that the burden of proving a case on a balance of probabilities is automatically shifted from the plaintiff to the defendant where the defendant adduces no evidence to controvert the evidence adduced by the plaintiff. The burden of proof always lies within the person who alleges save in exceptional cases discussed below and supported by law.

48. In **Kirugi & Another V Kabiya & 3 Others [1987] KLR 347** the Court of Appeal stated the obvious that the burden was always on the plaintiff to prove his case on the balance of probabilities and that such burden was not lessened even if the case was heard by way of formal proof.

49. In this case, as I have stated above, the plaintiff pleaded particulars of negligence against the defendant. It was therefore expected that in her oral evidence, she testifies to prove any of the alleged acts of negligence attributed to the defendant to prove that the accident did occur the way she described it in her plaint. In her testimony in court, the plaintiff's closest evidence to how the accident occurred was that she had called the deceased but received no response so the following morning she sent Milkah her sister who did not find him there as he had not reported. She (Milkah) went to Buruburu police station and made a report there but Benson was not there. The police however had

Benson's identity card and the police reported that Benson had been knocked and killed on the night of 19th August 2007. She went to City mortuary where the body was taken. She identified the body of Benson. She then stated that:-

> **".…….My son was one who took intoxicating drinks. He was a careful person who cared about his life. He was not a careless person who could jump into the road where he could be knocked by a motor vehicle. The driver of the said motor vehicle must have been negligent or reckless to knock and kill Benson."**

50. From the above extract evidence given by the plaintiff, it is my view that she did not strictly speaking prove any of the acts of negligence as pleaded and or attributed to the defendant. Coupled with the failure to call the police who are said to have reported that the deceased was knocked and killed on the night of 19th August 2007, it is not clear under what circumstances the deceased, whom the police abstract described as ***"intending passenger,"*** met his death. Was it sufficient to state that the deceased was a careful person and that he cared about life such that he could not have jumped into the road to be knocked by a vehicle, and that therefore the defendant must have been reckless or careless or negligence, I think not.

51. This court is therefore not told of how the material accident occurred at the time and place stated in the plaint and police abstract issued by the police and in the manner alleged. That being the case, I agree with the defendant that the plaintiff did not discharge the burden of proving the liability of the defendant on a balance of probabilities that indeed the accident occurred in the manner pleaded thereby fatally injuring the deceased, since the plaintiff was not at the scene of the accident. The police abstract did not state how the accident occurred and or who was to blame for its occurrence as the results of the investigations were never disclosed to the court.

52. The defendant on the other hand in his defence denied the manner in which the accident was alleged to have occurred and went further to provide particulars of contributory negligence but did not call any evidence to prove those particulars. In **Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another [2014] e KLR.** The Court of Appeal was categorical that ***submissions cannot take the place of evidence*** and faulted the learned trial Judge's lifting of some figures from a respondent's submissions and awarded it against the 1st appellant. The court stated:

> "Submissions ***cannot take the place of evidence. The 1st defendant had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties marketing language"*** each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all."

53. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. To that extend, it is trite that those allegations by the defendant against the deceased Benson Irungu on how he was responsible for the accident remained allegations until proved by evidence. However, a witness cannot just come to court and state that this is the way an accident which occurred happened. She is bound to prove her case on a balance and probabilities. In this case, I find that the plaintiff's evidence alone is not sufficient to prove negligence against the defendant. Since the material accident was fatal and it occurred at night as per the police abstract produced in court, the plaintiff should have called the police who were investigating the circumstances under which the accident occurred, or even one of the witnesses named in the police abstract one Mr David Maina whose address was given as Box 658 Nanyuki to enable the court understand the circumstances under which an intending passenger met his untimely death in such a way as to determine the liability of the parties. The production of a police abstract alone proved the fact that there was an accident involving the deceased and the defendant's motor vehicle KAT 940L. To prove liability on negligence against a party, there must be more proof than a statement of the claimant who was not at the scene or police abstract. It was not sufficient or the plaintiff to state that her son was a careful person and that the defendant must have been careless that is why he knocked the deceased.

54. The bare evidence given by the plaintiff in my view did not require any evidence of rebuttal by the defendant. Since the said evidence did not attribute any particular act of negligence on the part of the defendant. Other than the pleadings which pleadings is not evidence. It is on that basis that I would with utmost respect distinguish the cases cited by the plaintiff who sought to rely on the holdings that failure by the defendant to adduce evidence to rebut the claim prima facie rendered him liable in negligence and that the court should find her evidence credible and the whole truth.

55. In this case, I have no doubt in my mind that the plaintiff honestly gave evidence to the best of her knowledge to the fact of her deceased son meeting his untimely death following a road accident. But the disturbing question is whether the plaintiff, in the circumstances of this case, gave any evidence that pointed to the negligence of the defendant in the manner that he drove, steered, controlled or managed the accident motor vehicle thereby negligently knocking down the deceased Benson. In other words, there is no clear/direct or circumstantial evidence of who was really at fault and to what extent, in this very unfortunate fatal accident, since the defendant, having realized that the plaintiff did not intend to call any eye witness or investigating officer, opted not to call any evidence as there was nothing to rebut or controvert since the plaintiff had not discharged her burden of proving the negligence of the defendant, on a balance of probabilities.

56. Notwithstanding my above factual findings, the big question is, is the defendant completely free from the hook of being found liable in view of the above circumstances? The ultimate answer lies in the recent decision by the Court of Appeal in Bosire, Karanja and Maraga JJ.A in **CA 179/2003 Rahab Micere Murage (suing as a representative of the estate of Esther Wakiini Murage V Attorney General and 2 Others [2015] e KLR** delivered on 20th April 2012. In that appeal which arose from the judgment and decree of the High Court Nairobi (Angawa J) delivered on 3rd July 2001 in HCC 2775/1991 the circumstances were exactly the same in all material particulars as are in this present case. The plaintiff was not present when the accident which fatally injured her daughter occurred. She produced a police abstract showing that the accident which was a collision between two motor vehicles in which both drivers died was ***"pending investigations."*** The trial judge dismissed the appellant's case for lack of sufficient evidence which provoked the appeal to the Court of Appeal. The learned trial judge had found that there was no proof as to how the accident occurred and that no negligence was proved against any of the three respondents. On the ground of appeal that the learned trial judge erred in finding that there was no negligence proved against the respondents whose defences blamed each other for the cause of that accident, the Court of Appeal held; inter alia:

> ***"As stated earlier, the respondents blamed each other for the accident. They tactfully avoided calling any evidence regarding the cause of the accident presumably relying on the provisions of Section 109 of the Evidence Act which provides that:***
>
> ***"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***
>
> ***That an accident did occur is not in dispute; that the three cars involved in the accident were respectively owned by the three respondents; How the accident happened was a matter within the knowledge of the respective drivers of those three vehicles. Well driven motor vehicles do not just get involved in accidents. The driver of the 1st respondent's vehicle died in the accident. The remaining ones, we suppose, were alive at the time of the appellant's case was heard. The failure on their part to testify must have been a deliberate act on the part of the 2nd and 3rd respondents. The police appear not to have been in a hurry to conclude investigations as to the cause of the accident. The appellant went to them to get a police abstract report of the accident. They gave one but the accident was said to be still under investigations. The conduct of the respondents appears to us to suggest that they deliberately withheld evidence as to the cause of the accident to frustrate the appellant's suit. Section 112 of the Evidence Act Cap 80 of the Laws of Kenya, we think was meant to deal with situations as those in the present case. The Section provides thus:***

"In Civil proceedings when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

The appellant alleged negligence against all the respondents as the cause of the accident in which her daughter died. She was not there at the scene and could not have known how the accident happened. As stated earlier vehicles driven on public roads in a proper manner do not without cause become involved in accidents. It must be for that reason that the appellant accused the respondents of negligence. Since each of the three respondents had knowledge as to how the accident happened, they were duty bound under the law to call evidence to show either, which one of them was responsible for the accident or which one of them was innocent in the matter. All of them having failed to adduce evidence in that regard, the rebuttable presumption of fact is that all of them were in one way or another negligent and through such negligence caused the accident in which the deceased died. It is not a presumption arising out of the doctrine of res Ipsa Loquitur, but from the evidential burden as imposed under Section 112 of the Evidence Act.

Having come to the foregoing conclusion, it is our judgment that Angawa J erred in ruling that no negligence was proved. The burden was on the respondents to disprove on their part as the cause of the accident was a matter especially within their knowledge but each of them failed to offer evidence in that regard as required by law. It follows that each of the three respondents is liable to the appellant in damages in equal shares……."

57. The Court of Appeal in the above judgment set aside the order dismissing the appellant's suit with costs and substituted therefore an order entering judgment in favour of the appellant against the three respondents jointly and severally.

58. From the above authoritative and binding decision, which was delivered in 2012- quite recently, this court has no option but to adopt the whole decision which was based on a case that was in parimateria with the instant case and d facts, that the burden of proof lies on he who alleges is not in dispute. However, where it is trite clear like in the instant case that the plaintiff was not present when the fatal accident occurred and the defendant who was the driver of the material motor vehicle involved in the accident is possessed of the evidence of how the accident occurred but deliberately fails to adduce that evidence with the sole intention of frustrating the plaintiff's suit, Section 112 of the Evidence Act would be invoked by the court to deal with such a situation. The defendant in this case having pleaded particulars of negligence or contributory negligence against the deceased, it was incumbent upon him to adduce evidence to prove those facts of the deceased's negligence that contributed to or caused the fatal accident. The rebuttable presumption of fact therefore, is that the defendant was negligent, which negligence caused the accident in which the deceased died, and it is not a presumption which arises out of the doctrine of Res Ipsa Loquitur, but from the evidential burden as imposed under Section 112 of the Evidence Act. The cause of the accident being a matter especially within the defendant's knowledge but he failed to tender any evidence in that regard as required by law, it follows that the defendant was to blame and therefore liable in damages to the plaintiff. It also follows, therefore, that all the decisions relied on by the defendant in his very persuasive submissions are inapplicable in the circumstances of this case as the burden of proof is concerned. In addition, it follows that even the doctrine of Res Ipsa Loquitur relied on by the plaintiff is inapplicable in the circumstances of this case. The doctrine of Res Ipsa Loquitur would only be applicable where the subject matter is entirely is under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence (see **Bikwatirizo V Railway Corporation [1971] EA 82**. Thus, to successfully apply this doctrine of Res Ipsa Loquitur, there must be proof of fact that is consistent with negligence on the part of the defendant as against any other cause.

59. This is a case of a motor vehicle knocking down a pedestrian only described in the police abstract as an intending passenger. There are indeed no facts that have been proved by the plaintiff to presume negligence on the part of the defendant as against any other cause. In addition, the defendant would only be enjoined to rebut the presumption of Res Ipsa Loquitur after the plaintiff had established a

prima facie case by relying on the facts of the accident, which facts as I have stated earlier, were not available as the plaintiff was not an eye witness and neither did the defendant testify to state those facts. I would therefore without hesitation hold, like in the decision of **Esther Wakiini Murage** (supra) case that Section 112 of the Evidence Act was meant to deal with situations where the plaintiff is deprived of evidence as to the occurrence of the accident and the defendant deliberately withholds evidence as to what the cause of accident was in order to frustrate the plaintiff's suit.

60. Accordingly, I find that the defendant in this case is liable for the accident that resulted in the death of the deceased Benson Irungu Wanjohi. I find nothing to suggest that the deceased could have contributed to the occurrence of the said accident and I therefore reject the proposal by the defendant that I should apportion liability in the ratio of 50:50.

61. On the question of whether the plaintiff is entitled d to any quantum of damages and if so, how much; the plaintiff testified and produced a limited grant of letters of administration intestate. She also produced a death certificate to prove death of the deceased. She testified that the deceased was her son. He was a mechanic and he was 26 years old, unmarried at the time. He earned kshs 15,000/- per month and that he always gave her shs 5,000/- per month. The death certificate too disclosed the occupation of the deceased as a mechanic. In her submissions, she prayed for a dependancy ratio of 2/3 using a minimum wage of shs 12,654 per month but when challenged by the defendant on why she submitted using a figure which her son was not earning, she reverted in the reply submissions to the original figure of shs 15,000/- since she was bound by her testimony. The plaintiff relied on the case of **Joachim Ndaire Macharia V Mary Wangare Ndaire** (supra) to espouse that under Cap 149, her evidence as to the deceased's occupation and as recorded in the death certificate which is a public document/record is conclusive evidence of such entry which was not challenged. Further, she urged the court to accept her evidence on the deceased's earnings as being unchallenged based on **Esther Nyambura V Carnos Rashid Chepaurence & Another** (supra) and **David Kimathi Kaburu V Gerald Mwobobia Murungi** (supra) that in Kenya most of the individuals earning need not be proved by production of documents such as banking statements or payment vouchers or pay slips……" She also relied on the Court of Appeal decision in **Jacob Ayiga Maruja V Simeon Obayo** (supra) adding that if the only way of proving earnings is equally the production of documents, would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihoods in various ways and that it is not just documentary evidence that can prove earnings.

62. I am in total agreement with the above position as espoused in the Court of Appeal decision of **Jab Ayiga Marija V Simeon Obayo** and have nothing useful to add. The evidence by the plaintiff on the deceased's occupation and earnings were not rebutted. It was not even tested in cross examination. I see no reason to reject it and therefore accept it as credible and truthful. Therefore, under the Fatal Accidents Act, I would award the plaintiff damages as follows: Loss of dependancy, taking into account the following factors:-

That the deceased was expected to pay his taxes to the Government, from his monthly earnings pegged at 30%; That there is no rule of the thump that dependancy ratio must be 2/3 especially in a case like the instant one where the deceased, though single, was no doubt expected to marry and spend most of his earnings on his wife and children. I am fortified by the decision in **Rev. Father Leonard O. Ekisa & another V Major Birgen [2005] e KLR** where Ringera J held inter alia:

> ***"……..there is no rule of law that two thirds of the income of a person is taken as available for family expenses. The extend of dependancy is a question of fact to be established in each case."***
>
> ***" In determining the right multiplier, the right approach is to consider the age of the deceased, the balance of earning life, the age of dependants, the life expected, length of dependancy, the vicissitudes of life and factor accelerated by payment in lump sum (Hannah Wangaturi Moche & Another V Nelson Muya HCC 4533/93)."***

63. In this case the deceased was aged 26 years. There was no evidence as to the age of the plaintiff. There was also no evidence as to the vicissitudes of life or other imponderables which would have

shortened his working life to only 10 years proposed by the defendant in his submissions. There is also no reason given why the court should take the deceased's earnings to be 3000/- per month, in the absence of any contrary evidence that he earned shs 15,000/- per month as a mechanic. I would accept this figure of kshs 15,000/- being what the plaintiff testified as the deceased's monthly pay and reject the proposed figures in the plaintiff's submissions as submissions are not evidence.

64. On the dependancy ratio, the plaintiff herself testified that she used to receive 5,000/- which is 1/3 of the deceased's stated income. I would therefore apply that dependancy ratio of 1/3.

The official retirement age in Kenya is 60 years save for voluntary retirement and that of Judges which is 70 years or 65 years on voluntary basis. I do not therefore see the basis upon which the defendant instead averred that the general retirement age at the time of the deceased's death stood at 50 years. That must have been out of guess work since the employment laws of this country are clear. In my view, the proposals by the defendant are inordinately and or excessively low and without any justification. I would therefore award the plaintiff loss of dependancy calculated as follows:

15,000 less 30% tax = 4,500=10,500

Thus 10,500 x 12 x 34 x 1/3 = 1,428,000.

65. Under the Law Reform Act: Pain and suffering, the death certificate shows that the deceased died on the dame date of the accident. No one knows how long it took him to die. Whether on the spot or after some time. The plaintiff proposed shs 100,000/- whereas the defendant proposed shs 5000/- relying on **Nairobi HCC 1484/1993 Lucy M. Njeri V Fredrick Mbuthia & Another** and **Ngigi Kimani V George Ikonya Thuo HCC 1300/98** as well as **Nyeri HCCA 76/2013 James Mugo Manyara V James Gitu Wambugu.**

66. The generally accepted principle is that very nominal damages will be awarded on the head of pain and suffering if death followed immediately after the accident. However, higher damages will be awarded if the pain and suffering was prolonged before death. The conventional sum that courts have over time awarded has ranged between 10,000 to 100,000 where the deceased dies on the same date of accident.

67. In this case, I would award the plaintiff shs 50,000 for pain and suffering based on the decision on **Rev Father Leonard O. Ekisa** case (supra). On the loss of expectation of life, the law is such that this award and that of pain and suffering be capped to a minimum so that the estate does not benefit twice from the same death under the Fatal Accidents Act and Law Reform Act. The plaintiff proposed kshs 100,000 as appropriate considering that the deceased lived a healthy and prosperous life and by his death he was deprived of his normal expectation of life. She relied on **Mushtaq Hassan** case (supra) and **Kakiki V Abdo & 2 others [1990] KLR 327**. The defendant proposed shs 70,000 based on the case of **Nairobi HCC** 1484 **of 1993 Lucy M. Njeri V Fredrick Mbuthia & Another.** I would in the circumstances of this case award the plaintiff kshs 80,000/-.

68. The plaintiff also submitted on what she called general damages (reasonable funeral expenses) and relying on **Leonard O. Ekisa & Another** case prayed for shs 200,000 for funeral expenses. She also prayed for special damages of shs 23,600. The general principle of law is that special damages must not only be specifically pleaded but they must be strictly proved. In my humble view, funeral expenses have never been a general damage. It is a special damage incurred in the process of sending off the deceased. It must therefore be specifically pleaded and strictly proved. Lord Goudand CJ in **Bonham Carter V Hyde Park Ltd [1948] 64 TLR 177** stated

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

69. The plaintiff's plaint at paragraph 8 pleaded as follows:-

The plaintiff incurred the following costs for funeral of the deceased.

Particulars of special damages:

Mortuary changes – shs 4,150/-

Accident abstract shs 200/-

70. In her testimony in court, she only produced a receipt for shs 4150/- for mortuary charges. She also produced many other documents as listed in her submissions and stated that she paid kshs 500/- to Kenya Revenue Authority for search certificate which special damage of kshs 500/-was never pleaded. In her summary she claimed for special damages kshs 4150/- and general damages to take into account the 5000/- he used to give her. Yet in her submissions she now turned funeral expenses into general damages and claimed for so many other items which she neither pleaded , testified on their expenditure nor proved their expenditure. In the result, I would reject all the special damages proposed for want of pleadings and or proof and award the plaintiff shs 4,150/- only being mortuary charges expenses pleaded and strictly proved.

71. In the end, I find that the plaintiff proved her case against the defendant on a balance of probabilities. I enter judgment for the plaintiff against the defendant on liability at 100%.

72. I also award the plaintiff damages as follows:

1. General damages

a. Under the Fatal Accidents Act (loss of dependancy)

Kshs 1,428,000.

b. Under the Law Reform Act

i. Pain and suffering kshs 50,000.

ii.Loss of expectation of life kshs 80,000.

2. Special damages kshs 4,150.

73. I further award the plaintiff costs of this suit and interest at court rates. Interest on general damages will run from date of this judgment until payment in full. Interest on special damages will accrue from the date of filing suit until payment in full. Those are the orders of this court.

Dated, signed and delivered in open court at Nairobi this 16th day of February 2016.

R.E. ABURILI

JUDGE