



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 269 OF 2011**

**PHILOMENA MUTHEU NZYOKA (Suing as a legal representative  
of the estate of the late TIMOTHY KIEMA MUSANGO....PLAINTIFF**

**VERSUS**

**TRANSPARES KENYA LIMITED.....DEFENDANT**

**JUDGMENT**

1. This suit was instituted on 6<sup>th</sup> March 2008 by the plaintiff P M N (suing as the next of kin and on behalf of the estate of T K M (deceased) against the defendant Transpares Kenya Limited, vide an undated plaint.

2. The amended plaint was later amended on 14<sup>th</sup> March 2011 and filed in court on 16<sup>th</sup> March 2011 with leave of court.

3. In the said amended plaint, the plaintiff avers that the defendant was at all material times to this suit the registered owner of motor vehicle registration No. KAE 837P/ZB 5543 Mercedes Benz S/trailer (HCV). That on or about the 14<sup>th</sup> day of November 2005 while the deceased was employed and working as a driver of the defendant, he was assigned duties by the defendant to deliver goods to Uganda (Kampala) and while the deceased was in the course of discharging his duties as the driver, he was involved in a traffic road accident at Tororo in Uganda as a consequence of which he sustained severe injuries and he died.

4. It was further averred that the deceased was survived by

1. P M N aged 48 years
2. R K 38 years
3. P K 29 years
4. J M K 25 years
5. K K 18 years
6. M K 18 years

7. M K 4 ½ years

8. K K 14 years

9. M K 16 years

10. A K 8 years

11. M K 16 years

12. M K 10 years

5. The plaintiff claimed that the deceased was aged 40 years old, working for the defendant as a driver and earning a monthly salary of shs 15,000 , and his dependants relied on him for financial support and upkeep. Due to the accident, it was averred that his life was shortened and his estate suffered loss and damage. The plaintiff claimed for special damages made up of :

**a. Mortuary fee           Kshs 5,000**

**b. Coffin                       Kshs15,000**

**c. Transport                Kshs 20,000**

**Total Kshs 40,000**

6. She also claimed for general damages and loss of earnings and dependency, costs of the suit and interest.

7. The defendant filed an amended defence dated 24<sup>th</sup> March 2011 on 28<sup>th</sup> March 2011 denying each and every allegation leveled against it by the plaintiff. It denied that the plaintiff had the capacity to file suit herein, or that the deceased was its employee. It further denied owning the accident motor vehicle or that the deceased sustained any fatal injuries or that loss and damage were suffered by the plaintiff as alleged. Particulars of dependants were denied; occupation and earnings of the deceased were also denied and the plaintiff was put to strict proof thereof.

8. On a without prejudice basis, the defendant contended that if at all there was any accident involving the deceased then the deceased was solely to blame for its occurrence in that:

**a) He drove at an excessive speed in the circumstances**

**b) Failing to stop, slow down, swerve or in any other way manage or control the vehicle to avoid the accident.**

**c) Failing to exercise sufficient care and skills in driving and managing the vehicle;**

**d) Breaching, disregarding and or disobeying the highway code;**

**e) Deliberately courting disaster, and or**

**f) Causing the accident**

9. The defendant also denied that this court has jurisdiction to determine this suit for reason that :

**a) The alleged accident occurred in Uganda which is outside the jurisdiction of this court.**

**b) The alleged claim is governed by work injury Benefits Act, 2007 and by virtue of Section**

**58(2), the jurisdiction of the court is ousted.**

10. The defendant denied receiving demand and or notice of intention to sue. The suit herein was first initiated before the chief Magistrate's Court at Milimani Commercial Courts but was later transferred to the High Court for hearing and final disposal. Before the said transfer, parties argued the preliminary points of law challenging jurisdiction of the court to hear and determine the suit since the cause of action arose in Kampala Uganda and that Section 58(2) of the work Injury Benefits Act, 2007 ousted the jurisdiction of the court from hearing and determining the claim filed under the said Act. Vide a ruling delivered by B.N. Olao Chief Magistrate( as he then was), in Milimani CMCC 1402 of 2008 on 27<sup>th</sup> May 2011 upheld the preliminary objections raised by the defendant and stayed the proceedings and directed the plaintiff to have the suit transferred to the High Court. Vide a Miscellaneous Application No. 273/2011 filed in the High Court at Milimani the High Court , Rawal J (as she then was) ordered for the transfer of the matter from the Chief Magistrate's Court to this court for hearing and final disposal. The order for transfer was made on 7<sup>th</sup> July 2011.

11. The suit was heard on 14<sup>th</sup> May 2012 before Honourable Khaminwa J (as she then was). The plaintiff testified as PW1 in Kikamba language under interpretation. She testified that the deceased T K M was her husband. That he used to work for the defendant and could be send to work in Uganda. That the deceased was a driver and that he died in an accident in November 2005 in Uganda. PW1 produced a police abstract from Uganda Police as PEX 1. She further testified that the deceased's body was brought to Chiromo Mortuary and a burial permit issued as shown by Exhibit 2 produced. She produced receipts for mortuary charges shs 5,000, coffin; shs 20,000 and transport shs 15,000 as exhibits 3 and 4 respectively. She also produced demand letter send to the defendant as PEX5. She produced a grant of letters of administration *ad litem* as PEX 6 and a letter from the area chief as PEX7. She stated that the deceased was married to Rebecca Katunga as his second wife and they had 6 children. The second wife had 4 children.

12. The plaintiff further testified that the deceased used to earn shs 15,000 per month. She produced his pay slip as PEX 8. She prayed for his earnings until he attains the age of 60 years since he could have gone on and received more than shs 15,000/-. She stated that the deceased used to take care of all the family and she used to sell vegetables. She produced his death certificate as PEX 9 and postmortem report as PEX 10.

13. In cross examination, the plaintiff responded that she knew of the deceased's death in 2005 when she was notified by the company. That her husband had left home one month before his death in Uganda where he had been send by the company. She stated that she had 6 children but did not produce their birth certificates.

14. In cross examination, the plaintiff stated that she had children with the deceased while her co-wife had 4 children and in total are 10 children. She reiterated that the accident took place in Uganda and that she was notified by the owner of the company( defendant) that the deceased worked for the company.

15. PW2 R K N testified in Kikamba under interpretation and stated that the deceased was her husband. That he worked with the defendant. He was a driver and was involved in a road accident in Tororo Uganda and died on 14th November 2005. That she had last seen him in October the same year. That they used to live in Nairobi. The deceased was buried on 26<sup>th</sup> December 2005 after the body was brought from Kampala to Nairobi, preserved at Chiromo Mortuary and the family met funeral expenses as per receipts produced by PW1. PW2 stated that the deceased was in good health. She confirmed that she had 4 children with the deceased, whereas the co-wife had 6 children. She acknowledged that PW1 was her co-wife and that PW1 had authority to sue. PW2 prayed for compensation since they were jobless. She stated that the information they got was that the deceased died in a road accident.

16. In cross examination, PW2 confirmed being the co-wife to PW1 and that the deceased was her husband. She denied witnessing the accident. She also stated that she did not have birth certificates for their children in court and that her husband used to visit her.

17. In re-examination, PW2 stated that their area chief who knew her husband well recognized her as the deceased's wife and that the deceased earned shs 15,000 per month and that they lived in the same compound.

18. At the close of the plaintiff's case, the defendant did not call any witness and closed its case. Parties were directed to file submissions. They complied and on 17<sup>th</sup> July 2012 judgment date was set for 17<sup>th</sup> September 2012, rescheduled for 11<sup>th</sup> October 2012 and from then the matter kept being mentioned from time to time until the defendants filed an application dated 20<sup>th</sup> May 2014 seeking stay of proceedings/judgment pending HCC 88/2014 consolidated with HCC 38/2014 wherein a moratorium had been issued staying all suits wherein the defendant's insurance Company Concord Insurance Company Limited was the insurer since it was in receivership. The plaintiff filed another application dated 26<sup>th</sup> June 2015 which two applications were heard together as the plaintiff's application sought orders that this court proceeds to pronounce the judgment as the hearing had been concluded by Honourable Lady Justice Joyce Khaminwa (as she then was) and that the plaintiff be exonerated from the existing moratorium proceedings between the defendant's insurer in HCC 88/2013 and HCC 38/2014 or any other proceedings involving Concord Insurance Company Ltd and any party.

19. In my ruling rendered on 23<sup>rd</sup> November 2015, I dismissed the defendant's application and ordered that the court shall proceed to render the judgment in this suit which had been heard to conclusion by the late Honourable Joyce Khaminwa J. It is that ruling of 23<sup>rd</sup> November 2015 that paved the way for this judgment.

20. Both parties' advocates filed their respective submissions to guide the court in determining both liability and quantum of damages.

21. Mr Ngangito advocate represented the plaintiff. He filed his client's submissions on 8<sup>th</sup> August 2012 relying on the amended plaint dated 14<sup>th</sup> March 2011 and the testimony and documentary evidence adduced by the plaintiff and PW2.

22. In the submissions of the plaintiff, it was averred that the deceased died in the employment of the defendant and while in the course of duty in Uganda when the defendant's motor vehicle that he was driving KAE 906 N/ZB 5240 Mercedes Benz/trailer (HCV) was hit by another motor vehicle registration number KAE 837P/ZB 5543 Mercedes Benz /S Trailer HCV also owned by the same defendant which was being driven from another direction and as a result the plaintiff's husband T K M sustained serious injuries as a result of the accident and succumbed to death. The rest of submissions echo the pleadings as per the plaint and the testimonies of PW 1 and PW2. The plaintiff's counsel prayed for general damages in the sum of shs 7,200,000 and special damages of shs 40,000

23. On liability, the plaintiff's counsel urged the court to find that the plaintiff had proved on a balance of probabilities that the defendant was negligent. Further, that the defendant had not controverted the plaintiff's evidence and that neither had it proved any of the particulars of contributory negligence pleaded hence it should be held 100% liable and be ordered to compensate the deceased's family under the work Injury Benefits Act, 2007. Section 11(1) of the Work Injury Benefits Act was relied on to the effect that though the injury in accident occurred outside Kenya, the law obliges the court to act as if it occurred in Kenya where the employee was deployed outside Kenya temporarily. It was submitted that in this case, the deceased was employed by the defendant and was only sent to deliver goods in Uganda when he was involved in the fatal accident. It was also submitted that the deceased was aged 40 years and could have worked for another 20 years up to retirement age of 60 years hence the damages of shs 7,200,000 general damages and shs 40,000 special damages . No case law was referred to by the plaintiff's counsel.

24. The defendant filed its written submissions dated 8<sup>th</sup> March 2016 on 9<sup>th</sup> March 2016. The defendant's counsel submitted that the suit was improperly before the court as the plaintiff had no *locus standi* to file the same as she had no grant. That no doctor's report was produced to show the actual cause of the deceased's demise; that no doctor was called to produce any report to show the exact cause of death and

or produce a post mortem report as provided for in law. It was also submitted that no police abstract was produced to show the cause of the accident and or whether the defendant was negligent.

25. It was further submitted that no birth certificate was produced to show when the deceased was born. Further, that no receipt was produced by the plaintiff to prove the shs 40,000/- special damages claimed hence it cannot be awarded. Reliance was placed on the Court of Appeal (sic) decision in **Civil Appeal No. 144/2001 Onesmus Maingi & Another v Sun Kendi Mbui** where Lenaola J ( I note that Lenaola J is a High Court Judge not Court of Appeal Judge) held that special damages must be strictly proved.

26. The defendant's counsel further submitted that assuming the deceased died of an accident in the defendant's motor vehicle which was denied, then he was the author of his own misfortune since he was driving the motor vehicle and he knew the consequences of his own negligence. Further, that the plaintiff had not stated how the defendant had been negligent since tests on the motor vehicle indicate that it was in good condition. Relying on **HCC 101/96 Margaret Chenda Yeri & Another V Nagiv Samson & 2 Others** it was submitted that there was no evidence of how much the deceased spend on his family hence the issue of dependency had not been proven and therefore the claim should be dismissed.

27. Finally, the defendant's counsel's submitted that the defendant's Insurance Company Concord Insurance Company Ltd had been placed under receivership and that there was a moratorium in existence until 9<sup>th</sup> April 2016 as issued for 6 months on 12<sup>th</sup> October, 2015 (annexed to the submissions). The defendant's counsel prayed that the judgment be stayed pending the outcome of the moratorium.

#### **Determination.**

28. This court has carefully considered the plaintiff's claim, the defence as filed, the plaintiff's testimony, that of her witness PW2 and documents produced in evidence. I have also considered both parties respective written submissions as filed and the authorities relied on by the defendant's counsel. There were no issues framed for determination by the court and the defendant never called any witness to support its defence as filed and therefore the plaintiff's evidence remain uncontroverted.

29. From the evidence on record and submissions, in my humble view, the following issues flow for determination:

- 1) Whether there was an accident involving the deceased Timothy Kiema Musango.**
- 2) Whether the deceased was in the lawful employment of the defendant at the material time of the alleged accident.**
- 3) Whether the deceased was in the course of his employment when the alleged accident occurred and whether the motor vehicle he was driving belonged to the defendants.**
- 4) Who was to blame for the accident as alleged?**
- 5) Whether the plaintiff herein has locus standi to institute this suit.**
- 6) Is the suit herein tenable?**
- 7) What damages if any would the plaintiff be entitled**
- 8) What orders should this court make?**
- 9) Who should bear costs of this suit/ to?**

30. On the first issue of whether there was an accident on the material day of 14<sup>th</sup> November 2005. The plaintiff testified and produced the following documents as exhibits, which from the defendant's counsel's submissions, it appears he never participated in the trial of this suit and neither did he peruse the

court file.

31. The plaintiff produced PEX1 police abstract from the Uganda Police dated 17<sup>th</sup> November 2005 confirming that an accident did occur on 14<sup>th</sup> November 2005 at 2100 hours at Busitema along Jinja – Tororo Road involving Musango Timothy male adult aged 40 years a driver Kenyan resident of Mombasa C/O Transpares Ltd; and that the driver died in hospital. The said police abstract issued by Busia (U) police station shows that it was issued to the defendant herein Transpares (K) Ltd of P.O. Box 86029, Mombasa vide police Reference NO. TR 116/2005. The said police abstract list the motor vehicles involved and their respective drivers and owners and on whose behalf the goods were being carried.

32. The deceased T M is stated in the said police abstract to have been driving motor vehicle registration no. KAE 906N/ZB 5240 M. Benz S/Trailer (HCV) carrying 356 bags of wheat grain property of Ntake Bakery & Company Ltd P.O. BOX 15207, Kampala. The owner of the motor vehicle is named as Transpares Kenya Ltd. The second motor vehicle involved in the material accident is motor vehicle no. KAE 837P/Z Benz S/Trailer (HCV) while carrying 356 bags of wheat grain property of Ntake Bakery & Company Ltd. The motor vehicle is said to be owned by Transpares K. Ltd. The said motor vehicle was driven by Kisilu Joshua Mbai a Kenyan.

33. It therefore follows that there was indeed a road traffic accident involving the deceased Timothy Musango while driving motor vehicle KAE 906N/ZB 5240 M/Benz S/Trailer (HCV) as pleaded.

34. As to whether the deceased was at the material time of the accident in the lawful employment of the defendant, the plaintiff testified and produced a pay slip as PEX 8 for the month of August 2005. The exhibit is headed (Transpares (K) Ltd) Drivers) and the employee/payee is T K M. The deceased, according to the said pay slip used to receive pay by cash. His employment No. is 2128. He earned a gross pay of shs 15,000 inclusive of house allowance of shs 2,000. In my humble view, there is overwhelming evidence adduced by the plaintiff to prove, a balance of probabilities, that the deceased was in the defendant's employment as a driver at the time he met his death.

35. The other question for determination is whether the deceased was in the cause of employment when he met his death as shown by the death certificate PEX9 and post mortem report PEX 10 and whether the motor vehicle he drove belonged to the defendant.

36. Although the plaintiff did not produce copy of records to show ownership of the vehicle which according to the police abstract report PEX1 belonged to the defendant, this court is persuaded that the detailed information in the said police abstract PEX1 which was produced as an exhibit without any objection on the part of the defendant is sufficient proof that the deceased who is named as the driver of motor vehicle KAE 906N/ZB 5240 M Benz S/Trailer (HCV) was the driver of the accident motor vehicle and that he died while in the cause of his employment on 14<sup>th</sup> November 2005 along Jinja - Tororo Road in Uganda at Busitema. I am also persuaded that the said motor vehicle belonged to the defendant. I am fortified by the Court of Appeal decision in **Joel Muna Opija V East Africa Sea Food Limited [2013] e KLR** where the Court of Appeal held that the best way to prove ownership of motor vehicle would be to produce a document from the Registrar of Motor Vehicle showing the registered owner. However, if a police abstract is produced in court without any objection, its contents cannot be denied.

37. Further, in **Lake Flowers V Cila Francklyn Onyango Ngonga & Another [2008] e KLR** the Court of Appeal had earlier on held that without the appellant producing evidence at the trial to counter what the 1<sup>st</sup> respondents blamed its driver for, it was difficult for it to contest the liability blamed against it. It was also not possible to deny ownership of the motor vehicle without any evidence to counter the contents of the police abstract produced by the 1<sup>st</sup> respondent.

38. In the instant case, the defendant filed a defence denying everything that was pleaded by the plaintiff and putting her to strict proof thereof. However, despite the plaintiff adducing evidence that the deceased was the defendant's employee as driver who drove the named motor vehicle at the time of his death, and that it was the defendant's officials who notified her of the deceased's death in Uganda while he was on

duty; and that the police records showed the defendant to be the owner of the material motor vehicle being driven by the deceased at the material time, the defendant did not adduce any evidence to rebut the plaintiff's evidence. It therefore follows that the police abstract records produced was adequate proof of the defendant's ownership of the motor vehicle that was then being driven by the deceased when he met his untimely death.

39. It was, in my view, not sufficient for the defence counsel to put forth serious submissions on behalf of his client, denying each and every allegation of fact leveled against it by the plaintiff. Submissions and pleadings, it has been held by this court and the Court of Appeal, do not substitute evidence; and neither would answers in cross examination build a defence for the defendant.

40. In the end, I find that the plaintiff has proved on a balance of probabilities that the deceased was in the course of his employment with the defendant at the time of his demise and that he drove the motor vehicle KAE 906 N/ZB 5240 M/Benz S/Trailer (HCV) which belonged to the defendant.

41. The other key question in this case is who was to blame for the material accident on 14<sup>th</sup> November 2005 wherein the deceased died.

42. The plaint by the plaintiff as amended on 14th March 2011 does not set out any particulars of negligence against the defendant. The plaintiff at paragraph 5(b) of the said amended plaint simply pleaded that the deceased was in the course of discharging his duties as a driver, when he was involved in a traffic road accident at Tororo in Uganda, as a result he sustained severe injuries and he died. The plaintiff then pleaded that she had brought the suit under the Law Reform Act Chapter 26, Fatal Accidents Act Chapter 32 and Work Injury Benefit Act No. 13 of 2007 Laws of Kenya.

43. The plaintiff in her testimony gave evidence that did not attribute any negligence on any person not even to the defendant's agents, servants or driver. However, in the advocates submissions, he introduced new evidence to the extent that the deceased died when the vehicle he was driving collided with another motor vehicle KAE 837P/ZB 5543 M/Benz S/Trailer (HCV) also belonging to the defendant. The information regarding the later motor vehicle was appearing for the first time during submissions. In the pleadings and evidence, no attempt was made to state how the material fatal accident occurred and as to who was to blame for its occurrence.

44. Parties are bound by their pleadings and the evidence they adduce only goes forth to prove the pleadings which contain allegations of fact. In the absence of a pleading as to how the accident occurred and as to who was to blame for the material accident, the plaintiff could not purport to adduce evidence through her advocate's submissions blaming the defendant for the occurrence of the accident; and neither could she adduce evidence in her testimony as to who was to blame for the accident.

45. It is on that basis that I find that this suit, in as far as it purports to be anchored on the tort of negligence cannot succeed, as there was no pleading or evidence supporting the tort of negligence against the defendant. Furthermore, the provisions of Order 2 Rule 10 of the Civil Procedure rules oblige that **"..... Every pleading shall contain necessary particulars of any claim, defence or other matter pleaded....."**

46. It is trite law that the burden of proof lies with he who alleges. See Section 107-109 of the Evidence Act Cap 80 Laws of Kenya.

47. In my humble view, it was the duty of the plaintiff to plead and particularize negligence or negligent acts on the part of the defendant if at all she wanted this court to make a finding that the accident and resultant death of the deceased was due to the negligent acts of the driver of the other motor vehicle or that the motor vehicle that the deceased was driving at the material time of the accident was faulty or was not in sound mechanical condition which was foreseeable by the defendant who allowed the deceased to drive it thereby causing it to be involved in an accident.

48. Although Section 112 of the Evidence Act is clear that in civil proceedings, when any fact is

especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him; in this case, it is clear that although the defendant pleaded negligence on the part of the deceased but adduced no evidence to prove those particulars of negligence, I am of the opinion that the plaintiff was under a duty to plead those particulars of negligence that are attributable to the defendant, that would have been responsible for the occurrence of the material accident, which she did not.

49. Under Section 109 of the Evidence Act, the burden of proof as to any particular facts 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.

50. In this case, the defendant denied everything pleaded against it by the plaintiff but adduced no evidence to controvert the plaintiff's testimony. Nonetheless, it was upon the plaintiff, even if the case had preceded *ex parte* or by way of formal proof, to prove her claim against the defendant, on a balance of probabilities. Failure to discharge that burden cannot entitle the plaintiff to a finding by this court that the defendant was, in any way liable for the material accident in which the deceased, who was the driver for the pleaded motor vehicle, met his death.

51. Had the plaintiff pleaded any particulars of negligence against the defendant, then it would be expected that the plaintiff proves any of those particulars of negligence or in the alternative, the court invokes Section 112 of the evidence Act that the defendants had in their possession knowledge of those particulars of negligence hence, even if the plaintiff did not call any evidence to prove negligence, the burden of proof would lie on the defendant to disprove those facts. That was not the case here. The plaintiff purported to adduce evidence only through her counsel's submissions that the accident occurred when two vehicles belonging to the defendant collided thereby killing the deceased. As I have stated above, I reiterate that parties are bound by their pleadings and are not allowed to adduce evidence by way of submissions. **In Tracom Limited & another v Hassan Mohamed Adan [2009] eKLR** the Court of Appeal stated that:

***“The purpose of requiring certain claims to be pleaded is to forewarn the defendant that there are other claims to be made which may not be necessary and immediate consequences of the wrongful act as those claims are in respect of losses which the law does contemplate as arising naturally from the infringement of the plaintiff's legal right.”***

52. The plaintiff, furthermore, did not even rely on the doctrine of *Res Ipsa Loquitur*. This is not case where this court can find that there was a deliberate act on the part of the defendant not to testify to hide the cause of the accident. It is simply that the pleadings by the plaintiff do not disclose any negligence on the part of the defendant and no evidence was led to prove negligence.

53. In the end, I find that it has not been proved on a balance of probabilities, that the defendant was to blame for the material accident involving the deceased driver and who was also the employee of the defendant while in the course of his employment.

54. The other aspect that this court must nonetheless look at is that the plaintiff brought this suit under the Work Injury Benefits Act No. 13 of 2007. The court, however, noted that the Act above came into operation on *20th December, 2007*. This suit was instituted in 2008 and the deceased died in 2005. The law applicable for claims not based on negligence would have been the Work Injury Benefits Act. Under the Work Injury Benefits Act no evidence of negligence or breach of common law or statutory duty of care on the part of the defendant was necessary. What was necessary was the proof that the employee was injured or died while he was engaged upon his duty. Yet again, the plaintiff's submissions never attempted to work out what the deceased would have been entitled to under the Work Injury Benefits Act or even the Workmen's Compensation Act as initially pleaded and amended. The quantification of damages focused on what this court would have found as damages due and payable to the deceased's dependants had I found the defendant liable for negligence or breach of statutory or common law duty of care.

55. Furthermore, the provisions of Section 58 (2) of the Work Injury Benefits Act having been declared unconstitutional by J.B. Ojwang J on 4<sup>th</sup> March 2009 vide Petition No. 185 of 2008, this claim could not have been brought under the Work Injury Benefits Act, which, nonetheless, has no retroactive effect. The Section provided:

***“Any claim in respect of an accident or decease occurring before the commencement of this act shall be deemed to have been lodged under this Act.”***

56. On the issue of whether the plaintiff had locus standi to institute this suit, the defendant made a submission based on its pleading that the plaintiff had no grant of letters of administration. However, the plaintiff adduced evidence and produced as Exhibit 7 a limited grant of letters of administration *ad litem* granted to her on 31<sup>st</sup> August 2007 before instituting this suit on 6<sup>th</sup> March 2008 in the Chief Magistrate’s Court at Nairobi vide CMCC No. 1402/2008. The limited grant was issued vide P& A Cause No. 2026 of 2007 at Nairobi and signed by Honourable Joyce Aluoch J ( as she then was ). It therefore follows that the plaintiff had the *locus standi* to institute this suit on her own behalf and on behalf of other dependants of the deceased who were named in the plaint and in the letter by the of Chief Maluma location vide his letter dated 16<sup>th</sup> March 2007; and on behalf of the Estate of the deceased T K M.

57. I must mention that although the defendant submitted that there was no doctor’s report to show actual cause of death and that there was no proof of the deceased’s age, those arguments must have been for academic purposes since the plaintiff produced PEX10 post mortem report signed by a doctor at St Antony’s Hospital Tororo where the deceased died, confirming cause of death as being haemorrhagic shock, brain damage due to excessive bleeding. That autopsy report also indicated the various injuries the deceased sustained leading to the conclusion as the cause of death. In addition, the plaintiff produced PEX 9 certificate of death of a Citizen of Kenya occurring abroad no. A0384 issued on 28<sup>th</sup> October 2008 which shows the cause of death. It also gave the age of the deceased as 45 years.

58. Those being public documents, in my humble view, and in the absence of any evidence to the contrary, the plaintiff proved on a balance of probabilities, that she had *locus standi* to institute this suit; the cause of the deceased’s demise and his age at the material time of his death.

59. The next issue for the court’s determination is whether this suit is sustainable, with regard to limitation period for filing suits. This issue is framed having regard to the fact that this court is deemed to know the law and therefore must apply the law in determining all cases or proceedings before it since parties plead facts and only submit on the law and leave it to the courts to make determinations. In the instant case, although the defendant did not plead the statute of limitation, I have found it necessary to invoke it here because I am deemed to know the law and as ignorance of the law is no defence.

60. Further, a suit that is filed out of the statutory period would in essence oust the jurisdiction of the court in determining that dispute. Furthermore jurisdiction is everything, without which a court of law downs its tools. It is not a procedural technicality which can be cured by the application of Sections 1A and 1B of the Civil Procedure Act commonly known as the overriding objectives of the law; and or invocation of Article 159(2) (d) of the Constitution of Kenya. ( see **Owners of Motor Vessel Lilian S’ V Caltex Oil (K) Ltd [1989] KLR and David Githumbi Thande V Dairy Farmer’s Co-operative Society and 9 Others HCC 2004[2010] e KLR.**

61. In **Rawal V Rawal [1990] KLR Page 275** Bosire J as he then was stated authoritatively that :

***“ The object of any limitation statute is to prevent a plaintiff from prosecuting state claims on the one hand, and on the other hand protect a defendant after he had lost evidence or his defence from being disturbed after a long lapse of time. It is not to extinguish claims.”***

62. The learned Judge in the above case was citing with approval the decision in **Dhanesvar V Mehta Vs Manilal M Shah [1965] EA 321** where the court Stated that :

***“ The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other hand to protect a defendant after he had lost the evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”***

63. And in *Iga V Makerere University* [1972] EA 62 it was held inter alia that

***“A plaint which is barred by limitation is a plaint “barred by law.” A reading of the provisions of Section 3 and 4 of the Limitation Act ( Cap 70) together with Order 7 Rule 6 of the Civil Procedure Rules seems clear that unless he appellant in this case had put himself within the limitation period by showing the grounds upon which he could claim exemption the court “ shall reject” his claim....the limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief.***

64. What the above decisions speak is that once a claim is statute barred, unless the barrier of limitation is lifted by extension or enlargement of time, the claim shall be rejected irrespective of its merits. The question is, what is the status of this suit whose drafting of the plaint does appear to have been done by an amateur rather than a professional?

65. The cause of action herein arose on 14<sup>th</sup> November 2005 when the deceased T K M died in Tororo, Uganda where he had been temporarily deployed by his employer the defendant herein to deliver goods as per PEX1,an abstract from police records in Uganda.

66. That being the case, the case for compensation founded on the tort of negligence ought to have been brought before the end of twelve months from 14<sup>th</sup> November 2005. Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya enacts that:

***“ 4(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”.***

67. In this case, the cause of action arose on 14<sup>th</sup> November 2005 and the suit was filed on 6<sup>th</sup> March 2008 which was within 3 years. However, where the injured person dies, the Limitation of Actions Act is clear that an action must be brought within twelve months from the date when the person died. See Section 27, 28 and 29 of the Limitation of Actions Act. Where such suit is not brought within the stated limitation period, then the plaintiff is given an opportunity, either before or after filing of suit, to seek under Section 27 of the Limitation of Actions Act, on application to extend the time within which suit should have been filed.

68. The relevant Sections of the law provide that ***“29 provision where injured person has died***

***1. In relation to an action to which Section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of the deceased person by virtues of Section 2 of the Law Reform Act (Cap 26) Section 27 of this Act and Section 28 of this Act shall have effect subject to Subsection 4 and 5 of this Section.***

***2. Subsection (1),(2) and (3) of Section 27 of this Act and Section 28 of this Act shall have effect, subject to Subsection (4) and (6) of this Section, in relation to an action brought under Fatal Accidents Act (Cap 32) for damages in respect of a person’s death, as they have effect in relation to an action to which Section 27 of the Act applies.***

***3. In the following provisions of this Section, and in Sections 27 and 28 as modified by those provisions, “ the deceased” means the person referred to in Subsection (1) or Subsection (2) as the case may be.***

***4. Section 27(1) of this Act shall not have effect in relation to an action falling within Subsection***

***(1) or Subsection (2) of the Act, unless the action is brought before the end of twelve months from the date on which the deceased died.***

***5. For the purposes of the application of Subsection (2) of Section 27 of this Act to an action falling within Subsection (1) or (2) of this Section.***

***a. Any reference in the said subsection (2) to the plaintiff shall be construed as a reference to the deceased.***

***b. ....***

***6) In the application of Sections 27, 28 and 29 of this Act, to an action brought under the Fatal Accidents Act.***

***a. Any reference to a cause of action to which an action relates shall be construed as reference to a cause of action in respect of which it is claimed that the deceased could (but for his death) have maintained an action and recovered damages, and***

***b. Any reference to a cause of action shall be construed as a reference to establishing that the deceased could (but for his death) have maintained an action and recovered damages in respect thereof.”***

69. From the provisions of Section 29 of the Limitation of Actions Act set out above, it is trite that where the person injured as a result of a tortious act or omission of another dies, then his or her personal representatives can only bring an action on behalf of the estate of the deceased person within twelve months from the date when the deceased died. And therefore it follows that where such period of twelve months from date when the deceased dies has lapsed, unless, by application of Sections 22,27 and 28 of the Limitation of Actions Act, leave of court is sought and obtained extending such period for bringing an action, the action would be statute barred.

70. It is on the basis of the above provisions of Section 4 (2) of the Limitation of Actions Act as read with Section 29 of the same Act that I find that although this suit was instituted within 3 years from the date when the cause of action arose on 14<sup>th</sup> November 2005, it nonetheless involves a person who died as a result of the injuries sustained in the accident. As such, the suit founded on the tort of negligence should have been lodged within one year from the date when the cause of action arose thus, by 14<sup>th</sup> November 2006.

71. In the alternative, the plaintiff ought to have sought and obtained leave of court or extension of time for filing of the suit as provided for under Section 27 of the Limitation of Actions Act. That was not done. Consequently, this suit is statute bared.

72. Accordingly, I find that this suit is a nullity *ab initio* and must be struck out which order I hereby make and strike out the suit as filed.

73. But assuming that the suit herein was instituted within the statutory period of one year; or that the plaintiff proved her case against the defendant on a balance of probabilities the question would be how much this court would award as damages.

74. Starting with special damages, the law is clear that special damages must not only be specifically pleaded, but that they must be strictly proved. The plaintiff in her amended plaint dated 14<sup>th</sup> March 2011 pleaded for shs 40,000 special damages covering mortuary fees shs 5,000, coffin shs 15,000, transport shs 20,000/-. She gave evidence and produced receipts PEX3 receipt dated 23<sup>rd</sup> November 2005 for shs 20,000/- for coffin and PEX 4 dated 26<sup>th</sup> November 2005 being transport to Kitui for shs 15,000/-. No receipt for mortuary fees was produced. I would therefore have awarded shs 35,000/- special damages pleaded and proved.

75. On the claim for general damages, the court notes that although the plaintiff's initial claim claimed for general damages under the Workmen's Compensation Act, the amended claim removed that claim and substituted it with the claim for general damages Under the Law Reform Act, Chapter 26 Laws of Kenya, Fatal Accidents Act Cap 32 and Work Injury Benefit Act No. 13 of 2007.

76. As already pointed out, the Work Injury Benefit Act is inapplicable in this case, Section 58 thereof having been declared unconstitutional. Thus, the cause of action having accrued before the Act (WIBA) coming into effect, the constitutional court on 4<sup>th</sup> March 2009 found that the Act could not operate retrospectively and that as the provisions of the Act were inconsistent with the Constitution, those provisions were declared null and void of the statute law. It therefore follows that the plaintiff's claim under the Work Injury Benefits Act No. 13 of 2007 was misplaced and this court could not and cannot make any award of damages under that head.

77. On the claim for general damages under the Law Reform Act, first, it appeared from the submissions and pleadings that learned counsel for the plaintiff had no clue of how damages in fatal cases is assessed. He simply multiplied 3,600,000 by two to get 7,200,000. I have no idea where from and how he arrived at that seven digit figure.

78. Nonetheless, under the Law Reform Act, courts award damages for pain and suffering and loss of expectation of life. Under pain and suffering, it is not disputed that the deceased died on 14<sup>th</sup> November 2005 the same day of the accident. The police abstract and post mortem report from the Ugandan authorities show that the deceased died in hospital the same day. There is no evidence that the deceased died on the spot following the material accident whose manner of occurrence is not disclosed or at all in either the pleadings or the evidence adduced. This court is in essence left speculating on what might have happened leading to the deceased's demise.

79. In principle, higher damages for pain and suffering are awardable where the deceased dies long after the accident, whereas minimal damages under this head are awarded where the deceased dies on the spot. In this unfortunate case the plaintiff's counsel did not assist this court at all. He simply threw at the court some speculative figures which make no sense.

80. In **Leonard O. Ekisa & another V Major K. Birgen [2005] e KLR** Emukule J awarded shs 30,000 general damages for pain and suffering where the deceased died on the same day of accident. Doing the best I can, and applying the above Leonard Ekisa case, and taking into account time lapse from the time that decision was made in July 2005 which is 11 years ago, and the inflationary trends in Kenya, I would award the plaintiff shs 80,000/- for pain and suffering.

81. On loss of expectation of life, it is also not in doubt that the deceased, according to the post mortem report and death certificate, was at the material time aged 45 years when he died. There was no evidence that he suffered from any illness or was of ill health. He was in the middle of his life. Based on the **Leonard Ekisa & Another** (supra), case where the deceased was aged 45 years at the time of his demise, he was awarded shs 30,000 for loss of expectation of life, I would, in the circumstances of this case, taking into account time lapse since the above case was decided and inflationary trends in Kenya award the plaintiff shs 80,000/- for loss of expectation of life.

82. On the claim under the Fatal Accidents Act, the plaintiff's counsel proposed a sum of shs 7,200,000 based on no calculation or principle known in law.

83. For a court of law to award damages for loss of dependancy there must be evidence of dependants and evidence of dependancy. In the amended claim, the plaintiff pleaded that the deceased who was a driver by profession was survived by the following dependants.

**1. P M N aged 48 years**

**2. R K 38 years**

3. P K 29 years

4. J M K 25 years

5. K K 18 years

6. M K 18 years

7. M K 4 ½ years

8. K K 14 years

9. M K 16 years

10. A K 8 years

11. M K 16 years

12. M K 10 years

84. Although no birth certificates for the above persons named as dependants of the deceased were produced, the plaintiff testified and produced the area chief's letter identifying all the above named persons as the deceased's dependants - one R K also testified and corroborated PW1's testimony that she was the deceased's second wife ( now widow) and that all the children named are the deceased's children. The two widows also testified that they lived with the deceased and that he was their sole breadwinner as they were unemployed. Nothing was however said concerning the children who were adults, as to whether they worked or not.

85. I am persuaded that on the evidence adduced, on a balance of probabilities, the persons named and identified by the plaintiff, PW2 and the area chief in his letter "**to whom it may concern;**" that they were all the deceased's dependants. There was also evidence that the deceased was working as a driver and earned a salary of shs 15,000 as shown by the pay slip for August 2005.

86. In Kenya, at the material time of the deceased's demise, the employment laws provided for retirement age to be 55 years. The deceased, nonetheless, had he lived beyond 2007 he would have fallen in the category of the new law which now provides for retirement at 60 years. The deceased, therefore, had 15 years to his retirement.

87. In **Radhakrishen M.Khenmaney Vs Mrs Lochaba Murlidhar [1958] EA 268 page 269**, Sir Owen Corrie Ag JA citing with approval the principles applied in **Peggy Frances Hayes & Others V Chunibhai J Patel & another CC 173/1956**, where it was observed that

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

88. In the present case I would take the deceased's income as shs 15,000 less tax of 30% = 10,500. On the Actual dependency, although no real evidence was adduced as to how much the deceased gave to his two widows and applied towards his children's upkeep, and there is no doubt that the two widows were jobless and therefore in the absence of any other evidence to the contrary, they relied on the deceased. There is also no hard or fast rule on the ratio of dependency. However, having regard to the circumstances of this case I find that ? of the deceased's earning went to his big family of two wives and ten children whereas ? went to his own upkeep. I would therefore in my view award loss of dependency as follows, applying the multiplier of 10 years, taking into account the vicissitudes of life for a long distance driver like the deceased in this case, shs 10,500 x 12 x 10 x ? = 840,000.

89. In the end, total damages would have been as follows had the plaintiff proved her case against the defendant on a balance of probabilities:

<b>1. Special damages</b>	<b>shs 35,000</b>
<b>2. General damages</b>	
<b>a. Under Law Reform Act</b>	
<b>1. Pain and suffering</b>	<b>shs 80,000</b>
<b>2. Loss of expectation of life</b>	<b>shs 80,000</b>
<b>b. Fatal Accidents Act</b>	
<b>1. Loss of dependancy</b>	<b>shs 840,000</b>
<b>Total damages</b>	<b>shs 1,035,000</b>

90. I would also have awarded interest at court rates from date of judgment until payment in full and costs of the suit.

91. The upshot of all the above analysis is that the plaintiff's suit against the defendant is hereby dismissed for want of proof of liability against the defendant on a balance of probabilities and she is therefore awarded nothing.

92. On the costs of the suit, costs are in the discretion of the court, and in any event to the successful party. However, in this case, I note that the plaintiff and the entire family of the deceased lost their sole breadwinner, there is no evidence that the plaintiff or the deceased's estate is possessed of any sufficient means to meet the costs of this suit which they have lost due to what I can comfortably attribute to the reckless manner in which the claim was pleaded and presented before this court. There was, in my humble view, no professionalism in the manner in which this case was presented. There was no diligence in seeking appropriate remedy that would have been available to the plaintiff. Regrettably, courts are umpires. They decide on the pleaded facts and evidence adduced. They do not descend into the arena of the dispute to help one party whose case has no head or tail from the pleaded facts and evidence presented.

93. On the other hand, the defendant lay back and vigorously asked the court to stay the delivery of this judgment because its insurance company, Concord Insurance Company Ltd was in a receivership and moratorium was in place from time to time. The court did not buy the defendant's proposal as there was no current moratorium staying this particular suit. In addition, from the submissions by the defendant's counsel, this court was taken aback. The submissions revealed that counsel did not, either participate in the hearing of this suit, or even peruse the record before filing submissions. In other words, the defence was submitting on irrelevancies unrelated to the record. In the premises, I find that there is no justification to award costs to the defendant and I therefore order that each party shall bear its own costs of this suit.

94. Those are the final orders of this court.

Dated, signed and delivered in open court at Nairobi this 26th day of July 2016.

**R.E. ABURILI**

**JUDGE**

In the presence of:

Mr Nyangito for the plaintiff

Miss Mr Oonge h/b for Miss Chania for defendant

CA: Adline