



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 9 OF 2013**

**F M M & F K S ( Both suing as the personal Representative of  
the estate of M K (deceased).....PLAINTIFF**

**VERSUS**

**JOSEPH NJUGUNA KURIA .....1<sup>ST</sup> DEFENDANT**

**MOSES GATHOGO NDUNG’U.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 8<sup>th</sup> January 2013 and filed in court on 16<sup>th</sup> January 2013, the plaintiffs F M M and F K S ( suing as personal representative of the estate of the deceased M K instituted suit against the defendants Joseph Njuguna Kuria and Moses Gathogo Ndungu claiming for general and special damages.

2. The plaintiffs alleged that on or about the 2<sup>nd</sup> day of April 2012 the deceased was lawfully travelling as a passenger in motor vehicle registration No. KAU 027 W Nissan matatu along Kangundo Road when at Njiru Bridge or thereabouts, the 2<sup>nd</sup> defendant who was the authorized driver of motor vehicle registration No. KAZ 416 R so negligently drove, managed and or controlled the said motor vehicle that he caused it to loose control and violently collide with motor vehicle registration No. KAU 027 W Nissan matatu thereby seriously injuring the deceased as a result of which he died.

3. It was further alleged that the 1st defendant was the registered owner and or owner in actual use and possession of motor vehicle registration NO. KAZ 416 R Lorry Truck which was being driven by the 2<sup>nd</sup> defendant.

4. The defendants filed a notice of appointment of advocates dated 6<sup>th</sup> February 2013 through the firm of Miller and company Advocates on 11<sup>th</sup> February 2013 and filed joint statement of defence dated 8<sup>th</sup> May 2013, on 10<sup>th</sup> May 2013 denying the plaintiff’s claim and contending that it was fatally defective, incompetent, discloses no or any reasonable cause of action against the defendants and that they would crave to have the suit struck out. In the alternative, the defendants pleaded that the deceased was responsible for the occurrence of the accident and set out at paragraph 7 particulars of the deceased’s negligence. The defendants further claimed that the accident was caused by the negligence on the part of the owner and or, the drive of motor vehicle registration No. KAU 027W and set out particulars of negligence in paragraph 7 of the plaint.

5. The defendants also denied that the doctrine of *Res Ipsa Loquitur* pleaded by the plaintiff was applicable in the circumstances of this suit. They also denied receiving demand and notice of intention to sue and also denied jurisdiction of this court, urging the court to dismiss the plaintiff's suit against them with costs.

6. The plaintiffs filed reply to defence on 22<sup>nd</sup> May 2013 reiterating the contents of the plaint and denying all the particulars of negligence attributed to the deceased by the defendants. Parties complied with pre-trial requirements under Order 11 of the Civil Procedure Rules and only the plaintiff's counsel filed a list of 11 issues dated 29<sup>th</sup> July 2013 on 30<sup>th</sup> July 2013.

### **Evidence.**

7. The suit was heard on 20<sup>th</sup> April 2015. The 1<sup>st</sup> plaintiff F M M testified on oath as PW1 adopting her witness statement filed in court on 16<sup>th</sup> January 2013 as her evidence in chief. She testified that the deceased M K was her husband and that the 2<sup>nd</sup> plaintiff F K S was the deceased's father. She also produced her bundle and list of documents filed together with her plaint as P exhibits 1-10 and the defence did not object save for the police abstract whose production was reserved for the police investigating officer.

8. The 1<sup>st</sup> plaintiff testified that her husband the deceased was travelling when he died on 4<sup>th</sup> April 2012 in a traffic accident along Kangundo Road at Njiru Bridge. That she had obtained a limited grant of letters of administration which she also produced in her list and bundle of document. That the accident involved motor vehicle KAZ 416R Lorry/Truck owned by the 1<sup>st</sup> defendant Joseph Njuguna Kuria and driven by Moses Gathogo Ndungu the 2<sup>nd</sup> defendant; and motor vehicle registration No. KAU 027 W Nissan matatu. That the deceased M K was a passenger in the Nissan matatu KAU 027W when motor vehicle KAZ 416R lost control and violently rammmed into the matatu. That the deceased was rushed to Kenyatta National Hospital where he was admitted and he died two (2) days later. The accident was reported at Kayole police station. She was issued with a police abstract and that is when she came to know of the registration numbers of the accident motor vehicles and their owners and drivers.

9. The 1<sup>st</sup> plaintiff testified that she blamed the driver of the lorry following information from the police station that:

10. PW 1 further testified that from the police reports, the driver of the offensive lorry, who is the 2<sup>nd</sup> defendant, was charged with the offence of causing death by dangerous driving.

11. The deceased's body was later taken to Kenyatta Mortuary and the 1<sup>st</sup> plaintiff paid sh 32,678 for hospital and mortuary fees. She also bought a coffin at shs 12,000, hired a hearse and paid transport costs of shs 32,000 to Kitui where he was laid to rest. She paid shs 500/- for official motor vehicle search at KRA, 150/- for death certificate and shs 26,030 for letters of administration all totaling shs 91,358.00. She also claimed shs 30,000/- being expenses for food and drinks for mourners.

12. The first plaintiff further testified that she had with the deceased one issue K M aged 2 years and that the deceased was at the material time of the accident and demise a building contractor earning between shs 1,000 -1500/- per day. That he supported his peasant parents at home and paid house rent, provided clothing and food for her and her son and their general maintenance. That the deceased was aged 26 years at the time of his death and enjoyed a healthy and vigorous life of a self employed building contractor based in Nairobi and that he spend almost all his earnings on his family. She urged the court to award her special and general damages under the Law Reform Act and under the Fatal Accidents Act, and costs of the suit.

13. In cross examination by Mr Mare counsel for the defendants, PW1 stated that K M was her son and that the deceased was his father and that she had a waiting card for his birth certificate. She

testified that she did not witness the accident and therefore could not confirm how the accident occurred but that he was aware that two motor vehicles collided and that the lorry driver is the one who was at fault. She stated that the deceased was buried on 16<sup>th</sup> April 2012 and that hospital bills were cleared by his parents. She stated that she is not the one who paid the advocate for limited grant and that her husband worked in Kasarani Mwiki. That although she did not know his employer, she knew that he worked as a mason and that he worked every day except on Sundays. That he always brought her all his daily earnings which were never less than kshs 1000/- 1500/- and that he could send about 500/- to his parents leaving her with 1000/- and that he could go for about only 2 days without work.

14. In re-examination by Miss Obaga, PW1 stated that she went with 2 other people to instruct the advocate and that she was in the company of her brother in law leading them so she could not tell whether he paid the advocate. She also stated that it was the police who informed her that the lorry driver was to blame for the accident and that he had been charged in court.

15. PW2 F K S who is also the 2<sup>nd</sup> plaintiff testified on oath that the deceased was his son whereas the 1<sup>st</sup> plaintiff was his late son's wife (widow). He confirmed that all that the 1<sup>st</sup> plaintiff had told the court was true. He stated that he was born in 1938 and his wife who is the deceased's mother was aged 66 years. That they were jobless and that they depended on their deceased son who worked and send them money for their upkeep to the tune of about kshs 500/- per day and that sometimes he would send more. He prayed for compensation for the loss of his son through a road accident.

16. In cross examination by Mr Mare counsel for the defendant, PW2 responded that he authorized the filing of this suit. That he had 4 children who are married daughters who also assist him a little but that before the deceased died, he used to buy him food and clothing. That the deceased was his last born son. That PW2 send PW2 shs 500/- per day and sometimes he could save and send shs 2000/- after three days since PW2 lives in a drought stricken area of Ukambani. PW2 stated that his son was buried after 2 weeks. That he was told that the deceased died in a road accident after a lorry crushed into a matatu in which the deceased was travelling.

17. The plaintiff also called PW3 PC Caleb Osodo (No 82021) attached to Kayole Police Station performing traffic duties who testified on oath that according to the police records kept at Kayole police station, on 2<sup>nd</sup> April 2012 an accident did occur along Kangundo road on 2<sup>nd</sup> April 2012 involving motor vehicles KAU 027W Nissan matatu driven by Charles Njiru and KAZ 416R driven by Moses Gathogo Ndungu. That the driver of KAZ 416 R Moses Gathogo Ndungu was blamed for the occurrence of the accident. That the said driver was charged with a traffic offence of causing death by dangerous driving after investigations revealed that he failed to keep safe distance and hit the matatu from behind as a result of which passengers suffered injuries while others succumbed to the injuries. He cited the court file number at Makadara court as being TR 2567/2012. He also stated that the said driver/accused absconded during proceedings and a warrant of arrest was issued against him but the case had to be withdrawn on 3<sup>rd</sup> June 2014 under Section 87A of the Criminal Procedure Code. He stated that the accused having absconded he could still be arrested and charged in court.

18. PW 3 produced a police abstract which was issued to the plaintiffs as an exhibit. He also produced a duplicate photocopy of a police file as an exhibit.

19. In cross examination by Miss Kihumba counsel for the defendant, PW3 stated that he was not the investigating officer but was relying on the file and records kept by the police. He stated that the two motor vehicles were inspected and the inspection certificates were in the duplicate police file which he had produced as exhibit. He reiterated that the second defendant was charged in court but was not convicted because he absconded. He stated that according to the remarks on the certificate of examination of motor vehicle registration No. KAU 027W, passenger seats were loosened and detached.

20. At the close of the plaintiff's case, the defence called one witness Moses Gathogo Ndungu who

testified on oath as DW1 and who is also the second defendant in this case. According to the 2<sup>nd</sup> defendant, he was driving tipper KAZ 416R behind the Nissan matatu KAU 027W and that it had rained overnight. He drove at 50 kilometers per hour and as he drove down hill the matatu Nissan stopped abruptly on the road forcing the 2<sup>nd</sup> defendant to apply emergency brakes and his lorry skidded as he tried to swerve on to his right hand side to avoid ramming into the matatu but that he could not swerve since there was an oncoming vehicle. As a result, he pushed the matatu to the near side verge where it stopped while the lorry entered the ditch on the same side as a result, the passengers in the matatu were injured and were rushed to various hospitals. He contacted the owner of the lorry and police from Kayole Police station visited the scene and towed the motor vehicle to Kayole police station. He then recorded his statement with the police the following day and was charged with careless driving at Makadara court.

21. In cross examination by Miss Obaga counsel for the plaintiff, DW1 stated that he was charged with the offence of dangerous driving. He admitted that some people died and that the police officers found him to blame for the accident after carrying out investigations but that according to him, it is the matatu driver who was to blame for the accident. He stated that he had not sued the matatu driver. He also stated that the plaintiffs could not be blamed for the accident because the deceased was a passenger.

### **submissions**

22. At the close of the defence case, parties' advocates were granted time to file and exchange their written submissions.

23. The plaintiff's counsel filed her submissions dated 6<sup>th</sup> November 2015 on 9<sup>th</sup> November 2015 whereas the defendant's counsels filed their submissions on 4<sup>th</sup> January 2016. However, a judgment dated could not be fixed immediately thereafter until 10<sup>th</sup> March 2016 owing to the congested court diary.

24. In her submissions, Miss Obaga for the plaintiff submitted on the issues of liability and quantum of damages payable. On liability it was submitted that from the evidence of PW3 a police officer from Kayole police station who also produced the police traffic duplicate file, involving the material accident and the investigations carried out, DW1 who was the driver of the offending motor vehicle was to blame for the accident and that is why he was charged in court with the offences of causing death by dangerous driving albeit the charges were dropped under Section 87A of the Criminal Procedure Cod after the DW1 driver absconded.

25. The plaintiff's counsel maintained that the 2<sup>nd</sup> defendant, according to the police investigations was negligent in that he drove at a speed which was dangerous to the public and in the given circumstances he lost control and rammed into the rear of motor vehicle registration No. KAU 027 W Nissan matatu which had slowed down at a bridge; and that DW1 failed to keep his distance.

26. It was further submitted that albeit the defendant in their paragraph 7 of the defence blamed both the deceased and the owner of the Nissan matatu KAU 027W for the accident, they never joined the said third party owner to the proceedings hereto and that neither did they lead any evidence to prove the blameworthiness of the deceased who was a mere passenger and who was not in any way in the control of the two motor vehicles. Miss Obaga maintained the innocence of the deceased and urged the court to find that on a balance of probabilities that the defendants were responsible for the death of the deceased Mutinda Kamende and to hold them jointly and severally to blame for the material fatal accident at 100%.

27. On quantum of damages, the plaintiff's counsel claimed that her clients were entitled to damages both under the Fatal Accidents Act and the Law Reform Act.

28. Under the Fatal Accidents Act it was submitted that the deceased died aged 26 years, he was a building contractor earning shs 1500/- per day. The plaintiffs' counsel prayed for a dependency ratio

of 2/3 and a multiplier of 35 years.

29. It was further submitted that the deceased used to give the parents kshs 500/- and to his wife shs 1,000/- daily. The plaintiffs did not produce any documentary evidence of the deceased's income but relied on the holding by the Court of Appeal in **Jacob Ayiga & Another V Simon Obayo** (suing as personal representatives of the **Estate of Thomas Ndaya Obayo [2005] e KLR** where the Court of Appeal refused to 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 production of documents, which stand would do a lot of injustice to very many Kenyans. It was further submitted that the defendants did not rebut the evidence on occupation and income of the deceased. The plaintiffs prayed for damages calculated as follows:  $1500 \times 26 \times 12 \times 35 \times 2/3 = 10,920,000$  and relied on **Millicent Kimuli and Benson Wanjohi Njogu** (suing as administrators of the **Estate of Ephantus Murimi Wanjohi V Mbisi Linah Catherine & Another [2015] e KLR**; **James Gichuru & Another V Maingo Investments Ltd HCC 1681/99**, and **Keats Njuguna Muchiri V Mash Express Ltd [2008] e KLR** wherein the courts used multipliers of 30,30 and 29 for deceased who were aged 30,25 and 26 years respectively.

30. The 1<sup>st</sup> plaintiff also claimed for damages of shs 150,000/- for loss of consortium and companionship relying on the decision in **Salvatore De Luca V Abdullahi Hemed Khalif & Another [1994] e KLR**. The plaintiffs also claimed for special damages totaling to kshs 91,358.00.

31. Under the Law Reform Act, the plaintiffs claimed for loss of expectation of life for a sum of shs 200,000/- contending that the deceased had been healthy and young. Reliance was placed on the cases of **Patricia Mona & Dennis Anthony Musyoka** (suing as personal representatives of the estate of **Anthony Musyoka Vs Samuel Opot Omondi & NEMA Nairobi HCC 574/2010** where Waweru J awarded 120,000 to the deceased who was aged 47 years; and **Violet Jeptum Rahedi Vs Albert Kubai Mbogori [2013] e KLR** where the same judge awarded 150,000 for a deceased aged 44 years.

32. On pain and suffering, it was submitted by Miss Obaga that the deceased died on 4<sup>th</sup> April after being involved in an accident on 2<sup>nd</sup> April 2012 albeit the death certificate erroneously referred to date of death as 2<sup>nd</sup> April 2012. The he died after 3 days and was in a lot of pain before his demise. They prayed for shs 300,000/- relying on the **Patricia Mona** (supra) case where shs 20,000 was awarded for a deceased who died on the spot. And to avoid duplication of damages under Law Reform and Fatal Accidents Act the plaintiffs declined damages for lost years. They prayed for total damages as follows:

Fatal Accidents Act 11,020.000

Law Reform Act 500,000

Special damages 91,358.000

Total 11,611,358

33. In a rejoinder, the defendants filed their submissions on 27<sup>th</sup> January 2016 with leave of court and on liability, they submitted that PW3's evidence did not prove negligence against the 2<sup>nd</sup> defendant. That the police file produced in court does not show any statements of eye witnesses as to the circumstances of the accident. That the police file only shows names and particulars of injuries sustained by the persons involved in the accident. Further, that PW3 was not an investigating officer.

34. In addition, the defendants' counsel submitted that DW1 was driving at a moderate speed of 50 kilometers per hour when KAV 027 W which was 6 meters ahead suddenly stopped in the road thereby blocking the road. That DW1 tried to swerve to the right lane but encountered an oncoming vehicle and so he was forced to return to his lane hence there was no basis upon which the police preferred charges against DW1 the 2<sup>nd</sup> defendant only and not against the driver of the KAU 027W

who recklessly stopped his motor vehicle on the road thereby causing an obstruction. Further, that the 2<sup>nd</sup> defendant though charged with the offence of careless driving, he was never convicted hence the plaintiffs had failed to prove negligence against the defendants. The defendants urged this court to dismiss the plaintiffs' suit and find the driver of the KAU 027 W liable for the material accident.

35. Quantum of damages, it was submitted that should the court find the defendants liable, then the quantum of damages would be as follows:-

36. **On Loss of dependency**-That the court should consider the fact that there were no certificates to show that the deceased trained as a mason or that he earned shs 1500/- per day hence the court should take kshs 7,586 as the statutory minimum wage applicable as at 4<sup>th</sup> April 2012 for general workers in Nairobi as provided for under Column 2 of the 1<sup>st</sup> Schedule of the Regulation of wages(general ) ( Amendment) Order, 2011.

37. On the multiplier, it was submitted by the defence counsel that albeit the deceased was aged 26 years old at his death, and in informal employment, we have to take into account the contingencies and vicissitudes of life and adopt a multiplier of 10 years. Relying on **Roger Dainty V Mwingi Haji & Another [2004] e KLR** where the Court of Appeal upheld a multiplier of 10 years where the deceased died aged 27 years and in **Solomon Ndungu Kabugi V Zachariah Mureu Karume [2009] e KLR** where a multiplier of 20 years was used where the deceased died aged 30 years old.

38. On the dependency ratio, the defendants' counsel proposed  $\frac{1}{2}$  as there was no evidence that the 2<sup>nd</sup> plaintiff and the deceased's mother were the deceased's dependants. Thus  $7,586 \times 12 \times 10 \times \frac{1}{2} = 91,023$  was proposed.

39. On the loss of consortium a sum of kshs 50,000 was proposed relying on **Rose Adisa Odari V Wilberforce Egesa Magoba [2009] e KLR** where the court awarded shs 50,000 to a widow whose husband died aged 24 years old.

40. On the damages under the Law Reform Act, the defendant proposed a sum of kshs 30,000 for pain and suffering relying on **Betty Ngatia V Samuel Kinuthia Thuita [1999] e KLR** where shs 10,000/- was awarded where the deceased died a day after the accident. In this case it was submitted that the deceased died the same day of the accident.

41. On damages for loss of expectation of life, it was submitted that an award of shs 70,000 /- would be sufficient. Reliance was placed on **Nairobi HCC 116 of 1993 John Muriithi Kariuki V George Mwangi** where a similar award was made for a deceased who died aged 26 years.

42. The defendant had no issue with special damages given that they were pleaded and proved by way of receipts. Thus the defendant quantified damages to a total of kshs 302,390. They however prayed for dismissal of the suit since liability was not proved to the required standards.

### **Analysis and Determination**

43. I have carefully considered the pleadings, the evidence as adduced both oral and documentary, the submissions filed by both parties' advocates and the authorities relied on in their submissions. The plaintiffs filed issues on 30<sup>th</sup> July 2013. In my humble view, the main issues that fall for determination are:

1. Whether the plaintiff proved the liability of the defendants for the occurrence of the material accident
2. What is the quantum of damages that would be payable in the circumstances of this case?
3. What orders should this court make?

#### 4. Who should bear the costs of this suit?

44. On the question of who is to blame for the material accident wherein the deceased M K died, it is not in dispute that a fatal accident did occur on 4<sup>th</sup> April 2012 involving the deceased Mutinda Kamende along Kangundo Road involving motor vehicle KAZ 416R and KAU 027W.

45. It is also not in dispute that motor vehicle KAZ 416 R was at the material time of the accident owned by the 1<sup>st</sup> defendant Joseph Njuguna Kuria and being driven by the 2<sup>nd</sup> defendant Moses Gathogo Ndungu as the agent/servant/authorized driver of the 1<sup>st</sup> defendant owner and in the course of his employment.

46. It is also not disputed that motor vehicle registration No. KAZ 416 R rammed into motor vehicle KAU 027W Nissan matatu from the rear. The only dispute is whether there was proof that the 2<sup>nd</sup> defendant was to blame for the occurrence of the accident and therefore the 1<sup>st</sup> defendant being vicariously liable for acts of his driver/agent/ servant in the course of his employment.

47. According to the 2<sup>nd</sup> defendant, he was driving tipper KAZ 416R behind the Nissan matatu KAU 027W and that it had rained overnight. He drove at 50 kilometers per hour and as he drove down hill the matatu Nissan stopped abruptly on the road forcing the 2<sup>nd</sup> defendant to apply emergency brakes and his lorry skidded as he tried to swerve on to his right hand side to avoid ramming into the matatu but that he could not swerve since there was an oncoming vehicle. As a result, he pushed the matatu to the near side verge where it stopped while the lorry entered the ditch on the same side as a result, the passengers in the matatu were injured and were rushed to various hospitals. He contacted the owner of the lorry and police from Kayole Police station visited the scene and towed the motor vehicle to Kayole police station. He then recorded his statement with the police the following day and was charged with careless driving at Makadara court.

48. The 1<sup>st</sup> defendant blames the owner/driver of KAU 027W for the accident for stopping abruptly. In the written defence, the defendants also blamed the deceased for the occurrence of the accident for among others; failing to put on a safety belt; failing to remain seated while the matatu was in motion; attempting to alight or jump out of the matatu and failing to have the regard for his own safety.

49. The owner/driver of KAU 027W is blamed by the defendants for driving carelessly/recklessly, failing to keep a safe distance; failing to see motor vehicle KAZ 416R in sufficient time to avoid the collision, driving without presence of mind; driving at a speed which was excessive in the circumstances; failing to heed the warning of KAZ 416R; among other allegations of negligence. However, at the hearing, the 1<sup>st</sup> defendant only blamed the driver of KAU 027W for stopping abruptly as a result of which the 2<sup>nd</sup> defendant rammed into KAU 027W since the road was slippery as it had rained overnight.

50. On the other hand, the plaintiffs, it is not disputed, were not eye witnesses to the material accident. They only learnt of the fateful accident. However, the plaintiffs called PW3 who was not an investigating officer who produced the police records which include charge sheet; bond and bail bond, notice to attend court, notice to intended prosecution; certificates of examination and test to the 2 motor vehicles, driving licences; investigations diary; finger prints; rough and fair sketch plans of the scene of accident; and police abstract form as well as OB extracts.

51. According to the defendants, since there were no eye witnesses, then the court should find the owner of KAU 027W to blame for the accident. The plaintiffs on the other hand maintain that as the driver/owner of KAU 027W was not joined to the case as third party, this court cannot place any blame on it and that the deceased could not have contributed to the occurrence of the accident as pleaded by the defendant since he was a passenger.

52. The law is clear that he who alleges must prove. See section 107-109 of the Evidence Act on “burden of proof.” In this case, the burden of proof solely lies on the plaintiffs to prove on a balance of

probabilities that the defendants were to blame for the accident wherein the deceased Mutinda was fatally injured. On the other hand, where the defendants allege contribution from the deceased or the driver/owner of KAU 027W then it is upon the defendants to prove on a balance of probabilities that indeed, those other named persons contributed to or were wholly to blame for the accident. In the instant case, it is true that the plaintiffs were not eye witnesses to the accident. However, the police who investigated the fatal accident, found the 2<sup>nd</sup> defendant to blame for the accident and charged him in court with offences of careless driving contrary to Section 49(1) of the Traffic Act Cap 403 Laws of Kenya and causing death by dangerous driving contrary to Section 46 of the Traffic Act vide TCR 2567/12 at Makadara Law courts. The police officer who testified was not an investigating officer. However, he produced police records which are public records containing the investigations diary, charge sheets and sketch plans to the accident. The defendants did not object to the production of those documents. The 2<sup>nd</sup> defendant too admitted being charged in court only that he denied absconding and stated that he was only charged with careless driving and police were yet to charge him with causing death by dangerous driving as some of the injured persons were still in hospital.

53. Nonetheless, this court has perused the police records and finds that although there was no eye witness statement, the 2<sup>nd</sup> defendant's own statement and testimony in court and as given to his insurance Company through Rapid Investigations Services show that he rammed into the matatu KAU 027W from the rear on 2<sup>nd</sup> April 2012 at or about 7.30 a.m along Kangundo road near Njiru bridge. The certificate of examination on KAU 027W show that the defects noted on the matatu which included passenger seats, loosened and detached could not have contributed to the cause of the accident and neither were the defects noted on KAZ 416R. The sketch plan clearly show that the defendants' motor vehicle KAZ 416R did crush into the rear of KAU 027W near a bridge.

54. According to the investigations report, the driver of KAZ 416R FAW Tipper lost control and rammed into the rear of the matatu. There is also a report in the investigations file that the matatu driver had slowed down at a bridge when the tipper rammed into it. The deceased is listed as one the passengers who was injured seriously and later died in 4<sup>th</sup> April 2012 at Kenyatta National Hospital while undergoing treatment.

55. Albeit the defendants have shifted blame on the driver/owner of KAU 027W for the occurrence of the accident, with the 2<sup>nd</sup> defendant alleging that the driver stopped hence the ramming into the rear since it had rained, and after the tipper skidded, this court observes that the owner/driver of KAU 027W was never issued with a third party notice or claim for contribution by the defendants herein. This court cannot, therefore, on the available evidence and without according the owner/driver of KAU 027W a hearing, find that they were in any way to blame for the material accident. I further find that the allegation against the 3<sup>rd</sup> party driver is an afterthought.

56. Furthermore, the act of slowing down by the 2<sup>nd</sup> defendant driver while approaching a bridge is a recommended act and it was incumbent upon the 2<sup>nd</sup> defendant, while approaching a motor vehicle ahead of him, having seen a bridge ahead, to keep distance and equally slow down as he was going downhill. By the 2<sup>nd</sup> defendant's own admission, there was an oncoming vehicle ahead hence he could not swerve to the right to avoid ramming into the matatu. No prudent driver would be expected to overtake another motor vehicle on a bridge. In my humble view, the only inference I make as to why the 2<sup>nd</sup> defendant skidded is because he was driving at a high speed while following KAU 027W near a bridge and did not expect that the motor vehicle ahead of him would slow down since as was further admitted by DW1, there was an oncoming motor vehicle.

57. Further if KAU 027W was to blame for this fatal accident, the question is, why did the defendants choose not to enjoin them to this suit seeking contribution/indemnity? It is not enough to shift blame to a person who is not a party to the proceedings. This court can only determine issues between parties before it. In this case, as between the plaintiff and the defendants, this court finds that on the evidence from the police records, the plaintiffs have proved on a balance of probabilities that the 2<sup>nd</sup> defendant was wholly to blame for the accident for failing to slow down and or keep distance at a

bridge thereby ramming into the matatu wherein the deceased Mutinda Kamende was a passenger thereby fatally injuring him.

58. There is also clear evidence from the police records that the 2<sup>nd</sup> defendant was charged with careless driving and causing death by dangerous driving and that he absconded albeit there was no explanation given why the police did not follow up to have him rearrested and charged afresh now that he had resurfaced in these proceedings after the charges were withdrawn under Section 87A of the Criminal Procedure Code.

59. Although there is no conviction, on the evidence available, I am persuaded that the plaintiff has on a balance of probabilities proved that the 2<sup>nd</sup> defendant was negligent and was to blame for the accident which occurred on 2<sup>nd</sup> April 2012 involving the deceased Mutinda Kamende and other passengers. The police files show that he sustained head injury and that he was rushed to Kenyatta National Hospital where he died on 4<sup>th</sup> April 2012 while undergoing treatment as per OB No. 10/10/4/2012 report by his brother N K. I find that the 1<sup>st</sup> defendant owner of the accident motor vehicle is vicariously liable for acts of his driver/agent/servant the 2<sup>nd</sup> defendant. I hold them jointly and severally liable for the accident that occurred on 2<sup>nd</sup> April 2012 involving KAU 027W and KAZ 416R at 100%.

60. On quantum of damages payable to the plaintiffs, the plaintiff are widow and father of the deceased Mutinda Kamende. They brought this suit under the Law Reform Act and the Fatal Accidents Act. Under the Law Reform Act, they claim for loss of expectation of life and damages for pain and suffering. The deceased was allegedly employed as a building contractor. He was aged 26 years. There was no evidence that he was qualified in any skill. However, it does not follow that an unskilled person cannot be engaged in informal employment to eke a living as a casual. The plaintiffs testified that the deceased earned shs 1500 per day. This was in 2012. That he used to give his widow shs 1000 for sustenance with his young son and his father shs 500 or more for the parents upkeep since the parents were old unemployed and living in the drought stricken Ukambani area. The plaintiffs claimed for loss of dependancy under the Fatal Accidents Act. The plaintiff produced copy of the chief's letter (Karuta location, Kitui County confirming that she was the only known widow to the deceased. It is dated 24<sup>th</sup> July 2012. The plaintiffs also produced limited grant of letters of administration *ad litem* issued on 3<sup>rd</sup> October 2012 to them jointly for purposes of filing this suit and a death certificate issued on 27<sup>th</sup> August 2012 showing that he was a building contractor and the cause of death was consistent with the head injury due to blunt trauma.

61. On the claim under the Law Reform Act, I have compared the proposals by the plaintiffs and those put forth by the defendants and the cited decisions.

62. The defendants contend that the deceased died on the spot whereas the plaintiffs claim that the deceased died on 4<sup>th</sup> April 2012, the third day after the accident. The death certificate produced show date of death as 2<sup>nd</sup> April 2012. However, all other documents including the police investigations diary as well as the receipts from Kenyatta National Hospital dated 10<sup>th</sup> April 2012 show that the deceased was admitted at Kenyatta National Hospital on 2<sup>nd</sup> April 2012. I have no doubt in my mind that the deceased died three days following the accident albeit the death certificate reads 2<sup>nd</sup> April 2012 which could have been an error which was nonetheless not corrected by the plaintiffs. I also had the opportunity to see and hear the plaintiffs and assess their demeanor as they testified that the deceased M K died on 4<sup>th</sup> April 2012 at Kenyatta National Hospital and that the death certificate was erroneous. I accept their oral evidence which was consistent with the documentary evidence contained in the police investigations file and records from Kenyatta National Hospital which are public documents. I reject the assertion by the defendants that the deceased died instantly or that he died on the same day of the accident. PW1 testified that the deceased was in much pain at Kenyatta National Hospital when she visited him and that he died 2 days later.

63. I would therefore award under the heading of **pain and suffering** a sum of **kshs 50,000/-**.

64. **On loss of expectation of life**, I would agree that in life there are many vicissitudes and therefore an award of **shs 100,000** would be sufficient based on the decision on **Nairobi HCC 116/93 John Murithi Kariuki V George Mwangi** which was decided in 2012. **Total award** under the Law Reform Act kshs 150,000.

65. under the Fatal Accidents Act, as already stated in this judgment there was evidence that the deceased was a building contractor. However, I am in agreement with the defendant's submissions that it was important to show that he was trained as such, albeit that is not the only evidence that would prove that the deceased worked. From the oral testimonies of the plaintiffs, I am entitled to believe that the deceased was a casual worker in some construction site. On his earnings, there was no record kept. 2012 is very recent evidence of his earnings which could be obtained by his widow from the former employer but there was none.

66. In the circumstances, whereas I believe the testimony that the deceased worked and eked a living, evidence of his actual earnings was not available. He could have earned more or less than shs 1,500/- per day. In the absence of evidence of actual earnings, this court agrees that guidance can be found in the Regulation of wages Order general as per legal notice No. 64 of 3<sup>rd</sup> June 2011 for general labourer. I find that a daily rate of shs 364.95 cts would be applicable especially in the absence of evidence that the deceased send shs 500/- per day to his father the 2<sup>nd</sup> plaintiffs who did not indicate by what mode he received that money. Mpesa statements would have been availed but were not. Thus, the deceased earned shs **10,948.50 per month**.

67. On the multiplier, I find that the deceased died aged 26 years old. He would have worked until about 60 years the official retirement age under the employment Act, 2007. However, there are vicissitudes in life that would most likely shorten his life including natural causes of death. In the circumstances I give a **multiplier of 23 years**.

1. However, that ratio is not cast on stone. The deceased worked and lived in Nairobi a high cost city. He would no doubt spend most of his income on personal living expenses. I would in the premise find that his dependants would only get  $\frac{1}{2}$  of his earnings based on the case of **Leonard Ekisa & Another V Major Birgen [2005] e KLR** where **Ringera J (as he then was) stated:**

*“ There is no rule of law that 2/3 of the income of a person is taken as available for family expenses. The extent of dependency 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 the dependant, the life expected, length of dependency, the vicissitudes of life and factor accelerated by payment in lump sum.”*

68. There was no dispute that his wife, son and aged parents who lived in drought stricken Kitui County depended on his support as they were unemployed. In the premises, I accept that they were his dependants.

69. Accordingly, I work out loss of dependancy as follows: **10,948.50 x 12 x 23 x  $\frac{1}{2}$  = 1,510,893**

70. Under loss of expectation of life, the plaintiffs urged an award of shs 200,000 citing **Patrick Mona** case (supra) where a 47 years old deceased was awarded shs 120,000/- under this head. Indeed, the younger the deceased, the higher this award is likely to be. In this case deceased was aged 26 years and would have lived to his full potential I would award shs 150,000 under this head under loss of consortium, the plaintiff pleaded for damages under this head and prayed for shs 100,000 based on **Salvatore De Lucia** case (supra) where the Court of Appeal awarded shs 40,000 to a widower for loss of love and consort in 1994. The defendant proposed a sum of shs 50,000 based on **Rose Adisa Odan** case (supra) 2009 case. **I would in the circumstances of this case award the plaintiff shs 70,000/-.**

71. Total general damages



