



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

**AT NAIROBI**

**CIVIL CASE NO. 318 OF 2012**

**MARY NJERI MURIGI .....PLAINTIFF**

**VERSUS**

**PETER MACHARIA.....1<sup>ST</sup> DEFENDANT**

**GITUNDU MWAURA .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was instituted by the plaintiff Mary Njeri Murigi (personal representative of the estate of the deceased James Murigi Kungu against the defendants Peter Macharia and Gitundu Mwaura.
2. The plaintiff claims that following fatal accident which occurred on 5<sup>th</sup> March 2011 involving motor vehicle KAR 613 Y along Race course Road, Nairobi, the deceased died as a result of the negligent acts of the defendants as enumerated in paragraph 6 of the plaint and that as a consequence, the plaintiff and the estate of the deceased suffered loss and damage. It was alleged that the deceased was lawfully crossing the road when the 2<sup>nd</sup> defendant negligently drove/managed/controlled motor vehicle registration No. KAR 613 Y causing it to violently knock the deceased as a result of which he died.
3. The defendants filed a joint defence denying allegations leveled against them by the plaintiff and claiming that the accident was caused by the negligence of the deceased who among other acts of negligence, crossed the road in a negligent/reckless manner; crossed the road when it was not safe to do so; walked carelessly and dangerously on the road; failed to walk after due care and attention; failed to move to avoid the accident; entered the road without observing the kerb drill, failed to keep to the pedestrian walk; failed to have regard to other road users and motor vehicle KAR 613Y. The defendants also blamed the driver of motor vehicle KAY 069X for the coalition accident. The defendants claimed that the driver of KAY 069 X failed to have any sufficient regard for the safety of road users by driving without due care and attention, failed to keep a proper look out for motor vehicles that might reasonably have been on the road; drove at an excessive speed on the circumstances; collided into motor vehicle KAR 613Y; endangered lives of other road users in his manner of driving and overtaking ; had total disregard for the traffic rules; failed to stop, slow down; to swerve or in any way manage the said motor vehicle so as to avoid a collision.
4. The defendants denied the applicability of the doctrine of vicarious liability on them. They denied particulars of loss and damage and or having received notice to sue from the plaintiff. The defendants prayed for dismissal of the plaintiff's suit with costs.

5. On 1<sup>st</sup> October 2012 the plaintiff filed reply to defence joining issues with the defence and reiterating the contents of the plaint while denying the contents of the defence.
6. The defendants filed their own statement of issues dated 4<sup>th</sup> June 2013 on 10<sup>th</sup> June 2013 whereas the plaintiff filed her issues dated 14<sup>th</sup> June 2013 on 18<sup>th</sup> June 2013. Both parties complied with the pre-trial requirements under Order 11 of the Civil Procedures Rules. They also filed and exchanged their respective witness statements and lists and bundles of documents to be relied on at the hearing and the suit was certified as ready for trial on 9<sup>th</sup> October 2013.
7. The plaintiff Mary Njeri Murigi testified on oath on 27<sup>th</sup> July 2015 as PW1 after obtaining leave of court to amend the paragraph 8 of her plaint to read kshs 200,000/- for loss of earnings instead of kshs 20,000/-. She adopted her witness statement as filed and dated the 16<sup>th</sup> March 2012 as her evidence in chief. She stated that the deceased James Murigi was her husband who died in a road accident on 5<sup>th</sup> March 2011. That she was at home in Kayole on the material date of accident when she received a telephone call from her son George Ngugi at about 6.00pm informing her that the deceased had been knocked down. He gave her the number of one Joel Mutisya whom she called and he confirmed the position and waited for her at St Peter Claver's Church. She hired a taxi accompanied by her daughter in law and son and on arrival, met Joel Mutisya who informed her that he had witnessed the deceased being knocked down and that the deceased had been rushed to Kenyatta National Hospital but that he had succumbed to the injuries on the way.
8. The plaintiff proceeded to the City Mortuary to view his body. The plaintiff stated that the deceased was a subcontractor in the construction industry. That he used to trade as Murigi Kungu contractors and used to earn a net profit of kshs 200,000 and used to bank the business money into her bank account. She produced documents to show his trade and bank statements. She also produced as exhibits letters of administration with respect to the deceased's estate. She produced receipts amounting to kshs 86,200 towards burial expenses. She testified that the deceased used to support her in her business. He also used to support their 3 children Benson Kungu, George Ngugi and Virginia Waitherero and his 7 grand children. She also produced a police abstract and death certificate as exhibits. She further produced a Kenya Revenue Authority search certificate to show ownership of the motor vehicle that knocked her husband being one Peter Macharia and the driver as Gitundu Mwaura. The plaintiff further testified that her husband also owned a matatu KBK 539K and he used to save kshs 2000 to the Sacco on a daily basis and brought home kshs 4000/- per day. That the matatu used to ply Nairobi- Kangari route in Kandara, Murang'a. She produced statements from NTK Sacco to show the income he allegedly saved per day as an investment. The plaintiff stated that she was unemployed and sickly. She had lost her husband's support and sought damages due to the loss.
9. In cross examination by Miss Rotich counsel for the defendants, the plaintiff stated that she was not at the scene of accident but received a call. Further, that she recorded her statement at central police station but that she had not testified in any traffic proceedings. She maintained that her deceased husband worked as a contractor although she did not have his qualification certificates or the registration certificates of his company. She confirmed that the bank statements showing six months transactions between 1<sup>st</sup> September 2011 and 31<sup>st</sup> January 2012 did not show deposits from Murigi contractors. She also confirmed that some, invoices were for 2010 while others were for 2011. She confirmed that although KBK 539K was their vehicle, they had to pay the Sacco to use it for the deceased's funeral. The plaintiff also confirmed that all their children were over 18 years but were dependent on the deceased since the boys worked with him and continued with his business after his demise to complete the contracts he had entered into with third parties. She maintained that although her husband had his own account at I&M Bank, he closed and opened an account in her name and that even the log book for KBK 539K was in his name but she transferred it into her name.
10. In re-examination by Mr Maina, the plaintiff stated that bank statements were for the year 2010 before his demise showing the money used to be deposited in the account by the deceased and that her son continued issuing invoices for the pending work until the contracts ended.

11. The plaintiff also called PW2 Mr Joel Musau Mutisya who testified on oath that he was a pastor with African Inland Church at Kariobangi North and a student in Leadership and an intern at Scott Christian University. He adopted his witness statement recorded on 16<sup>th</sup> March 2012 as his evidence in chief and stated that he witnessed the accident wherein the deceased was knocked on 5<sup>th</sup> March 2011. That on the material day he was coming from the Inter College University Games at Pan African Christian University at Kasarani in a bus. That a matatu coming from the opposite direction towards Racecourse Road making a turn towards Bus Station knocked down a pedestrian crossing at a pedestrian crossing level and rammed into the rear left side of the bus the witness was travelling in. That the said matatu was being driven very fast. That he was in motor vehicle KAY 069 X and the matatu was KAR 613Y. PW2 alighted from the bus, picked up the hat of the pedestrian who had been knocked and went to assist him. The pedestrian had suffered head injuries and was already dead. The witness also picked the deceased's diary which had fallen down upon being knocked, a broken mobile phone and a wrist watch. He called the number he found in the diary and spoke to a man who confirmed that he knew the victim to be his father. Shortly thereafter PW2 received a telephone call from a lady who informed him that she was his wife and he informed her of the accident.

12. That the police came to the scene after a few minutes and he gave them the story of the occurrence of the accident. He waited until the deceased's wife arrived at KNUT House, called him and he joined them and accompanied them to the City mortuary. He stated that the accident occurred at the exit of Temple Road and Racecourse Road at a Zebra crossing, near Kenya Planters Cooperative Union (KPCU). He denied that the deceased was negligent or at all. He also denied that the accident was caused by any other vehicle other than the one he had stated.

13. In cross examination by Miss Rotich counsel for the defendants, PW2 stated that the accident occurred between 5.30 pm and 6.00pm. He also stated that the deceased's body lay on the lane entering Temple Road. That the deceased was on the pedestrian's crossing when he was hit and thrown onto the opposite lane. PW2 denied that the deceased was hit by another bus. He maintained that the defendant's motor vehicle hit the bus he was travelling in on the left side of the rear side. That the matatu came flying and it was on a Saturday. That after the accident, he was told to escort the deceased's relatives to record a statement but that he had not been called to testify in any other court concerning the material accident.

14. In re-examination by Mr Maina, PW2 maintained that he did witness the occurrence of the accident although the police had not called him to go and record a statement. Upon being questioned by the court he also stated that the deceased died on the spot.

15. PW3 Julius Kuria Njoroje testified for the plaintiff that he was the Chairman of NTK Sacco and adopted his witness statement recorded on 14<sup>th</sup> August 2014 as his evidence in chief. He confirmed that the deceased James Murigi was their member of the NTK Sacco. That he owned and operated matatu KBK 539K and that the deceased used to remit kshs 2500 per day to the Sacco out of which 500/- was for operations of the Sacco. He produced records as contained in the plaintiff's further list and bundle of documents. He stated that any collection in excess of shs 2500/- was given to the owner of the matatu and that he would be refunded end month. He produced certificate of registration of the Sacco and added that the deceased was member No. 63.

16. In cross examination by Miss Rotich counsel for the defendants, PW 3 stated that he was Chairman of NTK Sacco but he did not have the Sacco's Constitution in court. That he knew the deceased. He confirmed that daily contributions and that the matatu belonged to the deceased's family and that even his wife would attend Sacco meetings if the deceased was not available. He confirmed that the Sacco charged shs 8000 for the hire of 2 vehicles for the funeral including the deceased's matatu.

17. PW1 was recalled on 27<sup>th</sup> October 2015 when she produced all her original documents on oath. The said documents are listed as P EX1-10 as per the original list and bundle of documents filed with this suit.

18. At the close of the plaintiff's suit, the defence counsel closed the defence case as she had no witness

to call. Both parties' advocates filed and exchanged their written submissions. In her submissions dated 27<sup>th</sup> November 2015 and filed on 30<sup>th</sup> November 2015 the plaintiff submitted on two issues namely, liability and quantum.

19. On liability, the plaintiff's counsel maintained that the plaintiff had on a balance of probabilities proved that the defendants were to blame for the material accident and that despite filing a defence, they did not call any witness to prove the allegations that the deceased or a third party motor vehicle were responsible for the fatal accident. They urged the court to find PW2 credible in his testimony and that even the police abstract dated 30<sup>th</sup> March 2011 showed that KAR 613 Y was blamed for the accident. Further, that they had proved that the 1<sup>st</sup> defendant owned the accident motor vehicle which was driven by the 2<sup>nd</sup> defendant.

20. On quantum, the plaintiff's counsel submitted that the plaintiff had proved the loss and damage suffered by her and the estate of the deceased who was aged 60 years at the time of his death. He prayed for damages under the Law Reform Act and Fatal Accidents Act. He urged the court to apply a multiplier of 15 years, multiplicand of shs 100,000, dependancy ratio of 2/3 thus  $100,000 \times 12 \times 15 \times \frac{2}{3} = 12,000,000$ . He also prayed for shs 100,000 for pain and suffering; shs 62,200 special damages. Total 12,162,600. Reliance was placed on 2 decisions namely **Nairobi HCC 859/99 Nancy Njeri Muthiani Vs James Wambua & Another** and **Nakuru HCC 373/2003 Benedeta Wanjiku V Changwon Cheboi**. Counsel also prayed for costs of the suit and interest.

21. The defendants filed written submissions dated 1<sup>st</sup> February 2016 on 9<sup>th</sup> February 2016 framing two issues for determination namely, liability and quantum.

22. On liability, it was submitted that the traffic rules and regulations require a pedestrian to exercise caution while crossing the road hence the deceased ought to have been very careful while crossing the road. They maintained that it was the deceased who caused the accident by crossing the road without ensuring that it was safe to do so and that the driver of KAR 613Y was not negligent while driving. They relied on the case of **Peter Okello Omedi Vs Clement Ochieng [2006] e KLR** where the court stated that the plaintiff being a pedestrian owes a duty of care to other road users to move with due care and in a manner that would not endanger the safety of other road users. It was submitted that the plaintiff had failed to prove the particulars of negligence set out in the plaint and that on the other hand, the defendant had adduced evidence to prove that the deceased caused the accident by crossing the road without observing the traffic regulations expected of a pedestrian. The defendant's counsel urged the court to find that the deceased should be held 50% liable for causing the accident.

23. The defendant's counsel also implored this court to be guided by the case of **Joseph Muturi Koimburi V Mercy Wahaki Mugo 9 2006) e KLR** where the court held that :

*“Having found that the respondent was hit while crossing the road, the lower court then was wrong in apportioning liability and finding the appellant 70% to blame. In my view, the respondent was fully to blame for her reckless behavior in attempting to cross a busy dual carriage way at that time of the night. When infact the foot bridge was available for that purpose, in fairly close proximity. Any driver of ordinary prudence is not expected to find pedestrians on that part of the road, at that hour of the night, and the appellant could not possibly be blamed for that accident. I adopt the reasons for the court in a similar situation in the case of Waindi Vs Pharmaceutical Manufacturing Company Ltd [1986] KLR 506”.*

24. The defendants also relied on **Julius Omolo Ochanda & Another V Samson Nyaga Kinyua Nairobi HCCA 680 of 2007** where the court held that both parties should share blame equally in a collision accident.

25. On quantum, the defendant's counsel submitted that the court should, in calculating the dependancy period use a multiplier of 2 years for a 60 years old deceased taking into account the vagaries and

vicissitudes and uncertainties of life. They relied **Muasya Mburi Kiseli V Martin Mutisya Kiio & Another [2010] e KLR** where the court used a multiplier of 2 years for a 58 years old deceased who was self employed.

26. On the multiplicand earnings, it was submitted that although the plaintiff testified that the deceased was a contractor T/A Murigi Kungu Contractors, she had no evidence of that as he had not studied for it and neither did she have evidence of certificate of incorporation for Murigi Kungu Contractors. That she did not prove that the said business deposited any money into her account hence, that it was possible that the deposits were from her business and not the business of her husband. That the invoices produced were inconsistent and may have been forged hence they should be disregarded. The defence counsel therefore urged the court to apply minimum wage of a worker vide subsidiary legislation in 2009 under the Labour Institutions Act of 2007 and proposed shs 7000 as a multiplicand as no proof of income was placed before the court. The defendants had no issue with 2/3 dependency ratio and the total sum would be  $7,000 \times 2 \times 12 \times 2/3 = 112,000$ .

27. On pain and suffering, the defendant urged the court award shs 10,000/- since the deceased died on the spot. Reliance was placed on **Kericho HCC 35/2011- Eldoret Express Company Ltd V William Kirui Korir [2014] e KLR; Muasya Mbuvi Kiseli(supra)** and **David Mukii Mureka V Richard Kanyago & Another HCC 78/2000 Nairobi**.

28. On general damages under the Law Reform Act, the defence submitted that once an award was made under Fatal Accidents Act, no more award should be made under the Law Reform Act reliance being placed on the Court Appeal decisions in **Delmonte (K) Ltd & Another V Anastacia Kanini Kithii [2015] e KLR** applying **Kemfro Africa Ltd T/A Meru Express Services [1976] & Another V Lubia & Another [1987] e KLR 30**.

29. On special damages the defence urged the court to award only that which was proved. However, they urged the court to exercise its discretion and dismiss the plaintiff's suit.

### **Determination**

30. I have carefully considered the claim herein by the plaintiff, the written statement of defence, the oral and documentary evidence adduced by the plaintiff and her witnesses; the written submissions filed by both parties advocates as supported by statutory and case law. In my humble view, the issues for determination as agreed by both parties in their submissions are:

- a. Who was to blame for the accident?
- b. What is the quantum of damages if any, payable to the plaintiff?
- c. Who should bear the costs of this suit?

31. On the first issue of who was to blame for the accident, I must first note the undisputed facts. First is that despite the defendant's denying ownership of the accident motor vehicle KAR 613Y and or the occurrence of the material accident in the manner pleaded on 5<sup>th</sup> March 2011, the Plaintiff adduced both oral and documentary evidence which proved without question, that the 1<sup>st</sup> defendant was the owner of the accident motor vehicle KAR 613Y by production of copy of records dated 1<sup>st</sup> March 2012 as P EX 8C . The vehicle is described as KAR 613Y Isuzu Mini Bus Matatu, orange in colour log book No. 50157995J manufactured in 2003 owned by K- REP Bank Ltd and Macharia Peter. This evidence of ownership as at 1<sup>st</sup> March 2012 and the accident having occurred on 5<sup>th</sup> March 2011 as shown by the police abstract report was not controverted in any way.

32. On the occurrence of the accident, albeit denied in the written defence, the evidence of PW2 Joel Mutisya, and the police abstract records issued on 30<sup>th</sup> March 2011 and produced as PEX 2 is clear that the accident of 5<sup>th</sup> March 2011 involving James Murigi Kungu as a pedestrian and motor vehicle

KAR 613Y driven by Gitundu Mwaura of Box 12 66 Nairobi was reported to DTO Central Police Station Nairobi. The 2<sup>nd</sup> defendant's telephone numbers are also provided. The accident was reported vide OB No. 25/5/3/2011. It has also not been controverted that PW2 witnessed the accident in that albeit questions were put to him to suggest that he never testified in a traffic criminal proceeding, the police abstract PEX 2 is clear that the police recorded him as one of the witnesses. His telephone number is also recorded in the police abstract. This court had the opportunity of seeing and hearing PW2 as he testified on the occurrence of the accident and I believed him as a truthful and credible witness.

33. In the absence of any contrary evidence to rebut the contents of the police abstract and copy of records, as well as the credible evidence of PW2, I find that the plaintiff has proved on a balance of probabilities that an accident occurred on the date pleaded 5<sup>th</sup> March 2011 involving the deceased and motor vehicle KAR 613Y belonging to the 1<sup>st</sup> defendant and lawfully being driven by the 2<sup>nd</sup> defendant driver, agent or servant and who was in the cause of his duties or employment of the 1<sup>st</sup> defendant. The vehicle, undeniably, was a public service vehicle insured by Direct Line Assurance Company Limited policy No. 3037781. The defendants also denied that notice to sue was served on them but they did not challenge the plaintiff exhibit No. 9(a) and 9(b) which was a demand notice to the driver Gitundu Mwaura and Peter Macharia both dated 28<sup>th</sup> February 2012 copying the said letters to the 1<sup>st</sup> defendant's insurers Direct line Assurance Company Ltd.

34. It is also not in dispute that the casualty of the material accident was the deceased James Kungu Murigi as evidenced by police abstract records and a death certificate issued on 3<sup>rd</sup> June 2011 being No. 118129 showing his age, occupation, date of death, place of residence and cause of death as chest injury due to blunt force trauma due to motor vehicle accident.

35. The only issue is who was to blame for the accident. According to PW2 who is an undisputed eye witness to the material fatal accident, he was travelling in a bus along Race Course Road near KPCU and was about to alight so he had stood up and moved near the conductor when a speeding matatu coming from the opposite direction towards Racecourse Road made a turn towards Bus Station and knocked a pedestrian who was crossing at a pedestrian walkway and it rammed into the rear left side of the bus in which PW2 was travelling. PW2 got out of the vehicle and went to assist the deceased. He picked his hat and diary, called a number which turned out to be the deceased's son's telephone and relayed to him the sad occurrence. The deceased's son in turn called his mother PW1 and gave him PW2's telephone number. The plaintiff called PW2 and got the details of the accident. PW2 waited for the plaintiff and even escorted her to the City Mortuary and to the police to record a statement on the occurrence of the accident.

36. In the written defence, the defendants enumerated particulars of negligence on the part of the deceased. They however did not attempt to call the driver of the matatu (2<sup>nd</sup> defendant) to testify and persuade the court on how the deceased, by crossing the road at a pedestrian's designated crossing level, contributed to or was solely to blame for the occurrence of the material accident. The defendants also elaborately in their written statement of defence wholly blamed the owner/driver of KAY 069X the bus wherein PW2 was a passenger, for being negligent and enumerated what they considered acts of negligence on the part of the said driver/owner of the bus KAY 069X. However, once again, no attempt was made by the defendants to call any evidence to prove those acts of negligence on the part of the bus driver/owner. Neither did the defendants enjoin the said bus owner as a third party for liability to be determined against the said bus owner. In their submissions, however, the defence counsel purported to state that the defendants had adduced evidence that showed that the deceased was the sole author of his own misfortune. The defendants even cited very authoritative decisions to support their propositions. However, the record is clear that the defence closed their case without calling any evidence. Further, the law is trite that he who alleges must prove. In this case, the burden of proving negligence on the part of the defendants lay on the plaintiff and she did call PW2 an eye witness who vividly described how the accident occurred. PW2 blamed the 2<sup>nd</sup> defendant for the material accident because he emerged over speeding and as he made a turn, he crushed the deceased who was lawfully crossing at a pedestrian crossing level. The police abstract also show that the police blamed the 2<sup>nd</sup> defendant for the occurrence of the accident. There is no evidence to show that the deceased was negligent in crossing

the road at a pedestrians' crossing level and not just any other part of the road.

37. Albeit the 2<sup>nd</sup> defendant was not charged with any traffic offence, the police abstract show that the case was still pending under investigations. It is however not clear why the police never charged him with any traffic offence. Neither was the driver of KAY 069X charged with any offence. However, this court is alive to the fact that the standard of proof in traffic offences, like other criminal cases is higher than that standard of proof expected in civil cases. In the former case, it is on a beyond reasonable doubt basis whereas in the latter case, it is on a balance of probabilities basis. Furthermore, the decision and discretion to charge a suspect lies with the police and the plaintiff would only be a witness. In addition, having examined the authorities relied on by the defendants on liability of pedestrian, I am persuaded that they are not relevant to this case for reasons that first, there was no evidence that the deceased pedestrian carelessly crossed the road without due care and in a manner that endangered his life. Secondly, the case of **Joseph Muturi Koimburi** (supra) can be explicitly distinguished from this case because in the Joseph Koimburi case, the court was dealing with a situation where the deceased was found to have been crossing the road at a place not designated for pedestrians and that infact there was a foot bridge at close proximity hence a prudent driver could not be expected to find pedestrians on that part of the road.

38. Pedestrian crossings are usually marked areas for pedestrians to cross and therefore it is expected that motor vehicles would, when approaching a pedestrian crossing slow down to allow pedestrians to cross before proceeding. In this case, the defence did not adduce any evidence which was in its possession, as to whether the 2<sup>nd</sup> defendant ever slowed down on approaching the pedestrian crossing or took any avoiding act to avoid crushing the pedestrian and ramming into motor vehicle KAY 069X .

39. This court further does not phantom how KAY 069X could have contributed to the occurrence of the material accident since KAR 613Y only rammed into KAY 069X after crushing the pedestrian at a pedestrian crossing. Furthermore, if or at all KAY 069X was or contributed to the occurrence of the material accident, this court wonders why the defendants did not issue the owner thereof with a third party notice or notice of claim for indemnity or contributions. In the absence of any such third party proceedings against the owner of KAY 069X this court cannot make any finding on its liability or contribution to the occurrence which contribution is not apparent. I therefore dismiss any shifting of blame to the owner of KAY 069X by the defendants.

40. On whether the deceased should shoulder any blame, I find that he should not for reasons that there is no general rule that a pedestrian who is knocked while crossing the road at a designated place by a speeding reckless driver must have contributed to the occurrence of the accident just because he was to be found on the road at that material time. Roads are for use by motorists and pedestrians as well. It is the duty of motorists to drive with due care and attention and observe all the traffic rules and regulations regarding road signs and right of way for pedestrians who have equal rights to use the roads as designated.

41. A person who is driving a vehicle is under a duty of care to other road users. The vehicle is a lethal weapon and due care is expected of the driver who is in control thereof. The evidence on record which is uncontroverted is that the 2<sup>nd</sup> defendant emerged and turned while '**flying**' and there is no evidence that he slowed down while approaching the pedestrian crossing. What level of care can this court expect from a 60 year old man who lawfully used the pedestrian crossing and is crushed by a reckless speeding matatu which thereafter rams into a bus ahead?. This court does not find any *volenti non fit injuria* on the part of the deceased.

42. On the evidence as adduced by PW2, the doctrine of Res Ipsa Loquitur would in my view apply, even if there was no eye witness to the accident. I find that the 2<sup>nd</sup> defendant was indeed negligent as he was over speeding and never slowed down at a pedestrian crossing to allow the deceased his right of way. The second defendant ought to have known that one must slow down or even stop at a pedestrian crossing to avoid knocking down pedestrians who are lawful road users.

43. This court is perplexed that the police who visited the scene did not prefer any charges against the reckless driver of the offending motor vehicle even after their preliminary investigations as per the police abstract clearly revealed that the said driver -2<sup>nd</sup> defendant was to blame for the accident. There was also no evidence of an inquest conducted to preserve evidence. Nonetheless, as I have stated before, the fact that the driver of the offending motor vehicle was not charged with any traffic offence is not proof of him not being negligent.

44. It is in my humble view that in this case, the failure by the police to clearly investigate and take appropriate action against reckless matatu drivers like the 2<sup>nd</sup> defendant is proof of police lethargy which has over time and again led to merciless loss of lives on our roads due to continued reckless driving by drivers of impunity. And despite putting forth an elaborate written defence, it is surprising that the defendants chose not to testify as to how the deceased or the driver of the third party bus were to blame for the accident that fatally injured the deceased.

45. Apportionment of liability in my view would only be plausible if there was some material evidence to show how the deceased would have contributed to the occurrence of the accident. Although failure to call evidence by the defence perse is not evidence of their blame worthiness, in the instant case, I find that the plaintiff proved her case on a balance of probabilities that the 2<sup>nd</sup> defendant was wholly to blame for the accident leading to the demise of her husband. Her witness evidence of PW2 on how the accident occurred was never controverted and in my humble view, answers in cross examination could not support or build the defence case. Neither are strong submissions by defence counsel evidence for the defence in support of their allegations of contributory negligence on the part of the deceased pedestrian. I am in total agreement with the decision by my learned brother Judge G.V. Odunga J in **Linus Nganga Kiongo & 3 Others V Town Council of Kikuyu [2012] e KLR** on the consequences of a party failing to call evidence wherein he stated:

**“.....in the case of Motex Knitwear Mills Limited Milimani HCC 834/2002 Honourable Lessit J citing Autar Singh Bahra & Another Vs Raju Govindji HCC 548 of 1998 stated:**

***“Although the defendant has denied liability in an amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> plaintiff’s case stand unchallenged but also that the claims made by the defendant in his defence and counterclaim are unsubstantiated, in the circumstances the counterclaim must fail.....” Where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in co doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.....”***

46. I am in agreement with the above persuasive exposition that indeed, it is not sufficient for a party and more specifically the defendants in this case to have made strong statements of defence on paper blaming other people for the accident. Their defence remains mere allegations not proved by evidence as required under Sections 107 and 108 of the Evidence act.

47. In addition, pleadings, answers in cross examination and or submissions do not amount to evidence or defence. It therefore follows that however well choreographed the submissions are and however serious the cross examination was and however fervent and vehement the statement of defence is, are not evidence. In the end, I find that the plaintiff has on a balance of probabilities proved that the material accident was wholly caused by the negligence of the 2<sup>nd</sup> defendant driver of motor vehicle KAR 613Y then in the employment of the 1<sup>st</sup> defendant proven owner thereof and who I find is vicariously liable for the acts of the 2<sup>nd</sup> defendant, I find both defendants jointly and severally liable for the accident that fatally injured the deceased James Murigi Kungu and hold them 100% liable.

48. On what quantum of damages are payable to the plaintiff, I will commence with special damages. The law regarding special damages is that they must not only be specifically pleaded but they must be

strictly proven. This is the principle enunciated in the case of **Ratcliffe V Evans [1832] 2 QB 524** as applied in the cases of **Kampala City Council V Nakaye [1972] EA 446**, and **Hahn V Singh [1987] KLR 716**.

49. In the instant case the plaintiff pleaded for special damages amounting to kshs 86,200 made up as:

**a. Funeral expenses-** The plaintiff testified and produced receipts for;

- i. Kenya Revenue Authority search certificates shs 500
- ii. Mortuary charges 5,700
- iii. Mortuary charges (permanent grave and burial certificate 25,500
- iv. Grave maintenance 7000
- v. Transport charges by NTK Sacco 8000

Total Kshs 46,200

50. Out of the above, Kenya Revenue Authority search certificate fees was not pleaded though proved. I therefore deduct that amount of 500/- leaving a balance of shs 45,700/- pleaded and proven special damages being funeral expenses. Although the defendant's counsel in their submissions attempted to discredit the transportation costs for the body, saying one of the vehicles belonged to the deceased, it is not disputed that the vehicle was at that time managed by the NTK Sacco and had to be fuelled and maintained. Shs 4000/- in my view as claimed is a modest figure for each motor vehicle transport costs and I hereby award the plaintiff shs 45,700/- as special damages.

51. The plaintiff also claimed for damages both under the Law Reform Act and the Fatal Accidents Act. She testified that she was the deceased's widow and produced a grant of letters of administration and *litem* issued to her on 1<sup>st</sup> February 2012. She also produced a death certificate showing that the deceased died aged 60 years old. She further adduced evidence that the deceased was a businessman running matatu business and saving at least 2000 with NTK Sacco and taking home shs 4000 per day. Further, that he was a building contractor and one of his sons was his foreman. Invoices were produced to show that the son had to continue paying the contracts left by his deceased father. Bank statements and NTK Sacco statements were produced to show the income received from the businesses estimated at shs 200,000 per month.

52. However, the defendant in their submissions contended that there was no concrete evidence of the deceased's earnings and that in any case, there was no evidence that he was a trained contractor hence the court should disregard that evidence and use estimates for general workers under the subsidiary legislation made under the labour institutions Act, 2007.

53. I have carefully considered the evidence adduced by the plaintiff and the submissions by both parties' advocates on the issue of quantum of general damages. However, I note that the submissions by both parties' advocates on the claim for general damages both under the Law Reform Act and Fatal Accidents Act is ambiguous and convoluted. That being the case, it is my duty to ensure that I set the record straight as follows:

54. Under Law Reform Act, damages are awardable pursuant to Section 2(5) of the Act which provides that:

**“(5) the right conferred by this part of the benefit of the estates of deceased persons shall, in addition to and not on derogation of any rights conferred on dependants under the Fatal Accidents Act or the Carriage by Air Act 1932 of the United Kingdom.”**

55. In the United Kingdom, the applicable law and principles are common law jurisprudence as adopted and applied by Kenyan courts. Thus, under the Law Reform Act, the courts are entitled to award damages for pain and suffering by the deceased and loss of expectation of life. The correct mode of assessing damages under the Law Reform Act is that the net benefit inherited by the dependants under the Law Reform Act must be taken into account in respect of damages awarded under the Fatal Accidents Act because the loss suffered under the Fatal Accidents Act must be offset by the gain from the estate of the deceased under the Law Reform Act (see **Kemfro Africa T/A Meru Express Service & 2 Others V D.M Lubia [1982-88] I KAR 727**).

56. However, the plaintiff having taken out letters of administration and claimed for the benefit of the estate of the deceased, she is entitled to a claim for pain and suffering and loss of expectation of life under the Law Reform Act which awards shall be taken into account in the assessment of damages awardable under Fatal Accident Act.

57. Under Law Reform Act, (1) pain and suffering, it is in evidence that the deceased died on the spot. I would award a conventional figure of shs 10,000/-.

58. On the award for Loss of expectation of life, the deceased was aged 60 years. There is no evidence that he was of ill health. I award kshs 100,000.

59. Under the Fatal Accidents Act, it is clear that the deceased James Murigi Kungu died aged 60 years. There was no evidence that he suffered from any ill health. There was evidence that he was a businessman and contractor who also supported his family comprising the wife –plaintiff and his adult children one of whom worked with him. There was however no evidence of his audited accounts to show his net income. In determining the multiplicand, the important figure is the net earnings of the deceased and multiply it by a reasonable figure representing so many years (multiplier) bearing in mind the expectation of earning life of the deceased, the expectation of life and dependancy of the dependants and chances of life of the deceased and dependants. The total sum is then discounted to allow legitimate considerations such as the award being received in lump sum and if wisely invested; would yield returns of an income.

60. In this case, it was averred that the deceased was a contractor. The defendants contended that there was no evidence of his training. However, this court, on the evidence adduced, is persuaded that the deceased was a building contractor. There were invoices book PEX 10 showing that he operated a business name called Murigi Kungu Contractors and the services described are such as plaster work done at Kitisuru site for Busy Bee Investments Ltd. The invoices are dated from 7<sup>th</sup> November 2011 before his demise to 3<sup>rd</sup> December 2011 after his demise. It is the view of this court that it is not trade licences and or certificates of incorporation that would prove that one worked and or earned a living. I am fortified by the decision in **Jacob Ayiga Maruja & Another V Simeon Obayo CA 167/200 [2005] e KLR** where the Court of Appeal observed that:

***“ we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to Very many Kenyas who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things.”***

61. Thus, whereas I agree that where a person is employed and his salary is not determined, his income may be determined by reference to the government wage guidelines issued from time to time, however, in a case like this one where there was evidence of the deceased being engaged in business ventures not only of building but also matatu as confirmed by PW3, it would be unwise and unjust to rely on government minimum wage guidelines to determine his net earnings. Indeed, there are no proper accounting books kept by the deceased and therefore a multiplier approach would not be appropriate. In such circumstances courts have made lump sum awards instead of estimating income in the absence of proper accounting books showing the net income received. See **Mary Khayesi**

**Awalo & Another V Mwilu Malungi & Another Eldoret HCC 19/97 Nambuye J and Albert Odawa V Gichimu Gichenji Nakuru HCCA 15/2003 [2007] e KLR – Ringera J.** In the latter case, Ringera J stated that:

*“The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy and the expected length of the dependancy are knowable with undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice never do.”*

62. In the present case, there were only invoices from the deceased’s firm to Busy Bee Investments Ltd. The bank statements do not show any deposits therein by the deceased’s clients. But this is not to say that the deceased did not earn any income. The plaintiff testified that the deceased closed his personal account at I&M Bank and opened one in her name for the matatu business and even had the logbook registered in her name. Further, it is not clear how shs 100,000 monthly earnings was arrived at by plaintiff’s counsel. In the premise, there is no evidence of annual or monthly income for the deceased or even actual dependancy. Therefore, doing all I can, and as a court would be left to speculate for the sake of methodology, an award of damages being in the discretion of the trial court, and since the figures given to this court are not facilitative of a methodology approach, I would to avoid making speculative awards, having believed that the deceased was a contractor and matatu operator but that he kept no proper books of account, I award a lump sum figure of Kshs 4,000,000 which I consider reasonable and moderate in the circumstances for loss of dependancy.

63. Summary: liability against the defendants jointly and severally at 100%; special damages awarded. Ksh 45,700; general damages: under the Law Reform Act, -pain and suffering Kshs 10,000; loss of expectation of life Kshs 100,000; Under the Fatal Accidents Act, I award a lump sum of Kshs 4,000,000. Total award Kshs 4,155,700. I also award the plaintiff costs of the suit together with interest from the date of this judgment until payment in full. The interest on special damages to accrue from the date of filing suit until payment in full.

Orders accordingly

Dated, signed and delivered in open court at Nairobi this 17<sup>th</sup> day of August, 2016.

**R.E.ABURILI**

**JUDGE**