REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 413 OF 2013

(Appeal from the judgment and decree of Honourable Ms. S. Atambo Principal Magistrate delivered on 19th July 2013 in Milimani Chief Magistrate's Court Civil suit No. 7914 of 2007)

MASTERMIND TOBACCO (K) LTD ……..APPELLANT

VERSUS

JANE MIYOGO AND JARED MORIASI (suing as the personal representatives and administrators of the estate of

JACKSON NYAKUNDI ONYANCHA)……RESPONDENT

JUDGMENT

1. This appeal arises from the judgment and decree of Honourable Ms. S. Atambo Principal Magistrate delivered on 19th July 2013 in Milimani Chief Magistrates Court Civil suit No. 7914 of 2007. The appellant herein Mastermind Tobacco (K) Ltd was the defendant in the lower court whereas the respondents Jane Miyogo and Jared Moriasi Onyancha suing as personal representatives of the estate of the deceased Jackson Nyakundi Onyancha were the plaintiffs. Originally, the respondents sued the appellant claiming for general and special damages arising from the death of the deceased Jackson Nyakundi Onyancha who was shot and fatally wounded on 13th March 2006 while he was travelling in the appellant's motor vehicle. The deceased was an employee of the appellant and it was alleged that he was engaged in his duties as a court clerk along Kiambu Road whereupon the employer's vehicle was attacked enroute to deliver merchandise to customers and he was shot dying on the spot. The respondents blamed the appellant for being negligent.
2. The appellants filed a defence denying that the deceased was at the material time engaged upon his work and or that they were negligent in any manner and averred that he was on his own frolic not acting in the course of his employment with the appellant when he died. The appellant also alleged that the deceased was negligent or careless and responsible for the fate that befell him because he was found in a place where he had not been authorized to be.
3. The suit was heard and determined in the respondent's favour. Being dissatisfied with that judgment, the appellant lodged this appeal on 29th July 2013 challenging the decision of the trial magistrate. The Memorandum of Appeal dated 26th July 2013 sets out 8 grounds of appeal namely:

1. *That the learned magistrate erred in law and fact by failing to have due regard and to take into account the oral and documentary evidence by the appellant's witnesses presented to the*

court showing that the deceased died while engaging in a duty not assigned to him by the appellant.

2. *The trial magistrate erred in law and fact in finding that the appellant was 100% liable for the death of Jackson Nyakundi Onyancha.*
3. *That the trial magistrate erred in law and facts by finding that the appellant's compensation to the estate of the deceased Jackson Nyakundi Onyancha was insufficient in the circumstances.*
4. *The trial magistrate erred in law and fact by awarding general damages under the Fatal Accidents Act to the time of shs 2,324,920 thus failing to appreciate the factor of eventualities of life while calculating the said amount.*
5. *The trial magistrate erred in law and fact by awarding damages for pain and suffering under the Law Reform Act to the tune of Kshs 50,000 having noted that the plaintiff's witness had confirmed that the deceased died on the spot.*
6. *The trial magistrate erred in law and fact by disregarding the defendant's evidence that indeed the deceased exposed himself to the unfortunate incident that led to his death.*
7. *That the trial magistrate erred in law and fact by awarding an excessive award for loss of expectation of life in the circumstances.*
8. *That in all the circumstances of the case, the learned magistrate failed to serve justice equitably given the evidence before her.*

4. The appellant prayed that the appeal be allowed and judgment of the lower court be set aside together with costs and also prayed for any other order that this court may deem fit to make.
5. The appeal herein was admitted to hearing under Section 79B of the Civil Procedure Act on 21st July 2014 exactly one year ago and on 5th November 2014 directions were given by Honourable Onyancha J. Parties then agreed to have the appeal herein disposed of by way of written submissions. Which they dutifully filed and exchanged and this court is now called upon to determine the appeal based on those submissions and the record as a whole.
6. This being the first appeal, the duty of this court as espoused in Section 78 of the Civil Procedure Act is to re evaluate and re consider the evidence and the law and exercise as nearly as may be the powers and duties of the court of original jurisdiction and come to my own independent conclusion but in doing so, I must give an allowance of the fact that I neither saw nor heard the witnesses as they testified. This power was well expressed in the case of Selle **V Associated** Motor **Boat Company Ltd [1968] EA 123.** In addition, as the appellate court, I will only interfere with the lower court's decision if the same is founded on wrong principles of fact and or law as guided by the Court of Appeal decision in the case of **Nkube V Nyamuro[1983] KLR 403.** However, this court is not bound by the trial courts findings of fact if it appears that either the lower court failed to take into account particular circumstances or probabilities, or if the impression of the demeanor of a witnesses is inconsistent with the evidence generally. In **Nderitu Vs Ropkoi & Another, EALR, 334** the Court of Appeal was clear that an appellate court should be slow to differ with the trial court and should only do so with caution and only in cases where the findings of fact are based on no evidence; on a misapprehension of evidence; or where it is shown that the trial court acted on wrong principles of law in arriving at the findings that he did. The same principle was captured in **Mwangi & another V Wambugu [1983] 2 KAR 100.**
7. Applying the above law and principles as set out, I now reexamine and re evaluate the record, evidence and submissions. The 1st respondent herein testified in the lower court as PW1 that she was the widow to the deceased and produced an affidavit of marriage. She testified that on 13th March 2006 the deceased had gone to work at the appellant's place of work and that she received a report at about 6.30 pm that one of the appellant's vehicles had been involved in a road traffic accident. She called the company(appellant) and they confirmed to her that the accident had occurred but that she could not get details whether the deceased was among the casualties. The deceased never returned home and that nobody told her of his whereabouts. His phone was not going through so at 6.00 am the following day she went to the appellant's premises and at 10.00am when the sad news were broken to her of her husband's death, that he had been shot dead at 12.30 pm on 13th May 2006 by robbers who ambushed and attacked their sales van and that he had died on the spot at Githunguri in Kiambu. She was informed

that his body was at the City Morgue so she went and confirmed.

8. In cross examination the 1st respondent stated that the deceased was employed as a legal court clerk. She admitted receiving kshs 675,000 as his death insurance claim, kshs 75,000/- funeral expenses in total kshs 750,000 from the appellant.
9. The plaintiff also called PW2 No. 75284 Corporal Susan Mueni stationed at Githunguri police station who confirmed that according to OB NO. 26/22/9/08, a robbery with violence incident was reported to their station involving the appellant's van which was selling cigarettes from Githunguri Division at Kagwi and were attacked by four armed men with AK 47 rifles after blocking the appellant's motor vehicle/security backup vehicle, killing the deceased on the spot and locked the driver in the boot, abandoning him elsewhere. According to the police abstract, the deceased was described as a security officer. The witness produced the OB Abstract as exhibit.
10. In cross examination the witness stated that the driver of the van was carrying cigarettes and that he is the one who reported the incident to the police station. She also stated that there were two motor vehicles, the one carrying the cigarettes and the other was security back up vehicle. She confirmed that the reportee driver stated that the deceased was a security officer and that the police investigations revealed that the deceased was a security person in the security van, which enabled the police conclude that he was co-security officer.
11. PW3 Dr. Joseph Ndungu performed an autopsy on the deceased's body on 16th March 2006 at the City Morgue and found him with two gunshot wounds on the front neck and in the back. He concluded that the deceased died as a result of gunshot wounds on the head. The body was identified by Thomas Onyancha and Ronald Ondieki. The witness produced an autopsy report as an exhibit.
12. The appellant called three witnesses. DW1 Charles Maranga Maingi who worked as the appellant's security officer for 12 years testified that he knew the deceased who worked as a court clerk. That on 13th March 2006 while he was providing security to sales persons and van to Githunguri he was attacked by thungs on his way to Githunguri. He stated that he was accompanied by the deceased who had requested for a lift and told him that he was headed for Kiambu, so the witness agreed and they followed the sales van which was ahead when suddenly people shot at the sales van. He applied brakes, stopped and he was ordered to get into the boot and the motor vehicle was driven away and after 30 minutes he was abandoned and the robbers drove off. The witness got a lift and went to report the incident to the police and later learnt that Jackson had been shot.
13. In cross examination the witness maintained that he was a security officer employed by the appellant and that he was an ex police officer. His duties entailed guarding company property(surveillance of sales van vehicles and on the material date as was usual, he received instructions from the chief security officer to escort the van carrying cigarettes to Githunguri to deliver to a dealer. That there were 53 cartons in the delivery van which cartons were less and did not require special police escort. He stated that he did not find out from the deceased what he was going to do at Kiambu but that since the deceased was his fellow employee and the vehicle was for their employer, he decided to give him a lift. He admitted that he made a report to the police to the effect that his security officer was shot, and that he was not armed. The witness also stated that security did not have to be armed.
14. In re-examination DW1 stated that the deceased was not there to assist him although he did not know specifically where the deceased ought to have been.
15. DW2 Jones Munene Mbuthia a Deputy Human Resource Manager for the appellant testified and produced the deceased's letter of employment showing that the deceased was employed as a legal court clerk based in Nairobi. In cross examination he stated that security did not fall in his docket. He stated that on the material day there was no security provided to the van delivering cigarettes as it was not a large consignment to qualify for armed guard. That he knew the deceased's duties were confined to lands office hence he got into the security van which was not part of his duties and they only got to know his whereabouts from DW1 after the shooting. The witness maintained that the deceased was not supposed to be in that security van.
16. DW3 Ephantus Maina a payable accountant employed by the appellant testified that he is the one who prepared payments to the deceased's widow(PW1) for kshs 750,000 and 75,000 which was death insurance claim and funeral expenses.
17. In cross examination the witness stated that the payment was full for loss of life and dependency

since the company had a group personal accident cover for all employees and it covers loss of life in case of an accident involving an employee, covering liability of an employer. He admitted not being conversant in insurance policy issues but that the sum paid was adequate in terms of f their compensation policy and that the suit was settled after the widow was paid.

18. The parties then filed written submissions.The plaintiffs/respondents' counsel submitted that the sum paid to the widow which was 750,000/- less 75,000 funeral expenses which was due whether or not negligence was proved as it was an insurance claim under the work Injury Benefits Act where compensation and payment is mandatory but that the claim herein was based on negligence of the employer leading to the death of the employee and which falls under the employer's liability at common law hence the estate of the deceased could not have been fully compensated by that payment. The plaintiff's counsel submitted that there was ample evidence that the deceased, on the material day had been deployed as a security officer according to the OB extract report made by DW1 Charles Marangu made at Githunguri police station and that therefore the deceased died while on duty escorting the cigarettes van in the company of DW1. Further, that the appellant was negligent in failing to provide armed escort to the deceased while escorting the merchandise. Counsel maintained that there was no evidence that the deceased had deviated from his employer's business or that he was on his own frolic when he was shot. Further, that the appellant had a duty of care to its employees which they breached by allowing the deceased to travel to Kiambu without usual escort of armed police officers hence they were negligent. He relied on the case of **Makala Mailu Mumede V Nyali Golf and Country Club CA 16/1998** where Nyarangi JA held that ***just because an employee accepts to do a job which is inherently dangerous is not an excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection***. Counsel also relied on **Winfield and Jolowicz on tort 14th Edition London Sweet Maxwell page 213.** The plain tiffs/respondents maintained that as per the OB extract, the van with Merchandise was always escorted by armed special crime prevention officers of Nairobi but that on that material day the said escort team was committed elsewhere. The respondents also maintained that the appellant was under a duty care which it breached for authorizing the sales van to proceed to Kiambu without armed escort. The plaintiff counsel also relied on the case of **Postal Corporation Of Kenya V Job Gachange Njagi [2006] e KLR and Morgans vs Lauchbury & Others [1972] 2 ALL ER page 606.**

19. On whether the deceased was on his own frolic, it was submitted, relying on **Julius Munguti Maweu v Kenya Horticultural Exporters Ltd Machakos HCC 75/97** that it had not been proved that the driver was prohibited from allowing into the vehicle any other persons other than himself. The respondents also submitted on quantum asking for damages under the Law Reform Act and the Fatal Accidents Act and specials all totaling kshs 3,897,922.

20. The defendant/appellant submitted that it was not negligent and therefore it could not be held liable for the fatal shooting of the deceased while he was in their van since he was not on an authorized journey. According to the appellants, the deceased's work was confined to the lands office Nairobi as a court clerk and not security personnel hence, he was not expected to have hiked a lift to Kiambu where he met his death when robbers shot at him. In addition, it was submitted that the incident was clearly out of control of the appellant. The appellants reiterated their witness testimony in court and maintained that the deceased was not authorized to join the team that supplied the cigarettes to the customers and that in any event the widow had been fully compensated . Further, that the deceased must have known that getting into a security van and escorting merchandise was a risky affair since he had no instructions to be part of the security escort vehicle hence the appellant owed him no duty of care outside his duties that he was employed to do, relying on the cases of **Afro Spin Ltd V Peter Wagumo Obiero [2005] e KLR; Eastern Produce (K) Ltd V Christopher Ahado Osiro [2006] e KLR; Makuleiyo V Otis Elevator Company Ltd HCC 823/1968 EA LR 1969.**

21. On quantum of damages the appellant's counsel maintained that the sums of shs 750,000 paid and acknowledged by the deceased's widow were sufficient hence the suit ought not to have been filed urging the court to dismiss the respondent's suit with costs.

22. In her judgment delivered on 19th July 2015 S. Atambo Ms Principal Magistrate found that it was an undisputed fact that the deceased was an employee of the appellant and that he was in the course of his duties when he was shot dead hence his estate though compensated, the

compensation was not adequate. The trial magistrate found that in as much as the deceased was employed as a legal court clerk, but that all evidence pointed to the fact that the deceased was in the course of this duties as a security officer at the material time. Further that the defence witnesses could not explain what the deceased was going to do in Kiambu or that he was on his own frolic since even the report made to the police station by DW1 was clear that the deceased was a security officer and that DW1 was hard pressed to explain whether the deceased had travelled with the security team as security back up. Further that DW1 contradicted himself in evidence given in court and the report he made to the police station after the robbery incident in that whereas he described the deceased as security officer at the police station he nonetheless changed in court and did not want to admit that the deceased accompanied him as security yet he had no skills, training or protective gear. Further, that the OB extract confirmed that normally the vans are escorted by officers from the special crime prevention unit SPCIU who were not available on that day since they were busy elsewhere leading to the inference that there was always a potential risk of attack hence they were to be escorted by armed officers.

23. The trial magistrate also concluded that in the absence of the defendant/ appellant's policy document to support DW1 attempt to differentiate what was escorted by security officers and what was not, the appellant was negligent for allowing the sales van to go out without police escort and leaving only the deceased and DW1 in escort. In her view, the appellant had not established the claim that the deceased had deviated from the employer's business for personal reasons.
24. On quantum, the trial magistrate was of the view that the 750,000/- was not sufficient to compensate the deceased's estate and it did not indemnify the employer for negligence or breach of duty. Applying the multiplier of 17 years since the deceased was 43 years and expected to retire at 60 years, she awarded kshs 2,234,920 under the Fatal Accidents Act made up of 17,095 x 17 x 12 x 2/3. Under the Law Reform Act, the trial magistrate awarded the plaintiff kshs 50,000/- for pain and suffering and shs 100,000/- for loss of expectation of life, costs and interest. She found that special damages of kshs 75,000/- pleaded was not proved.
25. In support of this appeal and the grounds set out in the Memorandum of Appeal dated 26th July 2013, the appellant submits, on grounds 1,2,3 and 4 that the trial magistrate disregarded issues of law and fact and as a result found the appellant 100% liable for the death of Jackson Nyakundi Onyancha despite evidence from DW1 that the deceased had requested for a lift and that being a legal court clerk he was required to be at lands office Ministry of lands Nairobi but opted to go for a frolic of his own. As a consequence, it was submitted that the appellant cannot compensate the deceased for acting outside his scope of his duties which he had been assigned by the appellants. They relied on **Halsbury's Laws of England 4th Edition VOL 16 paragraph 562** to demonstrate that where an employee abandons the business of his master and while on a mission of his own, his employer is not responsible for the negligent act of the employee. The appellant also pleaded that the trial court also erred in awarding shs 2,324,924 under the Fatal Accidents Act without proof and disregarding the rules of evidence in arriving at the judgment. They relied on **CA 212/98 CA Abdul Ali Mahadhi V Ramadhan Said & Freight Forwarders Ltd.** The appellant maintained that with the payment of shs 750,000/- from the Insurance Company, the respondents were not entitled to any other form of compensation.
26. On grounds 5,6,7 and 8 of appeal, the appellant contended that the trial court did not take into account the appellant's submissions but only considered the respondent's submissions which she upheld yet PW1 was not an eyewitness and gave hearsay evidence which ought to have been treated with caution. They relied on **Elijah Ole Kool V George Ikonya Thuo Nairobi HCC 1299/98** that the respondent failed to prove their case on a balance of probabilities that the appellant failed either in their statutory common law duty, and that they instituted suit that was misconceived and unsubstantiated in law. Further that the respondents did not come to court with clean hands and did not therefore deserve to be aided by the court. The appellant urged the court to set aside the judgment of the lower court with costs.
27. The respondents supported the judgment and decree of the lower court and urged this court to uphold the same and dismiss this appeal with costs. They maintained that they had proved breach of duty of care on the part of the appellant and that the evidence on record showed that

on a balance of probabilities, the appellants were liable for the fatal shooting of the deceased who was assigned security duties without being given any basic training and or protection. The respondents also urged the court not to interfere with quantum of damages save that they sought for enhancement from 2,474,920 to 3,824,920. They also prayed for shs 75,000/- being funeral expenses relying on **HCC 61/2001 and CA 312/2009 Premier Dairy Ltd & Another [2013] e KLR** where the Court of Appeal allowed funeral expenses without production of receipts as proof of expenditure. They also relied on **Makano Makonye Monyancha V Hellen Nyangena CA 113/2012 [2014] e KLR and Avtar Singh Bhabra and Another V Geoffrey Ndambuki [2014] e KLR** in urging the court to uphold the entire decision of the trial court on quantum.

28. I have carefully considered the pleadings on record in the lower court, the evidence both oral and documentary, the able submissions by both parties advocates in the lower court and before this court together with the authorities cited in support of the parties respective positions. There are three issues for determination in this appeal, coupled with several ancillary questions which shall be answered in the course of analyzing the three issues. The issues are:

a. Whether the appellant was liable to the respondents for the death of the deceased Jackson Nyakundi Onyancha in the circumstances of this case.
b. If the answer to the above issue is yes, what is the quantum of damages payable?
c. What orders should this court make?

29. Section 107 of the Evidence Act provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. In this very unfortunate case where a life was lost in the hands of reckless robbers who reap where they never sow, it is not disputed that the deceased was an employee of the appellant and that he was employed as a legal court clerk as evidenced from DW1's evidence, and the defence witnesses who also produced his letter of appointment. It is also not disputed that on the material date when the deceased met his uncalled for death, he was found to be in the appellant's motor vehicle registration No. KAT 190L in the company of DW1 who was its driver and employee of the appellant as a security officer, accompanying another van KAR 741 E which was carrying cartons of cigarettes enroute to supply to a customer in Kiambu.

It is further not disputed that DW1 was providing security surveillance back up to the van that was carrying cigarette merchandise for sale when, enroute, they were attacked by armed thugs who shot at his car thereby fatally wounding the deceased. The question that arises from the above brief uncontested facts if what duty if any did the appellant as an employer have towards the deceased as an employee. And if there was a duty, was the appellant in breach of such duty? And if there was breach, were the fatal injuries as a consequences of that breach?

30. The appellant contended that the deceased was employed as a legal clerk and that therefore since he was not authorized to use the security van to Kiambu as his job was confined to going to the lands office in Nairobi Ardhi House, then he was on his own frolic and endangered his own life by risking to enter into the van to accompany the security officer, which was not his ordinary cause of duty. It is further contended that the appellant could not have been expected to offer the deceased any protection as the incident was not foreseen.
31. The relationship between employee and employer is described in **Halsbury's Laws of England 4th Edition VOL 16 paragraph 562** as follows:-

> ***"It is an implied term of the contract of employment at common law, that an employee takes upon himself risks necessary incidental to his employment. A part from the employer's duty to take reasonable care, an employee cannot call upon his employer, merely upon the ground of their relation of employer employee to compensate him for any injury which he may sustain in the course of the dangerous character of the work upon which he is engaged. The employer is not liable to the employee for damage suffered outside the course of his employment. The employer does not warrant the safety of the employee's working condition nor is he an insurer of his***

employee's safety, the exercise of due care and skill suffices."

32. The above passage which reflects the common law position was adopted by the Court of Appeal in the case of **Mwanyule V Said t/a Jomvu Total Service Station [2004] 1 KLR 47** as the law applicable in Kenya. In that case, the Court of Appeal concluded that the employer owes no absolute duty to the employee and that the only duty owed is that of reasonable care against risk of injury caused by events reasonably foreseeable, or which would be prevented by taking reasonable precaution.
33. Thus, in order for the respondents to succeed in a claim of this nature, they had to prove or establish that the appellant failed to exercise reasonable care for the safety of the deceased against risks which were reasonably foreseeable.
34. As I have stated above, it is an undisputed fact that the deceased was employed as a legal court clerk and not as a security guard. However, on the material fateful day of 13th March 2006, he was to be found travelling in the appellant's van enroute to Kiambu and moreso, accompanying a sole security officer who was carrying out escort duties to the sales van ahead, carrying cartons of cigarettes merchandise for delivery to the appellant's customers in Githunguri. According to DW1's evidence, the deceased called him and hiked a lift to go to Kiambu. DW1 did not ask the deceased what he was going to do in Kiambu, and that he knew that the deceased worked as a court clerk. DW1 also stated that the vehicle was a company vehicle and the deceased was an employee of the company so he gave him a lift. It is also DW1 who reported the robbery attack to the police and made a very detailed description of the incident vide OB No. 36 of 13/3/2006 which OB report was received by No. 31665 Senior Seargent Benard Munwayi. DW1 in cross examination stated that the deceased had no authority to be where he was and that DW1 could not indicate that he was with the deceased because the company knew DW1 he was alone. However, the detailed statement of DW1 to the police as per his report on 13th March 2006 was very clear that:

" Mr Charles Marangu Maingi C/O Mastermind Tobacco P.O. BOX 64144 Tel 020-350037,0722690624 Nairobi has made the following report. He says that on the 13th day of March 2006 at around 12.30 pm while escorting a Mastermind Tobacco Company motor vehicle registration No. KAR 741 E Nissan hardbody being driven by Joseph Waweru Ngau and his salesman Martin Mwangi Muriithi were blocked by motor vehicle registration No. KAK 725 a saloon white car with four occupants each armed with an AK rifle. This was along Moi Road near Pen Elite in Kagwe six kilometers North of Station. The driver of the pickup banged the robbers vehicle and sped off. The reportee was driving a Suzuki Escudo registration No, KAT 190L that was trailing the pickup as a back up motor vehicle providing security. ***His security officer Jackson Nyakundi Onyancha was shot five times on the head, neck, abdomen and two shots on the chest dying instantly***. *The reportee was bundled into the back of the motor vehicle, then driven a few kilometers where he was abandoned and he was put in the boot of the robbers vehicle which they abandoned and took off with motor vehicle registration No. KAT 190 L Suzuki Escudo which belonged to the reportee. The scene has been visited photographed and the body taken to the city mortuary.* ***It was learnt that the sales van is always escorted by Special Crimes Prevention Unit (SCPU) officers of Nairobi area, but never got any today since it was alleged they were committed elsewhere.*** *Investigations in progress."*

35. The above comprehensive report to the police by DW1 was clear that the deceased's capacity in the van was that of a security officer and not as a court clerk at that particular moment. The trial magistrate who had the advantage of seeing and hearing witnesses as they testified and observing their demeanor was clear in her mind and stated that DW1 was hard pressed in cross examination to explain why he was accompanied by the deceased, after he tended to exculpate the appellant that it was not the company policy to carry personnel who were not security personnel in that vehicle. It is the same DW1, who reported without any coercion or intimidation, that his security officer had been shot dead. That was a report made to the police, a public law enforcement and security agency.
36. Then there was the evidence of DW2 Jones Munene Deputy Human Resource Manager who

stated that the deceased's employment was as a legal court clerk whose duties were confined to the Lands office. He admitted that the sales van was only to provide surveillance security not armed personnel as per company policy since the van did not have a large consignment. The witness admitted that he was involved in security arrangements but not directly. He also admitted that on the material date there was no security provided to the van delivering the cigarettes since it was not a large enough consignment to be provided with armed guard so there was only a surveillance security van for the sales van. He also admitted that the reason for armed escort is that the value they carry is high but he did not know the value of the merchandize that was being transported on that day. He again stated (contradicting himself) that sales vans are never escorted. DW1 did not regret the incident because it was a normal occurrence and that he was not aware where the deceased was on that day until after the shooting since it was not part of his duties to be in the security van and that the witness was not even sure the deceased was with DW1.

37. with utmost respect, the above evidence as adduced by the defence witnesses was self contradictory in material particulars and could not have assisted build the defence case or at all. A Human Resource Manager who at the time he was testifying as at 13th May 2013 was 7 years after the incident must have had occasion to read the police report concerning the incident yet he testified that he was not sure if the deceased was with DW1 during the incident when DW1 was very categorical in his testimony in court and statement to the police that he was with the deceased in the van when the incident occurred. DW1 also materially contradicted himself that at one moment he knew that sales vans were escorted by armed personnel when they carried high value consignments and yet he did not even know the value of the consignment which was carried on that day. He then contradicted himself further and stated that sales vans were never escorted by armed guards. He also stated that on the material day no security was provided to the van delivering the cigarettes whose value he did not know, although he confirmed that cigarettes are high value goods and are targets for robberies.
38. I have also examined the judgment of the trial magistrate and in my view, she considered all that evidence on record and analyzed it in a succinct manner before arriving at her conclusion as to whether the evidence of DW1 and DW2 were capable of dislodging the evidence adduced and produced by the respondents regarding the circumstances of the death of the deceased. It is therefore my view that the very strongly worded submissions, by the appellant's counsel regrettably, cannot persuade this court to find that the trial magistrate failed to have due regard to all the evidence of the appellant's witnesses.
39. In the detailed witness statement of DW2, who also produced the deceased's letters of employment, the defence witness detailed the duties of the deceased which all related to duties of a paralegal clerk. He also stated that the deceased's duties did not require him to provide any escort services to the defendant's sales vehicles and that he was strictly required to be at the Lands offices in Nairobi. What this witness did not tell the court is whether on the material day and date, he was aware that the deceased had been assigned duties that would command him to be at lands office, Nairobi but that because the deceased was a person who could not take instructions, he failed to go to Lands office and chose to hike a lift in the company van enroute to Kiambu to do or perform undisclosed business. The witness also stated that the act of hiking a lift in a sales vehicle was contrary to company regulations. However, DW1 was categorical that the deceased was in the escort vehicle and not in the sales vehicle. The DW2 then concluded that the deceased was on his own frolic and therefore he did not heed his supervisor's instructions . The above evidence was rebutted by the PW3 evidence as per the DW1's report to police that the deceased was at that time of the shooting offering security services. Furthermore, there was no evidence from the deceased's supervisor since DW2 did not say that he was the deceased's supervisor, to show that the deceased had on the material date been assigned any work at the Lands office and or that the deceased had disregarded his supervisor's instructions by undertaking duties that he was not required to undertake when he was shot.
40. I reiterate that the deceased's supervisor did not testify to indicate that the deceased had on that particular day been specifically instructed and assigned specific duties of being at the Lands offices in Ardhi House within Nairobi but that instead, the deceased abandoned his duties to go for his own issues, which issues were also unknown to the DW1 who allegedly gave the deceased a lift. The evidence of DW1 giving the deceased a lift was contradicted by DW 1

evidence as per his report to the police following the shooting incident that: ***" His security officer Jackson Nyakundi was shot five times on the head….." a***s per OB extract No. 36 of 13/3/2006. The question that must beg an answer is, if the DW1 knew that the deceased was a court clerk who was not an authorized passenger in that surveillance vehicle at that time, why did he report to the police, which is a public record, that the deceased was his security officer? What was so difficult for the DW1 to simply state in his police report that he had given a lift to the deceased who was his fellow employee, enroute to Kiambu? The inference that this court makes from such conduct of DW1 is that he was an unreliable witness and the contradictory evidence of DW1 and DW2 are a pointer that they knew that the deceased, whose job description was that of a court clerk, could nonetheless be assigned different duties and those duties in the instant case were security duties wherein he was to be found on the fateful day as reported by the DW1. Indeed, as correctly observed by the learned trial magistrate, there was absolutely no contrary evidence to show that the deceased was not killed while in the course of his employment.

41. Although the appellant wanted the court to believe that the deceased disregarded the regulations that did not permit him to do any other job other than the court clerk duties, there was no such regulations or policies produced in court to prove that the deceased was a difficult employee who did not follow instructions of his supervisor. The deceased's contract of service had just been renewed in December on 22nd December 2005 four months before his demise upon review of his performance and finding that his performance was good indeed, if the deceased had violated any terms of his employment, the appellant would have marshaled all the evidence and adduced it in court, including calling the deceased's supervisor and the chief security officer to confirm that the deceased had on that material day been instructed to do or perform a different task from that of being security officer or that there was no way a legal court clerk could have been assigned security duties since he was not trained to undertake those duties.
42. This case is in *pari materia* with the case of **Oluoch Eric Gogo v Universal Corporation Ltd HCCA 263 of 2006 Nairobi** where the appellant casual worker was injured when the machine which was being repaired by a technician injured him. The respondent contended that since the appellant was never assigned any duty to operate the machine at all and that if the machine broke down then the appellant was instructed to call for help which he did, the respondent maintained that by handling the machine the appellant was voluntarily assuming risk by being close to the machine and purporting to assist the technician to repair the machine without authority since he was not trained to repair the machine. The respondents in that case relied on **STAT PACK Industries Vs James Mbithi Munyao Nairobi HCC 152 of 2005** where the court stated that :

> ***"An employer's duty at common law is to take all reasonable steps to ensure the employee's safety but he cannot baby sit an employee. He is not expected to watch over the employee constantly".***

43. The trial magistrate in the above case had dismissed the appellant's suit on the ground that the appellant was not trained to repair the machine otherwise there was no need for him to call the technician to repair it hence he was injured through his own carelessness. The appellate court, in reversing the decision of the trial magistrate found that the appellant sustained the injury in the course of his employment. The court also found that the it had not been shown that the appellant was that neither had it been shown that the appellant had failed or refused to heed the technician's warning not to assist in any way while the technician was repairing the machine. The only difference between this case and the one of Oluoch Eric Gogo is that in that case the machine that injured the appellant is the one he normally operated as a casual worker and that when it broke down he called a technician to repair it. The technician then asked the appellant to assist while he repaired it and in the process, the technician switched on the machine without alerting the appellant thereby crushing his finger.
44. In the instant case, it is not denied that DW1 who was a security officer was in the company of the deceased and was acting within the scope of his work when the team was attacked by thugs and therefore even if DW1 had not been authorized to carry the deceased in that vehicle,

the contradictory evidence of DW1 and DW2 are material and only renders the defence case unbelievable and cannot be rebut the the reliable evidence of PW3. Since the deceased was not an authorized or trained security officer, the DW1 would no doubt be responsible for allowing the deceased into the van as a security officer knowing that it was against the company policy to allow non-security personnel into the surveillance van and the appellant herein would no doubt be vicariously responsible for the acts of its employee, DW1. But that is not the case here since DW1 himself confirmed that on that day the deceased was working as a security officer and albeit it is strongly submitted by the appellant that the deceased was not authorized to do that security work, and that nobody instructed him to so accompany DW1,there is no evidence on record to show that when DW1 left for the surveillance duties, he had oral and written instructions not to be accompanied by any other person as his co-security, unless such person was authorized in writing to perform such duties. There is ample evidence that on that day there ought to have been (Special Crimes Prevention Unit) accompanying the sales van but that it was engaged elsewhere. In my view, the deceased was instructed by the appellant to accompany the DW1 on surveillance duties and therefore he was in the course of his employment when he met his untimely death.

45. In **HCCA 65 of 2002 SIMBA POSHO MILLS LTD VS FRED MACHIRA ONGUTI [2005] e KLR, t**he plaintiff general worker was injured by a machine roller when his supervisor asked him to push maize into a new machine which had just been installed. His right fingers were caught by the machine. The respondent blamed the appellant for his own negligence as the machines installation had not been completed and a certificate of competence of the new machine had also not been issued. It was contended by the respondent that the appellant was not allowed to fiddle the machines. The trial magistrate apportioned liability and on appeal, Kimaru J allowed the appeal holding the employer wholly liable for the accident and for breach of the statutory duty of care.

46. In Habbury's Laws of England 3rd Edition VOL 28 paragraph 88, it is stated that:

"Where the relationship of master and servant exists, the defence of volenti non fit Injuria is theoretically available but is unlikely to succeed. If the servant was acting under the compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. Owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk and so the defence does not apply in an action against the employer."

47. The Court of Appeal echoing the above words from the Halsbury's Laws of England **in Makala Mailu Mumende v Nyali Golf Country Club [1981] KLR** 13 stated; per Nyarangi J.A:

"No ***employer in the position of the defendant would warrant the total continuous security of an employee engaged in the kind of work the plaintiff was engaged in, but inherently, dangerous. An employer is expected to reasonably take steps in respect of the employment, to lessen danger or injury to the employee."***

48. In other words, It is the employer's responsibility to ensure a safe working place for its employees. The appellant's incessant contentions that the deceased was responsible for the fate that befell him and particularly the care free attitude demonstrated in the evidence of DW2 was unfortunate. DW 2 did not mince his words when he stated in his evidence in cross examination that he did not regret the incident and that those were normal occurrences. That cavalier attitude is a reflection of a do not care attitude of a Human Resource Manager who cared less of the duty of care bestowed upon the employer to ensure safety measures were put in place to ensure that employees are not exposed to the risk of injury that could have been prevented. I say " cavalier and "carefree' attitude because the evidence of PW3 and even DW1 and DW2 themselves considered as a whole was clear that whenever a sales van was out with merchandise, it had to be accompanied by armed security and that on that day, according to the report made to the police by DW1, the Special Crimes Prevention Unit which was to escort the sales van was committed elsewhere.

49. From the above evidence, it is clear that it is the appellant who took the risk of letting the sales

van go without armed escort and in its place, they asked DW1who though a trained security officer (ex police officer) he was unarmed accompanied by an untrained security officer- the deceased to provide surveillance escort. It was not shown by the appellant that because DW1 was a trained security officer, he could not have been shot dead the same way the deceased was riddled with bullets; since both were seated in the driver's cabin.

50. In my view, the plaintiffs/respondents did prove, on a balance of probabilities that the appellant was negligent and or breached the common law duty of care in permitting the deceased to serve as a security officer without according him adequate security measures to ensure his safety, knowing very well that the deceased was not a trained security personnel.

51. The appellant in this case owed the deceased a duty of care and did breach that duty as a consequence of which the deceased was fatally wounded. That breach of duty, in my view, had a casual nexus with the injury that the deceased sustained, as was correctly pointed out in **HCCA 152/2003 Nairobi Statpack Industries V James Mbithi Munyao [2005] e KLR as well as HCC 1299/98 Nairobi Elijah Ole Kooi V George Ikonya Thuo.** In this case I find that causation as a matter of fact was proved by the respondents on a balance of probabilities.

52. In **Securex Agencies (K) Ltd v Bernand Ochieng Olute [2009] e KLR** where the respondent was a security officer while at work and in response to an alarm, he was directed to the scene of a robbery at a shop along Hakati road and on arrival, three people came out of the shop and shot him on his waist. He claimed that he did not have any formal training as a security officer except the drilling for 4 days and that he understood his work and was provided with uniform and equipment, which was not enough. The respondent also claimed that he was not provided with protective gear such as a bullet proof jacket despite the appellant being aware of the hazards of the duties assigned to him. The appellant on the other hand pleaded *volenti-non-fit-injuria* but the respondent countered that the appellant used the respondent's desperate position of being unemployed to expose him to great danger. The appellant maintained, like the present appellant, that the respondent knew that the job he was engaged in was a dangerous one and accepted it knowing its hazards and that the respondent was injured by criminals who were not within the control of the appellant and that the appellant employer was only under a duty to take reasonable care and not strict care of employees and that since there is nothing the appellant could have done to avert the incident, the appellant was not negligent in any way. Relying **on David Ngotho Mugunga v Mugumoini Estate HCC 2336/89,** the appellant maintained that it could not be held vicariously liable for criminal acts of trespassers and that the respondent having accepted knowingly to do a dangerous job, he was estopped under the doctrine of *volenti non-fit injuria* from bringing that kind of claim.

53. On appeal, the court held that on the evidence availed, the respondent had no opportunity to run away or take cover as he was apparently taken by surprise and that there was no evidence adduced of any specific instructions that the respondent was given as to how to take care of himself whilst attending to such an emergency. The court also found that there was no evidence that the respondent was provided with protective gear to protect him from the gunshots hence he could not have been negligent. In this case, just like in the above case though persuasive, I accept the findings of the learned judge that the appellant herein did not demonstrate that the deceased could have evaded the fatal shots by doing anything. DW1 too did not tell the court what tactics he used to or applied from his training as a security personnel to evade the gunshots. The DW2 who was not a security officer testified that such occurrences were normal. He did not tell the court that security officers who were not armed were trained in some special skills of evading gunshots. The fact that the sales van was expected to be escorted by Special Crime Prevention Unit is in my view a clear manifestation that the danger that the deceased, DW1 and even the sales van personnel who escaped unhurt were exposed to- of being shot by armed robbers, was a danger which was reasonably foreseeable. That being the case, it was expected that the appellant would take reasonable precaution of care against the risk of injury to the deceased. It did not. An implied contractual obligation placed on the employer to an employee is to protect its employees from acts of trespassers. This is so because the employees undertaking security services are expected to, and were indeed in the cause of protecting the property of the appellant enroute delivery to its customers and the possibility of armed thugs who are in essence trespassers striking was not a remote possibility as that precisely is what security personnel are engaged to do- guard

against invasion by trespassers who are armed with dangerous weapons including guns, and whose target is to disarm or disable the security team and snatch away the merchandize.

54. Thus, the robbers' action must be examined in the context of the deceased's duty to protect the employer's property and personnel ferrying the merchandize safely to its destination and the deceased's role as a "security officer" in fulfilling that duty as an employee of the appellant. In providing security surveillance to the sales van on the day when Special Crimes Prevention Unit (SCPU) were unavailable is an indication that the danger of the sales van being attacked as stated by DW2 was not only imminent bur foreseeable as a normal occurrence and real. The deceased was therefore, in my view, assigned a dangerous job. It was not his usual job of offering security escort to sales people. The appellant knew attacks on their sales vans was a normal occurrence which is a sign of dangerous engagement out there. In my humble view, the nature of the danger to which the deceased was exposed required the appellant to provide more care to minimize or eliminate than that ordinarily provided to other employees. **See Mumias Sugar Company v Charles Namatiti CA 151/87 Gachuhi, Masime and Gicheru JJA. Held:**

> ***" An employee is required by law to provide safe working conditions of work in the factory and if an accident occurs while the employee is handling machinery the employer is responsible and will be required to compensate the injured employee."***

55. The above decision of the Court of Appeal reminds the appellant that it has a duty of care to provide a safe working environment for its workers. The incident having taken place in the course of the deceased's employment, under common law, the employer and not the employee DW1 who purportedly gave the deceased a lift is liable for the conduct of DW1 in allowing the deceased to be part of the security team. Assuming DW1 did so without authority of the employer by saying " I did not want them to know I was with him." This is true even if the employer had no intention to cause harm and or played no physical role in the harm. The basic under lying principle and rationale for this is that employers direct the behavior of the employees and accordingly, must share in the good as well as the bad results of that behavior. By the same token that an employer is legally entitled to the reward of an employee's labour and profit, an employer also has the legal liability if that same behavior results in harm. The second rationale is that when a worker is injured while on duty, he needs to be compensated and the most likely to pay is the employer and not a fellow employee. The legal system is thus interested in making the victim whole, and assigning liability to the employer rather than employee who has the best chance of meeting that goal. The key factor is that employees must have sustained the injury in the course of his employment and for an act to be considered to be within the cause of employment, it must either be authorized by the employer or be so closely related to an authorized act that an employer should be held responsible. In Appeal Cause No. 2 of 2015 **Qamin Quarries (Ltd) V Anthony Ngaita Karoi [2015} e KLR** the respondent was employed by the appellant as a welder. He was instructed by his senior supervisor to repair a leaking roof of the workshop by patching the iron sheets and hesitated but later agreed and after repairing one side of the roof successfully and on turning to the other side of the roof, he fell after stepping on the timber that broke and suffered serious injuries. The appellant denied liability and maintained that the respondent was not acting within the scope of his employment but was on his own frolic when the accident occurred and that he was responsible for his injuries for being negligent. The trial court made a finding of fact that the appellant was liable 75% and the respondent contributed 25% and proceeded to award damages. On appeal it was contended by the appellant that the respondent was employed as a welder and instead went to do the work of repairing the workshop roof without instructions from his employer. It was urged in the alternative that even if the respondent had been authorized to carry out the roof repairs, the employer could not have been liable because the injury was not foreseeable since it was not known that the wood supporting the roof was weak and that the trial court had shifted the burden of proof contrary to Section 107, 108 and 109 of the Evidence Act and that the respondent did not prove that he was instructed to repair the roof. The appellate court found for the respondent and dismissed the appeal for reasons that the act of complying with instructions from DW2 could not be dismissed as being an engagement by the respondent in a frolic of his

own citing **Halsbbury's Laws of England 4th Edition VOL 16 page 358-662** that:

> ***"an employer is under duty to take reasonable care for the safety of his employees in all the circumstances of the case so as not to expose them to an unnecessary risk. This duty includes an obligation to provide competent staff, adequate materials, proper system of work and effective supervision. The duty further includes the obligation to provide a reasonable safe place of work and access to it. This duty vicariously remains with the employer even after he delegates to another person."***

56. Therefore, base on the authorities that I have cited above, and which are relevant to this case, I find that albeit the deceased undertook a risky engagement, that engagement was subject to the employer's duty to take reasonable care and the employer failed to take that reasonable precaution to protect the deceased against the risk of injury. First, the deceased was not a trained security officer with necessary skills to handle such a dangerous situation. Secondly, he was not on that day provided with any protective gears such as bullet proof vest/jacket and thirdly, he was made to provide security back up to a security officer who was not armed. Lastly, the job that he was engaged to do was normally undertaken by (Special Crime Prevention Unit) who are highly trained and heavily armed police officers.
57. For the above reasons, I find that the submissions by the appellant and the various decisions relied on both in the lower court and in this appeal are not persuasive enough to enable this court upset the findings and decision of the trial magistrate on liability against the appellant at 100%. Accordingly, I disallow the appeal on liability and sustain the findings and decision of the trial magistrate, and add that the fact that the trial court did not replicate the appellant's arguments word for word in the decision does not mean that those arguments were not considered and that the decision therefore is a nullity.
58. On the question of quantum, the appellant complains in their grounds of appeal that the trial magistrate erred in law and law in awarding damages that were excessive in the circumstances; in finding that the insurance payment (compensation) made was insufficient; and in failing to consider the factor of eventualities of life while calculating the award under the Fatal Accidents Act.
59. In my view, considering the submissions made by both parties on those issues regarding quantum, the issue for determination is:

a. *Whether the life insurance compensation was adequate compensation and whether the deceased's estate was therefore not entitled to any other damages whether under the Fatal Accidents Act or under the Law Reform Act.*

60. From the record, the appellant did not make any submissions in support of the grounds of appeal touching on quantum of damages under the Law Reform Act and Fatal Accidents Act despite raising it in the grounds of appeal. This court nonetheless is entitled to determine whether the deceased's estate was, besides the insurance (group life) compensation paid to his widow, entitled to any other damages and whether the respondents were entitled to loss of dependency. For this court to interfere with an award of damages made by the trial court, it must be demonstrated that the court below in the exercise of its discretion in assessing the damages either acted on wrong principles or awarded so excessively or so inordinately low damages or has taken into consideration irrelevant matters or failed to take into account or consideration relevant matters and as a result arrived at the wrong decision. These principles were espoused in the cases of Butter **V Butter [1984] KLR 225 and Kemfro Africa Ltd t/a Meru Express & another V a.m. Lubia & Another [1982-88] I KAR 727.**
61. The respondent's claim was founded on the Law Reform Act and the Fatal Accidents Act. The manner of assessment of damages under the Fatal Accidents Act was succinctly put by Ringera J (as he then was in **Beatrice Wangui Thairu V Honourable Ezekiel Barngetuny & Another Nairobi HCC 1638 of 1988** where the learned Judge stated;

> ***"The principles applicable to assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find the value of the annual***

dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum this arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if likely invested yield returns of an income nature."

62. As stated earlier, the appellant in the submissions, contested the award of damages generally, that the same was misconceived and an abuse of the court process. To determine whether the award was justified or based on sound legal principles, DW3 in his evidence in the court below confirmed that the kshs 750,000 paid out to the deceased's widow PW1 was for Group Personal Accident Insurance Cover and in his view, that was adequate compensation. I disagree, the Group Personal Insurance cover was not and has never been the same as a claim or compensation for damages arising from a claim based on negligence or breach of duty of care. Once an employee is insured and dies while he is on duty, that claim is payable by the insurance company, whether the death or injury thereof is as a result of negligence or not and such payment from a group insurance scheme does not act as estoppel for the estate of the deceased or his dependants to claim for damages under the Law Reform Act or the Fatal Accidents Act.
63. The appellant avoided submitting on that crucial issue and neither is there any law in support of the contention in the ground of appeal. In **Nairobi HCC 248/2005 James Wambura Nyikal & Another v Mumias Sugar Company Ltd & Another**, Honourable Mwera J (as he then was) held that the insurance claim paid under Group Insurance Scheme where the deceased was a contributor was not on account of or as compensation/damages following the accident and the learned Judge proceeded to award damages under the law Reform Act and Fatal Accidents Act.
64. From the evidence on record adduced by the appellant, the cheque payment in December 2006 produced as Defence exhibit wherein the 1st defendant received shs 750,000 less shs 75,000/- recoverable funeral expenses, it is clear that the payment was for death insurance claim. The said payment was released from Security Department which fact further goes to prove that the deceased worked in the security department. The Group Personal Accident dues were also settled by the Insurance Company of East Africa as per the Defence exhibit 3 -an acknowledgement of funeral expenses advance of shs 75,000/- recoverable from GPA dues. I therefore concur with the above decision of Mwera J and dismiss ground No. 3 of the appellant's Memorandum Of Appeal. I then proceed to determine whether the award under the Fatal Accidents Act to the tune of Kshs 2,324,920 was erroneous or failed to take into account eventualities of life while calculating the same and whether the award under the Law Reform Act to the tune of kshs 50,000/- was justified; and or whether the awards under both statutes was manifestly excessive in the circumstances of the case.
65. As regards the estate of the deceased Jackson Nyakundi Onyancha, the trial magistrate used a multiplicand of 17 years, salary of 17,095 p.m. Thus 17,092 x 17 x 12 x 2/3 dependancy ratio = 2,234, 920. Under the Law Reform Act, she awarded kshs 50,000/- stating that the deceased died on the spot as a result of gunshot wounds. Under loss of expectations of life, she awarded shs 100,000. The appellant has not submitted on now erroneous those awards were and which wrong principles were applied by the trial court in making the said awards. It has not justified interference with those awards. The deceased was aged 43 years at the time of his death. He was in a contractual employment with the appellant and of good standing and performance . There was no evidence that he was sickly. He would, as per the employment Laws of this country, have been expected to work until age 60 years. Albeit the appellant complained of imponderables by way of statement in the Memorandum of Appeal, there was no submission to justify that ground. In **Benedetta Wanjiku Kimani V Changwon Chekoi & Another [2013] e KLR**. Anyara Emukule held thus:

"……there are indeed many imponderables of life, and life itself is a mystery of existence. It is not however in the premise of the court to determine or explore

those imponderables. The duty and promise of the court is to apply the generally known period during or about which an employee of the deceased's occupation would remain inactive work and retire".

66. I therefore find the application of 17 years by the trial court appropriate in the circumstances. On the dependency ratio, the court in **Leonard Ekisa & Another V Major Birgen [2005] e KLR** Ringera J stated:

" There is no line 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 visitudes of life and factor accelerated by payment in lump sum."

67. In this case, the age of the deceased and his dependants were all known and adduced in evidence. The widow's national identity card was produced showing that she was born in 1968. The three children's birth certificates were produced in evidence. They were in 2008 aged 21, 12 and 4 years (born 1986, 1995 and 2003. It was also pleaded that the deceased was the sole breadwinner. The deceased's parents were also pleaded as being his dependants and by his death they all lost sustenance. It was not shown that the dependency ratio of 2/3 was not appropriate in the circumstances. The appellant's submissions in the lower court only concentrated on the shs 675,000/- Group Life Insurance cover compensation paid as being adequate and the discharge voucher which as I have stated, was not, in any way related to the claim for compensation under the Law Reform Act and Fatal Accident Act. I therefore uphold the dependency ratio applied by the trial court. There was no challenge to the deceased's monthly pay per month as per his letter of renewal of contract dated 22nd December 2005 which was Kshs 17,095.000 based on his good performance.
68. For all the above reasons, I uphold the award for loss of dependency as awarded by the trial court.
69. On loss of expectation of life the trial court awarded a conventional figure of shs 100,000/-. There is no reason why this court should interfere with that award. I uphold the same. The same with pain and suffering. The deceased died on the same day of the attack. He sustained five bullet wounds following gun shots in the head, neck and many other parts of the body. He must have suffered great pain before dying and the3erefore an award of kshs 50,000/- was not excessive. I rely on the case of **James Wambura Nyikal & Another v Mumias Sugar Company Ltd & Another** (supra) where Mwera J (as he then was) awarded Kshs 90,000/- for pain and suffering and shs 100,000/- for loss of expectation of the life for a deceased who died on the same day of accident while being taken to hospital following an accident. He was aged 42 years.
70. In the end, I dismiss this appeal with costs to the respondent. I uphold the trial magistrate's judgment on liability and quantum in favour of the respondents against the appellant as well as the award of costs and interest.

Dated, signed and delivered in open court at Nairobi this 21st day of October 2015.

R.E. ABURILI

JUDGE

21/1/2015

Coram R.E. Aburili J

C.A. Adline

Miss Abok holding brief Mbaluka for appellant.

No appearance for respondent

(Later Mr Swanya appears) and says I am for the respondents. I am sorry I am late.

COURT- Judgment read and delivered in open court as scheduled. Judgment to be typed.

R.E. ABURILI

JUDGE

21/10/2015