REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 754 of 2005

CORNELIA ELAINE WAMBA.....:PLAINTIFF

VERSUS

SHREEJI ENTERPRISES LTD & OTHERS.....DEFENDANTS

JUDGMENT

The plaintiff Mrs. Cornelia Elaine Wamba approached the seat of justice in her capacity as the personal representative of the Estate of Philipe Wamba deceased vide a plaint dated the 8th day of February,2005 and filed on the 17th day of June,2005. The plaint was subsequently amended with leave of court on the 4th day of July, 2007 and filed on the 5th day of July, 2007. The salient high lights of the same are that:-

(i) Authority to present the suit is vide a grant of letters of administration issued by the High Court of Tanzania on the 24th day of April,2003 vide succession cause No.2 of 2003 vide which the plaintiff was vested with the vesture of a personal representative.

(ii) The action is brought under the law reforms Act cap 26 and the Fatal Accidents ACT CAP 32 laws of Kenya on behalf of the plaintiff and other dependants.

(iii) The plaintiff was the registered owner of motor vehicle registration number TZB1776 a Nissan petrol while the 1st defendant was the registered owner of motor vehicle Reg. No. KAD 950V.

(iv) On the material; day of 11th day of September,2002 the deceased who had been authorized by the plaintiff to use motor vehicle registration number TZB 1776 a Nissan patrol during his expedition in the republic of Kenya when on the Nairobi Mombasa high way at Wangalla near Voi while the deceased was lawfully driving the said motor vehicle, the defendant negligently, carelessly, recklessly and without due regard for other motorists on the road veered off his left side of the road, to the right side of the road and notwithstanding the deceaseds' efforts to veer off the road in an attempt to avoid the collision but the defendants motor vehicle KAD 950V driven by the 2nd defendant still collided with the plaintiff's said motor vehicle.

(v) It is the contention of the plaintiff that the accident was due to the 2nd defendant's negligence for which the first defendant is vicariously liable. The particulars of negligence are particularized as driving at a speed which was excessive, veering or allowing the defendants motor vehicle to veer off the road on the wrong side of the road, failing to steer his motor vehicle on a proper cause, driving on the wrong side

of the road without any or due regard for the lives of the occupants of the oncoming cars; failing to brake timeously, failing to stop, swerve slow down or in any other such manner so as to manage or control the said motor vehicle so as to avoid the accident which accident resulted in the death of the deceased.

(vi) The plaintiff will also rely on the doctrine of Resipsa Loquitor.

(vii) It is further the averment of the plaintiff that the deceased who met his death as a result of the actions complained of was a graduate of Horvard in 1993, held masters in Journalism from Colombia University, Editor of Transition Magazine and African Ency Copaedia; founding manager of Havard website.com; Author of Kinship A family's journey in Africa and America (Dutton) 1999; winner of the 2000 Gustavus Myers outstanding Books award and the recipient of the 37th Annual Alicia Patterson Foundation grant.

(viii) At the time of the deceased's demise, he was earning us Dollars 60,000a year being a grant from the Allcia grant Foundation for purposes of undertaking research on African Youth and around US Dollars 90,000.00 from book sales, journalism the activities and other sources all totaling to US Dollars 150,000.00 per annum.

(ix) By reason of matters complained of the deceased's life was abruptly and unlawfully cut short by the afore said negligence of the defendant.

In consequence thereof the deceased suffered loss of expectation of life, the plaintiff untold grief and suffering for which the plaintiff claim damages particularized as cost of obtaining the grant of representation Kshs.30,000.00, costs of police abstract Kshs.100.00, Funeral expenses comprising transport expenses to Tanzania Kshs.250,000.00, costs of coffin Kshs.15,000.00, clothes, flowers, food Kshs.10,000.00, loss of the motor vehicle to the tune of US Dollars 7,257.00 and the cost of the assessors report Kshs.15,000.00.

The plaintiff therefore sought the following reliefs:-

(a) Damages under the law Reforms Act cap 26.

(b) Damages under the fatal accidents, Act.

(c) General damages

(d) Special damages in the sums of USD 7,257.00 and Kshs.320,100.00

(e) Exemplary damages and or aggravated damages.

(f) Costs of this suit.

(g) Any other or further relief this honourable court may deem fit.

The first and second defendants responded to that claim vide a defence dated the 5th day of September, 2005 and filed on the 7th day of September, 2005. The salient features of the same are that:-

(i) Denied contents of the plaint and put the plaintiff to strict proof.

(ii) Denied averments that the first defendant was the owner of motor vehicle Reg. No. KAD 950V and that the 2nd defendant was its employee.

(iii) Denied responsibility for the causation of the collision as well as each and every particulars of negligence attributed to them.

(iv) In the alternative to number (iii) above that the accident or collision was beyond the control of the 2nd defendant not withstanding the exercise of all reasonable care by him.

(v) Further in the alternative, that the alleged accident was caused by the negligence of the owner, agent and or servant of motor vehicle Reg. number KTK 382 make Mecedes benz lorry particularized as driving at a speed that was excessive in the circumstances, failing to ensure that motor vehicle Reg. number KTK 382 was road worthy, driving and allowing a defective motor vehicle to be on the road without due regard to other motor vehicles, failing to ensure that all wheels were new and road worthy for undertaking along distance journey; losing control of motor vehicle registration number KTK382 as a result of the tyre burst and causing the said vehicle to veer off its right lane and encroach on to the left rightful lane in which the 2nd defendant was driving motor vehicle Reg. Number. KAD 950V; failing to stop swere, slow down and or exercise or maintain any proper or effective control of motor vehicle Reg. number KTK 382; failing to keep proper look out while driving the third party motor vehicle, driving without due care and attention; driving on the wrong side of the road and obstructing the path and the view of motor vehicle Reg. Number KAD 950V.

In the further alternative and without prejudice to the foregoing averred that the afore said accident was caused and or contributed to by the negligence of the motor vehicle Reg. No.TZB 1776 particularized as driving at a speed that was excessive, in the circumstances; driving dangerously and recklessly without due care and attention to the motor vehicle traffic, in particular motor vehicle registration number KAD 950V being driven by the 2nd defendant; failing to exercise or maintain any proper or effective control of motor vehicle reg. number TZB 1776; failing to keep on his side of the road; failing to keep proper look out while driving the said motor vehicle; failing to stop, swere, slow down and or maintain any control over motor vehicle Reg. number TZB 1776 and allowing the same to collide with motor vehicle REG. Number KAD 950V and driving without due care and attention. Further went on to deny responsibility for loss both special and general and put the plaintiffs to strict proof. Denied responsibility to meet the reliefs sought in the plaint in favour of the plaintiffs.

The first and 2nd defendants took out a 3rd party notice seeking indemnity and or contribution in full respect of the claims for special and general damages, costs and interest made against the defendants by the plaintiff as listed in the plaint in his action, costs of defending the action inclusive of costs of third party proceedings, interest and any other and or further relief that this court may deem fit to grant.

The grounds for taking out the 3rd party notice in a summary are that the accident which occurred as a result of the alleged collision between the plaintiffs' and the defendants vehicles was caused by and or substantially contributed to by the negligence of the 3rd party, its servants and or agent particularized as driving on the wrong side of the road; suddenly and without warning swerving on to the path of the 1st defendants vehicle thereby forcing the 2nd defendant to swere off the road to the right side where it collided with the plaintiffs vehicle; steering the 3rd party's vehicle on to the in coming lane directly in the path of the 1st defendants vehicle; forcing the 2nd defendant to swere the 1st defendants vehicle on to the right side of the road to avoid a head on collision with the third party's vehicle; driving without due regard to the safety of other road users particularly the 2nd defendant; driving without due care and attention, driving at an excessive speed in the circumstances; failing to swerve, to slow down or control the third party's vehicle in a manner to avoid the accident and lastly driving a defective motor vehicle.

The 3rd party responded to that notice by filing two defences one dated on the 27th day of February,2007 and filed on the 28th day of February,2007 and a second one dated 28th day of February ,2007 and filed on the 2nd day of March,2007 filed by two different firms of advocate. On 12/02/2008 the 3rd party's counsel made an election to rely on the 3rd party's defence dated 28th day of February,2007 and filed on 2/3/2007. In a summary the 3rd party denied responsibility to compensate the defendants by way of indemnity and or contribution or otherwise in regard to any judgment and or costs entered in this case against the defendants and put the defendant to strict proof. Further denied the occurrence of the accident on the 11th day of September, 2002 involving motor vehicles TZB 1776, KAD

950V and KTK 382 in the manner and place pleaded in the plaint, denied allegations and particulars of negligence attributed to them in the 3rd party notice and put the defendants to strict proof. Asserted that motor vehicle KTK382 Mercedes Benz was not involved in any accident as alleged. Denied responsibility for any loss and damage to the plaintiff and put the defendant to strict proof.

Parties were heard. The plaintiff Mrs. Cornelia Elaine Wamba gave evidence as PW1. In both her examination in chief and cross examination she reiterated the content of the amended plaint and added that she is the mother of deceased; she was the owner of the accident vehicle which she had just purchased in August of that year just a few weeks before the accident in September; she had authorized her son to drive that vehicle; she was not at the scene of the accident but is sure the son died as a result of that accident. With regard to the earning capacity of the deceased, she maintained that the deceased was well educated had held jobs in the USA and was leading an independent life. The deceased used to file tax returns. He was a journalist by profession and he had excelled both academically and professionally. He had authored books and Articles and he was in the process of preparing other books. He had worn a Grant to carry out research on youth in Africa from which he earns salary particularized in the amended plaint. With regard to funeral expenses she maintained that these were incurred as pleaded. She has locus standi to present the suit as she had obtained a grant of representation to the deceased estate first in Dares salaam before being resealed in Nairobi. The vehicle was a write off as a result of the accident as shown by the motor vehicle assessment report. She had no doubt the deceased son was an experienced driver.

With regard to loss of dependency she stated the deceased was not married; she herself PW1 was in full time employment; her husband was semi-retired; the deceased used to support his parents and grandparents occasionally. She maintained the death robbed the deceased of a bright career, support to the family and to the community at large as the deceased was involved in a lot of charitable work. She relied on the tax returns documents to prove the deceased income which was within the range estimated in the amended plaint.

PW2 was one James O. Wamba. The sum total of his evidence adduced both in chief and cross-examination is that he was brother of the deceased; they were travelling to Mombasa in the family car TZB 1776; him PW2 is an experienced driver but on this date it is his brother who was driving. They had been on the road for 4 hours. They had been chatting and listening to music as they drove on.

With regard to the occurrence of the accident, PW2 maintained that he witnessed the accident he was in the passenger seat at the front. Their vehicle was following a truck a head of them when suddenly the truck in front of them veered off the road to the right in what appeared to be a front tyre burst. Their vehicle had been travelling at between 80-100 km per hour but had slowed down because the truck a head of them was going slowly and had blocked their path. When the truck a head of them went off the road raising dust, he assumed it continued on till it stopped. He recalled the deceased remarking “what is this guy doing” in relation to the truck which had just veered off to the right its wrong side. PW2 continued to state that as soon as the truck a head of them veered off the road on the right, they were confronted by an oncoming vehicle which was speeding. The deceased went off the road to the left. The vehicle from the opposite direction came and collided with theirs at an angle. He blames the oncoming vehicle for the collision because he swerved into their path. Had it remained stationary on the road or swerved to their right there would have been no accident since they had swerved off the road. It is PW2s testimony that the deceased had slowed down when he saw the truck ahead of him go off the road; that even if they had remained stationary on the road they would still have been hit by the oncoming vehicle. Conceded the vehicle which went off the road raised dust. He denied that the deceased tried to overtake the truck ahead of him but recalled that the deceased continued driving on but the deceased slowed when they were confronted with the oncoming vehicle. The appearance of the oncoming vehicle was sudden. This vehicle did not stop or slow down and when the deceased swerved off the road, the oncoming vehicle also swerved to the same direction and collided with their vehicle at an angle, the two vehicles stuck to each other and the oncoming vehicle pushed theirs back words. It is his testimony that it was light when the accident happened and he could see clearly. According to him the truck which had gone off the road was still moving on as they collided with the oncoming vehicle but cannot say if they had completely passed it (the truck). He concedes the vehicle which had gone off the road was a head of theirs, when PW2 came out of the vehicle because they had been pushed backwards. He blames both vehicles for the causation of

the accident because if the truck which went off the road to the wrong side of the road had not gone off the road the way it did they would just have driven on. When him PW2 questioned the driver of the oncoming vehicle he explained that he had not seen PW2s vehicle.

PW3 Abdul Wahid Kasman stated that he was stationed at Moi District Hospital Voi. He gave evidence from the records to the effect that the deceased had been taken to Moi District Hospital Voi, and pronounced dead on arrival. The records indicated that the deceased had died on arrival at the hospital on 11th September, 2002. He died as a result of multiple injuries sustained in a road traffic accident. The major injuries noted in the post morten report were bleeding through the nostrils, which was evidence that one had had base skull fracture, fracture of tibia and fibula long bones of the body, severe head injury resulting in base skull fracture and fracture of the color bone.

PW4 Harun Githinji gave evidence as a motor vehicle assessor who assessed motor vehicle registration number TZB1776 on the 18th September, 2002. The findings are as per the motor vehicle assessment report. The pre-accident value of the motor vehicle was Kshs.560, 000.00 while the salvage value was Kshs.50, 000.00. According to him the assessment was professionally done.

PW5 No.218437 IP Christopher Giteta Mwangombe Wangombe gave evidence in his capacity as a police officer. He was at the material tine stationed at Voi police station. He recalled an accident occurred at Wagalla on the 11th day of September, 2002 on the way to Mombasa. Wagalla is in PW5s' area of jurisdiction but he did not cover the sense. It was covered by two officers CPL Wazir who had since passed on as at the time of trial and P.C. Mwakina who had since left the force as at the time of trial. From the records held at the police station, the accident was recorded in the OB vide OB number 12 on the 11/9/2002 at 11.55 p.m. with the entry having been made by P.C. Mwakina who recoded that the accident had occurred at 9.00p.m.

In accordance with the requirement in cases where a fatal accident had occurred, PW5 took a statement under inquiry from the driver of motor vehicle Registration number KAD950V trailer ZB 8394, Isuzu lorry and served him with the notice of intention to prosecute for the offence of careless driving. From the statement under inquiry, the driver Mr. Matheka said there was a struck on the road which was wavering on the road, the wavering made him veer off the road to his right as you face Nairobi from Mombasa. He did not see the vehicle which was behind the wavering truck. To PW5, recollection no action was taken against Mr. Matheka. Other records showed that the vehicle being driven by the deceased had no pre-accident defects.

When cross-examined the witness PW5 stated that observations made by Mwakina in the OB placed blame for the causation of the accident on the obstruction caused by motor vehicle KTK 382; that it is normal to serve N.I.P. (routine) in cases where there has been a fatal accident; post mortem contents reveals that the deceased died as a result of multiple injuries sustained as a result of a road accident; he only recorded two statements one from the driver of KAD950V and James Wamba. It was the duty of the investigating officer to recommend who to charge and PW5 does not know why no such recommendation was done. He reveals that in the records an inquest was recommended to be held but none was held.

On further cross-examination, PW5 stated that entries made in the sketch plan show marks left by KAD950V but not KTK382. With regard to the statement of Paul Njoroge, a loader in KTK 382, he recalled they were headed to Mombasa. On reaching near Voi, the front right tyre of their lorry burst and the lorry started zigzagging on the road for 10 meters and then veered off the road. He also recalled a lorry from the opposite direction which veered off the road to the right to avoid colliding with their vehicle. When their vehicle stopped, he came out and then saw dust 10 meters behind their vehicle. PW5 went onto state that all statements on the record reveals that KTK382 veered off the road to the right into the path of the oncoming motor vehicle from Mombasa and also that KAD.950V swerved to its right to avoid colliding with KTK382. In PW5s' opinion, blame goes to KAD950V because it had contact with the TZB1776. Blame also goes to KTK 382 because if there had been no tyre burst then most probably the accident would not have occurred.

The defence also called witnesses DW1 Barrack Ochieng Odera, the Human resource Manager of

Shreeji Enterprises Limited the 1st defendant produced death certificates for the driver of KAD 950V and loader of KTK 382 namely James Matheka and Paul Njoroge respective who had died on 24/4/2005 and 6/1/2004. They were in the respective vehicle when the accident subject of these proceedings occurred. The driver had recorded a statement in the course of investigation of the reason of the accident with his employer. According to the driver the accident occurred when him 2nd defendant tried to evade the driver of the vehicle whose tyre had burst. The witness confirmed James Matheka was the driver of KAD950V while the loader in KTK 382 was Paul Njoroge.

DW2 Emmanuel Daudi gave evidence both in chief and cross-examination to the effect That he is a resident of Manyatta village on the Nairobi Mombasa road; he was herding cattle near the tarmac when he witnessed the occurrence of the accident subject of these proceedings. It was at 6.00 p.m.; he was on the Mombasa side; the Shreejis vehicle passed him then 150 meters away he heard a tyre burst of a vehicle heading to Mombasa. This vehicle veered into the path of the vehicle coming from Mombasa forcing the vehicle from Mombasa to veer to the right and collided with the Tanzanian vehicle. The accident was 150 meters away and he could see clearly. It is his testimony that after the tyre burst the lorry cabin was off the road completely but not the trailer. But confirmed that KTK 382 which was headed to Mombasa did not collide with any of the other two vehicles. To the witness, it is the Shreeji motor vehicle which was in the wrong because it swerved into the path lane of the Tanzanian motor vehicle. He confirms the Tanzanian vehicle went off the road as you face Mombasa in order to avoid the collision but then they collided. The Tanzanian driver's side was hit by the head of the Shreejis motor vehicle.

PW3 Gerald Mwakina gave evidence to the effect that he was employed as a police officer at the material time. He was on duty on the Nairobi Mombasa high way when he received a report at 4.30 p.m. from motorists that an accident had occurred at a place called Mbuyuni. DW3 and colleagues took a lift to the scene. It was on 11/9/2003. He found the three accident vehicles at the scene. He drew a sketch plan and recommended the holding of an inquest. The entry in the OB was made after a visit to the scene. He blamed KTK382 because if there had been no tyre burst there would have been no accident.

When cross-examined the witness conceded that the time the accident occurred differed from witness to witness. According to DW3 he received the report of the accident at 4.30pm; the D.O. says the accident was at 5.00pm. While James Wamba an occupant of the Saloon car TZB 1776 stated the accident was at 6.30 p.m. He denied the suggestion that when he got to the scene it was already dark. DW3 was firm he took measurements when it was still day light. According to his observation KAD.950V was not to blame. The fault lay with KTK. Maintained KTK did not go off the road as it could have rolled. It was on the wrong side of the road as it was heading to Mombasa.

DW4 Mohamed Arif Khan gave evidence as the managing Director of African Insurance investor limited. They specialized in accident and fraud investigation and DNA evidence collection. In connection with these proceedings, he recalls receiving instructions from the defendants counsel in December, 2008 to give an opinion on an accident which had occurred on the 11th day of September, 2002. The witnesses DW4, was handed relevant documents and also carried out his own independent investigation. He prepared a report which he produced as an exhibit. To DW4 the reaction of the defendant's driver of swerving to his right was the best because KTK 382 had veered into its paths (defendant's vehicle path). DW4 concedes that the defendant's driver had two options one was to brake which would have resulted in a head on collision or swerving. He confirms KTK 382 swerved to the right because it was a right tyre burst. He doubts if the Saloon car would have kept on driving behind KTK382 on the road when it was Zigzagging. From the sketch plan KTK 382 was occupying 2.6 meters of the motor vehicle lorry in from Mombasa. In DW4s opinion, if the driver of KAD 950V had braked there would have been more loss of life.

When cross examined, the witness responded that at the time of the collision the motor vehicle TZB1776 was off the road, it was not head on collision but at an angle; that before the accident, the motor vehicle TZB1776 was driving on the left side of the road, and at the right speed permitted in the area. That prior to the collision KAD950V was driving on its side of the road but moved on to the wrong side of the road when it took the evasive action. DW4 goes on to state further that it is not true that KTK was

off the road because if this had been the correct position then KAD 950V would have continued on its right side of the road. Concedes that the statement of the driver of KAD 950V indicates that he did not see motor vehicle TZB 1776 but DW4 doubts if the position would have been different if the driver of KAD 950V had seen the driver of TZB 1776 because the condition of the road would have been the same and the driver of KAD950V would still have swerved to the right as you face Nairobi which is its wrong side DW4 concedes he relied heavily on the evidence on the record. The loaders statement says KTK382 Sig zagged and then swerved to the right and in his opinion DW4 says the said vehicle could have done both Zigzagging and then swerving. To him upon the right front tyre bursting, there is no way KTK382 could have continued driving on its rightful lane on the left. It had to shift to the right because that is where the weight was.

In his opinion the accident is not an act of God because a tyre burst does not happen without a reason. A part from staying too close to KTK382 at 4.5 meters, there is no other blame DW4 could assign to TZB1776. Reiterates that if KAD950V had not moved to its wrong side a more serious accident would have occurred with KTK382. DW4 placed no blame onto the driver of KAD950V but denied being biased in favour of the said driver. In his opinion the report was objective.

On further cross-examination DW4 conceded he did not interview anybody in connection with the accident. His investigation came 6-7 years after the accident.

At the close of the trial parties filed written skeleton arguments. Those of the plaintiff are dated the 11th day of April, 2011 and filed the same date. The following have been stressed:-

(i) The plaintiff is a holder of letters of administration and therefore has locus standi to bring these proceedings.

(ii) The evidence assessed on the record on liability indicates clearly that it was the driver of motor vehicle KAD950V to blame for the collision because it crossed over to the side of the vehicle TZB1776.

(iii) It is undisputed that the driver of motor vehicle KAD950V saw KTK382 approach zig zagging into its path and that is why he swerved to his right to the wrong path of the vehicles headed to Mombasa from Nairobi. Indeed he says he did not see motor vehicle TZB1776 but he should have anticipated other motorists on the road.

(iv) The driver of motor vehicle KAD.950V should have been on the lookout for the oncoming traffic.

(v) Contend that the plaintiffs case is within the principle of *Res ipsa loquitor* which shifts the burden of proof on to the defendant to prove that the accident was not due to an accident attributable to them or that the cause of the accident was on account of something which is not attributable to negligence attributed to them or that it was due to circumstances beyond their control.

(vi) Considering the totality of the entire evidence on the record the court is invited to find that the only evidence which has tendered to exonerate the 2nd defendant from blame is the evidence of DW4 which was tended on a without prejudice by a witness who never witnessed the accident and who prepared the report on the basis of documents 6-7 years after the accident. It only centered on the 2nd defendants action of veering off the road to the wrong side of the road and never considered other alternatives which were open to the 2nd defendant and could have been employed to avoid the occurrence of the accident.

(vii) A question of contributory negligence on the part of the deceased does not arise because no evidence was adduced to controvert PW2s evidence that the vehicle was going at 60 KM per hour; that the deceased took precaution to avoid a collision by swerving to his left to avoid the collision; that the deceased had proper and effective control of the vehicle he was driving, he kept to his side of the road. He only went off the road to avoid a collision, the deceased was on the look out for other motorists on the road and that is why he saw KTK382 veering off the right and KAD950V a head of his vehicle heading for a collision and then veered off.

(viii) With regard to shifting blame worthiness on the 3rd party, it is the plaintiffs stand that there is nothing that the 3rd party's tires were un-roadworthy in order to pin liability on the 3rd party. On the basis of the afore said assertion in (i)-(viii) the court was urged to find the defendants 100% liable to make good the damage caused onto the plaintiff.

On quantum the court was invited to award Kshs.100, 000.00 for pain and suffering, loss of dependency 2,387,616 US Dollars on the basis of paper work exhibited and the special damages as pleaded.

Turning to the 1st and 2nd defendants, their submission are dated the 8th day of April,2011 and filed on the same date. The following have been stressed:-

(i) After reviewing the pleadings and evidence of all the three parties on board the defence submitted that the plaintiff needed letters of representation to the estate of the deceased in order to pursue claims under the law reform and Fatal accidents Acts.

(ii) The documentation produced on record demonstrates that the plaintiff was the owner of motor vehicle Reg. No.TZB1776 while the 3rd party was the owner of KTK382 and they responded to the 3rd party notice as such.

(iii) On liability the defendants submitted that the court should believe the content of the police statement recorded from PW2 because this was recorded immediately after the accident when the memory of PW2 was very fresh which confirms the content of police sketch plan which is to the effect that the resting place for KTK 382 was on the road in the path of motor vehicle travelling to naiorbi; that there were no skid marks for KTK382 off the road; that if the 3rd partys vehicle had gone off the road it would have tipped over which confirms that KTK382 had blocked the path of KAD950V.

(iv) The court to believe and admit the content of the statements made to police by the driver of KAD950V and the loader of KTK382 under section 35 of the evidence Act cap 80 laws of Kenya because they had died as at the time of testimony and they could not be called to testify.

(v) To fortify what has been stated in number (iv) above, it is evidently clear that if it is true that KTK382 had gone off the road as claimed by PW2 in his testimony in court given 5 ½ years after the accident, no explanation has been given as to why the driver of KAD 950V suddenly served off the road to its right into the path of motor vehicle headed to Mombasa. On this account the court is therefore invited to find that the 3rd partys motor vehicle KTK382 did not veer off the road as claimed, that it blocked the path of the motor vehicle KAD950V and in the process caused it to veer off to its right and in the process collided with the deceased motor vehicle.

(vi) That by reason of what has been stated in number (v) above the 2nd defendant had no option but to take the only alternative action that is to swerve to his right as he was unaware of the presence of the deceaseds' vehicle on the road immediately behind the 3rd partys motor vehicle.

(vii) Due to the steepness of the road on the left hand side of the driver of KAD950V as you face Nairobi and the right of the deceased as you face Mombasa is what made the 2nd defendant not to veer off the road to the left. It is the same reason which made the deceased not to veer off to the left considering that KTK was allegedly off the road and moving on as claimed by PW2.

(viii) The defendants assertion in number (vii) above as being the correct position has been fortified by the evidence of DW2 who testified that he was herding goats by the road side and while 100 meters away he heard a tyre burst and on checking he saw the 3rd partys' vehicle as the one which had a tyre burst veering into the on coming lane following the defendants vehicle to veer into its right left lane and thereby collided with the deceased motor vehicle in an effort to avoid colliding with the 3rd partys' vehicle head on.

(ix) By reason of what has been stated in number (vii-viii) above the court is invited to hold that the 3rd partys vehicle KTK382 did not go off the road. Instead it stopped on the road into the oncoming lane of the defendants vehicle forcing the 2nd defendant to swerve to his right. In the circumstances, the 2nd defendant is not to blame for the causation of the collision between him and the deceased motor vehicle because firstly he was not aware of the presence of the deceased's motor vehicle immediately behind KTK 382. Secondly the steepness of the road to his left could not allow him to swerve to his left.

(x) The action the 2nd defendant took to swerve to his right was the only action he could have taken upon noticing the presence of the deceased's vehicle on the road in order to avoid a head on collision with the deceased's motor vehicle. This action is reasonable because it was meant to allow the deceased to drive on considering that there was no way the 2nd defendant could have known that the deceased was also contemplating to veer to the left.

(xi) The court is urged to believe the evidence of DW4 as an expert in this area and whose opinion save for calculation was in line with the contents of the police statements recorded from the 2nd defendant and one Paul Njoroge the loader in the 3rd party's vehicle which all go to confirm DW4s evidence that the 2nd defendants' action to veer off to his right was the best action one would take in the circumstance.

(xii) In view of the content of (xi) above the court is invited to hold that the 2nd defendant acted promptly and property in order to avoid a head on collision with the 3rd party's vehicle. This action does not amount to an act of negligence as that was the only evasive possible action open to him in the circumstances of this case.

(xiii) Contend the particulars of negligence attributed to the 2nd defendant stand faulted because police investigation did not establish evidence of speeding as the 2nd defendants assertion that he was going at 60km per hour was not controverted; the evidence has established that the 2nd defendants action of veering to his left was the only possible evasive action to take in the circumstance in order to avoid a head on collision with the 3rd party's vehicle in its paths and the deceased's motor vehicle on its right lane; failure to brake on the part of the 2nd defendant is excusable as there was no time to brake.

With regard to blame worthiness of the 3rd party, the defendants contention is that it is the 3rd party to solely blame for the causation of the accident because:-

(a) Although it is undisputed that the veering of the 3rd party's vehicle into the oncoming lane of the 2nd defendant motor vehicle was caused by the front right hand side tire burst, no evidence has been adduced by the said 3rd party to show that the tire burst was not caused by its negligence by demonstrating that the burst tire was not warn out or otherwise defective.

(b) It was necessary for the 3rd party driver to adduce evidence to demonstrate that the veering of his vehicle into the path of the oncoming vehicle was not caused by his negligence.

(c) The fact that the 3rd party's vehicle did not collide with any of the other is not a ground for absolving it from blame as its action is the cause of setting in motion the chain of events which led to the collision between the other two vehicles by forcing the defendants vehicle to veer into the oncoming lane of the deceased's vehicle.

(d) The police officers who investigated the accident place blame on to the 3rd party's motor vehicle as per the entries in the OB.

With regard to contributory negligence on the part of the deceased, it is the contention of the defendant that the deceased also should be blamed for the causation of the accident because he failed to keep a safe distance from KTK 382 and that is why it was not possible for PW2 to see KAD 950V approaching a head of them and that is why the 2nd defendant who was driving KAD950V was not in a position to see

motor vehicle TZB1776 behind KTK 382.

(b) Had the driver of KAD 950V and that of TZB 1776 seen each other in time, they would have seen the remedial action taken by the other and reacted in time to avoid veering in the same direction and avoid a collision.

(c) As per the opinion of DW4 in the circumstances displayed herein, the deceased ought to have known or realized that it was unsafe to veer off to his left.

(d) Upon seeing that the lorry ahead of him was Zig zagging the deceased should have stopped moving alongside it.

By reason of the reasoning above, the defendants suggest the deceased to bear 10% blame and the 3rd party 90% blame and 0% blame to the defendant.

On quantum the defendants have submitted that the cardinal principle to guide the court in this assessment is the principle that special damages must not only be pleaded, particularized but have to be specifically proved. The court is invited to find that although the plaintiff has pleaded and particularized specials of cost of obtaining a grant of representation abstract and funeral expenses no documentary proof of the same has been exhibit save for the cost of flowers which the court can allow at Shs.TZ.153, 000.00.

(ii) No receipt for the cost of the vehicle purchased hardly a month before the accident was produced but the court is at liberty to go by the content of the motor vehicle assessors report giving the pre-accident value of the vehicle to be Kshs.550, 000.00 less salvage value of Kshs. 50,000.00 which the court can allow.

On general damages, since the deceased died shortly after the accident, the court can allow Kshs.25, 000.000 for pain and suffering, KSHS.100, 000.00 for loss of expectation of life. As for loss of dependancy the court was urged to apply a multiplied of 19 years since the deceased was aged 31 years and would have actively worked till the age of 50 years as against an average income of USD 60,000 *per anum* as against 2/3rd dependency ratio.

Lastly that in the event the court finds the defendants also liable then the damages as well as costs to be apportioned appropriately.

The 3rd party also filed written skeleton arguments dated the 2nd day of July, 2011 and filed on the 15th day of July, 2011. The following have been stressed:-

(i) It is not disputed that the deceased was driving the plaintiff's motor vehicle reg. No.TZB1776 Nissan Patrol, whereas the first defendant is the undisputed owner of motor vehicle Reg. No.KAD950V/ZB8394 Isuzu lorry and the 3rd party the undisputed owner of motor vehicle Reg. No.KTK382 Mercedes Benz trailer.

(ii) It is undisputed and has been admitted by all parties that the 3rd party's motor vehicle KTK382 never came into contact with any of the other 2 vehicles.

(iii) On liability, it is the argument of the 3rd party that the accident between the plaintiffs and the defendant's vehicle occurred because the plaintiff's vehicle was speeding in an effort to avoid colliding with the 1st defendant's lorry which had left its lane and entered the plaintiff's vehicle lane.

(iv) PW2s evidence that had the 1st defendants driver not left its lane, the accident would not have occurred was corroborated by the evidence of PW5. Inspector Mwangombe who testified that according to his investigation, the accident was caused by the 2nd defendant who drove the 1st defendant's vehicle so negligently that he collided with the plaintiff's vehicle.

(v) The evidence of DW3 Gerald Mwakina who in the police records had stated that the 1st defendants' vehicle caused the accident but later changed to state in his testimony that the 3rd party vehicle caused the accident is unreliable and should be treated with caution considering that the evidence of PW2 James Wamba and DW2 Emmanuel Daudi and the sketch plan all go to demonstrate that the 3rd party's motor vehicle was almost completely off the road.

(vi) The court is invited to ignore the evidence of DW4 Mohamed Arif Khan as it was purely academic based on what happened or what should have happened.

(b) He was not an eye witness.

(c) The exercise was undertaken by him 6-7 years after the accident.

(vii) The 3rd party is not to blame in any way for the causation of the accident because:-

(a) PW2 confirmed that the 3rd party's vehicle was moving at about 60km per hour.

(b) The 3rd party driver took reasonable steps to the best of his ability to control the vehicle after the tyre burst considering that it neither hit the defendants or the plaintiff's vehicle. Nor did it tip off or overturn.

(viii) It is the 3rd party's contention that the defendant is wholly to blame for the causation of the accident because had the second defendant driven the defendants vehicle at a reasonable speed, he would have controlled the vehicle and avoided hitting the plaintiffs vehicle and for this reason the court should attribute 100% liability on to the defendant and order them to pay damages to the plaintiffs together with costs both to the plaintiff and the 3rd party.

On quantum of damages the 3rd party urged this court not to allow claims for costs of letters of administration, police abstract, funeral expenses loss of vehicle and the assessors' fees because they had not been proved.

(b)Further and in the alternative to the above the plaintiff cannot recover damages for loss of the vehicle TZB 1776 because it is on record that the said vehicle did not belong to the deceased but to the plaintiff and for this reason the plaintiff has a separate cause of action distinct from that of the deceased and for this reason she should file a separate claim for the vehicle.

(c) In the 3rd alternative, if the court were to award damages for the loss of this vehicle, the court will have to deduct the salvage value from the amount awarded for loss of the vehicle.

(d) As for general damages, the court is urged to award Kshs.30, 000.00 for pain and suffering before death as the deceased died within hours of the accident.

(e) As for loss of expectation of life it is submitted that an award of Kshs.100, 000.00 is reasonable.

(f) As for damages for lost years the court is urged to take note of the fact that the deceased's income was irregular and take the average earnings of the 4 years before death. They had no quarrel with the multiplier of 19 years and a dependancy ratio of 1/3rd in the first submissions. But later changed in their reply submission.

(g) On costs it is contended that the plaintiff is not entitled to the same as no demand notice was ever served by the plaintiff to the defendant and by the defendant to the plaintiff, there should be no order for costs in favour of the plaintiff.

The parties also relied on case law. The plaintiff relied on the case of **HUGHES VERSUS LORD ADVOCATE (1963) 1AIIER 705** wherein as per the observation of Lord Reid:-

"**Defender is liable although the damage may be a good deal greater in extend than was foreseeable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseeable"**

As per the observation of Lord Morris:

"**There can be no doubt in this case that the damage was the result of the wrongful act in the sense of being one of the natural and probable consequences of the wrongful act. It is not necessary to show that this particular accident and this particular damage were probable. It is sufficient if the accident is of the class that might well be anticipated as one of the reasonable and probable results of the wrongful acts…. In my view there was a duty owed by the defenders to safe guard the pursuer against the type or kind of occurrence which in fact happened and which resulted in his injury and the defenders are not absolved from liability because they did not envisage the precise can cancatenation of circumstance which led up to the accident"**

The case of **VIRGINIA WANJIKU KAIRU VERSUS HOSEA KIPKEMBOI SAMA ELDORET HCCC NO.R67/1999** decided by George Dulu Ag J on the 14th day of April,2005 wherein the defendant who was driving at 60kmph within Eldoret Town where the permitted speed limit was 50KPH, it was raining and the road was slippery veered off the road, applied brakes but hit a pedestrian off the road was found 100% liable to blame for the causation of the accident; the case of **PATRICK MUTIE KIMAU AND MOUNT BUILDERS AND MECHANICAL ENGEERING COMPANY LIMITED VERSUS JUDY WAMBUI NDURUMO NAIROBI CA 256/1996** where in the court of appeal held inter alia that:-

"A failure on the part of any person to observe any of the provisions of the highway code… by any party to the proceedings as tendering to establish or negative any liability which is in question in those proceedings relevant"

The case of **EMBU PUBLIC ROAD SERVICES LIMITED VERSUS RIIMI (1968) EA 26** wherein it was held inter alia that:

"**While the driver had to meet a sudden emergency and what was required of him was not perfect action, nevertheless on the evidence it had not been shown that the emergency was so sudden that he could not have taken that amount of corrective action which should be expected of a competent driver of a public service vehicle.**

The case of **KARANJA VERSUS MALELE (1983) KLR 147** wherein the court of appeal held inter alia that:-

" there are two elements to be considered when assessing the issue of liability namely causation and blame worthiness; there should be no distinction which can be drawn on attribution of negligence after seeing danger and negligence in not seeing it before hand; and lastly in assessing blame worthiness, the distinction is that the driver had a lethal machine/car in her control. Apportionment of blame represents an exercise of discretion"

There is also the case of **MSURI MUHIDDIN VERSUS NAZZOR BIN SELF ELKASSABY AND ANOTHER (1960) EA 207** wherein it was held inter alia that:-

"where there is a plea for Resipsa loquitor the respondent could avoid liability by showing either that there was no negligence on their part which contributed to the accident or that there was a probable cause of the accident which did not conote negligence on their part or that the accident was due to the circumstances not within their control. If the immediate cause of the burst tyre was the rough surface of the road that in itself did not establish that the accident was due to circumstances within the respondent's control. The speed of the vehicle in relation to the particular road condition was of most material factor and one which normally within the control of the driver of the vehicle, and there was certainly a duty on the driver to keep a proper look out to ascertain

the condition of the road and to adopt the speed of the vehicle to it.

In the same cited case **OF MUSURI MUHHIDDIN VERSUS NASSER BIN SELF (SUPRA) AT PAGE 206** paragraph 1 the court quoted with approval the decision in the case of **WING VERSUS LONDON GENERAL OMNIBUS CO (1909) 2K.B.652** thus:-

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

Lastly the case of **GEORGE MWANGI KINUTHIA AND ANOTHER VERSUS JAMES GACHUE AND ANOTHER NAIROBI HCCC. NO. 3291 OF 1995** wherein the deceased was aged 57 years, a business woman whose estimated working life was expected to be up to 65 years of age and who sustained fatal injuries in an accident, the court awarded Kshs, 10,000.00 for pain and suffering, Kshs.70, 000.00 for loss of expectation of life and Kshs.307, 300 rounded upto Kshs.300, 000.00 under the Fatal accidents Act.

The defendant also cited case law. The court will sample some for purposes of assessment. There is the case of **GENERAL MANAGER EA R&HA VERSUS THIERSTEIN (1968) EA354**. At page 357 pr. E-F there is observation that:-

"…**The plaintiff's car just before the accident come out from its left hand side towards and possibly as far as the centre of the road, and that by reason of this movement and also of its slow speed, the defendant was misled into thinking that it would turn into one of the side roads leading to Dundori. Despite the absence of any signal to support it, I do not consider that in coming to its collision the defendant was negligent, and it is apparent that once the possibility of a collision arose he acted properly and promptly in attempting to avoid or minimize it, not withstanding that on so doing he crossed over to the incorrect side of the road and there struck the other vehicle…"**

On the basis of the above observation the court held inter alia that the:-

"primary cause of the accident was the negligence of K and the defendant was not negligent in concluding that K intended to turn off the main road and acted properly and promptly in attempting to avoid the collision notwithstanding that in doing so he crossed over to his in correct side of the road…"

The case of **EMBU PUBLIC ROAD SERVICE LIMITED VERSUS RIIMI (SUPRA)** where in there is observation made at page 25 paragraph 1 thus:-

"As I understand the law as set out by these two judgments of this court, where the circumstances of the accident give rise to the inference of negligence from the defendant, in order to escape liability, has to show in the words of Sir AList Air Forbes, that there was a probable cause of the accident which does not conote negligence or in the words which I have previously used that the explanation for the accident was consistent only with an absence of negligence. The essential point in this case therefore is a question of fact, that is whether the explanation given by the defendant shows that the probable cause of the accident was not due to his negligence or that it was consistent only with the absence of negligence…"

The case of **DEVSHI VERSUS KULDIPS TOURING CO(1969) IEA189** where in at page 192. There is observation that:-

"A person relying on inevitable accident must show that something happened over which he had no control and the effect of which could not have been avoided by the greatest care and skill… where the circumstances of the accident give rise to the inference of negligence then the defendant in order to escape liability has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for the accident was consistent only with an absence of negligence…" In order to avoid liability must prove to the satisfaction of the court that they took all reasonable steps to ascertain that the tyre was fit for use on February 27….The mere external examination of a tyre which had run 21750 miles part of which was done on bad roads driven by drivers who had no instruction to report on un usual and heavy blow to the tyre and without any examination of its internal surface during the whole of that time seems to me to leave the defendant. With the burden undisclosed of satisfying the court that they had taken all reasonable steps to avoid this accident…." The duty imposed on the owner of an omnibus must be higher than that placed on the driver of a car, never the less there is clearly a duty imposed on the latter to make at least a visual inspection of the threads and walls of the hired cars tyres. There is no evidence of any such inspection in the present case either before the car was hired out or before it left Dodoma on its way back to Mombasa in spite of the fact that one of the tyres had had apuncture and another a near blow out and was badly cut. There is no evidence of the state of the road at the place of the accident and in particular whether there were sharp stones on the road which could have caused a blowout…"

On the basis of the aforeset out reasoning the court held inter alia that:-

"In the absence of any evidence as to an inspection of the tyres either before the car was hired out or before it left Dodoma and in the absence of any evidence as to the state of the road as a possible cause of the puncture, the presumption of negligence had not been rebutted."

There is the case of **ANASTASIA KAMENE CHEGE VERSUS LAWRENCE NDUATI GIGUTA NAIROBI HCCC NO.1786 OF 1984** decided by Aganyanya J as he then was (JARTD) on the 6th day of December,1984. There is observation that:-

"**From the evidence, the accident appears to have occurred suddenly. There was a tyre burst followed by loss of control and rolling of the vehicle in question. What could then have caused a sudden burst of the tyre over speeding or unroad worthiness of the vehicle tyre in question? No evidence was adduced on these 2 aspects of the particulars of negligence alleged in the plaint…. In the current case though the plaintiff alleged over speeding as possible cause of the tyre burst, hence the accident, no defence was filed to rebut the allegation. The question of resipsa loquitor has been raised this giving rise to presumption of defendant. No evidence has been adduced to rebut this presumption…"**

The case of **MUTHONI KABUGUA VERSUS CATHOLIC DIOCESE OF KIRINYAGA AND 2 OTHERS NAIROBI HCCC NO.5108 OF 1992** decided by Ang'awa J on the 30th day of July,2004. The court found the 3rd defendant 100% liable for the causation of the accident because "**The 3rd defendant did overtake at an inappropriate place. Then caused the said accident by obstructing an on coming vehicle. It was noted that 3rd defendant's vehicle was never hit by any of the other two vehicles. The other two vehicles collided as a result of avoiding the accident. The court found that the other two vehicles including that of the 2nd defendant were not all liable in negligence for this accident…"**

The case of **PAULINE NYABOKE NYAMORA AND ANOTHER (suing as the legal rep of the estate of Dishon Ogachi Nyamora versus Naomi Wairimu Kuria Nakuru HCC 457 of 2000** decided on the 21st day of Januqary, 2010 by Maraga J as he then was wherein the deceased suffered fatal injury in a road traffic accident and died on the way to hospital the court awarded Kshs.25, 000.00 for pain and suffering before death.

The case **of AMOS MUNGULUSI SYOMAU & ANOTHER VERSUS MAWINGO BUS**

SERVICES & ANOTHER MACHAKOS HCCC NO.64 OF 1997 decided by Mwera J on the 19th day of April, 2002 wherein the deceased was aged 35 years and the court applied a multiplier of 15 years. The case of **ANWARAII BROTHERS LIMITED AND ANOTHER VERSUS JOYCE MUNDI AND ANOTHER MACHAKOS HCCA NO.126 OF 2007** decided by Isaac Lenaola J on the 25th day of February, 2009 wherein the deceased was aged 32 years old and the court applied a multiplier of 18 years because the deceased would have worked till the age of 50 years. The case of **ESTHER NDUTA MWANGI KAMAU MUTURI AND ANOTHER VERSUS HUSSEIN DAIRY TRANSPORTERS LIMITED MACHAKOS HCCC NO.46 OF 2007** decided by Isaac Lenaola J on the 24th day of February, 2009 wherein the deceased was aged 33 years and the court used a multiplier of 17 years. The case of **JOSPEHINE NJERI TARRINO VERSUS NAROK COUNTY COUNCIL AND ANOTHER NAKURU HCCC NO.289 OF 1998** decided by B.K. Tanui on 2/3/92 wherein the deceased was 37 years old and the court used a multiplier of 12 years. The case of Joyce Mumbi Mugi (Administratrix of the estate of Celestine Mugi Maingi deceased versus the co-operative Bank of Kenya limited and 2 others Nyeri CA NO.214 of 2004 decided by the court of appeal on the 6th day of June, 2008 wherein the court totalized profits of the deceased business over a period of 6 (six) years and then took an average as earnings per year. The deceased was 51 years and the court applied a multiplier of 10 years. Lastly the case of **FIDELITY INTERNAITONAL AIRPORTS LIMITED VERSUS CENTROL BANK OF KENYA AND ANOTHER (2003) IEA56** wherein Mwera J the court with held an award of costs because no notice of intention to sue had been served before the suit was laid. It is however noted that the main suit had been settled leaving only the issue of costs for determination by the court.

The 3rd party also filed case law namely **FIDELITY INTERNAITONAL AIRPORTS LIMITED VERSUS CENTROL BANK OF KENYA & ONOTHER (SUPRA) ANWARALI BROTHRES AND ANOTHER VERSUS JOYCE MUNDI (SUPRA);** The case of **JOYCE MUMBI MUGI VERSUS CO-OPERATIVE BANK OF KENYA (SUPRA);EMBU PUBLIC ROAD SERVICES LIMITED VERSUS RIIMI(SUPRA);** also the case of **VIRGINIA WANJIKU KAIRU VERSUS HOSEA KIPKEMBOI SAMBU (SUPRA)** on loss of expectation of life, the 3rd party referred the court to the case of **LEONARD OBIERO BONDO VERSUS FRANCIS MUIRU MURUGU AND ANOTHER NAIORBI HCCC NO.4125 OF 1988**. Decided by Mbogholi Msagha J on the 19/3/93. The deceased was aged 28 years and the court awarded Kshs.60,000.00 The case of **PAULINE KULOLA MWADIME VERSUS DUNCAN MWENDAGO MWIKAMBA NAIORBI HCCC No.2774 of 1992** decided by Mwera J on the 14th day of June, 1992 wherein the deceased was aged 35 years and the court awarded Kshs.60,000.00 for loss of expectation of life.

For pain and suffering before death the 3rd party referred the court to the case of **LABAN NJOGU WAINAINA VERSUS DAVID KARIUKI KINGORI& ANOTHER NAIROBI HCCC NO.4148 OF 1989** decided on the 6th day of June,1991 wherein Mbogholi Msagha J awarded Kshs.10,000.00 for pain and suffering before death. The case of **FREDRICK GATAKA MUNGAI VERSUS GEORGE NKIBUNYI & JAMES NAIROBI HCCC NO.1993 OF 1990** decided on the 26th day of September, 1991 where in Mbogholi Msagha the court awarded Kshs.10, 000.00 for personal suffering before death.

Parties gave oral high lights of their written submissions. A revisit to the same by this court reveals that they are a reiteration of their written skeleton submissions. In summary the contention of the plaintiffs' counsel is that ownership of the plaintiffs vehicle and issue of locus standi of the plaintiff to bring this action have been settled. The only issue in dispute are liability and quantum on liability it is the plaintiffs contention that motor vehicle TZB 1776 then being driven by the deceased was lawfully driving in its lane; it is not responsible for the 3rd party's tyre burst which caused KTK 382 to Zigzag on the road and force KAD 950V to leave its side and veer into the rightful lane of TZB 1776; the deceased upon seeing KDK 950V coming towards it was justified in taking an evasive action in swerving off its rightful lane onto its left. It is therefore their stand that the deceased's vehicle was lawfully within its lawful limits and did everything possible while on its rightful side of the road. The plaintiff blames the defendant for the causation of the accident because into veered it the rightful lane of TZB 1776 and then off into the rightful off side escape for TZB 1776 irrespective of the reason for KAD 950Vs veering into the rightful lane of TZB 1776 and also into its rightful off side, the defendant is 100% to blame because it should

have anticipated that in the event of being can fronted with danger TZB 1776 would have definitely swerved to its left considering that KTK 382 was a head of TZB 1776. Further in doing so the 2nd defendant breached the high way code as he was not supposed to veer into the path of vehicles from their opposite sides which were in their rightful lane. The court has been urged to reject the defence's version that there is nothing the 2nd defendant could do because when the conduct of the 2nd defendant as to what he should have done before the collision and at the collision time is considered, it is clear that it should have been to avoid veering into the path of oncoming vehicles which were in their rightful lane. The facts demonstrated all go to show that the 2nd defendant in the circumstance failed to display the manner of driving and skill of good driving workmanship expected of a competent driver as he should have anticipated a possible presence of vehicles behind KTK 382. The doctrine of Res ipsa loquitor holds because the defendants have not ousted the assertion of liability off loaded on them by the plaintiff. As for quantum the court was invited to go by the suggestions made by them.

The defendant's high lights also reiterates their written skeleton arguments. They dispute the plaintiff's assertion that neither the deceased nor the 3rd parties are to blame for the causation of the accident. Their stand is that the two solely bear the whole blame for the causation of the accident with the 3rd party either bearing the whole blame or the greatest blame for the causation of the accident because there is demonstration that the 3rd party veered into the wrong lane of the 2nd defendant and in the process forcing the 2nd defendant to veer into the path of the deceased to avoid a collision with the 3rd party's vehicle and this was the only option open to the defendant as he could not veer to the left as it was steep and the vehicle could have overturned. As for the deceased, if he had maintained momentum or stopped on the road he would not have veered to the left and if he had done so there would have been no collision between the deceased and the second defendant. The plea of strict liability is not available to the plaintiff because him as a road user was obligated by law to take an evasive action and for this reason the court is invited not to penalize the defendant for doing what the law expected him to take. As for the 3rd party it is evident that had its tyre not burst there would have been no accident. It was their duty to ensure that their tyres were road worthy. They have failed to do so as they failed to adduce evidence in that respect they should entirely should or the entire blame for the causation of the accident with the deceased should erring a small portion if any. As for quantum they submit no specials were proved but should they be wrong, this court to go by their suggestions in their written submission.

As for the 3rd party, they maintain they are not to blame as their vehicle did not come into contact with any of the colliding vehicles. On damages they contend none has been proved against them but should they be wrong then the court is urged to go by suggestions made by them is in their skeleton arguments.

In a supplementary submission filed by the 3rd party the court was urged to use a multiplier of 10 years instead of 19 years.

This court has given due consideration to the rival pleadings rival evidence and rival submissions as well as principles of case law relied by all parties on board and the court proceeds to make the following findings on the same.

(i) The proceedings involve a fatal traffic accident in which the deceased subject of these proceedings Phillipe Enoc Wamba sustained fatal injuries.

(ii) It is undisputed that three vehicles were involved in the accident one of these vehicles is motor vehicle Reg.No.TZB1776. Documentation found at pages 36-47 in the plaintiffs bundle of exhibits comprising sale agreement between Peter Makongoro and Cornelia Alaine Wamba, hand written note dated 26/08/2002 introducing the bearer as a person seeking insurance cover for the motor vehicle in question in order to travel to Kenya, receipt No.00352104 issued by National Insurance corporation of Tanzania limited showing payments of TZ shillings 2,000.00 for change of user, insurance policy cover number 00031999 for 3rd party risk cover for the said motor vehicle commencing 22.08.2002 , official receipt for transfer fee in the name of Pastor Peter Makongoro dated 21/5/2001, an assessment note for VAT in the name of Peter Makongoro dated 15/5/2001, official receipt for motor vehicle registration fee received

from Cornelia Elaine Wamba dated 5th August, 2002, copy of Log Book number 00106411 giving the life history of the motor vehicle showing that the subject motor vehicle had first been registered as a new vehicle on 22/10/1991 in favour of Mission Aviation fellowship, that ownership moved to Pastor Peter Makongoro on the 21/5/2001 and then to Cornelia Elaine Wamba on the 5th day of August,2002, a receipt paid to the National Insurance Corporation of Tanzania limited, an accompanying document from Comesa dated the same date of 5/9/2002 and then a letter addressed too whom it may concern dated September 5,2002 signed by E.C. Wamba. A reading of the content reveals that the originator C.E. Wamba was authorizing her son Philipe E. Wamba to use the motor vehicle registered in her name and described as Nissan Patrol, registration number TZB1776, chassis number WRG460-168714 and Engine number TD42-044774.

(iii) By reason of the documentary assessment or survey in number (ii) above the court is satisfied and proceeds to make findings that:-

(a) the plaintiff had procedurally and legally vested herself with the ownership of motor vehicle registration number TZB1776 Nissan Patrol; that the plaintiff as the rightful owner of the said motor vehicle had power and the authority to authorize her late son Philipe E. Wamba to drive the said motor vehicle; that the said motor vehicle Reg. No.TZB1776 Nissan Petrol had been properly authorized to drive on Kenyan roads; that the authority to drive the said motor vehicle TZB1776 by the deceased as at the time of the accident subject of these proceedings has been confirmed by the unchallenged evidence of PW2 that indeed it is the deceased who was driving the said motor vehicle as at the time of the occurrence of the accident subject of these proceedings.

(2) It is common ground that two other vehicles were involved in the accident subject of these proceedings namely KAD 950 and KTK382.

(ii) That although the documentation on the history of the ownership of the above motor vehicle namely KAD 950V and KTK382 have not been exhibited, the court is satisfied with the content of the pleadings and evidence adduced and proceeds to make findings to the effect that the defendant was the rightful owner of motor vehicle Reg. number. KAD 950V and had rightly and lawfully authorized it to be on the road at the material time of the occurrence of the accident subject of these proceedings. Likewise the court is satisfied that the 3rd party was the rightful and lawful owner of motor vehicle Reg. No.KTK382 and had rightfully and lawfully authorized it to be on the road at the material time.

(iii) The court is also satisfied on the basis of the same documentation and evidence as in number (ii) above that the said motor vehicle namely KAD 950V and KTK382 were at the material time being driven by the servants, agents and or employees of the respective owners of the said motor vehicle.

(3) It is common ground that an accident occurred on the 11th day of September 2002, wherein the afore named motor vehicles namely KAD 950V and TK382 are alleged to have been involved. It is the findings of this court that the afore named motor vehicles were at the scene of the accident at the material time when the accident subject of these proceedings is alleged to have occurred.

(4) It is also common ground that the deceased died as a result of the fatal injuries sustained in the course of the said accident. This has been proved by the evidence of PW1 the mother of the deceased and PW2 the brother of the deceased that the deceased was in good health and that is why he was the one driving motor vehicle TZB 1776 from Tanzania and was headed to Mombasa.

(ii) In further support to the assertion in number (i) above, the plaintiff produced copies of the post mortem report found at pages 7-22 of the plaintiff bundle of documents. A perusal reveals that the Doctor who did the post mortem noted bleeding through the nostril, fracture of Right Tibia and Fibula and fracture of the right Clavicle and the Doctor concluded that the cause of death was cardio respiratory Failure due to multiple injuries/head injury. The death certificate No.669816 found at page 23 of the bundle of exhibits list the cause of death as cardio Respiratory failure due to multiple indory/Head injury. The police abstract contained both in the plaintiffs bundle of exhibits as well as the police investigation file all go to show that the deceased sustained fatal injuries as a result of the accident subject of these

proceedings.

(iii) In view of the facts assessed above the court is satisfied and makes a finding that the deceased's cause of death was as a result of injuries sustained in the accident subject of these proceedings.

(5) By reason of the death of the deceased and damage to motor vehicle TZB 1776 issue of liability and or ability to make good for the death and damage to the said motor vehicle arose for interrogation herein. The plaintiff placed blame on the defendants as owners of the motor vehicle REG. No. KAD 950V through vicarious liability for the actions of their employee/servants/agents and or driver of motor vehicle Reg. No. KAD 950V. Whereas the defendants moved the same seat of justice either shifting the entire blame or seeking contribution from the owner of motor vehicle Reg. number. KTK 382 through the same doctrine of vicarious liability on account of the actions of their employee/servant/agent and driver of motor vehicle Reg. No.382.

(6) By reason of matters afore stated in number 5 above issue of locus standi of the plaintiff to sue the defendants and that of the defendants and the 3rd party to be sued, and or joined into these proceedings became an issue. It is common ground that the right to be sued and to defend by the defendant and the 3rd party was an issue in the defence and the 3rd party notice. The defendant put the plaintiff to strict proof on the issue of ownership and vicarious liability in respect to motor vehicle registration number KAD.950V. Whereas the 3rd party put the defendant to strict proof with regard to the ownership and vicarious liability either in whole or by way of contribution with regard to the actions of the driver of motor vehicle Reg. No.KTK 382. The plaintiff has relied on the content of the police abstract produced as an exhibit to pin liability on account of ownership and vicarious liability. The abstract lists the owner of motor vehicle Reg.No. KAD 950V/2b8384 Isuzu lorry as Shreeji enterprises Kenya limited. Further reliance has been placed on the statement under inquiry of the driver who was driving the said motor vehicle at the material time namely one Jones Matheka contained in the police file. It confirms that the said Jones Matheka was an employee of the defendants and was driving as such on the material day. This stand has further been fortified by the testimony of DW1 Barrack Ochieng Odera who confirmed on oath that motor vehicle KAD 950V belonged to the defendant and that it was being driven by Jones Matheka, the 2nd defendant and it was so being driven at the material time of the accident.

(iii) With regard to the ownership of motor vehicle KTK 382, the defendant relied on the evidence of DW1 who produced the official search regarding ownership as exhibit D2. The content indicates the owner of motor vehicle KTK382 is Thiri B. Kamau. There is also the evidence of one Paul Njoroge Mwangi contained in a police statement produced herein which confirms that the said Paul Njoroge Mwangi was at the material time traveling in the said motor vehicle as a loader when the accident happened.

(iv) With regard to the locus standi of the plaintiff reliance has been placed on the documents assessed under number 6 above with regard to owhership and the mandate given to the deceased to drive it. As for locus standi to lodge the claim, there is reliance on the grant issued by the high court of Tanzania on the 24th day of April, 2003 produced as exhibit P.1. issued in cause number 2 of 2003. Resealing of the said grant in Kenya vide cause number 2371/2004 shows it was resealed on the 14th day of February,2005 gazettement of the resealed grant was made in the Tanzanan gazette on a date not indicated but the content indicates clearly that it refers to the estate of Philipe Wamba, it had been issued by the Tanzanian High Court on the 24th April,2003 at Dar-essa laam and resealed by the Kenyan High Court on the 14th day of February,2005.

(v) The submissions of the defendant and 3rd party do not insist on ousting the assertions of the ownership of the motor vehicles by their respective named owners.

(vi) The content of the police abstract, witnesses' statements in the police file and the content in the documentation with regard to the witnesses statements contained in the police file as well as the documentation on the grant of representation fall into the category of documents catered for under section 35 of the evidence Act. It provides:-

"**35(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied.**

((a) If the maker of the statement either-

(i) Had personal knowledge of the matters dealt with by the statement; or

(ii) Where the document in question is or forms part of a record purporting to be a continuous record made, the statement (in so far as the matters dealt with thereby are not within its personal knowledge in the performance of a duty to record information supplied to him by a person who had or might reasonably be supposed to have personal knowledge of those matters, and

(b) If the maker of the statement is called as a witness in the proceedings provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

2…….

3……..

4……

5……..

(vii) This court has construed the said provision of law and applied that construction to the assessment in number 1 and 6 (i)-(vi) above and the court proceeds to make the following findings on the same:-

(a) As assessed earlier on, the documentation assessed under item 1 above and as confirmed by the police abstract as well as the content of the police statements of James Wamba and Cornelia E. Wamba and as confirmed by the testimony of these two witnesses on oath in court, all go to show that the documentation with regard to the ownership of motor vehicle TZB 1776 as well as those relating to the issuance of the grant of representation to the estate of the deceased herein are public documents; that these were made in the course of public duty, they were based on information supplied by persons who had knowledge of the information forming the content of the said documents on this basis the court finds that:-

(ii) as found earlier on the plaintiff Cornelia E. Wamba is the owner of motor vehicle Reg. No.TZB 1776.

(ii) That she had authorized the deceased to drive it.

(iii) That she has locus standi to file suit for damages with regard to its destruction.

(b) As for locus standi to file suit on behalf of the deceased herein, the court is satisfied that the grant issued in Tanzana and resealed in Kenya is valid and is sufficient to bestow locus standi on the plaintiff to present the current proceedings on behalf of the plaintiff and the estate of the deceased.

(c) The content of the police abstract as confirmed by the evidence of DW1 Odera, and as supported by the police statement of Jones Matheka (deceased) all go to confirm that the first defendant Shreeji enterprises limited is the registered owner of motor vehicle Reg. No.KAD 950V. That it was being driven by one Jones Matheka on the material day and time as an employee/agent/servant and or driver of the first defendant. There is therefore locus in both the 1st and 2nd defendant to be sued and for them to defend as such.

(d) As for the locus standi of the third party herein, the unchallenged content of exhibit D2 being a copy of records from the Registrar of Motor vehicles with regard to the ownership of motor vehicle Registration number KTK 382 coupled with the 3rd party's failure to call evidence to controvert the content of exhibit D2 coupled with the statement of one Paul Njoroge Mwangi a loader, that on the material date and time he was in motor vehicle KTK 382 when the accident occurred all go to confirm that the 3rd party has locus standi to be sued by the defendants or for the defendants to seek contribution from the said 3rd party and for the 3rd party to defend the said 3rd party notice with regard to liability for the causation of the accident and liability for contribution in favour of the defendants.

(7). upon establishment of the locus standi of the parties to sue and to be sued as well as to defend the court proceeds to make an assessment of the facts on the issue of liability as between the said parties.

(i) From the facts the vehicle which set off the chain of events which led to the causation of the accident is KTK 382 according to the statement of Paul Njoroge Mwangi the loader in KTK 382 in summary, is that as they passed Maingu their lorry KTK 382 had a front tyre burst. The lorry started zig sagging. The driver tried to control the lorry but could not and it moved onto the right hand opposite direction and moved about 10 meters and stopped. At the front, there was a lorry coming from Mombasa direction, swerved on the right to avoid colliding with their lorry and before he alighted from his lorry he saw dust coming from behind and this was 10 meters from his lorry. He noticed that the lorry had an accident with a small car which was behind them…"

Another witness Boniface Ndusi Saheeh who was in motor vehicle KAD 950V/ZB8394 said he was asleep and noticed nothing. Jones Matheka the driver of motor vehicle KAD 950V in his statement under inquiry says that on the material dates the weather condition was fine and there was moderate traffic on the road. The stretch of the road was straight and he was going at 60km per hour. On reaching the location of the accident, he recalls seeing an on coming lorry from the opposite direction from a distance of about 100 meters. He does not know whether there was any other motor vehicle following the lorry Reg. No.KTK 382/ZA6608 M/Benz. Just as he was about to bypass with the on coming lorry it was suddenly driven towards his lane. He does not know why the on coming driver drove towards his lane and since a head on collision was imminent he drove towards his extreme right suddenly another motor vehicle Reg. No.TZB 1776 appeared in front which was following the lorry which drove into his lane and since it was so sudden he applied brakes to no avail.

It is appreciated that this evidence from the loader in KTK 382 and the 2nd defendant was not tendered on oath not tested in cross examination and for this reason its evidential value is watered down.

In contrast to the above we have the statement of James Wamba also contained in the police file. In it the witness says that their vehicle was going at 80Km per hour. The stretch of the road was straight and slightly ascending towards Mombasa. They were trailing a lorry whose registration number he could not immediately tell. The said lorry suddenly started wavering on the road and then veered off towards the right as you face Mombasa direction. He recalls seeing the lorry right front tyre having burst. As they were by passing the lorry with the tyre burst, another lorry whose registration he could not immediately tell appeared from the opposite direction. Since the lorry with a tyre burst was partially on the lane used by traffic from Mombasa, the on coming lorry was driven towards the lane they were using. Their driver steered towards his extreme left but the on coming lorry was also driven towards the same direction. The lorry hit the front right of their vehicle causing the vehicles to fuse together and in the process their driver and Athman Rashid were trapped in the vehicle…. The truck driver who hit their vehicle contributed to the accident. The statement is signed but no date is given.

It his testimony in court in chief PW2 James Wamba stated that they were behind a truck which was moving very slowly. The truck drifted towards the right into the opposite lane and went off outside the road. There was another truck going into the opposite direction. He came towards them. His brother tried to move off the road to the left to avoid him but he came and collided with them just off the road on the left. PW2 went on to state that when the truck a head of them veered off the road to the right, he could see as if the left tyre was flabby and assumed he was going off because of the tyre burst. It was also his left. PW2 was not sure about the speed but they were going lower than most vehicles on the road. They had

been behind the truck for 2 minutes. He could not recollect well but may be they were going at 60km per hour. But was sure that they collided off the road. They rode on a pumby road. The truck a head of them kept on getting bigger and bigger and then smashed into them. After the smash, the lorry pushed them backwards for 10-15 meters and then stopped at an angle. The truck on his right veered off - most of the road. The flabby rubber was still rumbling on and raising dust on the side of the road and so it was still in motion. … the impact was at an angle. PW2 went on to state that when the truck with the flabby tyre went to the right it did not contribute much. It is his testimony that the impact truck had no business going off the road. Had he remained on the road it would have been okay.

When cross-examined PW2 stated that the truck a head of them suddenly shifted to the right and then went off the road. He did not see him waver on the road. He just drifted off the road. He saw the on coming vehicle was 50 meters away. They had been driving for 4 hours. The deceased slowed down. Their vehicle was behind the truck for 2 minutes. He could only see the behind of the truck. They were in this condition for 4-5 meters which distance could not allow PW2 to see what was happening at the front. The truck a head of them was faster than their vehicle. It was also faster than the truck going off the road. It is his testimony that the deceased saw the on coming truck and then asked **"what is this guy doing?"** and then tried to get off the road and then the collision just happened in seconds. It was less than 10 seconds when they realized he would smash into them and 2 seconds to the smash. To him if the on coming truck had remained on the road they could have avoided the accident. Further that even if the deceased had stood on the road there still would have been an accident. But from a different angle. He assumed the lorry a head of them was off the road because of the dust and that is why his sketch plan shows the lorry with the tyre burst standing off the road.

DW2 Emmanuel Daudi. He was off the road said he was 150 meters away when the tyre burst. The vehicle whose tyre burst was headed from Nairobi to Mombasa. Upon the tyre bursting, the truck veered off to the right into the lane of vehicles heading to Nairobi. The defendant's vehicle headed to Nairobi veered to its right to avoid collision with the lorry whose tyre had burst and in the process swerved into the lane of vehicles heading to Mombasa. It met the Nissan coming from Nairobi and collided with it off the road.

When cross-examined DW2, stated that the defendant's motor vehicle had passed him. The tyre burst was 150 meters away. From the tyre burst to the collision was just a short moment. It is DW2s evidence that after the tyre burst the lorry went off the road but not the trailer. DW2 was on the right as you face Nairobi. The defendant's vehicle had gone 100 meters from him when he heard the tyre burst. He saw dust but not much.

The sketch plan exhibit 28 was drawn by PW2. It has no measurements. The sketch plan drawn by the police contained in the police file indicates KTK 382 rested on the right as one faces Mombasa. It is noted that no skid marks were noted. It appears to be on the road. It shows that KAD 950V moved on the right as you face Nairobi for a distance before skidding off the road and colliding with TZB 1776. No skid marks were noted for TZB 1776.

The court has also traced inspection reports in the police file. Motor vehicle Reg. No.TZB 1776 had no pre accident defects but had extensive damage on the steering mechanism, wind screen, Bonet, Body roof, near side door, rear body and chasis was bent. Motor vehicle Reg. No. KAD 950V had no pre accident defects but had damages on the Radiator, front body panel- Bamber bar, off side door, front head lamp. The trailer being pulled by KAD 950V had no pre accident defects or any damages noted on the body where as KTK 382 had no pre accident damages on the vehicle except that there was noted the off side front tyre burst which was opined that the tyre burst could have contributed to the cause of the accident. The trailer being pulled by KTK 382 had no pre accident defects nor any damages noted on it.

There is also the content of the investigation diary in which notice of intended prosecution was served on to the 2nd defendant by PW5 IP Mwangombe who said it was routine to issue the notice of intention to prosecute involving fatal accident. But to his recollection the 2nd defendant was never prosecuted in any court of law. The investigating officer recommended an inquest to be held but none was held.

There is also evidence of an expert assessment tendered by DW4. In summary DW4 looked at the records and came to the conclusion that the 2nd defendant was blame less. The action the 2nd defendant took to veer right into the path of an on coming vehicle which also veered into its left lane in the same direction that KAD 950V had veered into but in an opposite position is the best that KAD 950V could have taken in the circumstances. Instead DW4 placed blame on the deceased because if he had not made a move an accident would not have happened. 2ndly if the deceased had been driving at a moderate speed he would have been able to stop on the road. 3rdly both the impact and the damage would not have been so great let alone being fatal.

This court has given due consideration to the afore set out assessed evidence with regard to liability and the court proceeds to make the following general observations on the said evidence on the causation of the accident before finally determining liability.

(a) That all the three motor vehicles involved in the accident namely TZB 1776, KAD 950V and KTK 382 were all road worthy as they had no pre-accident defects with the exception of the condition of the tyres as the inspection reports did not mention the conditions of the tyres.

(b) The accident occurred late in the afternoon but it was not dark. It was still day light. The witnesses who gave statements and testified as eye witnesses stated that visibility was clear.

(c) There is admitted discrepancy with regard to the exact timing of the accident as regards the timings given by the eye witnesses namely PW2 and DW2 and that given by the police in the OB. Weighing the two versions together the court chooses to believe the version of the eye witnesses that the accident occurred in the evening before dark and that visibility was clear.

(d) The weather was good as there is no indication of any rainy or situation of presence of fog.

(e) The condition of the road was also good as admitted by the 2nd defendant in his statement under inquiry.

(f) KTK 382 had its front right hand side tyre bursting forcing it to waver on the road and then zigzagging off the road wholly as per the evidence of PW2 and his sketch plan and partially as per the evidence of DW2 and wholly on the road as per the content of the police sketch plan.

(g) Whether KTK 382 went off the road completely or partially, it is evidently clear that it caused obstruction to KAD 950V as this was its rightful lane as you approach Nairobi from Mombasa. Even if it can be said that it is only the lorry which went off the road leaving its trailer on the road, there was still obstruction as this lane which was the lane of motor vehicles headed to Nairobi from Mombasa were to use was not available for their use.

(h) It is undisputed that the right front tyre of KTK 382 busrt case law assessed herein states clearly that in order to place blame worthiness for the causation of an accident as a result of a tyre burst, it is material to establish the road worthiness of the tyre as against the condition of the road. Herein PW2s' unchallanged evidence is that the condition of the road was good. As against the burst tyre, there is no evidence to show as to why the tyre burst. No evidence was adduced by the 3rd party with regard to its durability or how long it had been on the road and how many miles it had done. For this reason the court makes a finding that in the absence of any evidence to the contrary the only probable reason for the tyre burst on a road surface described to be good is because of its poor states of maintenance. The duty to maintain tyres and ensure that these are serviceable before they are put to use on the road is on the owner of the motor vehicle making use of the particular tyre.

(i) Hand in hand with the duty of ensuring that the tyre is serviceable before it is put to use on the road is the duty for the owner to know that an unserviceable tyre causes danger not only to the occupants of the particular motor vehicle but also to other road users of the same road may they be off the road, or travelling in the same direction or opposite direction of the vehicle making use of the tyre and in the process making the danger of damage arising from such a tyre burst not only foreseeable but probable.

(j) With regard to the person using such an un road worthy tyre, there is a realization that speed of the vehicle needs to be controlled in such away so that in the event of any sudden tyre burst, the driver of the vehicle whose tyre has burst will be able to control the vehicle and bring it to a safe stop as soon as he experiences a tyre burst without necessarily causing damage to either the vehicle whose tyre has burst or to any other vehicle or person near by.

(k) The court is alive to the fact that parameters of good mannerism on road usage are set by the high way code. The court was available a copy and upon scheming through them reveals that road users are obligated to ensure their vehicles are road worthy, drive carefully with regard to the best interests and welfare of other road users; keep safe distance from the vehicle a head of them and passing on their side, be attentive and be on the look out for any dangerous situation that may arise in order to take quick action to avoid an accident or damage not only to their own vehicles but also to vehicles of other road user. In this regard the owner and driver of KTK 382 was duty bound to ensure that in the event of any tyre burst, he should be able to bring it to a safe stop on its rightful side of the road. The fact of KTK 382 having sig zagged and wavered on the road and then went off into the wrong lane either partially or wholly it must have been speeding and that is why it could not be contained on its side. As for TZB 1776, it was supposed to anticipate tyre bursts, motor vehicles zigzagging and wavering on the road as a result of a tyre burst. It means that the moment the deceased saw the vehicle a head of him wavering on the road or zigzagging and hearing the sound of a tyre burst and the raising of the dust he should have brought his vehicle TZB 1776 to a safe stop on the left side of the road. PW2s evidence is that they continued on. The fail of the deceased proceeding on and hoping that things would sort themselves out was an act of both miscalculation and in advertence. There is nothing to show that had TZB 1776 stopped and or gone off the road immediately KAD 950v would not have passed safely. As for KAD 950V the 2nd defendant ought to have anticipated such dangers on the road caused by tyre burst resulting in the vehicles from the opposite side wavering on the road. He should have driven in such away so as to be able to be on the look out on any unusual behavour for the other vehicles on the road. Had the 2nd defendant been attentive to this, he would have noticed the unusual behavior of KTK 382 in moving from its side of the road into the 2nd defendant's lane. Had he been this attentive then he wound have brought KAD 950V to a safe stop considering that KTK 382 partially went off the road wavering or zigzagging instead he just continued on. The 2nd defendant stated in his statement that it was too sudden to stop. The 2nd defendant was expected to be a prudent driver and to be able to apply brakes safely and bring his vehicle to a safe stop. Had he done so he would not have veered to the right lane which was a wrong lane for him to veer into.

(l) Road users are also expected to drive in such a manner so as to be able to take an evasive action in the event of being confronted by an emergency and they are not in a position to stop safely on the road. Applying this requirement to the actions of the three drivers herein, the court finds that in the absence of evidence that the driver of KTK 382 took any evasive action, the only reasonable inference that this court can draw from the facts is that the said driver took no evasive action. As for TZB 1776 the driver rightly swerved to its left upon sensing danger in order to avoid the imminent on coming KAD 950V. As observed earlier on TZB 1776 should have stopped on Seeing KTK 382 wavering a head of it and that may be, had such an action been taken may be TZB 1776 would have been driven off the road a few meters behind the said vehicle, may very well have not collided with KAD 950V. As for KAD 950V, had it not been driving at a speed and upon seeing the motor vehicle KTK 382, the 2nd defendant should have stopped. Had he stopped then he would have realized that KTK 382 had gone off the road only leaving the trailer on the road. He would then have noticed the approach of TZB 1776 and then remained stationary on its rightful side. The court has no doubt that TZB 1776 would have been left to proceed on its journey safely to give way to KAD 950V to move to its right way safely, maneuver around KTK 382 trailers obstruction on the road and then proceed on.

(m) The court is alive to the expert evidence of DW4 and but the submisions submitted by the plaintiffs and 3rd party's counsels' assertion that DW4s evidence should be treated with caution. The reason being that DW4 did the assessment from the court record; he was never even taken to the scene to make measurements for himself and form an opinion. He did not interview the eye witnesses as well as the police officer who drew the sketch plan. For this reason the court is of the opinion that the assessment from the records cannot operate to oust the observations made by eye witnesses as well as the police

officers who attended the scene.

(n) Lastly to be resolved is the competence of the evasive action taken by both the drivers of TZB 1776 and KAD 950V. It is undisputed that TZB 1776 swerved to its rightful left. It is also undisputed that KAD 950V swerved to its wrong side and in the process a collision occured. Weighing the two actions the court finds that KAD 950V by swerving to its wrong side in the wake of failure to take other precautionary measures mentioned above, its action amounts to nothing but an attempt to do its incompetent best. It matters not that the 2nd defendant did not see TZB 1776 because it was towered by KTK 382 trailer. TZB 1776 was anticipated on the road and knowledge of presence of invisible small vehicles behind towering vehicles from the approaching lane is not remote as that is why it is a mandatory requirement of the high way code that one should only venture out when he/she venture out of its lane. KAD 950V failed to do.

(o) There was also the issue of application of the doctrine of Resipsa Loquitor. Case law of assessed to the effect tat where this doctrine has been pleaded. In order to escape liability it is mandatory for the defendant to demonstrate that no negligence is attributable to their actions. By reason of the reasoning made above there is no way the defendant can claim that no negligence can be attributed to them with regard to the causation of the accident subject of this judgment.

From the afore set out assessment, the court makes a finding that the driver of TZB 1776 bears no blame in the causation of the accident subject of these proceedings because although this court has made a finding that he could have kept a safe distance and stopped to watch the out come of the wavering behavior of KTK 382 instead of just driving on, his action of swerving to his left which was his correct side of the road to take an evasive action to was in the circumstance not only proper but also a competent action for him to take. The burden of blame worthiness thus falls on the shoulders of the defendant and the 3rd party with the greater blame going on to the defendants for the reasons given in the assessment. The court therefore apportions liability at 60% as against the defendants and 40% as against the 3rd party. Upon establishing liability, the court now proceeds to make an assessment of damages both special and general.

SPECIAL DAMAGES

The law governing assessment of damages of this nature has now been crystallized namely that these have to be specifically pleaded, particularized and strictly proved. See the case of **OUMA VERSUS NAIROBI CITY COUNCIL (1976) KLR 297** and as crystallized by the decision of the court of appeal in the case **of HANN VERSUS SINGH (1985) KLR 716** where in the court specifically stated that:-

"**Special damages must not only be specifically claimed but also strictly proved, the degree of certainity and the particularity of proof required deponed on the circumstances and the nature of the acts themselves"**

This court has applied these principles to the plaintiff's special claim and it proceed to make the following findings on the same:-

(i) with regard to the amount claimed for the obtaining of letters of Administration in Tanzania and resealing of the said grant in Kenya of Kshs.30,000.00, indeed no receipt has been produced. There is however proof of the obtaining of the grant and the resealing of the same in Kenya has been given. The court has judicial notice from the exercise of its judicial function of the fact that these are not usually issued free of charge but upon payment. The plaintiff indeed paid for them. Lack of production of a receipt is no justification for with holding the claim. Save that in the absence of a receipt the amount claimed has to suffer a reduction to cater for any margin of error. For this reason the court exercise its judicial discretion and for the sake of fairness to both parties it allows Kshs.25, 000.00 under this head.

(ii) Kshs. 100.00 for the cost of the police abstract is allowed as prayed as this court has judicial notice of the fact that this is usually the cost of the abstract.

(iii) As for funeral expenses, the defence and 3rd party have no issue with the cost of Kshs.10,000.00 for followers whose receipt was exhibited. The court therefore allows Kshs. 10,000.00 for this item. The others being the cost of the coffin and air fare were disputed for the sole reason that no receipts were produced. The court cannot ignore the deceased was a resident of Tanzania. He died in Kenya, PW1 and 2 stated clearly that funeral service was held in Tanzania. There is nothing to show that the cortege left by road. The court will apply the same reasoning is number (i) above for allowing the claim for cost of air fare. It allows kshs.230, 000.00 under this head. As for the cost of the coffin there is no other way the body of the deceased could have been transported without a coffin. The court allows Kshs.15, 000.00 for this item.

(iv) As for the cost of the loss of motor vehicle and assessors fees, the defence and 3rd party have no objection to the court basing its findings on the findings in the assessors report produced herein. The pre accident value determined was Kshs.560, 000.00 less salvage value of Kshs.50,000.00 leaving a balance of Kshs.Kshs. 510,000.00 as special damages for the loss of the motor vehicle. As for the assessor fees the court takes judicial notice of the fact that such assessments are not usually free of charge. There is however only one receipt exhibited of Kshs.6, 000.00 which the court will allow.

GENERAL DAMAGES

The guiding principles for assessment of general damages that this court has judicial notice of are as follows:-

(i)Being damages at large, the assessment of this nature of damages is at the discretion of the court which discretion has to be exercised judiciously.

(ii) These should not be in ordinately too high or too low.

(iii) These are meant to compensate the victim for the injury suffered and not to enrich the victim.

(iv) Each case depends on its own set of facts and where past awards are cited for the courts' guidance, the court has to bear in mind the age of those awards, the strength of the Kenyan shilling when they were made and the strength of the Kenyan shilling as at the time the decision is being made and the rate of inflation.

These have been claimed under three heads namely pain and suffering before death, loss of expectation of life and los of dependency.

(a) Pain and Suffering before death.

The court bears in mind that the deceased was pronounced dead upon arrival at the hospital. It is not however indicated how far the hospital was from the scene of the accident or how long the deceased stayed at the scene before being taken to hospital. That not withstanding it is not disputed that the deceased suffered pain before death. The cited cases on this head gave awards ranging from Kshs.10, 000.00 to 30,000.00. They are around 30 years old. Doing the best it can the court awards Kshs.50,000.00 under this head.

(b) Loss of expectation of life under the law reform Act.

The court has judicial notice that courts' usually award a conventional figure under this head varying between Kshs.60, 000.00 to kshs.100,000.00. The court bears in mind the suggestion made by the disputants on what to them is a reasonable award. It also bears in mind the fact that there is no hard rule that the conventional figure cannot change and go beyond Kshs.100, 000.00. Considering the age of the cases cited to court for guidance with regard to this head and the strength of the Kenyan shillings when they were made and now the court is of the opinion that in the interest of justice to both parties. The court therefore makes an award of kshs.150, 000.00 (one hundred and fifty thousand) Kenya shillings under this head.

(c) <u>Loss of dependency.</u>

The court takes note of the content of the evidence adduced, the documents tendered in evidence with regard to the earnings of the deceased as at the time of death. The potential of these earnings growing to greater hights considering that the deceased had not only a bright future in his journalism career but had also proved to be a brilliant journalist who had worn not only awards for his brilliant work but had also worn the recognition of Foundations one of which was funding a research project being carried out by him. And even after his death it was found necessary to ensure that his name and prominence lives on leading to the introduction of an award scheme to other persons in this profession in his memory. There is no doubt he had a bright future.

The deceased was aged 31 years of age. He was not married but was engaged and intended to marry the following year. He had grand parents he used to support who were said to have been very old. His father was semi retired. The mother was in gainful employment as at the time of death but had retired as at the time of trial. It was the plaintiff's testimony that indeed the deceased supported them and many others as he was very generous.

With regard to assessment parties submitted on three fronts namely the ratio the multiplier and multiplicand and the income. On the multiplier the plaintiffs counsel has argued that considering that there is no retirement age in the journalism profession, the deceased could have been productive in his profession as long as he wished and for this reason the plaintiffs counsel suggested a multiplier of 34 years. Whereas the defendants suggested a multiplier of 19 years and the 3rd party who had concurred with the defendant at 19 years backed out and suggested a multiplier of 10 years.

This court has given due consideration to the afore set out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles.

(a) The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason.

(b) It is common ground that since the deceased was not permanently employed in an establishment with a retirement age bracket for its staff it is not possible to fix a retirement age.

(c) The nature of the profession engaged in also counts. Herein it is common ground that there is no fixed retirement age in the profession of journalism. One can work as long as he wished.

(d) Death through natural causes and departure for greener pastures elsewhere is also a factor.

Applying these to the rival arguments herein the court finds 10 years is too law. While 34 years is on the high side considering existence of possibility of death through natural causes. 19 years is moderate but slightly low. In this courts opinion a multiplier of 25 years is not only appropriate but fair to both sides.

As for the deceased income indeed income tax returns were produced a exhibits. All the three partys participating in these proceedings have relied on the income tax returns filed by the deceased for the period he was in gainful employment back in the USA and the documentation of his earnings from the Foundation which had detailed him to carry out research on their behalf. The plaintiff suggested a figure of US Dollars 105,336.00.

The defendants on the other hand basing their assessment on the same set of documents and for the reasons given by them suggested a figure of US Dollars 60,000.

The 3rd party also basing their assessment on the same set of documents and for the reasons given by them in their submissions suggested that the average income for the 4 years the deceased earned a regular income should be taken as the working figure of US Dollars 57,228.50.

This court has given due consideration to the afore said rival arguments on the choice of the multiplicand

and the court is of the opinion that indeed the average income is a possible working figure. But an element of increase in the average figure to take into consideration a possible growth in the earnings of the deceased had the deceased lived on cannot be ignored.

Herein there is nothing to show that the deceaseds' earnings would not have grown considering his excellence and brilliant performance in the profession not withstanding the fact that he had just started working in this profession. The court applies the same principles as those applied when making the choice of a multiplier. The court finds the figure suggested by the plaintiff rather on the high side. Where as that made by the defendant and 3rd party is slightly low. The court chooses an average of the two which is US Dollars 90,000.00.

As for the ratio of dependency both the plaintiff and the defendant are agreeable to the ratio of 2/3rds. Where as the 3rd party suggested a ratio of 1/3rd but no reasons were given for their departure. Due consideration has been made with regard to the afore set out rival arguments on the applicable ratio and the court is satisfied that the ratio of 2/3rds is appropriate. Loss of dependency will work out as US Dollars 90,000x25x2/3 which comes to US Dollars 1,500,000.00.

For the reasons given, the court makes the following final orders.

1. LIABILITY.

Judgment is given in favour of the plaintiff as against the defendants and 3rd party on liability as follows:-

(a) The driver of TZB 1776 bears no percentage blame for the causation of the accident.

(b) The 1st and 2nd defendant bears 60% (percent) liability in favour of the plaintiff.

(c) The 3rd party bears 40% liability in favour of the plaintiff.

2. **DAMAGES- SPECIAL**.

(h) Cots of obtaining letters of administration in Tanzania and resealing of the grant in Kenya Kshs.Kshs.25,000.00.

(ii) Cost of abstract KSHS.100.00.

(iii) Transport expenses to Tanzania Kshs.230, 000.00.

(iv) Cost of flowers Kshs.10, 000.00.

(v) Pre accident value of the motor vehicle TZB 1776 Kshs.560, 000.000 less salvage value of Kshs.50, 000.00 leaving a balance of Kshs.510,000.00.

(vi) Cost of assessors report Kshs.6, 000.00.

Total Kshs.776, 100.00.

(b) The defendants to pay 60% being Kshs.465,660.00.

(c) The 3rd party to pay 40% being Kshs.310, 440.00.

3. GENERAL DAMAGES

(a) Pain and suffering Kshs. 50,000.00. (fifty thousand only)

(i) The defendant to pay 60% being Kshs.30, 000.00.(thirty thousand only)

(ii) The 3rd party to pay 40% being KSHS.20, 000.00(twenty thousand only)

(b) Loss of expectation of life Ksshs.150, 000.00.(one hundred and fifty thousand only)

(i) The defendant to pay 60% being Kshs.90, 000.00 (ninety thousand shillings only)

(ii) The 3rd party to pay 40% being Kshs.60, 000.00 (sixty thousand) shillings only)

4. Loss of Dependency

US Dollars 1,500,000.00.
(i) The defendant to pay 60% being US Dollars 900,000.00.

(ii) The 3rd party to pay 40% being US Dollars 600,000.00.

5. Interest.

(a) Special damages will carry interest at court rates from the date of filing till payment in full.

(b) The general damages will carry interest at court rates from the date of judgment till payment in full.

(i) The defendant to pay 60%.
(ii) The 3rd party to pay 40%.

6. **Costs.** The plaintiff will have costs of the suit.

(i) The defendants to pay 60%.

(ii) The 3rd party to pay 60%.

SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE-JA

DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 21ST DAY OF SEPTEMBER, 2012.

JUDGE