REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Application 2077 of 1999

PHYLLIS WANGOI NJAU (Suing as the administrator of the estate of James Njenga Njau(Deceased):::PLAINTIFF

VERSUS

PELICAN HAULAGE CONTRACTORS LTD:::DEFENDANT

JUDGMENT

The plaintiff **Phyllis Wangui Njau** approached the seat of justice in her capacity as the administrator of the estate of James Njau Njenga deceased. The action is brought by way of a plaint dated the 6th day of October, 1999 and filed on the 29th day of October, 1999. The action is brought against the defendant Pelican Haulage Contractors Limited. In a summary, the plaintiff avers that the action is brought by the plaintiff in her capacity as the widow of the deceased James **Njenga Njau** for the benefit of the dependants of the said deceased under the provisions of the Fatal accidents Act chapter 32, laws of Kenya and for the benefit of the estate of the deceased under the law Reform Act chapter 26 laws of Kenya; that at all the material times the defendant was the registered owner of Motor vehicle registration number KXN041; that on the 17th day of September,1997, along Langata Road Nairobi, the deceased was lawfully driving his motor vehicle registration number KAE.126P when the defendants' driver, servant, employee and or agent so negligently managed and or controlled motor vehicle registration number KXN.104, that he caused the same to collide with motor vehicle registration number KAE 125P, as a consequence of which the deceased was fatally injured. The particulars of negligence relied upon are given as driving the defendants said motor vehicle without due care and attention, driving the said motor vehicle at a speed that was excessive in the circumstances, causing the said motor vehicle to ram into the deceased's' said motor vehicle; failing to see the deceased's' motor vehicle in sufficient time to avoid the said collision or at all, failing to apply brakes of the defendants' said motor vehicle sufficiently and/or in time to avoid the said collision or at all, failing to maintain any, or any adequate control of the defendant's said motor vehicle, failing to have any or any sufficient regard for the safety of the other road users, failing to stop, to slow down, to swerve or in any other way to steer, manage or to control the defendants said motor vehicle so as to avoid the said accident. Further that the plaintiff would also rely on the provisions of the traffic Act, Rules and regulations made there under and the High way code as well as the doctrine of Resipsa Loquitor.

The plaintiff goes further to aver that the deceaseds' dependants on whose behalf the action is brought are enumerated as **Peris Mumbi Njau** a daughter, **Hannah Wambui Njau**- a daughter, **Kibunja Njenga** a son of the deceased and **Phyllis Wangoi Njau** wife of the deceased. The plaint goes further to aver that the deceased was aged 42 years of age, he was in good health and living a happy and prosperous life which was cut short by the action of the defendants' complained of. As at the time of his death the deceased was in gainful employment earning kshs,150,000.00 per month.

In consequence thereof the plaintiff claimed from the defendant special damages for hospital

expenses , funeral expenses and Doctors' fees to the total tune of Kshs.360,000.00, General damages under the fatal accidents Act and the law reform Act, interest on the amount claimed and the resulting amounts claimed at court rates from the date of Judgment until payment in full, costs of the suit and such further or other reliefs as this Honourable Court may deem fit to grant.

The defendant was served, entered appearance and defended the plaintiffs' claim vide a defence dated the 8th day of May, 2000 and filed on the 12th day of May, 2000. In a summary, the defendant denied that it was the owner of motor vehicle registration number KXN041, that the said motor vehicle was involved in an accident on the date and at the place as set out in paragraph 4 of the plaint, that the plaintiff has locus standi to bring this suit, all the particulars of negligence attributed to them and put the plaintiff to strict proof.

In the alternative and without prejudice to the foregoing averred that if the said accident occurred which was denied, then it was solely caused or substantially contributed to by the negligence of the driver of motor vehicle registration number KAE126P who so negligently drove, managed and or controlled the said motor vehicle that caused the alleged accident. The particulars of negligence attributed to the deceased are given as driving at an excessive speed in the circumstances, failing to keep any or any proper look out for other road users on the said road, failing to have any or any sufficient regard for other traffic that might reasonably be expected to be on the said road, failing to take any or any adequate precaution while driving the motor vehicle on the said road, failing to brake, swerve, slow down or in any other manner manage the said vehicle so as to avoid the accident; driving without due care and attention, colliding with motor vehicle registration number KXN041.

The defendant went on further to deny that the doctrine of Resispsa Loquitor is of any relevance to these proceedings and put the plaintiff to strict proof; that he has no knowledge and make no admission of the particulars of loss and damage allegedly suffered by the plaintiff as set out in paragraphs 5 and 6 of the plaint; denied that the plaintiff is entitled to damages for the reasons advanced. In consequence thereof prayed for the dismissal of the plaintiff's claim against them with costs to them.

Parties were heard. The plaintiff called two witnesses namely **Phyllis Wangui Njau** as (PW1) and **Peris Mumbi Njau** as (PW2). The sum total of their testimony is that (PW1) is the widow of the deceased and she is also the plaintiff herein while PW2 is a daughter to (pw1) and the deceased. Both were not at the scene of the accident as PW1 was away in Kisumu on duty, while PW2 was in their house. Neighbours informed PW2 about the deceased father having been involved in an accident. She left for Mater Hospital where on her arrival found the deceased admitted and in a coma. PW1 also learned of the accident upon arrival from Kisumu. She also visited the hospital and found the deceased on a life support machine and he died shortly thereafter. PW1 confirmed that the deceased was an advocate of the High of Kenya with a private practice, but she does not know how much he earned from his private practice but all she knows is that he earned enough to make his family comfortable. She produced exhibits in support of her case.

The defence tendered no evidence but consented to the production in evidence of the police abstract, motor vehicle, Registrars copy of records and lastly interim medical bill from Mater Hospital.

Parties filed written submissions. Those of the plaintiff are dated the 30th day of September,2010 and filed on the 30th day of September,2010. The salient features of the same in a summary form are that;- The plaintiffs' case is uncontroverted, and the evidence tendered by the plaintiff as well as the documentary exhibits produced are sufficient to prove the plaintiffs claim; their reliance on the doctrine of Resipsa Loquitor is sound as it is uncontroverted that the death of the deceased was not controvetred, the police abstract gave details of the accident, the police abstract disclosed that the defendant was the owner of the accident vehicle registration number KXN041 which caused the accident .

That indeed there was no eye witness and that not withstanding, the plaintiff has proved that the deceased was in good health and he died as a result of the accident subject of these proceedings. The said accident was occasioned by the defendant as per the content of the police abstract and the copy of records from the Registrar of motor vehicles office. The court is invited to believe the authenticity of these documents in

terms of the provisions of section 81 of the evidence Act cap 80 laws of Kenya. The same position applies to hospital receipts and bills.

Argued further that the plaintiffs has locus standi to present the action complained of as she holds a grant of letters of administration to the estate of her deceased husband, that the action of her not joining the co administrator as a co plaintiff does not invalidate the suit as there is no requirement in law that both joint administrators must sue jointly; that in the absence of any evidence to the contrary the accident herein occurred as pleaded by the plaintiff; that even if the plea of negligence advanced by the plaintiff as the course of the accident does hold, the doctrine of Resipsa loquitor operates to shield the plaintiffs claim as the doctrine operates to shift the burden of proof on to the opposite party, which the defendant did not discharge as the defence adduced no evidence. Lastly that on the basis of the pleadings, evidence adduced, and the exhibits produced, the plaintiff has established basis for her claim both under the fatal accident Act as well as the law reform Act.

On quantum, the plaintiff's counsels suggested payments of Kshs.200, 000.00 for pain and suffering, loss of expectation of life Kshs.300, 000.00, loss of dependance Kshs.39, 600,000.00 and special damages of Kshs.360, 000.00.

The defendant's submissions on the other hand are dated the 14th day of Januuary, 2009, and filed on the 15th day of January, 2009. The salient features of the same are that:- the plaintiffs' capacity to sue is denied because it contravened the provisions of order XXX rule (2) as it was then as there is a requirement that where a suit is to be filed all the administrators have to be made party to it; that since PW1 and PW2 were not present during the occurrence of the accident, it was necessary for the plaintiff to call evidence to confirm not only the occurrence of the accident but also the causation thereof; that they concede that indeed the defendant called no evidence at the trial but that not withstanding, the burden of proof was on the plaintiff to prove her claim on a balance of probability; that they contend that the plaintiff called no evidence to prove the particulars of negligence relied upon by them to prove either 100% liability as against the defendant or by way of apportionment of any blame of whetever percentage as between the defendant and the deceased; that there is nothing to prove that the plaintiff is a widow of the deceased and for this reason, she stands non-suited in so far as the claims under the fatal accidents Act and the law reform Act cap 32 and ,26 of laws of Kenya are concerned.

On quantum, the defence contended that the same is not available to the plaintiff firstly because the basis for awarding it has not been laid; secondly no documentary proof was tendered to support the special claim.

On case law, and the law, the plaintiff referred the court to the text of clerk & Lindsell on Torts, Eleventh Edition page 399 Pr.646 wherein there is observation on the doctrine of Res ipsa loquitor thus:-

"Although the onus of proof of negligence lies on the party charging it, in some circumstances the mere happening of an accident affords prima facie evidence that it was as the result of want of due care on the part of the defendant. There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care."

On case law there is reliance on the case of **Ndungu versus Coast Bus Co. Limited (2000) 2EA462** wherein it was held inter alia by the court of appeal that:" **The employers liability largely depended on the pleadings and the evidence in support of the claim";** the case of **Kimotho versus Kenya Commercial Bank (2003) 1EA 108** wherein Mbaluto J as he then was held inter alia that:-

"**Failure by a party to call as a witness any person whom he might reasonably be expected to call if that persons' evidence be favourable to him may prompt a court to infer that, that persons evidence would not have helped the parties case…";** the case of **Jackson Magata Kiritu (personal representative of the estate of Loise Nyambura Magata versus Charles Cheruiyot Keter Nakuru**

Civil suit No.437/1996 decided by S.C. Ondeyo J as she then was on the 8th day of February, 2002 wherein liability was apportioned at 50% as against the plaintiff and 50% as against the defendant. The court with regard to a deceased person who was a girl aged sixteen years awarded Kshs.10,000.000 for pain and suffering, Kshs. 150,000.00 for los of expectation of life, Kshs.160,000.00 for loss of dependency and special damages of Kshs.25,344.50 all of which were to suffer a 50% reduction. The case of **Alice Mboga (for the estate of Tom Mboya Oyaro (deceased) versus Samuel Kiburi Njoroge Nakuru HCCC No.357 of 1999** decided by D.M. Rimita J as he then was on 21/9/2001 in a claim arising from a fatal accident of the deceased who was aged 53 years of age. He did not die on the sport. The court awarded Kshs.25, 000.00 for pain and suffering, kshs.150, 000.00 for loss of expectation of life. Considering that the deceased would have worked till the age of 65 years at as alary of Kshs.31, 922.00 inclusive of tax, the court took a figure of Kshs.22, 000.00 as the loss of income. Loss of earnings were worked out as Kshs.22,000.00x10x12x2/3=1,760,000.00. The total award comes to Kshs.1, 935,000.00 less 20% contribution. There is also the case of **Nancy Wangari Maina suing as a representative of Onesmus Maina Ndungu versus Stephen Kiragu and George Kinuthia Gichihi Nakuru HCCC No.487 of 1998 also** decided by D.M. Rimita J as he then was on the 26/10/2001. The parties apportioned liability at 90% as against the defendant and 10% as against the deceased. There were no documentary proof of earnings but from the evidence the court fixed the earnings at Kshs.5,000.00. The deceased was aged 35 years. The court chose a multiplier of 20 years. The court awarded Kshs.25, 000.00 for pain and suffering, Kshs.75, 000.00 for loss of expectation of life, Kshs.21, 000.00 as funeral expenses and loss of dependence at Kshs.5000.00x12x20x2/3 kshs.800, 000.00.

Total award came to Kshs.921, 000 less 10% contribution brining the figure to kshs.828, 900.00.

The defence made reference to case law but they did not avail copies for the courts perusal.

Parties don't seem to have agreed and filed issues either collectively or separately but there is consensus from the submission of both sides that the following are the agreed issues for determination by this court in the disposal of this matter namely:-

(1) Whether the plaintiff has locus standi to bring this matter and whether the suit is competent as filed?

(2) Whether the alleged accident occurred as a result of the negligence of the driver of motor vehicle registration number KXN041?

(3) Whether the plaintiff is entitled to compensation under the law reform Act and or the Fatal Accident Act as a result of the said accident and what is the quantum?

(4) Who is to pay the costs of this suit?

On locus standi the plaintiff asserts that she is properly before the seat of justice and she is entitled to an effective remedy on her claim. She tendered in evidence a grant of representation issued by the High Court of Kenya vide Nairobi Succession Cause No.307 of 1998. The content of the said grant reveals clearly that the same was issued in respect of the estate of one James Njau Njenga. It was issued on the 28th day of pril, 1998 to two persons namely Phyllis Wangoi and David Nganga Kamau. The suit is dated the 6th day of October, 1999 and filed on the 29th day of October, 1999. It means that as at the time the plaint was presented to court the plaintiff already had the grant.

The grant of representation was granted under the law of succession Act cap 160 laws of Kenya. Section 2 of the said Act defines a personal representative as meaning "**an executor or administrator of a deceased person**". Vide section 79 of the Act it is provided that **the personal representative of the deceased for all purposes of that grant and subject to any limitations imposed by the grant, all the property of the deceased shall vest in him as personal representative**. Vide section 80 thereof, such a grant takes effect from the date of the grant. While vide section 82 thereof there is provision in part that:-

"Personal representative shall subject only to any limitation imposed by their grant have the following powers:

(a) To enforce by suit or otherwise all causes of action which, by virtue of any law survive the deceased or arise out of his death for his estate. Vide section 83(b) a personal representative has a duty to get in all free property of the deceased including debts owing to him and moneys payable to his personal representative by reason of his death.

From the above provisions the plaintiff as a grant holder has a right to file claim on behalf of the deceased as done herein. The only caveat placed on to a grant holder in the exercise of that mandate is that he/she has to confine himself/herself within the limitation permitted by the provisions of the Act. It is evident from the reading of exhibit 1, that no limitations were placed on that grant such as making a requirement that in case of filing of any action on behalf of the estate both administrators were to be named as plaintiffs.

The defendant took issue with the plaintiff's presentation of the suit with her as sole plaintiff because according to them the presentation of the claim by the plaintiff as the sole plaintiff offends the provisions of order XXX rule (2) CPR as it was then. It provides:-

" **Where there are several trustees executors or administrators they shall all be made parties to a suit against one or more of them.**

This court has construed this provision and in its opinion the centrol command in this provision is the word "against" as a opposed to the word "for". It means that the requirement for participation in legal proceedings by all administrators on board only arises where the litigation is "against" the administrators and not where the litigation is for the administrator. Since the action herein is by an administrator there was no need to name all the administrators as plaintiffs. Only one surfices. The second administrator would have been mandatorily required to be brought on board if there had been a counter claim against the estate. For the reasons given above, the court is satisfied that the plaintiffs suit is proper and the plaintiff is properly before the seat of justice and she is entitled to an effective remedy.

With regard to blame worthiness the evidence of the plaintiff and the documents exhibited especially the death certificate exhibit 2 shows clearly that one **James Njau Njenga** aged 42 years then died on the 23rd day of September, 1997. The cause of death is indicated as Respiratory failure due to head injury and chest injury due to motor vehicle accident. As submitted by the plaintiffs, that position has not been controverted by the defence. The court therefore makes a finding that the deceased died as a result of injuries sustained due to motor vehicle accident.

Having established the cause of death, it is necessary for the plaintiff in order to succeed in her claim to demonstrate that the defendant is responsible for that death first by reason of having a link to the vehicle responsible for the accident and secondly that there is a link to the person responsible for the causation of that accident.

It is common ground that parties have fronted pleadings to court with that of the plaintiff placing the entire blame for the causation of the fatal accident on to the defendant. While that of the defendant denies the plaintiffs assertions and then places the entire blame on to the deceased with an alternative route of substantial contribution for the causation of the said accident on the deceased driver.

As mentioned, neither side tendered evidence of an eye witness. The defence tendered no evidence at all. It is however the plaintiffs stand both in her pleadings, examination in chief and cross-examination that the defendant is responsible for the loss of her husband through the road traffic accident. And for this reason she is entitled to compensation from them. Indeed as submitted by both sides she and her daughter were not eye witnesses. The question that arises is whether the evidence tendered by her is sufficient to enable her take refuge under the doctrine of Resipsa loquitor in order to warrant this court to shift the burden of proof on to the defendant by requiring the said defendant to demonstrate that they are not responsible for the causation of the accident by disproving the particulars of negligence attributed to

them by the plaintiff, and thereafter proceed on to prove the particulars of negligence attributed to the deceased by them. It is now trite and this court has judicial notice of the same that proof is on two fronts. Firstly by way of pleading which the plaintiff has complied with and secondly by adduction of evidence, which the plaintiff alleges to have complied with a fact disputed by the defence in their submissions. Likewise disproving the plaintiff's assertions on particulars of negligence attributed to the defence and the defendant's assertion of negligence attributed to the deceased also require to be proved and disapproved in alike manner by the defence. The plaintiff has no problem with the countering of her plaint by defence but has submitted that the defence alone does not hold in the absence of adduction of evidence by the defence to prove the assertions made in it.

In view of the afore set out competing interests it is necessary for this court to draw inspiration from case law on the subject. There is the case of **Karanja versus Malele (1983) KLR 147** where in 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 can 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 represented an exercise of discretion**. There is also the case of **Embu Public Roads Services Limited versus Rimi (1968) EA26** where in at page 25 Paragraph 1 there is observation that:-

"**where the circumstances of the accident give rise to the inference of negligence from the defendant; in order to escape liability the defendant has to show in the words of Sir Aistair Forbes, that there was a probable cause of the accident which does not connote 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 facts, 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.**

On the applicability of the doctrine of Resipsa loquitor, the court wishes to draw inspiration from the decision in the case of **Msuri Muhiddin versus Nazzor Binself EL Kassaby and another (1960) EA 201** 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 connote negligence on their part or that the accident was due to the circumstances not within their control…"In the same case of **Musuri Muhiddin versus Nasser Bin seif (Supra) at page 206 paragraph 1** there is quoted with approval 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 surrounding circumstances as was essential to its occurrence were within the sole control and management of the defendant, or her servant so that it is not unfair to attribute to them as prima facie responsibility for what happened. An accident in the case of Traffic on a High way is in marked 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…"

This court has given due consideration to the afore set out principles of case law and applied them to the rival pleadings as well as the rival submissions and the sole evidence of the plaintiff and it proceeds to draw out the following conclusions on the same:-

(1) On the occurrence of any accident between motor vehicles registration number KAE.126P and KXN 041 from the content of the pleadings, KAE 129Pappears to have been in the control of the deceased while KXN.041 is alleged to have been in the control of the defendant or his agent, servant and or employee.

(2) Ownership of the motor vehicle KAE 126P does not appear to be in contest from the pleadings of both sides and sole testimony of the plaintiff. The ownership of KXN041 attributed to the defendant was controverted by the defendant's defence. The plaintiff has relied on the production by consent of a copy of records from the Registrar of Motor vehicles dated August 18, 2008. These indicate clearly that motor vehicle registration number KXN.041 belonged to Pellican Haulage Cont. This extract is from public records.

(3) With regard to involvement of these vehicles in the accident, there is reliance placed on the police abstract number A280886 produced by consent. The police abstract produced by consent indicates that both vehicles named therein were involved in the accident.

(4) The weight to be attached to the production of these two documents is governed by the application of the provision of section 35(1) of the evidence Act cap 80 laws of Kenya. It provides:-

"**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 condition 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 these matters; and

(b) If the maker of the statement is called as a witness in the proceedings provided that the conditions 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 of his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable …."

5. The two documents namely the copy of records from the Registrar of motor vehicles and the police abstract which were produced in evidence by consent of both parties satisfy the ingredients in section 35(1) of the evidence Act (Supra) in so far as they go to prove the ownership of the accident motor vehicles and their involvement in the accident subject of these proceedings.

6. With regard to proof of blame worthiness, sections 107,108 and 109 of the evidence Act are relevant. These provide:-

"107(1) Who ever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.

(2) When a person bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

(108) The burden of proof in a suit or proceedings lies on that person who would if no evidence at all were given on either side.

(109) The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof shall lie on any particular person"

7. This court has construed the afore set out provisions of law and it is satisfied with submission of both sides of the devide that the correct position in law is that he who alleges has to prove meaning that the

plaintiff is obligated to prove the blame worthiness attributed by her, against the defendant with regard to particulars of negligence attributed to the defendant. Likewise the defendant is obligated to prove existence of particulars of negligence attributed to the deceased. It is the assertion of the plaintiff in her submissions that she has discharged that burden by the scanty evidence tendered and reliance on the doctrine of resipsa loquitor. Her oral testimony as well as that of her daughter is to the effect that they were not at the scene, neighbours alerted them of the accident, the deceased was in a coma after the accident and never talked; no volunteer came forward to volunteer any information on the causation of the accident. According to her she blames the accident on the defendant. In contrast the defendant said nothing by way of evidence. In this courts opinion the assertion in the pleading and the scanty evidence that it is the defendant to make good the loss suffered by the plaintiff coupled with the plaintiffs reliance on the doctrine of Resispsa loquitor is sufficient to shift the burden of proof on to the defendant to disprove the plaintiffs allegations on the one hand and then move on to the other hand and prove their own allegations in the defence. So when the defence did not demonstrate inability to avail their driver, agent or servant and or any other person who had control of the accident motor vehicle as at the time of the occurrence of the accident to explain how the accident occurred the only reasonable inference that can be drawn by the court from the conduct of the defendant is that if such evidence were to be tendered, the same would have been against the defendants interests. In the premises, the court makes a finding that the defendant has not discharged the burden of proof shifted on to them and for this reason they are 100% liable to make good the damage suffered by the plaintiff.

Having established liability, the court proceeds to assess quantum. This has been claimed under two heads namely special damages and general damages under the various heads. The applicable principles of law which are now trite and which this court has judicial notice of are as follows:-

(a) Special damages must be specifically pleaded, particularized and strictly proved. See the case of **Hann versus Singh (1985) KLR716** where in the Court of Appeal held inter alia that "**Special damages must not only be specifically claimed but also strictly proved, the degree of certainity and the particularity of proof required depends on the circumstances and the nature of the acts themselves"**

(b) As for general damages, the guiding principles are that:-

(i) These must not be inordinately too high or too low.

(ii) They are not meant to enrich the victim but to compensate the victim for the injury and or the loss suffered.

(iii) Where past awards are being relied upon, these should be treated as mere guides and each case should be considered on its own set of circumstances and or facts.

(iv) Where past awards are relied upon, on element of their age when thers were awarded, the rate of inflation when these were made as well as the rate of inflation at the time when these are sought to be relied upon should not be over looked by the court.

Bearing the afore stated principles in mind and applying them to the facts herein the court proceeds to make the following assessment on quantum.

Special Damages

These cover hospital expenses, funeral expenses and Doctors fees. Only the invoice exhibit six has been tendered. The date on it coincide with the date of the accident. Admission of the deceased to the said hospital and coincide with the date when the deceased passed on. The invoice bears the deceased's' name which is sufficient proof that the said invoice refers to the deceased subject of these proceedings. The non-explanation of how these were to be paid by **Otieno Opiacha** Advocates notwithstanding they are awardable. The total bill came to 181,760.78 apportion of which was paid leaving a balance. The court is inclined to allow the entire figure of Kshs.181, 760.78.

As for funeral expenses although no receipts were tendered, since death occurred a funeral was the ultimate result of that death. Incurring of funeral expenses cannot be ruled out. Lack of production of receipts is not a bar to an award under this head with the only caveat being that in the absence of production of receipts, the court has to make an allowance for the margin of error. In the premises the court doing the best it can allows Kshs.50, 000.00 under this head.

There will be no separate allowance for the Doctors fees as this should have been included in the hospital invoice.

Under general damages, the first head to be considered is the claim under the law reform Act for loss of expectation of life. The defence submitted that this claim is not available to the plaintiff because she did not prove to be a widow. The court has given due consideration to this assertion and it is of the opinion that the defence never asked for proof of marriage and the assumption to be drawn from their failure to so ask is that they were satisfied with the plaintiff describing herself as a widow of the deceased that not withstanding the plaintiff tendered in evidence two birth certificates for their children produced as exhibit 3(a) (b). These bear the names of the deceased and plaintiff as the parents of the named children. In the absence of evidence to the contrary, these documents speak for the correctness of their content in terms of the provision of section 35(1) of the evidence Act cap 80 laws of Kenya. Their content is shielded by the provision of section 64 and 65 of the evidence Act cap 80 laws of Kenya. These provide:

Section 64. The contents of documents may be proved either by primary or by secondary evidence.

65(1) Primary evidence means the document itself produced for inspection of the court,

66(a) Secondary evidence includes certified copies given under the provisions herein after contained.

No objection was raised to the production of these documents. They speak for themselves. Parenthood where no contrary evidence appears goes hand in hand with widowhood where evidence exists of the parents having been living together as in the circumstances of this case. There was no evidence to controvert the plaintiff's assertion that she was married to the deceased and was residing with him as such. In the premises she is entitled to claim damages both under the law reform and fatal accidents Acts.

In assessing the damages under the said named Acts, the court has borne in mind the afore set out guiding principles of case law and the court proceeds to make the following assessment:-

(a) **Loss of expectation of life**. The trend of the courts is to award a conventional figure. Being guided by the awards in he cited cases and considering their age I would assess an award of Kshs.250, 000.00 as proper under the head of loss of expectation of life.

(b) Damages for Pain and suffering is usually awarded for the pain suffered by the victim before death. Herein it is not clear whether the deceased went into a coma at the scene or thereafter. But there is no doubt that he suffered pain. He died 6 days after the accident. I have taken note of the age of the awards in the cited cases and the court proceeds to award Kshs.50, 000.00 under this head.

As for loss of dependency, as submitted by the defence, all that the plaintiff presented to court was a global figure of Kshs.150, 000.00 per month. No audited accounts were tendered save that it is not disputed that proof that the deceased was an advocate of the High Court of Kenya was tendered. It was pleaded that he was in good health a fact not disputed or disproved by the defence. His death certificate indicates that the deceased was aged 42 years and therefore a young man full of life who died at the prime of his productive life. Death was at the wrongful action of the defendant whom the law enjoins to make good that loss to the dependants of the deceased. Failure to provide proof of the actual income of the deceased is not a bar to such a claim. The court has jurisdiction to apply the principle in the case of **Sheikh Mushtaq Hassan versus Kamau Transporters and five others (1982-1988) 1KAR 946** and assess a global figure and then apply a percentage deduction to cover the percentage the deceased would naturally have spent on himself leaving the balance to be apportioned by the court to the surviving

dependants.

It is noted that the children of the deceased were minors then needing support from both parents. The court also should not loose sight of the fact that the plaintiff was in gainful employment. Taking judicial notice of the fact that unless the contrary is shown an advocate who is in sole practice or jointly with another or others does not work for free, but for a fee and some times receipt of hand some fees is not remote, an opportunity obliterated by his death for which the dependants should be compensated within the parameters of the law and not handsomely. Taking all the relevant factors into consideration and doing the best it can the court assesses a global figure of Kshs.15, 000,000.00. This will suffer a 30% deduction as money the deceased would have spent on himself. Loss of dependence would work out as Kshs.15,000,000.00x30/100= kshs.10, 500,000.00.

Interest will be worked out at court rates from the date of filing on the specials and from the date of Judgment on the general damages awarded.

For the reasons given in the assessment the court proceeds to enter Judgment for the plaintiff as against the defendant on the following terms:-

1. **Liability** assessed at 100% as against the defendant.
2. **Quantum**

(a) Special Kshs. Hospital expenses Kshs.181, 760.78.

(b) Funeral expenses Kshs.50, 000.00.
Total Kshs.231, 760.78.
General Damages

(a) Loss of expectation of life Kshs.250, 000.00.

(b) Pain and suffering before death kshs.50, 000.00

(c) Loss of dependency Kshs.10, 500,000.00.

Total Kshs.10, 800,000.00.

3. **Interest**

The special damages will carry interest at court rates from the date of filing till payment in full while, general damages will carry interest at court rates from the date of Judgment till payment in full.

4. **Costs**

The plaintiff will have costs of the suit.

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Apportionment
Total award Kshs.11, 031,760.78

1. (a) To the widow Phyllis Wangui Njau Kshs.5, 031,760.78.

(b)To the children:
(i) Peris Mumbi Njau.
(ii) Hannah Mumbi Njau
(iii) And Kibunja Njenga Kshs.6, 000,000.00 in equal shares.

2. The Adult shares to be paid out to the beneficiaries forth with.

3. Funds due to minors to be held in an interest earning account in a financial institution of own choice but approved by the Deputy Registrar of this Court in the joint names of the plaintiff and the Deputy Registrar of this court.

4. Interest earned on the said invested funds to be withdrawn by the plaintiff from time to time whenever need arises and the same to be applied towards the Educational and other general maintenance needs of the minors.

5. The main amounts so invested not to be withdrawn without authority from the court.

6. The said amount so invested to be paid out to the minors upon attainment of the age of majority.

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

R.N. NAMBUYE
JUDGE OF APPEAL.

DATED AND DELIVERED AT NAIROBI BY THE HON. MR. JUSTICE MAJANJA THIS 14TH DAY OF DECEMBER, 2012.

JUDGE.