



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 215 OF 1999

**LOIS WAMBUI THUO (suing on behalf of the Estate
of Capt. Raphael Thuo, Deceased).....PLAINTIFF**

-VERSUS-

THE ATTORNEY-GENERAL.....1ST DEFENDANT

KENYA SCHOOL OF FLYING LTD.....2ND DEFENDANT

JUDGEMENT

I. ACCIDENT AROSE FROM DEFECT IN TRAINING – AIRCRAFT, HENCE CLAIM IN NEGLIGENCE — PLAINTIFF’S PLEADINGS

This suit was commenced by plaint dated and filed on 5th February, 1999. The plaintiff moved the Court in her capacity as the legal representative of the Estate of **Raphael Thuo**, deceased. She sues the 1st defendant as legal representative of the Government of Kenya under which title falls the Directorate of Civil Aviation in the Ministry of Transport and Communications – and by virtue of the Government Proceedings Act (Cap.40, Laws of Kenya). The 2nd defendant is sued in its autonomous capacity as a limited-liability company operating an institution which provides flying instructions and examinations to trainee pilots.

The Directorate of Civil Aviation, at the material times, had engaged **Captain Raphael Thuo** as Chief Examiner for pilots on training. For the conduct of pilot training and examination, the deceased was assigned aeroplane registration No. 5Y-EHL serial No. 310R – 1226 belonging to the 2nd defendant. As trainer and examiner during flight, the deceased was the chief pilot on board, and was a passenger testing the craft pilots at the material time.

The plaintiff pleads that on 23rd May, 1998 while the said aircraft was afloat in the air, and without any pilot errors, it developed mechanical defects as it approached Eldoret Airport, and, in spite of all efforts made by the pilot to save the plane, it crash-landed, with the deceased dying instantly. The plaintiff states that the cause of death was negligence on the part of the 2nd defendant.

The plaintiff goes on to assert that both defendants were negligent, and gives particulars as follows:

- (a) that, they permitted an aircraft to be used for pilot examinations and testing while the said craft was unsound, unsafe and mechanically defective;

(b) that, they failed to warn the pilot that the aircraft was not mechanically fit for pilot studies and/or examination and failed to ensure that the said craft was fully sound and in such mechanical condition as to fly safely and be used for such purposes safely;

(c) that, they entrusted a defective aircraft to pilot-students;

(d) that, they failed to ensure that the aircraft was safe for use;

(e) that, they failed to insure with reputable insurance companies for the life and safety of the pilots and failed to insure the life and property of the pilot examiners and passengers thereon;

(f) that, they assigned a defective craft for use by the deceased which they knew or ought to have known was defective or mechanically unsound;

(g) that, they failed to maintain statutory or prudent insurance policy to cover the accidental death of a pilot examiner or persons who had duties or lawful cause to be aboard the said craft both as pilot and passenger.

It is pleaded that *res ipsa loquitur* applies and the defendants bear the duty of disproving liability for an accident such as the one which is the subject of the suit. It is pleaded that each of the defendants is liable for negligence attributable to the other, on the basis of the principle of vicarious liability.

The plaintiff pleads that owing to the negligent acts of the 2nd defendant, her husband, **Captain Raphael Thuo**, died instantly after the occurrence of the accident, with the result that the plaintiff has suffered loss and damage.

The suit is brought under the Fatal Accidents Act (Cap.32, Laws of Kenya) and the Law Reform Act (Cap.26, Laws of Kenya) , on behalf of the plaintiff and of two children of the deceased – **Kamau Thuo** born in 1983 and **Joy Kabura** born in 1993. It is pleaded that the deceased, prior to his death, was the chief pilot and proprietor of Tana Mara Aviation Company and was engaged in instruction and examination duties for pilots in Africa at large; and that his monthly earnings were in excess of Kshs.500,000/=. His death, it is pleaded, has occasioned to his widow loss of consortium, support and care which translate into special and general damages. It is pleaded that the fatal accident deprived the deceased of a substantial portion of his life-lease, occasioning loss and damage to his estate; and that his death was a sacrifice of professional capacity to earn for his family the means of support and livelihood – on which account a prayer is made for general damages.

The plaintiff seeks:

(h) damages under the Fatal Accidents Act (Cap.32) and the Law Reform Act (Cap.26);

(i) costs of the suit with interest;

(j) interest on costs from the date of filing suit;

(k) such further or other relief as the Court may deem fit to grant.

II. EXAMINATION - AIRCRAFT WAS SOUND, AND WAS FLYING UNDER DECEASED AS PILOT-IN-COMMAND WHO HAD SATISFIED HIMSELF OF CRAFT CONDITON – 2ND DEFENDANT’S PLEADINGS

In the 2nd defendant’s statement of defence, dated and filed on 9th April, 1999 it is pleaded that contrary to assertions in the plaint, it is not in the business of *administering examinations* to trainee pilots. The 2nd defendant admits that the deceased was the pilot-in-command, on board the 2nd defendant’s Cessna C310 R, registration No. 5Y-EHL at the time of the accident which is the basis of the suit. It is averred that the

deceased was carrying out an Instrument-Rating Route Survey between Eldoret and Kisumu airfields through Kakamega, for the Directorate of Civil Aviation (DCA) at the material time. It is denied that the deceased was at the time of the accident, carrying out pilot-training and examination on a student pilot; it is averred instead, that the deceased was at the material time completing the Instrument-Rating test on the student pilot which had been partially performed in Nairobi on 16th May, 1998. It is denied that the deceased was on board the aircraft as a *passenger* at the material time; it is asserted that the deceased could only be on board the aircraft as the pilot-in-command, but not as a passenger.

The 2nd defendant denies *negligence* on its part, and in particular denies that the aircraft was unsound, unsafe and mechanically defective, and asserts in the premises that there would have been no need for the 2nd defendant to warn the deceased about the condition of the aircraft; it is asserted besides, that the deceased himself, as pilot-in-command of the aircraft had satisfied himself of the air-worthiness of the craft before he took off.

The 2nd defendant denies that the aircraft was at any time entrusted to a student pilot; “the deceased was at all material times the pilot-in-command of the aircraft, [and] in charge of the aircraft.” It is pleaded that the aircraft was at all material times safe for use.

The 2nd defendant denied that it had failed to take proper insurance cover for the deceased while flying in its aircraft, and pleaded that the deceased had been employed by the DCA, and so the taking of insurance cover for him was the responsibility of the DCA. The 2nd defendant pleaded that it did indeed have a suitable insurance cover for passengers on its aircraft in respect of its legal liabilities; but it denied that the deceased had been a passenger on the aircraft.

The 2nd defendant pleaded that the aircraft “was mechanically sound and free from defects;” and that the port engine of the craft, serial No. L – 565033 was stripped on DCA’s instructions after the accident, and was found to be fully serviceable and operational, with a representative of the plaintiff present.

The 2nd defendant denies that it can be vicariously liable for the alleged negligence of the 1st defendant, as it did not employ DCA to perform any service. It is pleaded that the deceased was at the material time acting in the course of his employment with DCA, and therefore only the 1st defendant can be vicariously liable to the plaintiff for the negligent acts of the deceased; and the possible application of the doctrine *res ipsa loquitur* in this case in relation to the 2nd defendant, was denied.

Without prejudice to the generality of the foregoing pleadings, the 2nd defendant averred that the deceased had caused, or contributed to his own death through his negligence in the following respects: (i) as pilot-in-command of the aircraft at the material time, the deceased should not have been carrying out engine-failure manoeuvres at the height at which the aircraft was flying; (ii) the deceased should not have been executing engine-failure manoeuvres at such a height with the student-pilot who was insufficiently experienced to cope with the situation created by the deceased; (iii) the deceased, at the material time, should not have been carrying out engine-failure manoeuvres at all with a heavy aircraft; (iv) the deceased failed to take any, or any sufficient measures to correct the control position used by the student pilot as a result of the said manoeuvres; (v) the deceased was in error in carrying out the said manoeuvres while carrying out an Instrument Rating Route Survey with passengers on board the aircraft.

The 2nd defendant pleaded that the plaint was defective, as regards its claim under the Fatal Accidents Act (Cap.32) on behalf of the children in respect of whom the claim was being made: for the full particulars of those children had not been given as required under s.8 of that Act; and the plaint’s citation too was defective as the children in question are not named.

III. PILOT-IN-COMMAND DID NOT TAKE PRECAUTIONS BEFORE TAKE-OFF — 1ST DEFENDANT’S PLEADINGS

The plaintiff’s Chamber application dated 20th April, 1999 and filed on 3rd May 1999 sought leave to

enter interlocutory judgement against the 1st defendant: because since the filing of suit on 5th February, 1999 and the due service of summons to enter appearance on 10th March, 1999 the Hon. The Attorney-General had taken no action and had filed no defence. Subsequently, on 30th June, 1999 a consent was recorded for the withdrawal of the application, and the State Law Office was accorded an opportunity to file a defence.

The 1st defendant's statement of defence dated 16th June, 1999 was filed on 25th June, 1999. It is a defence of general denial which pleads (para.5): "The particulars of negligence are denied and the plaintiff is put to strict proof thereof." The 1st defendant "denies that he is vicariously liable as the 2nd defendant is a limited liability company and not a Government department" (para.6). The 1st defendant "denies that the [doctrine of] *res ipsa loquitur* applies" (para.7). "Particulars [relating] to the Fatal Accidents Act (Cap.32) and the Law Reform Act (Cap.26) are denied as the 1st defendant did not cause the plaintiff's death" (para.9).

The 1st defendant pleads that the accident was caused by the negligence of the deceased, and sets out particulars as: (i) failing to satisfy himself before take-off that the flight could safely be made; (ii) failing to take into account information available as to the route and aerodromes to be used; (iii) failing to take into account the weather forecasts and reports; (iv) failing to ensure that the aircraft was in a condition fit for use, before take-off; (v) carrying in the aircraft a load whose weight was not properly distributed and secured; (vi) failing to carry on the aircraft sufficient fuel, oil and engine coolant.

IV. ISSUES RAISED BY THE SUIT

The parties, on 25th January, 2000 filed their statement of agreed issues, for resolution through trial, and these were as follows:

- (i) whether the plaintiff has the capacity to bring this suit on behalf of the estate of the deceased?
- (ii) was the deceased a chief examiner or a deputy chief examiner for instrument ratings, employed by the Directorate of Civil Aviation (DCA)?
- (iii) was the deceased on board as a chief pilot in command?
- (iv) was the deceased carrying out an Instrument Rating Route Survey for DCA?
- (v) was the deceased carrying out an Instrument Rating test for the student pilot?
- (vi) was the deceased a passenger on the aircraft?
- (vii) was the aircraft properly insured?
- (viii) whether the defendants were negligent and thereby caused the accident?
- (ix) was the aircraft in any respect defective?
- (x) whether the accident was wholly or substantially contributed to by the negligence of the deceased?
- (xi) which defendant should be held vicariously liable for the deceased's negligence?
- (xii) whether the doctrine of *res ipsa loquitur* applies in this matter?
- (xiii) whether the particulars set out in para.6 of the plaint are in conformity with statute?

(xiv) whether the plaintiff suffered loss and damage?

(xv) is the plaintiff entitled to damages from the defendants, and if so, then to what extent?

(xvi) who should pay the costs of this suit?

V. DEFENDANTS' POSSIBLE LIABILITY, AND THE QUESTION OF INDEMNITY IN FAVOUR OF ONE OR THE OTHER

In addition to their pleaded defences against the plaintiff's claims, the defendants were exercised by the question whether in the event of the suit succeeding, one of them should be placed under legal duty to indemnify the other. So on 21st November, 2000 the 2nd defendant filed notice under *Order I, rule 21* of the Civil Procedure Rules. The notice, addressed to the 1st defendant, thus reads:

“TAKE NOTICE that the 2nd defendant herein the KENYA SCHOOL OF FLYING having been sued in this matter claims against you on the following grounds:-

“That on 23rd May, 1998 the deceased was at all times acting in the course of his employment with the Directorate of Civil Aviation (hereinafter the ‘DCA’), on whose behalf the 1st defendant is sued.

“The deceased was at all times the Pilot in Charge of the aircraft, and not a passenger.

“The 2nd defendant had no control over the deceased.

“The DCA and not the 2nd defendant was responsible for ensuring that the deceased had the appropriate insurance cover.

“If the deceased caused or contributed to his own death through his negligence, then it is only the 1st defendant who can be liable to the plaintiff for that negligence.

“The 1st defendant is solely liable to the plaintiff for the death of the deceased.

“That if any judgement is entered against the 2nd defendant you shall be liable to indemnify them to the full extent of that judgment.”

Obviously the 1st defendant was not in agreement with the 2nd defendant on the foregoing indemnity notice. For subsequently, on 6th December, 2000 the Attorney-General too filed a similar indemnity notice under *Order I, rule 21* of the Civil Procedure Rules. The notice, addressed to M/s. Kaplan & Stratton Advocates (acting then for the 2nd defendant), thus read:

“TAKE NOTICE that the 1st defendant herein the Attorney-General having been sued in this matter claims against you an indemnity on the following grounds:-

1. That at all material times relevant to this suit the deceased was assigned the 2nd defendant's aeroplane registration No. 5Y-EHL Serial No. 310R – 1226 for the purpose of pilot examination and training tests.

2. That the deceased Chief Pilot was on board as an examiner and a passenger testing the pilot trainee from the 2nd defendant at the material time.

3. That the 1st defendant had no control over the deceased.

4. That the 2nd defendant and not the Directorate of Civil Aviation was responsible for ensuring that the deceased had the appropriate insurance cover and/or that they maintained statutory or prudent insurance policy to cover accidental death of a pilot examiner or persons who had duties or lawful cause to be aboard the said aircraft either as pilot or passenger.

5. If the deceased caused or contributed to his own death through his negligence, then the 1st defendant cannot be liable to the plaintiff for that negligence.

6. That the 2nd defendant is solely liable to the plaintiff for the death of the deceased.

7. That if any judgment is entered against the 1st defendant you should be liable to indemnify them to the extent of such judgement.”

The makings of a suit contested on two parallel courses were confirmed when, a fortnight later the 2nd defendant filed, on 21st

December, 2000 a “defence to 1st defendant’s [indemnity] notice”, and in this further secondary pleading, the 2nd defendant thus asserted:

“1. The 2nd defendant denies the [claim that] the 1st defendant is entitled to any indemnity or contribution against the 2nd defendant as claimed in the 1st defendant’s notice dated 5th December, 2000 as alleged or at all.

“2. In answer to paragraphs 1 – 7 of the notice the 2nd defendant relies on all matters of defence appearing in its defence and the notice to the 1st defendant’s [defence] dated 21st November, 2000.

“3. All allegations which have not been expressly admitted or not admitted are repeated here and specifically denied.”

Just under a year later, the 2nd defendant’s Chamber Summons of 19th September, 2001 was brought, under Order I, rules 18 and 21(2) of the Civil Procedure Rules. The 2nd defendant was seeking orders:

“1. THAT the question of liability and indemnity pursuant to the notice served and filed on 21st November, 2000 ... between the 1st and 2nd defendants, be tried at the trial of the suit.

“2. THAT the costs of this application be in the cause of the proceedings between the 1st and 2nd defendants.”

The matter came up before **Ombija, J** who ordered, on 31st October, 2001 that the indemnity issue be tried in the course of the trial of the plaintiff’s suit.

VI. TESTIMONIES

1. *The Plaintiff’s Case*

This case was first heard before **Ouna, J** on 9th October, 2003 and I continued hearing it from 18th April, 2005 to the end, on 21st July, 2006.

Learned counsel **Mr. Munene** who had the conduct of this case on behalf of the plaintiff, gave an introduction as follows: the plaintiff, a widow, was suing on behalf of the estate of her late husband, **Captain Thuo** who had been engaged in the training of pilots on the material date. **Mr. Munene** stated that the training aircraft had developed mechanical problems, and then crashed, killing several people including **Captain Thuo**. It was the plaintiff’s claim that the aircraft had had a defect which should have

been known to the defendants; and that the aircraft had not been adequately insured.

PW1, **Lois Wambui Thuo** was sworn and gave her testimony before **Ouna, J** on 9th October, 2003. She testified that she had obtained grant of letters of administration in respect of the estate of her deceased husband, **Captain Raphael Francis Thuo**, and she was suing on behalf of his estate.

PW1 produced certain basic documents as exhibits: exhibit No.1 being a death certificate showing that **Captain Thuo** died on 23rd May, 1998; exhibits No.2, 3 and 4 showing that his children, **Kamau** and **Joy Kabura** were born on 24th August, 1983 and 28th July, 1993 respectively. When PW1 married **Captain Thuo** in 1982 he was already a pilot.

On the day the accident took place, **Captain Thuo** had told PW1 that he had been requested by the Kenya School of Flying to conduct a training flight to Eldoret. She later heard, on the same day, 23rd May, 1998 at 6.00 p.m. that her husband had died. She and her sister and brother went up to the Kenya School of Flying after she was called there, and **Captain Ririani** who is in charge of the School formally informed her of what had happened. Later the same day, **Captain Ririani** visited PW1's house, and intimated to her that DCA was to blame for the accident, and she should file suit against DCA. Acting on instructions left by the deceased, PW1 had him cremated within three days, on 26th May, 1998. Thereafter a service was held in memory of the deceased, on 30th May, 1998 and after the service **Captain Ririani** and his wife paid another visit to PW1, on which occasion **Captain Thuo's** business partner **Mr. George Mumbo** was present; and **Captain Ririani** then repeated the claim that the Kenya School of Flying was not in any way liable and could not make any payment to PW1. From **Captain Ririani's** non-liability declamations, PW1 now realised a problem was in the making; and so on the following day she called on her lawyers. Thereafter PW1 did not see **Captain Ririani** again, until July 1999 when the aviation fraternity visited her house in a goodwill gesture. PW1 later went to see **Mr. Kuto**, the Director-General of DCA (now the Kenya Civil Aviation Authority); but he intimated that the death of **Captain Thuo** during training flight was unprecedented, and there existed no procedure regarding payment of compensation by DCA. It emerged, in her talk with **Mr. Kuto**, that **Captain Thuo** when he died, had been "doing an instrument-rating, [and] also surveying a route between Kisumu [and] Eldoret." PW1 was aware that there had been an investigation of the circumstances surrounding the accident, and that a report had been prepared; and she had received a copy of that report from the DCA.

PW1 testified that her late husband had worked abroad for five years, and after his return to Kenya he had done freelance piloting for several years, and later became the Chief Pilot for African Airlines. When he did freelance flying he would earn some Kshs.300,000/= to Kshs.400,000/= per month; and when he gave flying instructions the Directorate of Civil Aviation (DCA) would pay to him Kshs.3000/= for every hour of work. The deceased had, in 1982, been appointed an instructor by the DCA. His letter of appointment in that capacity had brought much joy to his family, and the same "is always kept in his Flight Bag, together with his log book, licence and other pilot's items"; indeed, he must have had the letter, the witness believed, with him in the fatal flight even though it was not recovered. It was the witness' belief that **Captain Ririani** had owned the plane in which the deceased was killed; and to the best of her knowledge, the deceased had at the material time, been performing instruction tasks by mandate conferred by DCA. She believed it was **Captain Ririani** who "asked [the deceased] to go to Eldoret."

On cross-examination, PW1 testified that she lacked personal knowledge about the circumstances in which her husband had died in the aircraft accident. She averred that her husband had previously worked for Kenya Airways up to 1985, and again later, around 1990 and had been earning a salary and allowances amounting to Kshs.200,000/= (per month?) The witness averred that her late husband was the most senior pilot on the aircraft in which he died and in that capacity, "he does not take orders". She went on to testify: "he told me he was going to take students for training. I don't know if there was a pilot error. I would not be surprised if there were other pilots in that aircraft." She further averred: "I don't know how the accident occurred, but somebody must have been responsible... All I know is that my husband died. Kenya School of Flying called my husband to go to Eldoret. **Christopher Mutuku** and **James Muigai** were students at the school of flying. My husband was called to go for instrument rating. I don't know what my husband was doing at the time."

On re-examination, PW1 reaffirmed that her husband had been the Chief Pilot and Examiner on the aircraft in which he died: “He was Chief Flight Examiner for Instrument Rating, approved by DCA.”

On 29th January, 2004 **Ransley, J** directed that the proceedings in this trial be typed, and the matter came up before me on 18th April, 2005 when I began hearing the testimony of PW2, **Christopher Mutuku**.

PW2 testified that he is a pilot and was on the aircraft in which the deceased died, on 23rd May, 1998. He was in that aircraft at Eldoret, together with the late **Captain Raphael Thuo**, the late **James Muigai** and three other persons (two of these others being one **Julius** and his wife). PW2 was in the aircraft as a student pilot undergoing training. He believed the aircraft had belonged to Kenya School of Flying – where he, PW2, had been a student. Just before the accident, the aircraft, registration No. 5Y-EHL was, as far as the witness could recall, being piloted by another student pilot, **James Muigai**, and immediately before the mishap **Captain Raphael Thuo** had himself assumed control; in the words of PW2: “**James Muigai** was undergoing an examination. I think **Raphael Thuo** took over when something began to go wrong.” He went on to testify that such taking over of the aircraft “is normal practice; the examiner takes over.”

Sitting next to PW2 just before the fatal moment was one **Julius** (probably a ground-control officer at the Eldoret Airport), and he had a hand-held radio; and on that radio the witness heard the declaration of emergency being pronounced; **Captain Thuo** proclaimed: “We have an emergency and we will be making a crash landing”; he was talking to the Eldoret Airport control tower. Immediately after the declaration of emergency, **Captain Thuo** executed a turn. These motions confused PW2 for, in his words: “I did not see what was wrong.” The craft was about 10 nautical miles away from Eldoret Airport. Following the turn executed by **Captain Thuo**, only one minute passed, and the aircraft crash-landed on a field, hitting several trees as it careered downwards. The craft broke into flames upon hitting the ground.

PW2 who was sitting in the last seat, noticed that the aircraft as it plunged, was hit by trees on its right side. **Julius** was the first to find his way out of the wreckage, followed by PW2, and then **James Muigai** found his way out. The other three persons who had been in the craft perished in the craft fire. PW2, who sustained burns, had found his way out through the small baggage door.

PW2 testified that the aircraft which was involved in the accident was a Cessna 310R, and it had a capacity for six persons. The craft had one, entire cabin, without a separate cockpit.

PW2 testified further, upon cross-examination by learned counsel **Mrs. Kajwang** for the 1st defendant, that he had completed his training as a pilot in 1999, the year following the Eldoret air accident. Of the mode of training and examining pilots, the witness averred that it was the responsibility of the Kenya Civil Aviation Authority (KCAA) the successor to the Directorate of Civil Aviation (DCA) to appoint examiners; and the role of the Kenya School of Flying was to source examiners; and it is the DCA which had appointed the late **Captain Raphael Thuo** as an examiner on the fatal flight to Eldoret. PW2 believed that a request would have been made to DCA – to make such an appointment.

PW2 testified that on the ill-fated flight there had been on board three persons who could be referred to as joy-riders; they were not involved in the training and examination exercise. He knew that the aircraft was insured, thought he was not sure that the pilot trainees on board were covered by the insurance policy. PW2 had been in the same aircraft several times over the three months preceding the accident, and, although he did not have the maintenance records, he believed that the craft was in good condition.

The witness testified that he did know that a DCA report had been prepared on the aircraft accident, even though he had not been able to see that report. He averred that the only fuel the aircraft had at the time of the accident, was the fuel which it had drawn in its tank.

On further cross-examination by learned counsel **Mr. Makoolo** for the 2nd defendant, PW2 testified that he had been the one flying the ill-fated aircraft, as a trainee, on a flight to Kisumu, on the same day on which the accident happened. Eldoret as the training destination had been chosen because the negotiating

facilities in Nairobi, for use during training, were not functioning. Such facilities are located at the Jomo Kenyatta Airport in Nairobi; but their being non-functional, the witness testified, is not a problem for the large aircraft – as these have capacities for dealing with such shortfall.

PW2 testified that the examination which was being administered by the late **Captain Thuo**, was an Instrument Examination; and it involved reference exclusively to the instrument, to determine the location of the aircraft as it flew.

PW2 testified that the training aircraft had flown from Nairobi to Eldoret, and he and others had stayed overnight at the Sirikwa Hotel in Eldoret. He flew the plane to Kisumu; in his words: “When we lifted off from Eldoret I was piloting, so I was on the front left; and **Captain Thuo** was on the right. He was required at all times to sit on my right, in the seat of the instructor or examiner.” **Captain Thuo**, the witness testified, was the one in charge of the aircraft, and “took responsibility for... all things taking place there.” On the flight to Kisumu, the aircraft had six persons on board. PW2 flew the aircraft as **Captain Thuo** instructed him on instruments. Just before landing the aircraft at Kisumu Airport, the witness under, instruction, executed an instrument procedure; and landing took place in the morning of 23rd May, 1998. This procedure involved reference exclusively to instruments, in locating the airport; and it was repeated subsequently after three of the six persons on board disembarked. Although this was not part of PW2’s examination, it was taken a stage further, when four persons on board disembarked, and he was left alone with **Captain Thuo**; in his words: “We took off, flew around Kisumu, and then landed...; we did a procedure turn, then we landed.” At this point the others on the plane got on board; and now from Kisumu, on the fatal flight back to Eldoret, “**James [Muigai]** was being examined, and he was flying as a candidate; [PW2] was flying as a student.”

What was **James Muigai** being examined on by **Captain Thuo**, on the return flight to Eldoret? On a subject referred to as *asymmetric power*, which means reducing power on one side of the aircraft, as would happen if the engine on that side were to fail while the aircraft is in aerial motion. The witness could recall that he had also performed that procedure with **Captain Thuo** earlier, when he was the one flying the craft; and he averred that simulating one-engine failure while in motion was not necessarily dangerous; it could however become dangerous if the pilot did not take into account certain important factors, notably, position of craft in the air, above ground level; height above sea level; weight of the aircraft; state of the weather. The location of the aircraft in the air was always relevant – because “the higher you go, the greater the deterioration in aircraft performance” and “being too close to the ground takes away planning time, [and hence] the importance of creating room for manoeuvre.”

PW2 averred that apart from the passenger complement of six in the aircraft, on its last flight, it had uplifted fuel from Kisumu: “We filled all the tanks; the craft was heavy, I believe.” Of the six persons on board, **James Muigai** sat on the front left; **Capt. Raphael Thuo** on the front right; an unnamed gentleman and his wife sat in the middle-left and right; PW2 sat in the back-left; and **Julius** sat in the back-right.

PW2 testified that the aircraft flew from Kisumu to Eldoret with **Captain Thuo** always in command, and it was for him (**Captain Thuo**) to undertake any procedure he considered appropriate. In the case of candidate **James Muigai**, PW2 as he was sitting in the back seat, did not notice **Captain Thuo** simulate one-engine failure. Although it was a small aircraft and so one could see much in the front, from his seat PW2 could see only part of the controls in the front.

PW2 did not remember having spoken to the aircraft insurance investigators in 1998, in the aftermath of the accident; and he could not remember very well what he would have said during the investigations, some six years gone-by.

When, just outside Eldoret, PW2 heard emergency being declared in relation to the flight, he did not get the communication as to the type of emergency it was. He thought the control tower had replied, but he did not quite get the response. He testified that whenever emergency is thus declared, in flight practice, the pilot-in-command takes charge of the craft. The craft had quickly hit two trees; it was at first mainly the back part, that brushed over the trees, and then the right side – where **Captain Thuo** was seated – hit a tree. In the words of PW2, “I did not see anything else...It happened too fast; I did not see what the

Captain was doing.” The craft was on the ground, burning; the witness found his way out, following **Julius**; and the two assisted **James Muigai** to leave the wreckage.

PW2 did not thereafter see the wreckage of the aircraft; and he did not know if there had been any pilot errors at the time of the accident.

PW2 averred that in the enrolment process for pilot-trainee examinations, the candidate paid fees directly to the examiner – and he did not know what the examiner did with such monies paid. A trainee after qualifying, would obtain his certificate from the Kenya Civil Aviation Authority (successor to DCA). The examiner himself must have a letter of appointment issued by KCAA.

On re-examination by learned counsel **Mr. Munene** for the plaintiff, PW2 averred that the Cessna aircraft in which the accident had occurred, had two engines; and simulated power failure entailed reducing power on one engine; and such reduction of power would be set to be gradual, for a new pilot, for it could be a dangerous manoeuvre; and simulated engine failure if done under wrong conditions, could be fatal. The witness affirmed that after dropping off several passengers at Kisumu Airport, he and **Captain Thuo** had executed a simulated engine failure. He averred that it was the examiner’s responsibility to determine whether or not a simulated engine failure was to be conducted at a particular time. Since **Captain Thuo** was in command of the craft, it was he to decide where the aircraft would go; it was for him to determine the flight route for training – and he believed this was done on behalf of the KCAA.

2. *The Defendants’ Case*

DW1, **Gladys Igandu Murani**, was sworn on 18th April, 2005 and conducted through the examination-in-chief by learned State counsel **Mrs Kajwang**. She testified as follows. DW1 is the Aviation Licensing Manager of KCAA (successor to DCA), and she had previously been the Chief Licensing Officer of DCA. Her work had been to effect the registration of civil aircraft, and to licence flight crew; and this remains her work to-date. She receives applications from aircraft-owners for the registration of their aircraft. She receives applications for licences from pilots and flying engineers. Those who make such applications are subjected to a process of examination, and relevant details and results relating to such applications, are held in identifiable files. KCAA maintains records for registered aircraft, and issues certificates of airworthiness; such certificates are required to be renewed periodically.

DW1 testified that the late **Captain Thuo** had, on 13th January, 1998 applied to the DCA for an Airline Transport Pilot’s Licence (defence exhibit No.1), and that he did have, at the time of the accident, a valid pilot’s licence; and the aircraft which was involved in the accident, a Cessna 310R – 5Y-EHL too had a certificate of registration, No. 1264 E, issued on 12th May, 1998. The aircraft at the time of the accident was jointly owned by Kenya School of Flying and Kenya Commercial Finance Company Ltd (defence exhibit No.2).

The aircraft, Cessna 310R-5Y-EHL had a valid certificate of airworthiness-for-passengers category, first issued on 1st February, 1985 and thereafter renewed annually (the last renewal having been effected on 11th March 1998, to last till 10th March, 1999) (defence exhibit No.3). Once the certificate of airworthiness is issued, the craft may then be operated normally, and the person at any time with the right to operate it is the one who last applied for the renewal of the certificate.

On what basis is the certificate of airworthiness issued? DW1 testified that prior to issuance or renewal of the certificate, the aircraft is subjected to inspection; if the findings are right, then the KCAA (or its predecessor, DCA) issues the requisite certificate.

Every licence whether for persons or for aircraft, is preceded by examinations; in the words of DW1, “KCAA has examinations for each kind of licence”, and such examinations come in two parts – theory, and practical; and all the examinations are done under the authority of the Director-General of the KCAA.

The witness averred that the KCAA could have in-house examiners, but it may also source examiners

from outside. In her words: “There are areas where there are no in-house examiners. We identify the individual outside who is qualified, and we then appoint them as examiners. It is based on agreement. We issue the terms of reference in writing to the person who is appointed. We [pay] an allowance to them.”

The witness averred that DCA had as early as 17th June, 1983 accorded recognition to **Captain Raphael Thuo** by designating him examiner (defence exhibit No.4); in DW1’s words:

“By our letter of 17th June 1983 addressed to **Captain Raphael Thuo**, from the Director of Civil Aviation **J.N. Kahuki** we had designated him an ‘Authorised Examiner’

“This is the kind of letter that would be written to an examiner once identified.”

The DCA letter to **Captain Thuo** of 17th June, 1983 authorised him to conduct examination for licence-issue purposes, and it set out conditions for the handling of the examination as well as the examinee; the letter has guidelines; and there is an indication that it had been duly delivered to **Captain Thuo**.

DW1 testified that DCA’s letter of 17th June, 1983 did not constitute **Captain Thuo** an *employee*, but only designated him an examiner. To-date, it was averred, KCAA does not have in-house examiners; the witness testified: “We have lists of examiners and doctors used by the KCAA. Aeronautical Information Circular dated AIC/3/1995 shows details of approved medical consultants (Appendix A), approved examiners (Appendix B), approved Instrument-Rating examiners (Appendix C), and approved flying, type-rating and check-out pilots (appendix D).” The name of **Captain Raphael Thuo** appeared as No. 8, under the category of approved Instrument Rating examiners (Appendix C). Another document, Ref. No. AIC 3/1993 (defence exhibit No.5) made appropriate provisions for examination fees and for the allowances payable to examiners. Such fees were reviewed from time to time, in accordance with the Kenya Air Navigation Regulations 1985 (Revised) (AIC8/1995), 13th Schedule. All fees payable by applicants are paid to KCAA, while examiners’ fees were paid by companies, flying schools, or by the individual examinees – directly to the examiner. The witness averred: “We do not pay the examiner from the Authority [i.e. KCAA], but we pay an allowance, which is a proportion of the fee paid to us.” The fees paid to KCAA by the candidate are sometimes paid by the organization to which the candidate is attached, but, DW1 averred, “the name on record is that of the candidate.”

How is it ascertained that an aircraft is airworthy? DW1 testified that the question is an engineering one, and it is the aircraft engineers who do the assessment, before their findings are availed to the administrative authorities of the KCAA. In the words of the witness: “Maintenance of aircraft is dealt with by different persons, and our role is a secondary one. The day-to-day running of the aircraft is not KCAA’s responsibility; there is a maintenance schedule from the manufacturer; but KCAA seeks to know that there is third-party insurance for the aircraft.

DW1 was cross-examined by learned counsel **Mr. Munene**, for the plaintiff, on 30th May, 2005 and she testified that in her task of registration, she registers ownership of the aircraft rather than its technical details; however, KCAA has an Airworthiness Division which assesses the airworthiness of aircraft. Once the Airworthiness Division ensures due compliance, DW1 then deals with management issues.

Those who KCAA appoints as examiners, DW1 testified, come along by different channels; some of them make a direct application to the KCAA; yet others are recommended by somebody else; and still others are identified by KCAA by its own devices. And whether or not KCAA will appoint a particular person as an examiner, is based on KCAA’s appraisal of that person’s personal qualification; and each approved examiner comes by virtue of his or her expertise in a specific discipline. In the case of **Captain Raphael Thuo**, he performed a task for the KCAA by virtue of his expertise as an Instrument-Rating examiner, among some ten others in that category, also doing duty for KCAA. The witness testified that there were some 3000 operational pilots to whom KCAA had issued flying licences, but only about half of them today hold Instrument-Rating licences. When persons in such a category are appointed by KCAA as examiners, they carry no special designation different from their description as *examiners*; and on that account, any typification such as Deputy Examiner or the like, would have no significance in terms of

professional authority. The examiner's reports following the examination process, is returned to the KCAA.

DW1 testified that she did not know the details of how **Captain Raphael Thuo** was sourced as an examiner for KCAA; but she knew that the results of the examination which he had conducted while on the fatal training flight to Eldoret, had not been received by KCAA.

Learned counsel **Mr. Makoloo** also cross-examined DW1 on 30th May, 2005 and on that occasion she affirmed that for aircraft in operation, the certificate of airworthiness is renewed every year, and renewal dates are shown on the certificate. She was not, however, sure whether tests for airworthiness were always conducted before approvals for renewal were given.

The witness testified that the booking of piloting certificate candidates for examination (under the auspices of the KCAA) was not done by the institution to which these candidates may be affiliated – it was done by name of candidate specifically. Even where the candidate's school makes the examination booking (with KCAA), booking itself was strictly done in the name of the candidate. The flying school to which the candidate is attached, has no role in the attachment of examiners; this is the responsibility of the KCAA; and “the examination is conducted on behalf of the KCAA, and not on behalf of the school.”

On re-examination by learned State Counsel **Mrs. Kajwang**, DW1 testified that it was not the function of KCAA to train pilots, and the training task fell to the aviation training schools – five of which are currently in operation. Only examinations are handled by KCAA, in accordance with its own requirements; and what KCAA pays to examiners is no more than a “token of appreciation”; otherwise, all these examiners do work for a living elsewhere.

On 30th May, 2005 DW2, **Peter Musyoki Munyao** was sworn and conducted through the examination-in-chief by learned counsel **Mrs. Kajwang**. He testified that he is an Operations Officer with KCAA, and that part of his duties consists in the inspection of accidents; and in this behalf he is a gazetted Inspector of Accidents. Apart from having been trained in accident inspection, DW2 is a pilot; an air traffic controller; an instrument procedure designer; an inspector of dangerous goods; and an inspector of aerodromes – towards their certification as airports or aerodromes. DW2 holds a B.Sc.degree in Mathematics, and has worked with the KCAA over the last 12 years. After graduation he had undertaken Air Traffic Control training (1995 – 1998); he then had two-years on-job training, and was trained as a pilot in South Africa. He attended a three-month course in instrument design in the U.S.A.

DW2 referred to the report made by a deceased colleague of his, one **William Odhiambo Osir** (Defendants' exhibit No.10), on the flight accident which has led to the instant suit. He testified that the late **Osir** had been a gazetted accident inspector. The report relates to a Cessna 310R – Registration Mark No. 5Y-EHL, belonging to Kenya School of Flying and Kenya Commercial Finance Co. Ltd. This aircraft had been involved in an accident on 23rd May, 1998 at Lel Moku Secondary School in Nandi District at 12.18 p.m.

The report gives the history of the fatal flight: a Cessna 310R, 5Y-EHL; carrying six passengers; flew to Kisumu for refuelling; uplifted drums of fuel – 1 ½ drums which is 300 litres; the fuel must have been enough; **Captain Raphael Thuo** was the pilot-in-command, with trainee pilots; **Captain Thuo** had a valid flying licence, No. YK 56 AL issued on 3rd July, 1976 and last renewed on 13th January, 1998; a qualified pilot with 11,806.42 hours, **Captain Thuo** was qualified to fly other aircraft as well including Boeing 707.

The report gives the meteorological information for Eldoret about the time of the accident – specifically, 18 minutes before the accident: visibility; winds; clouds; temperature; dew-point. The Eldoret Air Traffic Controller could see the craft when it was coming to land. The aids to navigation were available and serviceable. The equipment on the ground and in the aircraft was serviceable. The first communication between pilot and ground control was at 11.36 a.m.; the last communication was at 12.21 p.m. and the aircraft had crashed. A fire broke out which consumed most of the aircraft; three people survived.

In the investigations, the port engine (i.e. the left engine) was stripped, to find out possible causes of the accident. The report showed that there was “no internal mechanical failure in the engine.” A large quantity of oil was found in the port engine; and this suggested that there had been no oil-starvation in that engine. The report shows that in the port engine, the “ignition and fuel system was still operating.”

The pilot had radioed the control tower at Eldoret saying that he had “lost an engine.” The investigations did not establish that the aircraft had “lost an engine”; what was found was a “rich cut,” i.e. the port engine was flooded with fuel, and it could not, on that account, start. The explanation, in the investigator’s perception, was that the pilot had just before the accident, simulated engine failure, involving giving the port engine too much fuel – which would have “made the engine quit.”

Although change or repair to the port engine had taken place prior to the examination flight, the investigator had not considered that this fact had contributed to the accident. According to the investigator, the aircraft had been maintained to the approved standards of KCAA; and what could have caused the accident was: aircraft becoming uncontrollable after hitting the tall eucalyptus trees; the pilot thereafter being rendered unable to control the craft; available air-space being too short to permit of manoeuvre.

DW2 in presenting the accident report testified that just before the accident, the aircraft had been performing simulated engine failure, which was part of the flying-test requirement; but unfortunately, this became a real engine failure; the procedure had operated normally, but the pilot then realised there was a problem, and he knew the craft would have to crash-land.

DW2 testified that the accident investigation report had not indicated whether the pilot-in-command would have been on the right or the left of the aircraft; “but in practice the examiner would sit on the right.” The witness stated: “Examiners are trained to occupy any front seat and be able to fly the aircraft.” He testified that: “The pilot-in-command is the one responsible for the care and management of the aircraft.”

Learned counsel **Mr. Munene** cross-examined DW2 on 16th November, 2005 and the witness testified further as follows. The witness has in the past been involved in as many as 50 aircraft-accident investigations, and in the case of some of these he had himself signed the report. He testified that it is not the contemporary practice, that an aircraft-accident investigator should set out his qualifications on the report; and such was the position too with the late **Mr. Osir’s** report on the aircraft accident in reference in the instant matter. **Mr. Osir** had been a pilot, and had been a colleague of DW2 in employment.

DW2 testified that **Mr. Osir** in his investigations, had made reference to the two engines of the Cessna 310R – 5Y-EHL, the port engine (left) and the starboard engine (right). He had examined the port engine – and found that, that side had rammed against the tree. DW2 testified that **Mr. Osir** had not stated in his report why he examined the port engine but not the starboard engine.

Mr. Osir in his report had stated that the port engine was damaged due to crashing on trees. Overall, according to the report: “The aircraft was totally destroyed due to crash-landing on trees, ground impact and post-crash fire.” DW2 averred that from the report, only one engine was tested – the port engine; and so the conclusion was based on the findings in respect of only one engine.

In the Report’s Appendix C, the Air Traffic Control account – which DW2 said would be the most accurate – is given; but he noted that the said account cannot by and of itself, shed full light on the situation at the time the accident occurred. The said Appendix C refers to the Instrument Route Training in which the late **Captain Raphael Thuo** was involved; but it makes no reference to the procedure of *asymmetric power*, entailing simulated engine failure. DW2 averred that Instrument Route Training would include simulated engine failure; that detail, however, did not have to be part of Appendix C in the investigation report. It is possible, DW2 testified, to engage in simulated engine failure while approaching a runway; and it is not necessary that such a procedure be notified to Ground Control. In principle, however, the procedure of simulated engine failure should not be done with passengers on board; but the matter is left to the judgement of examiner and he can conduct it in any location, at any stage.

From Appendix C it is clear that at 12.05 pm 18 seconds, **Captain Thuo** radioed Ground Control (Eldoret) to say “WILL REPORT PROCEDURE TURN COMPLETE”; 8 minutes later (12.13 p.m.) he radioed: “PROCEDURE TURN COMPLETE AND ESTABLISHED”; 5 minutes later (12.18 p.m., 0.3 secs) **Captain Thuo** radioed: “

WE ARE HAVING AN ENGINE PROBLEM AND LOOKING FOR A PLACE TO LAND”; 1 second later he radioed: “HAVING A PROBLEM WITH ENGINES” ; 6 seconds later **Captain Thuo** repeated the message: “EHL HAVE A PROBLEM AND LOOKING FOR A SAFE AREA TO LAND”; 4 seconds later **Captain Thuo** radioed: “CRASH-LANDING ON TREES HERE”; 3 seconds later, the fatal crash, **Captain Thuo’s** last words: “OH DEAR....” So after the reported procedure turn it was just slightly over five minutes before the crash.

DW2 testified that there were gaps in the communication from the aircraft, and this would be due to the fact that it was in extreme danger. **Mr. Osir** in his report had estimated that the aircraft careered downwards from a height of 9000 feet possibly passing 6983 feet and: “With the tree of 45 feet the aeroplane had 1972 feet to restart the engine – quite inadequate considering the weight of the aircraft and the altitude configuration. This resulted in the aeroplane rapidly losing more height thus colliding with the tree.” DW2 testified from the investigation report that the aircraft had gone through a drop of some 2,013 feet over a span of only four miles, and the eventuality in those circumstances would depend on different factors – such as the weight of the craft; if it was light it could come down gliding. This particular craft was already on but one engine; and the pilot was reporting that even the 2nd engine had a problem. After just one second, both engines were experiencing a problem; and in that condition, the aircraft was able to glide for another 16 seconds – over the ground span of four miles. When, at 11.45 a.m 15 seconds the Eldoret Ground Control had cleared the craft 5Y-EHL to land, DW2 testified, it must have been sighted from the ground; but it would not have been possible for Ground Control then to see if a simulated engine failure was in progress. The witness averred that even at that stage, if the examiner thought it fit he could very well conduct a simulated engine-failure procedure.

DW2 testified that in a two-engine aircraft, if one engine failed it would be possible to continue flying by the power of the operational engine.

The witness then responded to cross-examination by learned counsel **Mr. Makoloo**, for the 2nd defendant.

DW2 testified that in recorded aviation history, the occurrence of engine problems in mid-air does not necessarily lead to engine failure, and that there was an “intermediate approach” in dealing with such crises which was published and was for general use. The witness averred that it was entirely the responsibility of the flight examiner whether or not a simulated engine failure could be conducted with passengers on board, and whether or not such a procedure was being carried out, need not be an item of communication from aircraft to ground control; and consequently it was unsurprising that in the craft’s communication to the Air Traffic Tower at Eldoret on 23rd May, 1998 there was no mention of the asymmetric power exercise being conducted.

DW2 testified from the aircraft accident report that the pilot had not seen the dry eucalyptus tree on which he crashed; that in aviation, good visibility is essential; that although the pilot would have been expected to see the eucalyptus tree, the craft cascaded towards it while experiencing engine problems. Although it normally should be the student who approaches the landing, the witness averred, the pilot in charge had at one stage taken over. It had not been stated at what exact time the engine problem had started; it was not clear who was in control at the time the craft hit the eucalyptus tree; the mode of taking over from the student pilot was not clear; and, it was averred, the pilot who was flying the aircraft was not the same person who was communicating with Ground Control.

DW2 referred to the statement of cause recorded in the accident report:

“The accident occurred as a result of the aeroplane hitting the dry eucalyptus tree. Contributory factor was the pilot’s inability to control the aeroplane, rate of sinking and/or keep surveillance of the flight while performing other unspecified tasks.”

The witness averred that at the time of the fatal descent, the pilot could have been doing certain things which are not specified. He noted that in the accident investigator's assessment of "cause," there was no reference to "engine."

On re-examination by learned counsel **Mr. Makoloo** on 10th February, 2006 DW2 averred that a test had been carried out on the port engine but not the starboard engine, in the accident investigations. Why? In the words of DW2, "It seems to have been thought the right engine was not pertinent to the accident"; it was also "not clear whether the right engine was recovered."

The witness testified that the purpose of the simulated engine failure procedure in training, was to ensure that the student had competence in dealing with engine failure – and that such competence enhances the safe operation of aircraft. This procedure could be done whenever the instructor saw it fit – provided only that safety was ensured; it could be on take-off, or even when going to land.

The 2nd defendant's witness (DW3), **Joseph Martin Ririani**, was sworn and gave his testimony on 10th February, 2006. He averred that he is a pilot by training, and is currently the Managing Director of the Kenya School of Flying (2nd defendant). For 18 years he had worked with Kenya Airways; and he is a designated flight examiner of the KCAA.

DW3 testified that Kenya School of Flying prepares candidates for four types of flying licence: (i) private pilot licence; (ii) commercial pilot's licence; (iii) initial multi-engine licence; (iv) instrument ratings. Although the witness is Deputy Chief Examiner for KCAA for general flight tests, he is not employed by KCAA; "KCAA lacks the ability to employ its own examiners", and "individuals are selected and they then help the KCAA; to guarantee the check rights." "Check rights" are examinations in the air, and the flight tests – and their standards are "laid down and followed strictly."

DW3 testified that the aircraft in issue in this case, Cessna 310R 5Y-EHL, was the property of the 2nd defendant (he produced as defendants' exhibit No.2 the certificate of registration for the craft). He averred that the aircraft had been well maintained, in accordance with the applicable maintenance requirements. Like all other aircraft, the Cessna 310R every year underwent certificate-of-airworthiness test flights. In the testing procedure there were specific checks, as prescribed by the KCAA; and the certificate issued was a confirmation of airworthiness. The latest such certificate of airworthiness had been issued by the KCAA (defendants' exhibit No. 3) to run from 11th March, 1998 to 10th March, 1999. (It is to be noted, in this regard, that the date of the accident was 23rd May, 1998 – clearly within the currency of the certificate). In the issuance of the certificate of airworthiness, its documentation was also checked – such as valid insurance for the hull; passengers; third parties. DW3 testified that the Cessna 310R – 5Y-EHL had valid insurance, issued by Lloyds of London, for the period in question. The witness averred that the aircraft was sufficiently insured, and produced (defendants' exhibit No. 10A and 10B) the cover note and certificate of insurance for the period 8th February, 1998 – 7th February, 1999. What exactly was covered by such insurance? (i) hull; (ii) third parties; (iii) passenger bodily injury; (iv) property damage; (v) legal liability; (vi) baggage and effects; etc. At the time the accident took place, the said insurance cover would have covered everyone in the aircraft.

How did the 2nd defendant's aircraft end up in Eldoret, whereas they are based in Nairobi? DW3 testified that the aircraft was going on a check ride to Eldoret. As from 1988, the navigation aids in Nairobi were not working, while those in Eldoret were; and so it was necessary for examination purposes, to fly the craft to Eldoret. The examination process started from Nairobi, and proceeded towards Eldoret, with **James Muigai** and **Chris Mutuku** as the candidates, and **Captain Raphael Thuo** as the examiner – an examiner designated by the DCA (now KCAA).

The designation of examiners, the witness testified, was the mandate of the KCAA; in DW3's words, "the School [of Flying] did not participate in the designation of [**Captain**] **Thuo** as examiner."

The flight began in Nairobi, with **James Muigai** piloting under instruction. The relevant examination was Instrument-Rating; and its purpose was: "To test the ability of the student to fly from A to B in safety, in

conditions of bad weather, darkness, etc. by merely relying on instruments, until about landing time.” In preparation for such training flight, the candidate is required to do a comprehensive check of the aircraft while it is still on the ground; the purpose is to predict different conditions in the air, as some, such as icy conditions, are likely to affect the operation of the instruments. The test would also involve asymmetric power procedures – simulating loss of one engine, or one-engine failure. In such an exercise “it is the instructor who takes the candidate out, and kills one engine completely, when he is preparing he candidate for the test.” In such an exercise, DW3 testified, the candidate sits on the left, while the instructor sits on the right, and he does not intend that the candidate should know which of the two engines is being shut down. The candidate is expected to come to know which engine has failed, and then move on to boost the power of the surviving engine. Control of fuel levels is an element in the stabilisation of power in the surviving engine; but such control has to take into account the height above sea level.

DW3 produced (defendants’ exhibit No. 12) the standard flight training manual which gave guidance on the procedures to be conducted. He averred that the propriety of conducting the asymmetric power procedure was subject to the instructor’s discretion; but there were factors which he ought to take into account. It must be considered whether on one engine the craft can carry the weight being carried; and weight here refers to: people on board; fuel; altitude. According to this witness “asymmetric power is not to be done with passengers on board;” he went on to aver:

“**Captain Thuo** did the right thing when he disembarked all in Kisumu, and so he went only with **Chris Mutuku**; he had just taken 300 litres of fuel. So this was wise. Only **Chris Mutuku** and himself went up for the asymmetric test.”

DW3 had worked out a likely situation data in respect of the aircraft while it was in the area of Eldoret, after leaving Kisumu; and he found that the craft weighed 5172 lbs – i.e. the aircraft itself and its occupants. In his opinion, with that weight, and at the altitude at which the aircraft was flying, “it was not wise to have done asymmetry.” The witness testified:

“The maximum weight allowed on take-off was 5500 lbs. At 9000ft with six people on board, the weight should have been much less. Considering the weight, the altitude, and the air that can support that weight, simulation should never have been done, as it was not in the circumstances possible to play around with one engine.”

The witness placed responsibility for the mishap squarely at the doors of the pilot-in-command:

“From the moment anyone gets on board an aircraft, it flies about and later lands and packs, the responsibility for safety and comfort is delegated to one and only one person – the pilot-in-command. In a check ride, the examiner is the pilot-in-command. There are human errors involved in the decision to carry out certain manoeuvres – they are attributable to the pilot-in-command.”

DW3 testified that the Cessna 310R aircraft when it left Nairobi, under the charge of **Captain Thuo** had been in a sound state; and DW3 himself had flown it many times. When, on the day the accident took place, DW3 had been at Wilson Airport in Nairobi and somebody came to him saying “there had been a slight problem” with the Cessna 310, how did he react: “I dismissed that report, and I didn’t think much of it. The aircraft was good!” He assumed it was a slight problem: “Then later DCA communicated with me. The aircraft had crashed in fire, near Eldoret airport.” Even at this stage, DW3 averred: “I still doubted that the matter was serious; I still did not have the full story. Only two-three hours later did I come to know. The incident was at about 12.00 noon.” He got the full picture only at about 3.00 pm; and how did he react:

“I was baffled. What could have gone wrong? An experienced examiner! A very good aircraft! What could have happened?”

DW3 dispatched a vehicle which took his wife to Eldoret. The DCA also sent a **Mr. Kamau** (an investigator) to Eldoret the same day. The insurer was immediately informed. Three persons who

survived the crash, **Chris Mutuku**, a **Mr. Achaga** and **James Muigai** had been taken to the hospital, while three people had died – the examiner (**Captain Thuo**) and **Mr.** and **Mrs. Langat** (described by the witness as joy riders).

DW3 testified that the insurance company had sent an investigator without delay. He engaged in co-ordination arrangements with the next of kin of the dead and the injured; and he was at Wilson Airport to meet both **Mutuku** and **Muigai**, who were flown to Nairobi the next morning. **Muigai** was seriously injured; **Mutuku** was able to talk; **Achaga** basically left the craft unscathed.

DW3 testified that the insurance investigator who came to Kenya was one **Mr. Franz Stroeder**, and that this investigator conducted certain investigations in his presence and he could speak first-hand on things he perceived for himself during those procedures. When **Stroeder** came to Nairobi, **James Muigai** was unconscious; but he spoke to **Chris Mutuku** in DW3's presence, at Nairobi Hospital.

The port engine of the Cessna 310R had been brought to Nairobi by DCA, when **Franz Stroeder** was in Kenya to conduct investigations. A lorry of the DCA had been used to transfer the wreckage to Nairobi.

In the cockpit, the witness testified, there are levers which move cables, and the cables connect with the engine – the point of movement of the cables being referred to as the *throttle-body*. The witness testified that **Mr. Franz Stroeder** had opened the port engine and the throttle-body; and all things in the port engine were found in the forward position. The witness testified that it was possible to read the state of the cockpit from the throttle-body – notwithstanding the burning which had taken place. The deduction made by **Franz Stroeder** according to DW3, was that the levers attached to the port engine were fully in the forward position; and its significance was that this had caused a “rich cut”, a fuel flooding which disabled the port engine. These investigations were conducted in the presence of DW3, at the Cooper Motors Corporation Engineering yards, to which KCAA had entrusted the wreckage for custody.

DW3 testified that the starboard engine was also in the pack that came with the wreckage of the Cessna 310 from Eldoret. This engine was found to have power, and the witness thought this was the reason why KCAA was not interested in investigations on it. DW3 testified that no mechanical fault had been found on the remains of the aircraft, and “the aircraft was not defective in any way.”

DW3 testified that **Captain Franz Stroeder** had completed his investigation and made his report within five weeks, and the insurance company had already dispatched cheques for payments due under the operative policy.

Learned counsel **Mr. Munene** began his cross-examination of DW3 on 22nd February, 2006 when the witness testified that at the time the aircraft accident took place, 90% of the 2nd defendant's work had to do with the giving of flying instructions; and about 10% was taken up by charter service. For the 90% of the 2nd defendant's operations, it was transacting business with the DCA (Now KCAA) which was performing its mandate on behalf of the Government, in the regulation of training and the assurance of compliance with stipulated student check-hours. The 2nd defendant, like other schools of flying, conducted the training; and the DCA made arrangements for examinations and compliance with Government standards. In the words of DW3: “Even the simplest item, the student pilot licence, was handled by the [DCA]...[My front-office lady], **Jacinta Kiriga**, could not have called **Captain Thuo** and asked him to be an examiner on the flight. The check rights are given by the Directorate of Civil Aviation.”

DW3 testified that the students on the fatal flight were **James Muigai** and **Chris Mutuku**; and at some point each one of them would have to be taken through the procedure of simulated engine failure. The witness averred that even though the accident investigation report of 23rd May, 1998 had not expressly mentioned simulated engine failure as a procedure which took place before the Cessna 310R crashed, there is an allusion to that procedure:

“The pilot had radioed the Control Tower that he lost an engine. This hypothesis is ruled out by the

engine strip test conducted. Instead, a possibility of a ‘rich-cut’ on the engine exists resulting [in] the engine quitting.”

In DW3’s evidence, the rich-cut hypothesis was validated by the findings of the insurance investigator, **Franz Stroeder**, who opened up the port engine in his presence.

DW3 testified that the investigation of aircraft accident is an intricate matter which requires much knowledge, experience and integrity. Although **Mr. Osir** who wrote the investigation report of 23rd May, 1998 was not in his view a very qualified pilot, having spent most of his life in Ground Control, DW3 averred that **Mr. Osir** did his job, and this was the official report of the DCA which, therefore, carries full authority.

DW3 averred that he could not name the cause of the aircraft accident; but there were probabilities which could be read from the accident report; from **Mutuku’s** evidence; and from the assessment of the insurance investigator – of which the witness said: “I was overwhelmed by **Franz Stroeder’s** experience and knowledge; he was a pilot and an engineer, and such a combination is rare.”

DW3 testified that the accident was likely to have occurred after things got out of hand for the late **Captain Thuo**:

“**Captain Thuo** at that time was having multiple things on his hands. Anyone would have sympathised with his position at the same time...His energy was exerted on containing the emergency. Accidents in aviation rarely occur by the single item; always a series of things...It was the same with this accident. A series of things led to it. There would have been no accident if the aircraft safely landed on the ground; joy-riders were given a lift; the aircraft was now too heavy; Eldoret had no fuel, so in Kisumu, there had been a maximising on fuel.”

DW3 was concerned by the fact that the Cessna 310R at the time of the accident had joy-riders on board; and he averred that “**Captain Thuo** as the pilot-in-command, is the one who had allowed them on board.” These joy-riders, the witness averred, were DCA staff members based at Eldoret. In the words of DW3:

“The pilot-in-command gave a lift to the three people. I am not sure **Captain Thuo** wrote any tickets; but he is the one who gave authority. We only knew about the two students [who were to go on flight training].”

The witness testified that the insurance policy taken out for the aircraft covered passengers; and so the student-pilots were covered as passengers, and they were shown on the passenger list. Such a policy was not intended to cover crew, who should be covered by a different policy. The witness testified that for the 2nd defendant’s own pilots a separate policy was always taken out. He averred that he knew not of an insurance policy that could be taken to cover an examiner *qua* examiner; in his words:

“Frequent examinations and tests do take place in the air. Nobody covers for examiners, even today. When **Captain Thuo** enter an aircraft [for the purpose of examining a student] he is pilot-in-command.”

The witness averred that the insurance policies which the 2nd defendant takes out for its pilots, are for *named* pilots; and **Captain Thuo** aboard the 2nd defendant’s aircraft, “would be an outsider sent by the Government.” Of the practice regarding pilot insurance, DW3 thus averred:

“When I go to test other candidates, I am not insured in the aeroplanes [in which I will fly]; I would have insurance elsewhere; [and in the same way] **Captain Thuo** who was flying for his own company, would have his insurance [as a pilot] elsewhere. As an examiner, he was pilot-in-command. He would be taking decisions in relation to the aircraft [in which he was flying]. From Nairobi, the aircraft was his.”

DW3 testified that in the aftermath of the aircraft accident, the 2nd defendant's insurer had made payments in respect of the joy-riders who had been on board. He averred that he had on compassionate and humane grounds, made a case for such payments even though the 2nd defendant could not have had obligations towards joy-riders.

On cross-examination by learned counsel **Mrs. Kajwang**, DW3 testified that the examination process for pilot-trainees was the responsibility of the DCA, which booked candidates for such examination on an individual basis: "The student goes to DCA, pays-up, is given a date and time and name of examiner, and informed of the station where the examiner will meet him." The examination, DW3 averred, is done in the direct interest of the candidate who is advancing his career, and only in the indirect interest of the school of flying — this interest turning on the school's image which is boosted by the student's excellence in the examination.

On re-examination by learned counsel **Mr. Makoloo**, DW3 testified that any pilot who takes out an aircraft on a flight is required to carry out a mandatory check, known as "pre-flight inspection." Such inspection would reveal any discernible defect, and it enables the pilot to make a safe flight. During such preliminary checks it is possible for the pilot to run the engine at high power, before the craft is air-borne. It is a mandatory requirement that every pilot who flies out, must "know for sure how heavy his craft is, before departure," and he leaves behind a load-sheet duly signed showing the craft's load, the number of passengers on board, the amount of fuel taken in the tank, the location of the craft's centre of gravity. **Captain Thuo**, DW3 testified, was required to make a load-sheet for every departure of the Cessna 310R under his command, even though the 2nd defendant had been unable to find a copy of the load-sheet which he may have left in Kisumu before undertaking the fatal flight to Eldoret. DW3 averred that the operative rules of civil aviation are most specific about weight-calculation, and, for an aircraft carrying 14 passengers or less, the passengers are required to be individually weighed.

DW4, **Frederick Aggrey Opot** testified that he is the General Manager (Mechanical) of an airline known as East Africa Safari Air Express – as from May 2005. He was trained as an aircraft maintenance engineer, and did serve as an airworthiness inspector and an aircraft accident investigator. He trained as an aircraft engineer at the School of Aviation in Uganda (1973 – 1976), and had a diploma as a maintenance engineer, issued by the Directorate of Civil Aviation of the former East African Community. DW4 is a gazetted accident investigator.

In 1992 the witness left the service of DCA, and joined CMC Aviation, a general aircraft maintenance company based at Wilson Airport in Nairobi. He was at CMC in 1998, and had been requested by DCA to conduct investigations on the port engine of the Cessna 310R-5Y-EHL.

Why was it the port engine, and not the starboard engine, being delivered to CMC for investigation? The witness averred: "The investigator at the scene had determined that the starboard engine at the time of the accident, was producing power – but not the left one." This was a propeller-driven aircraft; and, DW4 averred: "The propeller tells us whether it was being driven at the time of impact. Different engine-types have different signature tunes at time of accident; it is easy to find out in the way the propeller has failed. The propeller can fail in a particular twisted manner if there was high power."

DW4 testified that whenever there is an aircraft accident, the Chief Inspector of Accidents appoints an investigator-in-charge – and there may under him be several investigators. The investigator is allowed by law to co-opt other investigators or experts, in the task of investigation. The investigator-in-charge of the accident in question, **Mr. Osir**, had co-opted CMC to carry out investigations – and this is how DW4 came to be involved.

It was CMC's engineer-in-charge at the engine shop who did the opening up of the port engine, at a time when an insurance investigator for 2nd defendant, **Captain Franz Stroeder** was also present. **Franz Stroeder** had earlier communicated (defence exhibits 13A and 13B) to CMC, that in the process of investigation certain specific elements required attention: the magnetos and the alternator; and the spark plugs. The magnetos were elements of the ignition system, linking up with the spark plugs in internal combustion. And, whenever there was engine failure, or its malfunction was reported in an aircraft in the

course of flight, it was imperative to look at the ignition system; for without ignition, the engine would fail. The alternator is part of the electrical system, and generates power for the whole aircraft, supplementing the power sourced from the battery. To such vital components of the aircraft, DW4 and his team gave special attention; they took the aircraft engine to CMC's engine shop, and ran them to see if they were working.

DW4 and his team also tested the fuel system; but no malfunction was found. Particular attention was paid to the piston-cylinder valve train and the bearings – but nothing was found that could be attributed to pre-crash failure. The witness however cautioned:

“I am not saying that there was absolutely nothing wrong with the engine. Failure can be caused by other things than the ones we were testing.”

I understood DW4 to be saying that in his findings, the Cessna 310R-5Y-EHL had, for all practical purposes, been in good condition prior to the accident. So, what “other things” could have led to the fatal crash? DW4 after reading the accident report and holding informal discussion with colleagues over it, thought that there had been “operational things” in the final trip of the aircraft which he had no competence to pass judgement upon; and one of these was simulated engine-failure procedure which appears to have been conducted before the aircraft crashed. DW4 expressed his agreement with the accident report, even though he said: “If I was writing it, it would not be exactly the same.” The witness averred: “The report here was complete. It covered all areas required to be covered. It is not to apportion blame – just to bring out cause. It is to say what, not who, caused the accident.” He made this significant statement about the pre-crash condition of the craft: “On our part we did not find what may be called pre-accident defects.” This position was also reflected in the accident report, the relevant paragraph (1.16, on “Tests and Research”) of which reads:

“The port engine strip inspection was carried out, and the findings were as follows:

1. No internal mechanical failure occurred to the engine. A large quantity of engine oil was still present within the engine and no signs of oil-starvation was witnessed during the disassembly.
2. The ignition and fuel system were operating normally, after carrying out bench tests on both sets of components.”

DW4 testified that there were certain factors which he had not inquired into, which could lead to engine failure, such as: fuel starvation (not enough in the wing tanks); a pipe leading to the engine being ruptured; malfunctioning of the fuel pump; blockage in the fuel system; disruption in the fuel-monitoring system. DW4's examination had been focussed on the *engine*.

On cross-examination by learned counsel **Mrs. Kajwang**, DW4 expressed his concurrence with the findings in the accident – investigation report, and expressed the opinion that those who died would probably have survived if there had been no trees in the aircraft's path as it approached land. The burden of the report, DW4 testified, was “operational issues,” and any flight is potentially accident-bearing though reality of accident stands to be modulated by a variety of factors, such as training, maintenance, etc. In some cases aircraft accidents are due to operational situations, and in others, to engineering-type situations.

VII. SUBMISSIONS OF COUNSEL

1. Defendants employed Deceased as Pilot-trainee Examiner, they ought to give Insurance Cover: Submissions for Plaintiff

Learned counsel **Mr. Munene** submitted that the late **Captain Raphael Thuo** had been acting for, on behalf of, and in the interests of both defendants; and that on this account the defendants had a duty of care to take out an insurance policy to cover his life – in all circumstances irrespective of cause of death.

Learned counsel, furthermore, contended that “the aircraft crashed due to engine failure, not pilot error or other causes attributable [to the deceased].” Should this contention be upheld, then damages payable to the plaintiff as widow, and to the estate under the Law Reform Act, and also general damages, would need to be assessed.

Mr. Munene set out as the main points addressed on liability, the following:

- (i) Was the late **Captain Raphael Thuo**, on the fateful day, carrying out duties as a Deputy Chief Examiner and doing and Instrument-Rating Route Survey for the DCA?
- (ii) In that capacity, was **Captain Raphael Thuo** the Chief Pilot-in-command?
- (iii) Was **Captain Raphael Thuo** a passenger in the aircraft?
- (iv) Was the aircraft properly insured?
- (v) Was there negligence by the late **Captain Raphael Thuo** as a pilot?
- (vi) Was the 2nd defendant’s aircraft defective?
- (vii) Who is to be held liable for the deceased’s death?

It was the plaintiff’s case that **Captain Raphael Thuo** was aboard the Cessna 310 R-5Y-EHL on 23rd May, 1998 when it crashed, and he died. He was survived by the plaintiff (widow) together with a son, **Kamau** (born in 1983) and a daughter, **Joy Kabura** (born in 1993). He was an experienced pilot who was, as at the time of the accident, running his own airline company. When the craft accident took place, the deceased was performing duties as Deputy Chief Examiner for the DCA; and he was also carrying out other duties for and on behalf of the DCA.

Learned counsel made submissions on evidence which, however, did not come out quite so clearly through the testimonies. In the words of counsel:

“...PW2 **Christopher Mutuku**...was a student pilot with the 2nd defendant on board the fateful flight. He piloted the craft from Eldoret to Kisumu where the passenger [?] disembarked. Thereafter the craft took on additional fuel. The late **James Muigai Kenyatta** was the other pilot on board. At Kisumu [**Captain Raphael Thuo**] conducted simulated engine failure tests. [**Captain Thuo**] and **James Muigai** took the simulated engine failure tests. [**Captain Raphael Thuo**] and **James Muigai** took the simulated engine failure tests over and around Kisumu with only the trainee pilots aboard. Thereafter, the plane landed, took on several civilian passengers and departed for Eldoret.”

It is not clear to me how such a perception of the evidence is arrived at. For in the proceedings it is recorded that PW2, **Christopher Mutuku** had testified as follows: there were six persons in the Cessna 310R-5Y-EHL when it crashed on 23rd May, 1998; PW2 is the one who had flown the plane on that morning from Eldoret to Kisumu; just before landing at Kisumu, PW2 executed an instrument procedure under instruction; the other four persons in the craft disembarked for a while at Kisumu, and PW2 was left alone with **Captain Thuo**; in his words: “We took off, flew around Kisumu....did a procedure turn, then we landed”; and at this point they took aboard the other four passengers, and it was **James Muigai**’s turn to be examined as he flew the plane towards Eldoret. What was **James Muigai** being examined on, as he flew the plane towards Eldoret? In PW2’s evidence, **James Muigai** was being examined on *asymmetric power*.

The evidence, therefore, is not consistent with learned counsel’s submission. Apart from there being the direct evidence of **Christopher Mutuku** (PW2) that the examiner was examining the student-pilot, **James Muigai** on simulated engine failure during the fateful flight from Kisumu to Eldoret, there is no evidence at all on record that **Captain Thuo** had taken both student pilots through the asymmetric power procedure

at Kisumu, before the departure to Eldoret. From the evidence on record, only PW2 was in the aircraft with **Captain Thuo** in the flight around Kisumu, when the asymmetric power procedure was conducted.

On the possibility that the simulated engine-failure procedure was being executed at the crucial moment when the craft developed problems, learned counsel **Mr. Munene** submitted:

“PW2...gave testimony as to the seating arrangements. Even under cross-examination, he was emphatic that he did not perceive any simulated engine failure test being carried out by [**Captain Raphael Thuo**] moments before the crash.”

As already noted, PW2's evidence as recorded is that the simulated engine failure was part of the examination process which was being conducted during the flight towards Eldoret. The witness, who was sitting in the back seat, could only see part of the controls in the front, and so he had not noticed, at the critical moment, whether **Captain Thuo** had simulated one-engine failure. In PW2's understanding, it was the examiner's responsibility to determine whether or not a simulated engine-failure was to be conducted at a particular time. About the time when the aircraft hit the tree, PW2 had testified: “I did not see anything else...It happened too fast; I did not see what the Captain was doing.” This shows that PW2 was not as affirmative, with due respect, on the actions taken by **Captain Thuo** about the time of the crash, as learned counsel portrays it.

Learned counsel submitted that it was the case, from the evidence of DW1 (**Gladys Igandu Murani**), that DCA was responsible for issuing annual licences for pilots and planes, and “all examiners including [**Captain Raphael Thuo**] were appointed by DCA.”

Counsel noted from the evidence of DW2 (**Peter Musyoki Munyao**) that the accident investigation report had established that there was no evidence of mechanical fault; had recorded that only the port engine was tested during the investigation; had reproduced the Air Traffic Control transcript on the vocal communication “between the pilot and the ground control at Eldoret”; had recorded the complaint from the aircraft regarding “engine problems”, followed by indications that the pilot was “looking for space to land”, and that the aircraft was “hitting trees.”

Of the evidence of DW3 (**Captain Joseph Martin Ririani**), counsel remarked his (DW3's) confirmation that the deceased was examining two student pilots (PW2 – **Christopher Mutuku** and one **James Muigai Kenyatta** who died sometime after the accident); and he was establishing flight routes for DCA.

Counsel remarked that it was clear from the accident investigation report that at 12.18.03 pm the pilot had communicated thus: “...we are having an engine problem and looking for a place to land”, and then repeated it at 12.18.04 pm and at 12.18.12 p.m; before crashing on trees at 12.18.16 pm; and from that sequence and pace of events, he concluded that (i) the primary source of the crash was engine problem; and that (ii) the crash-landing was “a secondary event caused by the plane losing power and altitude.”

Mr. Munene contests the finding in the accident investigation report, that no mechanical failure had afflicted the aircraft, in view of the fact that the craft had hit a tree; counsel contends that “the plane's engines were already non-functional before hitting the trees”. Why would both engines of the aircraft be non-functional? **Mr. Munene** sought to lessen the weight of the evidence found in the report and in the testimony of PW2 (**Christopher Mutuku**) and DW3 (**Captain Joseph Martin Ririani**), that on the fateful flight to Eldoret the examiner had engaged in the asymmetric power procedure, which entails flooding one craft engine through the “rich cut”, and simulating one-engine failure. Learned counsel contended that the rich-cut notion was “mere speculation, without any foundation [and not] backed with any concrete evidence”.

It was learned counsel's contention that insurance for the Cessna 310R – 5Y – EHL was incomplete, so long as it covered only hull, passengers, third parties, employee pilots; it ought to have covered also *examining pilots*. It is not clear, however, how this argument rests in harmony with the evidence on record. The pertinent evidence is that of DW3, **Captain Joseph Martin Ririani**. This witness testified that the 2nd defendant's pilots have a separate, individual policy in their own names; and this is not the general

policy covering hull, passengers and third parties. That such is the practice observed by the 2nd defendant, was not contested in the testimonies; and if it is a valid position in terms of obligations in law, then it would, I would hold, have to follow that **Captain Raphael Thuo**, as a pilot should have had a separate pilot's insurance policy – and from *his employer*. This point will be further analysed towards the end of this judgment.

Learned counsel correctly stated, with respect, that DW3 had confirmed that **Captain Raphael Thuo** had been carrying out duties for DCA, as flight examiner.

Mr. Munene contested the testimony of DW3 regarding the “rich-cut” as a factor in, or cause of the craft accident. In counsel's view, the accident-investigation report had alluded to the “rich-cut” scenario only as a *possibility*; and he thought DW3 had now portrayed this possibility as the only *probable* cause.

To demonstrate the shortfalls of the “rich-cut” hypothesis, counsel made submissions on specific elements of the evidence:

(i) counsel states, that PW2 “emphatically said that simulated engine failure tests were conducted at Kisumu”. That claim, however, is not borne by the evidence.

(ii) Counsel states : “When simulated engine failure tests were carried out at Kisumu, all passengers were ordered out of the aircraft. Indeed, it would be inconceivable for the tests to be carried out while a plane has passengers. It is contrary to regulations.” What counsel here states as the binding norm, I believe, comes from the evidence of DW3, **Captain Joseph Martin Ririani** who gave evidence on pilot-training procedures, and produced in aid a standard flight training manual (defendants' exhibit No.12). But PW2 (**Christopher Mutuku**) understood the position to be that the examining pilot can engage in the simulated one-engine failure procedure any time, as he considered appropriate; and he gave direct evidence that it was the late **James Muigai** who was piloting under examination as the craft left Kisumu for Eldoret, and that one of the procedures undertaken on this trip was asymmetric power. (And DW2 happened to be of the same view.)

(iii) Counsel states that from the ATC transcript attached to the investigation report, the plane was approaching landing and had finalized its approach to the airport when the problems leading to the accident cropped up; therefore, it was urged, there was no possibility of any tests being carried out. Yet such reasoning was not tallied to any evidence; on the contrary, PW2 (**Christopher Mutuku**) testified that it was the examiner's responsibility to determine whether or not a simulated engine failure was to be conducted at a particular time. And DW3 (**Captain Joseph Martin Ririani**) testified that in the tests carried out following the occurrence of the accident, the starboard engine was found to have been operational, whereas the levers attached to the port engine were found to be fully in the forward position – a condition which suggested that this engine had been disabled through the “rich-cut”.

(iv) counsel contended that the “rich-cut” theory was based on pure speculation. As I have already noted, PW2 has given evidence that the simulated one-engine failure procedure was being conducted on the Kisumu-Eldoret route. That evidence is not controverted; and therefore it must mean that somewhere along the Kisumu-Eldoret route, once or twice or more times, the “rich-cut” device was, indeed, employed.

(v) Counsel states : “The simulated engine failure results are always recorded on the examination paper schedule provided. Having been conducted at Kisumu.... DW3 does not say why any further tests could conceivably be carried [out], with landing-approach procedure in effect.” The factual basis of this contention, as already noted, would not stand up; but at the same time, the argument itself is, with respect, largely conjectural.

(vi) Counsel states from the accident-investigation report that “the aircraft was within the specified load limits and its weight did not contribute to the crash”. But what the report says is: “The aircraft was loaded within specified limits of the Aircraft Operation Manual”. However, in the testimony of

DW3 (**Captain Joseph Martin Ririani**), the weight of the Cessna 310R could have presented problems, depending on the procedure being undertaken; on the altitude; and on density of the air-column. With the six men on board, the full tanks of fuel uplifted at Kisumu, and the weight of the craft itself, DW3 calculated that the total weight of the aircraft was 5172lbs; such a weight would not have been safe at an altitude of 9000ft, in the elevated Eldoret area; and it would be much less safe if the craft had to go on just one engine.

The question of *insurance cover for examiners* was of great interest to counsel, in his submissions. He contended that both defendants had failed to have an insurance policy to cover **Captain Raphael Thuo**. It was apparent from DW1's evidence that DCA only recognized pilot-trainee examiners as *examiners*, but did not take an insurance policy for them in that capacity. DW3 had testified that the question of insurance for a *pilot* lies with the pilot's employer – but that the pilot-in-command was not the employee of either the aviation school from whom the student came, or DCA.

Learned counsel **Mr. Munene** contests such a claim. In his words:

“... DCA engaged the services of examiners. It should have taken out an insurance policy to cater for any accidents. In the alternative, DCA should as [a] prudent employer, insist on aviation [schools] taking out an insurance cover for trainees and examiners. As a regulator, it was negligent in not providing for the insurance policy. [The] Honourable Court is invited to note that neither [the] Civil Aviation Act (Cap 394) nor the Civil Aviation (Amendment) Act, 2002 has addressed this problem – which... a prudent public authority should have addressed.”

Learned counsel urged that **Captain Raphael Thuo** was engaged by 2nd defendant as an examiner – “therefore a servant of the 2nd defendant at the material time”. As DW3 had testified that the Kenya School of Flying (2nd defendant) has 90% of its activities as pilot- training, that also formed the main source of its income; and therefore the 2nd defendant's “failure to insure examiners who are “pilots-in-command” for aircraft [that provides the bulk of the income] is negligence”.

Mr. Munene, however, did not demonstrate by case-example how the duty to insure a pilot bearing a *specific, random task* arose in law, outside the framework of the pilot's regular and permanent engagement as a professional person whose job entailed plying the skies. To overcome the issue, learned counsel would perceive the deceased pilot as an *employee* of the defendants, who, therefore, the defendants have an obligation to insure in that capacity.

Counsel contended that it was an invalid contention that the deceased examiner and pilot-in-command had allowed joy-riders to get on board the aircraft, and that this became a factor in the fate of the craft; counsel's reason being that DW3 had not produced a passenger manifest, or the load-sheet showing what or who the craft had on board. This contention is, however, not borne out by the evidence on record – which shows clearly that apart from the examiner and the two student-pilots, three other persons were in the aircraft when it crashed; and that fuel had been uplifted at Kisumu.

Learned counsel urged that the question of liability be dealt with on the basis of the evidence of DW4, **Fredrick Aggrey Opot** who had testified that it is possible for engine malfunction to arise from a range of causes some of which cannot be discerned from a workshop assessment, even though the probability in the instant case is that the accident had arisen from operational causes. Counsel submitted that “there was no pilot-error either by [**Captain Raphael Thuo**] or the trainee pilot”.

Mr. Munene submitted that negligence, in relation to the aircraft accident, is to be attributed to the defendants. He derived this inference from the recorded communication between the craft and ground control at Eldoret, just before the crash:

<i>Time</i>	<i>Event</i>
9.14.06	EHL cleared to land.

- 9.18.03 EHL to Tower: We are having an engine problem and looking for a place to land.
- 9.18.04 Having a problem with engines.
- 9.18.12 EHL have a problem and looking for a safe area to land.
- 9.18.16 Crash-landing on trees.

Counsel's submission from the foregoing time-sequence was that the plane had developed an engine problem – and that this was the cause of the crash. He was tendering this proposition so as to negative the role of operational causes – such as pilot-error, or training procedures undertaken; counsel urged: “the defendants’ adoption of a hypothesis and failure to carry out further tests, on the balance of probabilities, have not discharged their burden of proof”.

Learned counsel submitted that the late **Captain Raphael Thuo** was carrying out duties for DCA, and that on this account, under s.12 of the Civil Aviation (Amendment) Act, 2002 the plaintiff had a cause of action against the 1st defendant.

Counsel submitted that since the deceased was to “observe and fulfil the entire examination schedule”, he was in the aircraft as a *passenger* – even if he was also *pilot-in-command*. It was urged that the deceased “was fulfilling a dual role and the defendants owed a duty to insure the pilot and to engage his services in a problem-free airplane”. He urged that it was reasonable to expect that “a prudent aviation operator and a public body” should “effect a policy of insurance to cater for eventualities”. Counsel submitted that the 1st defendant had failed to demand “that the 2nd defendant do have a policy of insurance for examiners”; and that “no defendant took the prudent steps to take out an insurance policy cover for flight examiners yet they were carrying out the defendants’ duty.”

On the basis of his contentions on liability, counsel proceeded to propose damages that should be awarded to the plaintiff. In counsel's words:

“The deceased ... was prior to his death a private pilot and also the Chief Pilot and proprietor of Tana Mara Aviation Company. The deceased was also engaged in duties of instructing and testing trainee pilots. The deceased died only aged 49 years.... He left two children namely **Kamau Thuo** born in 1983 and aged 15 years in 1998 and **Joy Kabura** born in 1993 and aged 5 years in 1998. The deceased died at an age when his wife and children needed him most. The deceased was a pilot as from 1972 and had good prospects.... His wife and children have indeed suffered a great loss since they entirely depended on the deceased for support and maintenance. The deceased used to earn [an] average income of Kshs.300,000/= to Kshs.400,000/= per month.”

Counsel urged that, under the Fatal Accidents Act (Cap.32, Laws of Kenya), a multiplier of 10 years to be adopted, using an earning of Kshs.350,000/= as the monthly mean, since as a pilot the deceased would have worked up-to his mid-sixties. He urged that for the two minor children and the widow, a multiplier of 2/3 dependency be adopted. He urged that in addition, under the Law Reform Act (Cap.26 Laws of Kenya) the sum of Kshs.10,000/= would be awarded for pain and suffering by the deceased who was stated in the death certificate to have died due to excessive heat. Counsel asked for Kshs.100,000/= under the loss-of-life head. The total amount claimed was Kshs.28,110,000/=.

2 . Plea of Res ipsa loquitur is neutralised; No Proof of Negligence; No Basis for Vicarious Liability: Submissions for 1st Defendant.

Learned counsel **Mrs. Kajwang**, for the Attorney-General, as legal representative of the Government of Kenya and on behalf of the Directorate of Civil Aviation falling under the Ministry of Transport and Communications (as required by the Government Proceedings, Act (Cap. 40)), embarked upon her submissions by enumerating the specific issues for resolution, previously agreed upon.

Learned counsel remarked the evidence of PW1, **Mrs. Lois Wambui Thuo**, that when after the aircraft

accident she had seen **Mr. Kuto** who was the Director-General of DCA, he had told her that DCA had no procedure for paying compensation in respect of a deceased examiner such as **Captain Raphael Thuo** – “because [examiners] were appointed by [DCA] to instruct and examine, [but] they are not employees”. It was PW1’s testimony that the deceased was a freelance pilot, and was the Chief Pilot of African Airlines. Counsel noted that PW1 had not furnished any evidence in support of her claim that the deceased used to earn as a freelance pilot the sum of Kshs.400,000/= per month; but she testified that DCA paid Kshs.3,000/= per hour to the deceased for instructing students or for providing other services such as instrument-rating. Counsel cast doubts on such evidence : because the plaintiff had only produced a letter from the late **Captain Thuo’s** previous employer stating that he earned a salary of Kshs.200,000/= as well as certain allowances. On cross-examination, PW1 had averred that she was not sure how much money DCA used to pay the deceased for his services.

Learned counsel remarked the evidence of PW2 that the asymmetric power procedure was one of the areas of training in which the late **Captain Thuo** had been engaged, during the flight; and according to the witness, this is not a dangerous procedure though it can be, depending on weight of aircraft, its performance, height above sea level, location, and height above ground-level.

Mrs. Kajwang noted from the evidence of DW1, **Gladys Igandu Murani**, that examiners for DCA are not employees of DCA, and that DCA has not been employing examiners; and that the relationship between the late **Captain Thuo** and DCA was that he was an “Authorized Examiner” in instrument ratings.

Counsel remarked DW2’s testimony that though in principle the procedure of asymmetric power should not be conducted with passengers on board, the matter is left to the judgment of the examiner, and he can conduct it in any location, at any stage.

Counsel also remarked the testimony of DW3, **Captain Martin Joseph Ririani**, that the Kenya School of Flying had no role in the identification of examiners for its students. DW3 had testified that the panel of flight-examiners had been seeking to identify a flight-practice route, for adoption by DCA; and the identification task was entrusted to the late **Captain Thuo** who the panel had named Deputy Chief Examiner for Instrument-Rating; and **Captain Thuo** was performing this task during the training flight in the Cessna 310R.

Counsel noted the testimony of DW4, **Fredrick Aggrey Opot**, who said the workshop assessment of the Cessna’s port engine showed no malfunction in any of its components; and he testified that the accident-investigation report suggested that *operational factors*, rather than mechanical ones, had largely led to the accident.

Learned counsel submitted that the deceased had not been an employee of the DCA; and any payments made to the deceased were mere tokens of appreciation for a contribution to the aviation industry as an examiner.

Learned counsel submitted that the deceased was the pilot-in-command of the Cessna 310R; and he was the examiner for two candidates, on the subject of instrument-rating. As pilot-in-command, it was submitted, the deceased was not a *passenger* in the aircraft; the accident investigation report of 23rd May, 1998 (p.4) bore this entry : “Personnel Information : Pilot/Captain: **Raphael Francis Thuo**; Age: 49 years”.

Counsel submitted that the duty to insure the aircraft, which rested only with the 2nd defendant, by the evidence adduced, had been duly discharged.

On the claim of *negligence*, counsel submitted that this was a mere allegation, but no cause of action had been established against the 1st defendant. It was urged that the deceased not having been an employee of DCA, no negligence could be claimed *via* the employment relationship; and besides, no particulars of negligence had been proved against the 1st defendant.

It was submitted that it had been shown through the testimony of DW1, **Gladys Igandu Murani**, that as at the date of the accident, the Cessna 310R had a valid Certificate of Airworthiness, which is only issued after an inspection of the craft has been carried out. Counsel stated: “It is our submission that the plaintiff failed to show that the 1st defendant failed to prove on a balance of probabilities that the 1st defendant permitted an unsound aircraft to be used for pilot examination.” DW3 had testified that the aircraft was in sound condition; and the investigations conducted at the C.M.C. Engineering Workshop following the accident, had revealed no pre-accident defects; and both DW3 and DW4 testified that there was no fault with the plane. Counsel submitted, I believe correctly, that no evidence had come through the testimonies of PW1 or PW2, showing that the aircraft had been *faulty*; PW2 indeed testified that the craft was not faulty; and DW3 had testified that *pre-flight inspection* by the pilot was mandatory, and such inspection would reveal any perceptible defect, if such be. Counsel further submitted that the plaintiff called no evidence to show that the 1st defendant “had any direct control over the soundness, safety and effectiveness of the aircraft”; and that no valid case had been made that the 1st defendant “had a duty to warn the pilot that the aircraft was not mechanically fit for pilot-training examination”. It was further submitted that the 1st defendant “did not entrust a defective aircraft to pilot-students, and no evidence has been led to the contrary”.

Counsel submitted that the position of pilot-training examiners had been well explained in the evidence of DW1 and DW3. DW3 had testified that examiners are not covered by the insurance policies for the aircraft, nor are pilots-in-command. DW3 testified that he himself serves as a pilot-training examiner, but the insurance policy that covers him is solely for himself *as a pilot* and is not an element in the management of the training-aircraft.

Learned counsel contested the plaintiff’s “engine-loss theory”, as the factor that led to the crash-landing at Eldoret. The engine – strip test carried out at CMC Engineering workshop had shown that the port engine was mechanically sound and was serviceable, save that the corresponding levers were found in a *forward position*, suggesting that the asymmetric power procedure had been in progress and this led to the engine quitting. This procedure, from the evidence of PW2, DW2 and DW3, could be dangerous depending on certain factors. DW2, **Peter Munyao** testified that the *elevation of Eldoret* is 7000 ft above sea level, and at this altitude, air is *thin* and the air cushion for aircraft is reduced, and the craft is apt to descend rapidly due to high pressure at high altitudes.

Mrs. Kajwang submitted that from the evidence of DW1 and DW3 it was clear that no relationship existed between the deceased and DCA which could fix DCA with *vicarious liability* for acts of the *deceased*. In the alternative, counsel urged that there would in any case be no liability for ordinary risks of service: because “it is trite law that an employer is not liable to his workman for any damage suffered, arising out of ordinary risks of service, when there is no negligence on that part either of himself or of his other employees”. Counsel, on this point, cited a passage from **Gray v. Stead** [1999] 2 Lloyd’s Rep.:

“The death of a seaman drowned at sea, whether in a shipwreck or other disaster, gives no cause of action if the ship were properly manned and equipped and there was no negligence on the part of the captain or the crew.”

The plaintiff had sought, even where evidence in support of her case may be lacking, to have negligence on the part of the defendants presumed – *res ipsa loquitur*. It was learned counsel’s submission that “the maxim is not a rule of law, [but] merely describes a state of evidence from which it is possible to draw an inference of negligence.” **Mrs. Kajwang** submitted that “both defendants have shown by way of evidence how the accident may have occurred without negligence on their part; hence the [pertinence] of the fact of the accident by itself disappears, and the plaintiff is left as she began, namely, that she has to *show negligence*”. The 1st defendant’s explanation, through the evidence, has been that the accident was caused by the possibility of a “rich cut” – and such a factual position would not be a result of any negligence on the part of the 1st defendant. Through the evidence of D.W.2, **Peter Musyoki Munyao**, counsel urged, 1st defendant had neutralized the effect of the presumption raised by the *res*. Hence the Court should judge whether, on balance, the facts establish that the claimant has proved her case, the burden of which must remain at the end, as it was at the beginning, on *the plaintiff* to discharge.

Learned counsel submitted that through the accident report of 23rd May, 1998 and through the testimony of DW2, inference of negligence from the bare fact of the accident, has been rebutted.

Counsel submitted that the plaintiff had failed to prove her case on a balance of probabilities – and so the claim be dismissed with costs.

If, however, the Court were to be inclined to find otherwise, then quantum should be determined on certain principles. (i) Under damages falling within the framework of the Law Reform Act (Cap.26, Laws of Kenya), for loss of expectation of life the sum awarded should be Kshs.100,000/=; and for pain and suffering it should be the conventional figure of Kshs.10,000/=. (ii) As regards damages under the Fatal Accidents Act (Cap.32, Laws of Kenya), it should be considered that the only fee payable by a student pilot where flight test is required, to DCA, is Kshs.1,320/=. Records for 1983 show that the deceased had carried out six tests for DCA, for which he had been paid Kshs.810/=. In 1984 he had carried out 12 tests, for which he was paid Kshs.2,310/=. In 1985 he had carried out three tests, for which he earned Kshs.880/= - and these were moneys paid to DCA by examinees, and then a percentage was made payable to the examiner. Considering that the deceased died at 49 years of age; that he left behind a wife and two children; that there was no evidence how much he spent on them; that it was not shown what his retirement age would have been, counsel proposed a multiplier of five years if it is discounted to take account of the vicissitudes of life and the benefit of lump-sum payment. And what was proposed was the figure of Kshs.300,000/= based on the figures: $\frac{2}{3} \times 5 \times 7, 500 \times 12$.

On costs, learned counsel began from the trite principle that they follow the event. She urged that the position be taken that the plaintiff had failed to prove her case on a balance of probabilities – and so the plea for costs and interest must fail. Counsel urged that the case be dismissed with costs to 1st defendant.

3 . Incompetence to Sue; No Proof of Negligence; Chain of Errors by Deceased led to Aircraft Accident: Submissions for 2nd Defendant

Learned counsel **Mr. Makoolo** submitted that although the plaintiff is making claims of moneys calculated on the basis of the earnings of her deceased husband, the figures presented are not validated with any formal documentation.

Counsel contested the rubric of the suit as filed, stating that the plaintiff is “suing for and on behalf of the estate of **Captain Raphael Thuo** (Deceased)”; whereas in cross-examination, the plaintiff (PW1) had admitted that the grant of letters of administration (plaintiff’s exhibit No. 1) for the said estate was in her name jointly with one **Rose Waruguru Gichira**.

Counsel remarked from the evidence of PW2, **Christopher Mutuku**, that there were three joy-riders on board the Cessna 310R on its training flight; fuel had been uplifted at Kisumu, filling all the aircraft’s tanks. Counsel submitted that the aircraft as it flew from Kisumu did have considerable weight. He noted from the evidence of DW1 that the aircraft had crashed only a few months after it had been issued with a Certificate of Airworthiness. He noted that DW1 had testified, from defence exhibit No. 4 (the letter appointing **Captain Thuo** an examiner) that the examiner is required to be on the look-out at all times during the examination procedure; and he further noted that DW1 while referring to defence exhibit No. 7 (claims by **Captain Thuo**) had confirmed that the examinations are done on behalf of DCA and not of the Kenya School of Flying. Counsel submitted that the accident investigation report of 25th May, 1998 had attributed the cause of the accident to the craft hitting the trees, the pilot’s inability to control the vessel, and the rate of sinking. This assessment amounted, as counsel saw it, to attributing the accident to pilot-errors; and thus the report ended by making certain safety recommendations; in particular, that pilots should be fully conversant with the performance of their plane at high-density altitudes, and with the landing parameters of individual aeroplanes before initiating certain manoeuvres. It was also recommended that pilots should realize that there could be degradation of surveillance while they performed other tasks, and they should endeavour to avoid collision by keeping a look-out on visual meteorological conditions.

Counsel noted from the evidence of DW3 that the Cessna 310R-5Y-EHL at the time of the accident was

properly insured and everybody on board was covered. According to DW3's evidence, "the 2nd defendant does not have anything to do with the appointment of examiners and did not appoint **Captain Thuo** to examine the students". Counsel noted DW3's testimony that the 2nd defendant could not have been negligent in not taking out an insurance cover for examiners.

Has the plaintiff the capacity to bring this suit on behalf of the estate of the deceased?

Mr. Makoloo submitted that the power to enter into relations, or do anything with respect to a deceased person is reposed in the administrators or legal representatives of the deceased's estate – a position acquired by virtue of Grant of Letters of Administration under the Law of Succession Act (Cap. 160, Laws of Kenya). Section 2 of that Act defines "personal representative" as the executor or administrator of a deceased person.

Yet plaintiff's exhibit No. 1 produced by the plaintiff shows the grant to have been made to the plaintiff jointly with another; and the two undertake to faithfully administer the estate according to law and to render true and just accounts. Compliance with the Act would dictate, counsel submitted, that "action taken by one in the absence of the other does not qualify the one taking the action as a personal or legal representative under the law"; and such is the import of s.81 of the Law of Succession Act (Cap.160).

Counsel submitted that no evidence had been tendered that the joint-holder of the letters of administration, namely **Rose Waruguru Gichira**, was dead; and consequently "the plaintiff did not have powers under the law to bring the suit in her name only." The inference must be drawn, learned counsel urged, that the plaintiff "is not acting under the grant of [letters of] administration [for] the estate of the deceased". Counsel submitted that the suit was defective *ab initio*; the plaintiff as described in the plaint had suffered no loss and damage; and the suit should be dismissed.

Was the deceased a Chief Examiner or a Deputy Chief Examiner for Instrument-Rating employed by DCA?

Counsel submitted from the evidence that the deceased was Deputy Chief Examiner for Instrument-Rating, and was not an employee of DCA.

Was the deceased on board as chief pilot-in-command? Learned counsel referred to the Air Navigation Regulations annexed to the governing legislation in aviation, the Civil Aviation Act (Cap. 394, Laws of Kenya). Regulation 2 defines a "pilot-in-command" as "a person who for the time being is in charge of the piloting of the aircraft without being under the direction of any other pilot in the aircraft".

Learned counsel concludes, correctly, with respect, that "the evidence tendered by all parties has shown that the late **Captain Thuo** was examining two student pilots. At the time of the crash there were also other people on board. From the evidence before the Court, it was not shown that any of them was a pilot and if so, [that any of them] was in a position to give orders to the deceased. It is also clear from the evidence that the deceased could not have been taking directions from the students he was to examine. It follows that he was the pilot-in-command". From this premise counsel concluded, I believe correctly, that the late **Captain Thuo** "was not a passenger in the aircraft".

Were the defendants negligent? Counsel submitted that no evidence had been produced showing that the defendants entrusted student-pilots with the Cessna 310R-5Y-EHL; but there was evidence that the aircraft was entrusted to **Captain Thuo**, an experienced pilot who was in command.

Learned counsel submitted that the evidence on record shows the aircraft to have been properly insured in every respect; but that this question would in any event bear no relevance to whether or not negligence was the cause of the accident. My understanding of this argument is that negligence in the causation of the accident has little to do with there having been adequate insurance cover – a valid contention, in my view.

Apart from the evidence showing the Cessna 310R-5Y-EHL to have been well maintained, learned

counsel drew the Court's attention to Reg. 29 of the Air Navigation Regulations which prescribe a set of safety rules to be complied with by a pilot-in-command, before take-off. Counsel submitted:

"By taking off on several occasions, from Nairobi to Eldoret, then from Eldoret to Kisumu, taking off in Kisumu to do an instrument – rating test for PW2 and later taking off from Kisumu to Eldoret, the deceased warranted that he was satisfied with the condition of the aircraft. He was satisfied that the aircraft had no defects whatsoever. Furthermore, the distance covered by that aircraft on all these occasions, including the asymmetric power done by PW2 is indicative of a technically-fit and mechanically-sound aircraft."

Was the accident wholly or substantially contributed to by the negligence of the deceased? Learned counsel submitted that the deceased as pilot-in-command, "had the overall judgment and authority over the aircraft". Yet under the deceased's watch certain things happened; passengers other than the two students getting on board; uplifting of a large quantity of fuel – thus increasing weight; conducting manoeuvres with passengers on board; conducting manoeuvres with a heavy aircraft; inadequate regard for altitude, and for flying height above ground at Eldoret. These short-falls in the conduct of flight from Kisumu to Eldoret, **Mr. Makoolo** submitted, were pilot-errors on the part of the deceased. Counsel referred to the letter by which the deceased had been appointed as examiner (defence exhibit No. 4): it required the examiner to maintain proper look-out during flight; and counsel urged: "The deceased failed to maintain proper look-out as required and thus failed to see the dry eucalyptus trees and crashed into them. He therefore also failed to have sufficient control of the aircraft. And so the aircraft crashed." Counsel noted that in addition to the accident investigation report of 23rd May, 1998 the testimony of DW4 had shown that the accident was due to "operational causes". Counsel submitted that the accident was wholly or substantially contributed to by the negligence of the deceased.

On the claim on the basis of vicarious liability, learned counsel argued, correctly in my view, that for vicarious liability to attach, it must be shown that the person proposed to be held vicariously liable had supervisory power over the tortfeasor; and it must be shown that the supervisee was himself culpable and thus liable.

Counsel urged that as the deceased was not employed by the 2nd defendant, he could not have been under the control of 2nd defendant. As an examiner the deceased was under duty to exercise diligence, circumspection and independence.

Learned counsel raised the paradox that the plaintiff could not very well pursue the claim based on vicarious liability without also conceding that the deceased had been negligent; for the Court could only uphold the claim of vicarious liability after first finding negligence on the part of the deceased. The estate cannot benefit by judgment in its favour, founded on vicarious liability, when the deceased was free of negligence.

Res ipsa Loquitur? This doctrine, counsel submitted, cannot apply in this case. For the essence of the doctrine is that the mere fact that the accident took place, leads to inference of negligence on a *prima facie* basis. The doctrine does not apply if the cause of the harm is known. DW2, DW3 and DW4 gave evidence that there are many possible causes of aircraft accidents – and hence the circumstances of the material accident lead to a series of hypotheses. Besides, counsel urged, "there is sufficient material from which the Court can form an opinion".

Regarding the deceased's business associations, learned counsel submitted, no evidence at all was produced that he was the Chief Pilot and proprietor of a certain Tana Mara Aviation Company, and indeed there was no proof that such a company even exists. Counsel submitted that the only evidence available regarding earnings of the deceased, was that from time to time, 1st defendant would pay to him some money as a token of appreciation: and therefore the evidence tendered did not support the claims set out in the plaint.

Is the plaintiff entitled to damages from the defendants? Learned counsel urged that damages, being monetary compensation for damage and loss suffered, follow only upon proof of such loss or damage; but

the plaintiff had not established that she had suffered loss and damage, quite apart from failing to show that any damage and loss has been occasioned by the defendants. Consequently, it was urged, the question of amount payable to the plaintiff in damages, was purely a moot point.

Learned counsel went further to make submissions on the basis that the Court might find it fit to make an award of damages. In that case, it was urged, it should by itself assess such damages.

If the Court had to assess damages, then the only reference-point would be the deceased's earnings; but no evidence of such, had been tendered except for the occasional payments made to the deceased by 1st defendant.

The Court should find, counsel urged, as in this Court's (*Ang'awa, J.*) decision in *Reuben Musau Kithuka & Another v. Rahab Muthoni & Another* HCCC No. 55 of 1999, that the deceased's income was not proved, and so the suit be dismissed. But, in the alternative, counsel submitted, damages would be payable only to the extent of the known allowances. Counsel submitted that the past allowances made to the deceased bore no periodicity, and thus they could yield no multiplicand for the assessment of damages. Yet, counsel urged, if the Court had absolutely to make an award of damages, then the said allowances could serve as reference for a minimum wage, which could then be applied as the multiplicand. The Court then could use as a multiplier the expectation of earning life of the deceased, the expectation of life, the dependency of the dependants, and the chances of life of the deceased and the dependants; and the sum arrived at would then be discounted to allow for considerations such as the lump-sum nature of the award.

Learned counsel urged that the plaintiff had dragged 2nd defendant to Court on the basis of unsubstantiated claims, and on this account the suit should be dismissed with costs to 2nd defendant.

VIII. FURTHER ANALYSIS

A. The Fact Scenario

From the pleadings, the detailed evidence, and the submissions of counsel, I proceed to set out my perception of the critical facts and points of law which will determine the nature of the decree to be pronounced in this judgment. The scenario of facts and inferences that emerges may be set out as follows:

- 1) The deceased, *Captain Raphael Thuo* was the examiner for two student-pilots on the Cessna 310R-5Y-EHL which, having arrived earlier at Eldoret, from Nairobi, on 23rd May, 1998 flew out to Kisumu.
- 2) On the flight from Eldoret to Kisumu, the Cessna aircraft had six persons on board: the examiner and his two student-pilots, and in addition, three others – one *Julius* and his wife, and one *Achaga*.
- 3) At Kisumu, four of the passengers disembarked, and the deceased and one student, *Christopher Mutuku* flew around that town, performing certain training procedures including the asymmetric-power procedure which entailed simulated failure of one of the two engines.
- 4) *Captain Raphael Thuo* was the pilot-in-command within the meaning of Regulation 2 of the Air Navigation Regulations made by virtue of the Civil Aviation Act (Cap. 394, Laws of Kenya), throughout the training flights which he undertook in the Cessna 310R-5Y-EHL.
- 5) The aircraft, which belonged to the 2nd defendant, was maintained according to the specifications of the manufacturer; it had Certificate of Airworthiness recently issued by the Directorate of Civil Aviation (DCA); and it was comprehensively insured in respect of third party claims; of the hull; and for passengers.

- 6) It is to be taken as a fact that the pilot-in-command, as specified in Regulation 29 of the Air Navigation Regulations, had at all take-off points during the training flights in the Cessna 310R–5Y–EHL discerned no defect in the aircraft, and was satisfied with its general condition from a safety standpoint.
- 7) The aircraft took-off from Kisumu on the morning of 23rd May, 1998 after uplifting full tanks of fuel, and with six persons on board, namely **Captain Francis Thuo** as pilot-in-command, **Christopher Mutuku** (student-pilot), **James Muigai Kenyatta** (student-pilot), one **Julius** and his wife, and one **Mr. Achaga**; and on this occasion it was **James Muigai Kenyatta** piloting under instructions.
- 8) The pilot-in-command, on this fateful flight from Kisumu to Eldoret, did perform the asymmetric power procedure, and is thought to have repeated this procedure just about the time of approach to landing at Eldoret Airport, about midday on 23rd May, 1998.
- 9) Radio communication from Cessna 310R-5Y-EHL to the Control Tower at Eldoret Airport stated at 11.40 a.m. that the craft would be overflying Kakamega at 11.44 a.m., with six passengers on board; but it overflew Kakamega at 11.45 a.m.; at 12.13 p.m. the craft was in the Eldoret area, and called Eldoret Control Tower to say: “Procedure Turn Complete and Established”; at 12.14.06 p.m. Eldoret Control Tower radioed clearance for Cessna 310-5Y-EHL to land; at 12.18.03 p.m. the Cessna Craft radioed Eldoret Control Tower: “We are Having an Engine Problem and Looking for a place to Land”; then a second later, at 12.18.94 p.m. the Cessna radioed that it was “Having a Problem with Engines”; eight seconds later the Cessna radioed: “EHL Have a Problem and Looking for a safe Landing area; four seconds later, at 12.18.16 p.m. the Cessna radioed “Crash-Landing on Trees Here”; the Cessna 310 crashed and burst into fire three seconds later, at 12.18.19 p.m.; and of the six persons on board, three including the pilot-in-command, died on the spot; one died later in a foreign hospital; two, including student-pilot **Christopher Mutuku** (PW2) survived.
- 10) An accident investigator conducted investigations and prepared a report dated 23rd May, 1998 which attributed the accident to operational causes, and suggested that the pilot of the Cessna 310R–5Y–EHL was engaged in unspecified duties as the craft, in its approach to Eldoret Airport, crashed into a dry Eucalyptus tree after the pilot became unable to control it, the rate of sinking being rapid, and surveillance having deteriorated.
- 11) Workshop assessment focused on the port engine, as it emerges that the starboard engine had earlier been found to have been functioning normally; and the levers connected to the same were found in a forward position, raising the probability that the port engine had been de-activated during a simulated one-engine failure test.
- 12) The deceased, **Captain Raphael Thuo** was on DCA’s approved list of pilot-training examiners; and for the fateful training flight of the Cessna 310R–5Y–EHL, he had been appointed not by the 2nd defendant, but by the Directorate of Civil Aviation (DCA).
- 13) Compensation to the pilot-training examiner came not from the school of flying or the DCA (the appointing authority), but from the student himself, even though DCA did, in the end, pay a modest honorarium to the examiner; and at the end of the training and examination the trainee received a certificate from DCA which was by statute, the regulatory body for standards in aviation.
- 14) DCA had no pilot-training examiners in its employ and on salary; it did not train pilots; but DCA ensured that all those who would fly aircraft as pilots, met certain standards of knowledge and competence.
- 15) The Kenya School of Flying (2nd defendant) was one of the several piloting schools, through which students passed before they, on their own account, applied to DCA for certification based on practical examination.
- 16) As the engagement of an individual as a pilot-training examiner is a purely *ad hoc* arrangement, it

happens that designated examiners are already experienced pilots with some primary flight-related occupation elsewhere; which means such persons are in the employ of a person other than DCA.

17) DCA has not been taking out insurance policies in respect of pilot-training examiners; with the effect that the examiner would have to fall upon the policy which he has *as a pilot* – and since he is not a pilot for DCA, the terms of such a policy bear more upon the principal employer than upon DCA.

B. Points of Law

(a) Competence to sue

On the basis of the plaintiff's complaint, learned counsel **Mr. Munene** submitted that the late **Captain Raphael Thuo** was carrying out duties for DCA, and on this account, under s.12 of the Civil Aviation (Amendment) Act of 2002 (Act No. 6 of 2002) he had a cause of action against the 1st defendant. It is clear to me, however, that the section of the Act being relied on does not by and of itself create a "cause of action". The pertinent provision would be the new s.21(8) inserted by s.12 of the said enactment:

"In this section liabilities... which fall to be discharged or performed shall include liabilities in respect of

(a).....

(b) a cause of action in tort which arose in Kenya".

So the *cause of action* must be established under the *applicable body* of law, before it can lead to the determination of liability to be discharged by virtue of the relevant section of the Civil Aviation (Amendment) Act, 2002.

The relevant cause of action, as stated in the complaint, is negligence; and the governing law on this tort is to be found in *common law precedents*.

The plaintiff cannot have a cause of action in the tort of negligence unless first she establishes her *competence in law to sue*; and learned counsel **Mr. Makoolo** contended that she lacks competence. Although this point had not been raised as a *preliminary objection*, its validity beckons out clearly. Whereas the plaintiff sues in the name of the estate of the deceased, there are two persons (including herself) who are joint-holders of the letters of administration for the estate. She fails to comply with the terms of s.81 of the Law of Succession act (Cap. 160) when she purports to conduct alone the affairs of the estate, in the absence of any evidence that the second administrator is no longer alive.

I will, however, consider the primary legal issues which have been canvassed by counsel.

(b) Did the aircraft accident result from negligence? Whose negligence?

As far as the 2nd defendant is concerned, if there were negligence on the basis of which a suit could be maintained, it would have to be in respect of the *maintenance* of the aircraft, Cessna 310R–5Y– EHL. But all the evidence adduced before the Court, from the plaintiff's side and from the defendants' side, is that the craft was well-maintained, and was in every respect serviceable and had a current certificate of airworthiness. Even the inspection which the deceased is to be taken to have conducted on the aircraft, on each of the several occasions when it took off with him as pilot-in-command, did not indicate any fault or defect with the craft. In the circumstances, I find and hold that there had been *no negligence* proved against the 2nd defendant.

It follows too that negligence has not been proved against the 1st defendant as regards the maintenance and the mechanical condition of the Cessna 310 R aircraft.

(c) Proving negligence

The plaintiff sought to rely on the doctrine of *res ipsa loquitur*, to settle the point that since the craft sank downwards, crashed on a tree and then burst into fire on the ground, negligence is to be presumed. Yet knowledgeable witnesses (PW2, DW2, DW3, DW4) have shown that certain factors could have led to the accident, and a probable cause has been perceived as decisions for which the deceased as pilot-in-command was responsible, which culminated in lack of control of the craft and to the crash-landing. So there are explanations, and a probable cause of the accident – a condition which rules out the operation of the doctrine of *res ipsa loquitur*.

In that context, both learned counsel for the defence submitted, convincingly, I believe, that the plaintiff then reverted to the original position: she must prove *negligence*. She did not, however, show any negligence on the part of either defendant, as the cause of the aircraft accident.

The plaintiff sought to rely on the doctrine of *vicarious liability*, to hold the defendant's liable for the accident. The applicability of that principle in aid of the plaintiff's case would, on the evidence adduced, present a forensic paradox; for it would have to be admitted that the pilot-in-command was himself negligent – and so someone else, on the basis of agency, or employment relationship, should bear responsibility for that negligence. Vicarious responsibility in law is thus defined in *Jowitt's Dictionary of English Law*, 2nd ed. (London, 1977) (p.1862):

“A principal is liable for acts of his agent within the scope of his authority. If A, an innocent principal, by B his agent to report, misleads C, his selling agent, and C, relying on the report, innocently misleads the buyer, the buyer may recover damages against the principal for deceit if B's report was reckless and untrue.”

The plaintiff's case is that the deceased was entirely blameless, and it is the defendants who were negligent; and if such is the case, then vicarious liability has *no application* and only one task remains: *proving negligence*. I have already held, on the evidence, that negligence on the part of either defendant has not been shown.

The main difficulty with the plaintiff's case is that being based on negligence, this cause of action must be *proved*. Both defendants have set down responsibility for the accident to the pilot-in-command; and on the evidence, this claim is to be upheld. The Cessna 310R – 5Y – EHL was on a training flight and could have engaged in many tests and procedures as specified in the pilot-training manual. It cannot be reasonable or justifiable that such an aircraft should take on board anybody other than the *examiner* and the *student-pilots*; and yet three extra people were on board who could only be described as joy-riders. Under aviation practices there is no way joy-riders could have found themselves on board the training aircraft except with the express authority of the *pilot-in-command*.

Although the Cessna aircraft had a capacity for six passengers, the fact that, that full complement was taken up, a full load of fuel uplifted in the tanks, and the craft flying to high altitudes with thin air while also, as indicated in the evidence, undertaking potentially-dangerous training procedures, would have, I would hold, gravely jeopardized the safety of the aircraft. The high probability, as shown in the evidence, is that the pilot-in-command had de-activated one engine of the Cessna aircraft, as part of the training for a student-pilot in coping with partial engine-failure. The consequence was that the considerable weight of the aircraft, at the high altitude of some 9000ft above sea level which was also fairly close to ground-level at Eldoret, could not be sustained on the power of one engine alone – resulting in crisis- reactions which would have clouded visibility. Thus on applicable principles of liability I would find that it was the pilot-in-command and not either of the defendants whose negligence led to the accident.

The plaintiff has also urged her case on the basis of duty to insure examiners. From the evidence on record, it is recognized that *a pilot* as a professional who operates in the air, requires an insurance policy. The Cessna 310R had been insured for *passengers* but not for pilot; and the plaintiff has contended that the pilot-in-command was also a passenger – which argument is contested by the defendants. The plaintiff's position lacks a basis, as the word passenger, as defined in the *Concise Oxford English*

Dictionary, 11th ed (2004) (p.1046) is:

“a traveller on a public or private conveyance other than the driver, pilot or crew.”

The deceased was not a passenger and should have had a special policy in his own name as a *pilot*. The possibility that there could be a special insurance for pilot-student examiners would appear as a *new proposition* which can only gain fulfilment through the adoption of new policies, practices and regulations in the field of aviation. Such a contingent proposition as is urged for the plaintiff, cannot at this stage be the basis for declaring a *legal right* in favour of the plaintiff.

It has not been shown that the deceased was an employee of either the 1st or the 2nd defendant, so that either could assume liabilities on the basis of the *laws of employment*. Just as no basis for a *common law obligation* has been laid which could make the defendants liable to the plaintiff in tort, so no provision of statute law has been invoked which could render the 1st defendant liable to the deceased's estate on account of the appointment of the deceased to serve as student-pilot examiner, or make the 2nd defendant liable for having provided schooling to the student-pilots before they enrolled for examination.

The foregoing analysis leads me to dismiss the plaintiff's suit with costs to the 1st and 2nd defendant.

This judgment and the consequential decree will dispose of the indemnity notices under Order I, rule 21 of the Civil Procedure Rules, respectively by the 2nd defendant (21st November, 2000) and the 1st defendant (6th December, 2000).

Any such motion as may arise on the basis of this judgement or the resulting decree, shall be heard and determined within the Civil Division of the High Court.

DATED and DELIVERED at Nairobi this 13th day of October, 2006.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Mwangi

For the plaintiff: Mr. Munene, instructed by M/s. Munene & Co. Advocates

For the 1st Defendant: Mrs. Kajwang, instructed by The Hon. The Attorney-General

For the 2nd Defendant: Mr. Makoloo, instructed by M/s. Enonda, Makoloo, Makori & Co. Advocates.