Kiarie (Suing as the legal representatives and administrator of the Estate of Kelvin Kamau Karanja (Deceased) v Stephen & another (Civil Suit 202 of 2012) [2023] KEHC 2749 (KLR) (Civ) (23 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2749 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 202 OF 2012

CW MEOLI, J

MARCH 23, 2023

BETWEEN

JOSEPH KARANJA KIARIE (SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATOR OF THE ESTATE OF KELVIN KAMAU KARANJA (DECEASED) ..... PLAINTIFF

AND

KAMAU STEPHEN ..... 1ST DEFENDANT

NATIONAL INDUSTRIAL CREDIT BANK ..... 2ND DEFENDANT

JUDGMENT

1. Joseph Karanja Kiarie (hereafter the Plaintiff) brought this suit by a plaint dated 03.05.2012 and amended on 11.02.2016 in his capacity as the legal representatives of the estate of the Kelvin Kamau Karanja, (hereafter the deceased). Kamau Stephen and National Industrial Credit Bank (hereafter the 1st & 2nd Defendant/Defendants) were named as defendants. The suit was for damages and arose from a road traffic accident that occurred on 31.05.2009 in which the deceased sustained fatal injuries.

2. The Plaintiff avers that at all material times the Defendants were the joint registered owners of motor vehicle registration number KAV 389Q (Lorry Truck) of which the 1st Defendant was the driver. That on the material day the deceased was lawfully and carefully driving along Kiambu Road, in motor vehicle registration number KBH 704P; that the vehicle registration number KAV 389Q, was at the material time being driven by the 1st Defendant, his driver, servant and or agent and who so negligently drove, managed and or controlled the said vehicle that it collided with motor vehicle registration number KBH 704P as a result of which the deceased sustained fatal injuries while his vehicle was so extensively damaged that it was written off.

3. On 07.08.2012 the 1st Defendant filed a statement of defence, later amended on 21.04.2016 in which he denied the key averments in the plaint and liability. He pleaded that the subject accident was wholly or substantially caused by the negligence of the deceased. The 2nd Defendant on its part filed a statement of defence equally denying the key averments in the plaint and liability. However, on its part, the 2nd Defendant also denied ownership, possession or control of and or being the employer of the driver of motor vehicle registration number KAV 389Q; that its name only appeared on the vehicle registration documents, to secure its financial interest as chargee in respect of a chattels mortgage agreement.

4. Pursuant to a consent recorded by the parties on 19.03.2014 before Waweru. J, the Plaintiff's suit against the 2nd Defendant was marked as withdrawn with no orders as to costs.

5. The matter eventually proceeded to hearing during which the Plaintiff testified as PW1. It was his evidence that he was a retired teacher and grantee of letters of administration PExh.1, had the authority to institute the proceedings on behalf of the deceased, who was his son. He proceeded to adopt his witness statement dated 30.04.2012 as his evidence -in -chief. The gist of his evidence was that the deceased was involved in a road traffic accident on 31.05.2009 along Kiambu Road at Ridgeways Junction at around 3.am.

6. That PW1 had arrived at the scene 30 minutes after receiving a call from a good Samaritan. That upon arriving at the scene he found motor vehicles KBH 704P and KAV 389Q which appeared to have collided on the right hand side of the road in the direction from Kiambu to Nairobi and the deceased lying on the grass a few metres from the road having died instantly. It was further evidence that his son was driving from Nairobi towards Kiambu and his vehicle had sustained severe damages while the other vehicle lay on the road. That officers from Pangani Police station attended the scene of the accident upon his arrival.

7. He testified that the deceased was a 24-year-old bachelor, in good health and employed at the Kiambu Teachers Sacco Ltd as an accountant earning Kshs. 77,030/- p.m. at the time of his untimely death, and that he supported his parents and siblings. He asserted the value of the vehicle driven by the deceased which belonged to him, to be Kshs. 1.5 million per valuation subsequently conducted by Zed Automobile Assessors PExh.2. PW1 outlined other items in the special damage claim and produced documents marked PExh.3 - PExh.12c. He blamed the 1st Defendant for driving at a high speed and causing the accident.

8. Under cross-examination by the defence counsel, PW1 confirmed that the monies allegedly paid to Montezuma Funeral Home, and for the copy of records and for preparation of the valuation report were not included in the special damage claim. He further clarified that the statement in his witness statement that the deceased was self-employed and earning Kshs. 30,000/- as per his witness statement, was a discrepancy. He admitted that he did not witness the accident and arrived at the scene some thirty (30) minutes later but reiterated the description of the scene of the accident asserting that both motor vehicles lay on the left side of the road towards Kiambu. Further he said that the deceased's vehicle sustained frontal damage on account of the impact from the accident whereas the Lorry-Truck sustained damage around the driver's door.

9. Benson Nganga Mwangi (PW2) testified that he worked with Metropolitan Sacco formerly Kiambu Teacher Sacco and produced a copy of his ID and staff card as PExh.1a & PExh.1b respectively. It was his evidence that he had worked for the said company for 16 years as Head of Finance and Deputy CEO. He confirmed that the deceased had worked with the said company for 14 months, his first appointment being that of trainee-manager, later confirmed as head of Internal Audit. He testified that the deceased earned a gross salary of Kshs. 77,032/- per month as and tendered letters evincing

the foregoing as PExh.10 & PExh.11 as well as the deceased's appointment letter PExh.13. He further clarified that the variation between the earnings in the pay slips and letter from the CEO was that upon his confirmation the deceased had other benefits.

10. The final witness for the Plaintiff was one Martin Theuri Mathenge who testified as (PW3) and introduced himself as a director of Zed Automobile Valuer based in Thika. The total sum of his evidence was that he was a professional vehicle assessor and had carried out the assessment of motor vehicle KBH 704P VW Passat and subsequently prepared a report. It was his evidence further that he assessed the pre-accident value of the said motor vehicle at Kshs. 1.5 Million, and the value of the windscreen at Kshs. 20,000/-. He tendered his report as PExh.2 for which he charged Kshs. 6,000/- and Kshs. 6,000/- as court attendance.

11. During cross-examination by the defence counsel he reiterated his credentials and clarified that his report was an assessment or pre-accident report, although it was described as a vehicle valuation report done on 29.06.2013. He confirmed that the accident occurred 4 years prior to the valuation of the vehicle and that he did not have an inspection report of the vehicle prior to the accident or its service record. It was his evidence that the assessment was conducted after repairs had already been done to the motor vehicle and that it was not declared a salvage. He did not have any photographs in respect of the said motor vehicle. He however opined that repairs to the said vehicle would have cost Kshs. 1.5 million.

12. Francis Kivuva Kimei (DW1) testified as the sole defence witness. He adopted his witness statement dated 03.08.2012 as his evidence- in- chief, and tendered a sketch plan of the scene of the accident attached to his statement as DExh.1. Confirming that Stanley Mwangi Chege was the driver of motor vehicle KAV 389Q he asserted that the said driver died in 2017.

13. During cross-examination he stated that, on the date of the accident, he was turn boy aboard the lorry which was travelling from Githunguri Dairies to collect milk. That he was sat aboard the cabin of the said lorry and could clearly see that the lorry was doing between 50-60Kph. He confirmed that the accident occurred along Kiambu Road near Ridgeways at a bend. It was his evidence that the deceased's motor vehicle drove at high speed along the bend behind another vehicle travelling in the same direction.

14. Further that, the deceased's motor vehicle attempted to overtake the motor vehicle ahead of it and failed to safely negotiate the bend and as a result encroached into the path of the oncoming lorry resulting in the collision of the two vehicles. It was his evidence further that the accident occurred inside the road despite efforts by the driver of the lorry to swerve away to avoid the deceased's motor vehicle and to warn the deceased by hooting and flashing his lights.

15. Submissions were filed by the respective parties after the close of the hearing. The Plaintiff's submissions was centered on two issues, namely liability and quantum. Restating the evidence before court, counsel contended that the 1st Defendant was wholly to blame for the accident on grounds that despite seeing the deceased's motor vehicle prior to the accident, he did little to avoid the said accident. He cited several decisions to support the finding of liability on the basis that the lorry driver was charged with the offence of Causing Death by dangerous driving. These include Ormrod & Another v Crossville Motor Services Ltd & Another 1953 (2) AER 753 CA as cited in Tabitha Nduhi Kinyua v Francis Mutua Mbuvi & Another [2014] eKLR and Gachanja Muhoro & Sons Ltd v Titus Mwala Nduva [2015] eKLR .

16. Submitting on quantum of damages under the Fatal Accident Act, counsel calling to aid the decision in Beatrice Wangui Thairu v Hon. Ezekiel Barngetuny & Another Nairobi HCCC No. 1638 of 1998 as cited in Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR urged

the court to adopt a dependency ratio of 2/3 and a multiplier of 36 years based on the deceased's proven monthly salary. The court was urged to make a total award under the said header of Kshs. 22,185,216/- calculated as follows Kshs. 77,032/- x 12 x 36 x 2/3.

17. Concerning damages under the *Law Reform Act*, counsel urged the court to make an award of Kshs. 300,000/- for pain and suffering and Kshs. 200,000/- for loss of expectation of life. On special damages, the court was urged to award a total sum of Kshs. 1,608,800/- based on material before the court. Cumulatively therefore, the court was urged to award Kshs. 24,294,016/-.

18. Counsel for the 1st Defendant anchored his submissions on the decisions in Kenya Port Authority v Modern Holding [EA] Limited [2017] eKLR, Jumbo North (E.A) Limited v Wilder Wangira [2020] eKLR, Trust Bank Limited v Paramount Universal Bank Limited & 2 Others, Nairobi (Milimani) HCCS No. 1243 of 2001 and cited Cheshire & Fitfoot on Law of Contract (6th Edn.) Pg. 21. As a preliminary point, counsel cited the provision Section 29 (4) of the *Limitation of Actions Act* and the decision in Philomena Mutheu Nzyoka (Suing as a Legal Representative of the Estate of the Late T K M) v Transpares Kenya Limited [2016] eKLR, to contend that an action arising from a fatal road accident must be brought to court within 12 months of the accident. That the suit herein was filed outside the statutory time limit without the requisite leave and is therefore statute barred and liable to be struck out with costs.

19. Concerning liability, counsel contended that PW1 did not witness the accident, or produce the police abstract or occurrence book (OB) or call the investigating officer to produce the police file or call an eye witness to the accident. Hence his evidence was hearsay that cannot prove the particulars of negligence pleaded against the 1st Defendant. Counsel went on to submit that the mere fact that an accident occurred is not ipso facto proof of negligence on the part of the 1st Defendant. That in the absence of an eye witness called by the Plaintiff, the only account is that given by DW1 as to the circumstances leading to the accident and that his evidence remains uncontroverted.

20. It was further submitted that based on that evidence, the deceased is entirely to blame for the accident. Hence the court ought to dismiss the Plaintiff's suit for lack of evidence of negligence as against the 1st Defendant. The decisions in Jamal Ramadhan Yusuf v Ruth Achieng Onditi & Anor [2010] eKLR, Alfred Kioko Muteti v Timothy MIheso & Another [2015] eKLR, East Produce (K) Limited v Christopher Asiado Osiro, Civil Appeal No. 43 of 2001 and Lucy Muthoni Munene v Kenneth Muchange & Kenya Bus Services Ltd were called to aid on the issue.

21. Concerning damages, counsel cited Margaret Njeri Magua v Wamoni Mwangi [2007] eKLR, Richard Macharia Nderitu v Phillemon Rotich Langat [2013] eKLR and Kemfro Africa Ltd v A.M Lubia (1982-85) 1 KAR 727 to urge the court to award Kshs. 70,000/- for loss of expectation of life and to deduct the amount from the award made under the Fatal Accident Act. Submitting on damages for pain and suffering counsel placed reliance on the decisions in Anastacia Tengecha & Another v Kenya Power & Lighting Ltd [2011] eKLR to urge the court to award Kshs. 5,000/- as the deceased died at the scene of the accident.

22. In response to the Plaintiff's submission under the Fatal Accident Act, counsel argued that PW2 did not produce any document to prove the change of name from Kiambu Teachers Sacco to Metropolitan Sacco or demonstrate that the two organizations are one and the same. Therefore, the court ought to disregard his evidence and find that the Plaintiff failed to prove the deceased's income. The decision in Jeremiah Wambui Njoroge v Philip Mwangi, HCCC No. 242 of 1999 was called to aid.

23. In the alternative is was submitted that in the event the court finds in favour of the Plaintiff on the issue, net earnings of Kshs. 36,959/- ought to be used as a multiplicand. On the multiplier, counsel

cited the decision in Isabella Waitherero G. Kanyi v Kenya Airways & Another [2000] eKLR to submit that since the deceased was aged 24 years at the time of his death and keeping in mind the vicissitudes of life, the court ought to adopt a multiplier of 16 years and a dependency ratio of 1/3. Counsel therefore proposed an award for loss of dependency to the tune of Kshs. 1,774,032/- computed as follows 36,959/- x 12 x 1/3 x 16.

24. Concerning the claim for the value of motor vehicle KBH 704P and special damages, it was contended that the loss of the vehicle is self-contradictory as valuation was conducted after the vehicle had been repaired. That the vehicle could not be written off and at the same time repaired. And besides, the assessment report was not instructive on the nature of repairs done to the said motor vehicle. Counsel relied on the decision in Capital Fish Kenya Limited v Kenya Power & Lighting Company Limited [2016] eKLR. Lastly, the court was urged to find that the Plaintiff only pleaded and proved specials to the tune of Kshs. 13,100/-.

25. The court has considered the pleadings, evidence as well as the submissions of the respective parties. There is no dispute that a collision involving the motor vehicle registration number KAV 389Q (hereafter the lorry) belonging to the 1st Defendant in the control of his driver and motor vehicle registration number KBH 704P (hereafter the Passat saloon) driven by the deceased, occurred on the material date along Kiambu Road near Ridgeways Junction. Further that the deceased sustained severe injuries to which he succumbed soon after. The twin issues falling for determination are whether Plaintiff has established negligence against the driver of the lorry on a balance of probabilities and if so, the quantum of damages to be awarded.

26. However, before delving into the merits, the court has been called upon to determine the preliminary issue of statutory limitation raised by the 1st Defendant. To the effect that pursuant to the provisions of Section 29 (4) of the *Limitation of Actions Act* an action arising from a fatal road accident must be brought to court within 12 months of the accident and that having been filed outside the statutory time limit without the requisite leave the suit herein is statute barred and liable for striking out. The Plaintiff did not in his submissions address the objection. The circumstances leading to the instant suit have been well captured.

27. Undeniably, this suit arose from a road traffic accident that occurred on 31.05.2009 in which the deceased sustained fatal injuries. The Plaintiff's suit is premised on the tort of negligence. Section 29 of the *Limitation of Actions Act* must be read together with section 27 of the Act. The former section in relation to Section 27 grants power to the court to give leave to file certain claims filed outside the limitation period. Section 29 provides that:-

> "(1) (1) In relation to an action to which section 27 of this Act applies, being an action in respect of one or more causes of action surviving for the benefit of the estate of a deceased person by virtue of section 2 of the *Law Reform Act* (Cap. 26), section 27 of this Act and section 28 of this Act shall have effect subject to subsections (4) and (5) of this section.
>
> (2) Subsections (1), (2) and (3) of section 27 of this Act and section 28 of this Act shall have effect, subject to subsections (4) and (6) of this section, in relation to an action brought under the *Fatal Accidents Act* (Cap. 32) for damages in respect of a person's death, as they have effect in relation to an action to which section 27 of this Act applies.

(4) Section 27(1) of this Act shall not have effect in relation to an action falling within subsection (1) or subsection (2) of this Act, unless the action is brought before the end of twelve months from the date on which the deceased died.

(6) In the application of sections 27, 28 and 29 of this Act to an action brought under the *Fatal Accidents Act*—

(a) any reference to a cause of action to which an action relates shall be construed as a reference to a cause of action in respect of which it is claimed that the deceased could (but for his death) have maintained an action and recovered damages; and

(b) any reference to a cause of action shall be construed as a reference to establishing that the deceased could (but for his death) have maintained an action and recovered damages in respect thereof."

28. The effect of Section 27 as read with sections 28 and 29 of the *Limitation of Actions Act* is self-evident. Hence the 1st Defendant's contention that the instant suit ought to have been filed within 12 months of the death of the deceased, that is on or before 31.05.2010. However, Section 4 (2) of the Limitation of Action Act provides that;-

"(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:"...

29. The accident and death in this case occurred on 31.05.2009 and the suit was filed on 03.05.2012 which is within the statutory time limit within which an action found on tort ought to be brought under the above provision. There appears to be a conflict between the provisions of Section 29(4) and the above provision. It seems that whereas section 27 and 28 of the Act provide for extension of limitation periods in respect of actions founded on tort for damages in respect of personal injuries beyond 3 years, Section 29(4) prescribes the additional condition that for section 27(1) to apply in regard to an action founded on tort brought for damages in respect of death, and not merely personal injuries, the action must have been brought within 12 months of death.

30. Thus, seemingly introducing a problematic distinction with regard to extension of time in respect of actions founded on tort relating to personal injuries vis-à-vis similar actions relating to death. In my humble view, if it was the intention of Parliament to bar tortious actions arising from death from being brought after the expiry of twelve months after death, or to deny extension of time in respect of such actions, nothing prevented the inclusion of an express provision to that effect.

31. This court concurs with the observation of Okwengu, J. (as she then was in) Jane Muthoni Njiru & Another v Muritu Kinyanjui & Another [2011] eKLR to the effect that:

"Nevertheless I do note that Section 29(4) of the *Limitation of Actions Act* is inconsistent with Section 4(2) of the Limitation Act which provides for causes of action founded on tort to be statute barred after 3 years. In this case, the deceased's cause of action arose on 13th March 2007 when he was involved in the road accident, and this is the same day the deceased died. Under Section 4(2) the claim being founded on tort, limitation would only set in 3 years later"

32. And recently, by Sergon, J in David Mwangi Kibogo (Suing as the Administrator of the estate of the late Scholastica Wamuhu Mwangi) v Benson Ndegwa Waweru & 2 others [2017] eKLR that ;-

> " 8) The nature of the plaintiff claim herein is founded on tort, consequently it will be statute barred after 3 years. Cause of action arose on 26th September 2011 when the deceased person died.
>
> 9) Under Section 29(4) of the Limitations of Actions Act gives 12 Months for a claim to be statute barred i.e 27th September 2012. By virtue of the nature of tort under which the plaintiff claim is brought limitation runs for three years i.e from 26th September 2011 to 27th September 2014.
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> 10) The suit herein was filed on 28th June 2013 and consequently it is properly before this court."

33. This court agrees with the above persuasive dicta, finding them more compelling than the determination in in Philomena Mutheu Nzyoka (Suing as a Legal Representative of the Estate of the Late T K M) v Transpares Kenya Limited [2016] eKLR relied on by the 1st Defendant and consequently finds that the preliminary objection is not well taken and has no merit. It is therefore the court's view that the present action is not time-barred.

34. Moving on to the substantive issues for determination, the parties' respective pleadings form the basis of their cases before the court. In Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

> "We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."

35. By his plaint, the Plaintiff pleaded and particularized the alleged negligence against the lorry driver. The 1st Defendant denied the particulars of negligence while equally pleading negligence against the deceased driver of the Passat saloon.

36. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in Mumbi M'Nabea v David M.Wachira [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:-

> "In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on

the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.

However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:

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

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

> "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

See also Karugi & Another v Kabiya & 3 Others (1987) KLR 347.

37. In Gideon Ndungu Nguribu & Another v Michael Njagi Karimi [2017] eKLR the Court of Appeal stated that "determination of liability in a road traffic case is not a scientific affair" and proceeded to quote Lord Reid in Stapley vs Gypsum Mines Ltd (2) [1953] A.C. 663 at p. 681 as follows:

> " To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it ...
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> The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally." (Emphasis added)

38. There is no dispute that the collision between the lorry driven by the 1st Defendant or his servant or agent and the Passat saloon driven by the deceased occurred on the material day at a bend on the Nairobi/Kiambu road, close to Ridgeways. And that the deceased sustained severe injuries to which succumbed almost instantly. From the total evidence before court, DW1 was the sole eyewitness to the accident. PW1 attempted in his evidence to testify to the manner in which the accident occurred based on his own observations and deductions at the accident scene.

39. This was clearly after the fact, the Plaintiff not having witnessed the accident. Thus, properly, PW1 could only describe the resting positions of the accident vehicles and his observations regarding the condition thereof. Anything more amounts to hearsay evidence. Unfortunately, neither the investigating officer was called to testify nor was an official police sketch plan of the accident scene tendered in evidence. Making it difficult to verify seemingly conflicting descriptions of the scene by PW1 and DW1.

40. The gist of the admissible part of PW1's evidence was that on arrival at the scene of the accident, some 30 minutes afterward, he found the two vehicles lying on the left side of the road facing Kiambu direction; that the Passat saloon had sustained frontal impact damage while the lorry was damaged on the driver's side next to the driver's door. For his part, DW1 in his evidence blamed the deceased for driving at a high speed at a bend, encroaching in the path of the lorry which was proceeding at moderate speed and hence the collision. This allegedly, despite the lorry driver swerving to avoid the deceased's vehicle while simultaneously flashing his lights and hooting.

41. The Plaintiff's description of damage sustained by the two vehicles appears to lend credence to DW1's evidence that the deceased's motor vehicle while attempting to overtake an unknown vehicle at speed along a bend, was unable to safely negotiate the bend and as a result encroached into the oncoming lorry's path resulting in the collision of the two vehicles. That seems logical given that the deceased was driving towards Kiambu while the lorry heading towards Nairobi. Besides, the two witnesses seemed to agree that after colliding the two vehicles rested on the left side of the road on which the Passat had been travelling. Unfortunately, the court does not have the benefit of the police sketch plan of the scene and PW1's substitute sketch does not carry much weight as he is not a professional trained in such matters.

42. Equally, evidence by PW1 that the driver of the lorry was found culpable and was charged and convicted for the offence of causing death by dangerous driving was not supported by relevant court proceedings. In any event, criminal culpability for traffic offences often does not necessarily impute liability in civil proceedings.

43. Thus, based on the available evidence before this court, it would appear that the deceased's vehicle which was at a high speed and attempting to overtake another vehicle encroached in the path of the oncoming lorry at a bend of the road, causing a collision. It was 3 a.m. and visibility was obviously compromised. Not to mention that both vehicles were at a bend in the road. The deceased's driving was clearly negligent if not downright dangerous and without due regard for other road users expected to be on the road. And while the deceased must take a higher degree of blame, it is also the court's view that had lorry driver exercised a higher degree care in the circumstances, the accident may have been averted. In this case therefore it is possible to apportion the degree of blame.

44. The Court of Appeal for East Africa in Lakhamshi v Attorney General (1971) E.A 118 while addressing itself to the question of blameworthiness in case where an accident involves two or more vehicles stated that;-

> " It is not settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent

> in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident. (Emphasis added).

45. The facts of this case compare well with the case of John Wainaina Kagwe -Vs- Hussein Dairy Limited [2010] eKLR where the appellant / plaintiff sustained serious injuries after his vehicle collided into the defendant/ respondents' vehicle. In that case, the respondent's lorry had been left on the road, at night and without any illumination or warning, with a large portion of it protruding into the plaintiff's way. The appellant/ plaintiff's vehicle violently rammed into the rear of the respondent's lorry. The Court of Appeal, in setting aside the decision of the High Court stated that while the respondent was largely to blame (70%) for obstructing the road, the appellant was also negligent, but to a lesser degree (30%) for failing to take evasive action.

46. Similarly, in this case, the deceased must bear a higher degree of liability considering his highly negligent driving, as compared to the lorry driver. Consequently, the court will apportion liability in the ratio of 70:30 in favour of 1st Defendant.

47. Moving on to the issue of quantum under the *Law Reform Act*, the Plaintiff urged an award of Kshs. 300,000/- for pain and suffering and Kshs 200,000/= for loss of expectation of life relying on Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR. The 1st Defendant for his part placed reliance on the decisions in Margaret Njeri Magua v Wamoni Mwangi [2007] eKLR, Richard Macharia Nderitu v Phillemon Rotich Langat [2013] eKLR, Kemfro Africa Ltd v A.M Lubia (1982-85) 1 KAR 727,and Anastacia Tengecha & Another v Kenya Power & Lighting Ltd [2011] eKLR to urge the court to award Kshs. 70,000/- for loss of expectation of life and Kshs. 5,000/- pain and suffering, as the deceased died instantly. The court was also urged to deduct the awards under the *Law Reform Act* from any sums awarded under the Fatal Accident Act.

48. Considering inflation trends over the years and the fact that the deceased appears to have died immediately after the occurrence of the accident, I would award the sum of Kshs. 50,000/= for pain and suffering and Kshs. 100,000/= for loss of expectation of life (See Sitati J in Eshapaya Olumasayi & Another -Vs- Minial H. Lalji Koyedia & Anor. [2008] eKLR).

49. On lost dependency, the Plaintiff pleaded that at the time of his untimely demise, the deceased was an employee of Metropolitan Sacco formerly Kiambu Teacher's Sacco working as an accountant with prospects of good health and long life. He was 24 years old bachelor at the time. The Plaintiff's oral and documentary evidence marked PExh.10, PExh.11 and PExh.12a, 12b & 12c appear to support different earnings in respect of the deceased. In the plaint, the income pleaded was Kshs. 77,032/- p.m. PW1 in his evidence urged the court to base its award on a salary of Kshs. 118,944/- p.m. PW2 on his part gave evidence in support of the sum pleaded in the plaint but explained away the variance on allowances and perks given to the deceased after confirmation in his position with the Sacco.

50. The 1st Defendant challenged earnings by arguing that PW2 neither produced any document to prove the change of name from Kiambu Teachers Sacco to Metropolitan Sacco nor demonstrate the relationship between the two Saccos. In the alternative counsel submitted that net earnings of Kshs. 36,959/-p.m ought to be used as a multiplicand.

51. The court has perused the documentary evidence in support of the award of the deceased's income in light of the respective parties' submissions. The heading of the document PExh.11 dated 17.04.2013 reads "Metropolitan Teachers Sacco Ltd (Formerly Kimabu Teachers Sacco Society Ltd)." PW2 explained thatthe name change was pursuant to rebranding of Kiambu Teacher's Sacco Society Ltd even while the management and staff were unaffected. In the absence of contrary evidence from the 1st Defendant, the explanation appears plausible.

52. Assessment of damages for lost dependency is not a precise science but an exercise based on settled principles and sensible estimates based on evidence. The Court of Appeal in Sheikh Mushtag Hassan Vs Nathan Mwangi Kamau Transporters & 5 others (1985) eKLR cited with approval the decision in Gammel vs Wilson (1981) 1ALLER where it was held that;-

> " [I]f sufficient facts are established to enable the court to avoid the fancies of speculation, even though not enabling it to reach mathematical certainty, the court must make the best estimate it can. In civil litigation, it is the balance of probability which matters...."

53. It is the court's considered view of the Plaintiff's evidence that, an income of Kshs. 77,032/- p.m. as pleaded in the plaint was proved on a balance. Regarding the multiplier, the Plaintiff proposes 36 years, the Plaintiff asserting that as a retired teacher, he and his wife and two of the deceased's siblings were dependent on the deceased. While the deceased's retired parents may have depended on him for their own support and for his siblings, the multiplier cannot not be based on the deceased's possible expected years in gainful employment but on the possible years during which the said parents could have depended on him. Thus, in the court's view given the parents' age, a multiplier of 20 years appears more appropriate.

54. Although the deceased was unmarried at the time of death, he would most likely have married within a few years of his career, therefore assuming greater responsibility for his own family. A dependency ratio of 2/3 appears unrealistic in the circumstances and in the court's view a 1/3 dependency ratio suffices for this case. Thus, general damages under the *Fatal Accidents Act* would work out as follows: - 20 years x 12 x Shs 77,032.00 x 1/3 = Shs 6,162,560/=.

55. Turning to the claim in respect of loss of motor vehicle KBH 704P in the sum of Kshs. 1,500,000/-, the Plaintiff relied on the evidence of PW3 and particularly the assessment report produced as PExh.2. The 1st Defendant correctly submitted that the alleged total loss of the vehicle is self-contradictory as valuation was conducted after the vehicle had been repaired. This was a material damage claim.

56. The Court of Appeal in Nkuene Dairy Farmers Co-op Society Ltd & another v Ngacha Ndeiya [2010] eKLR stated:-

> " In our view special damages in a material damage .....The claimant is only required to show the extent of the damage and what it would cost to restore the damaged item to as near as possible the condition it was in before the damage complained of. An accident assessor gave details of the parts of the respondent's vehicle which were damaged. Against each item he assigned a value. We think the particulars of damage and the value of the repairs were given with some degree of certainty. In Ratcliffe v. Evans [1892]2QB 524 Bowen L.J. said:
>
> > "The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to

the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

57. The court has reviewed PExh.2. The report is inconclusive and lacking in certainty and particularity. First, there was no indication as to the actual condition of the vehicle, at the time of alleged write-off, by way of photographs, professional description of damage, or estimated cost of repairs and the value of the salvage. The inspection was allegedly conducted on 29.06.2013, some four years after the accident. If the vehicle was inspected after repairs were carried out, what the Plaintiff was entitled to claim would be repair costs and not the value of the vehicle. Nonetheless, it is not clear from the report whether it was the repaired vehicle or wreck that was the subject of the inspection. Finally, the Plaintiff cannot claim total compensation for loss of the said vehicle without discounting the value of the salvage. The court is not persuaded that the claim for the loss of motor vehicle KBH 704P has been made out and it is disallowed.

58. Special damages pleaded and proved via PExh.4, 5 & 8 – 25 amount to Shs 62,100/=. In the result, judgment will be entered for the Plaintiff against the 1st Defendant in the net sum of Kshs.1,912,398/- made up as follows;-

General damages under the *Law Reform Act*

a. Pain and suffering- Shs 50,000/-.

b. Loss of expectation of life - Shs 100,000/-.

c. Special damages – 62,100/-.

General Damages under *Fatal Accidents Act*

d. Lost dependency – Shs. 6,162,560/-.

Gross Total – 6,374,660/=

Less 70% contribution

59. The Plaintiff is also awarded the costs of the suit and interest from the date of this judgment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

Mr. Njengo for the Plaintiff

N/A for the Defendant

C/A: Carol