REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO.164 OF 2019

FREDRICK MWANGI WAMWEA (Suing as father and

administrator of the estate of

HILDA WAMBUI MWANGI.....PLAINTIFF

VERSUS

MUTUMA MUNENE MEJA.....DEFENDANT

JUDGMENT

1. The plaintiff who is the father and administrator of the estate of Hilda Wambui Mwangi filed a plaint dated 30th August 2018 against Mutuma Munene Meja (the defendant) seeking the following prayers:

a) Damages under the Law Reform Act and under Fatal Accidents Act.

b) Special damages of Kshs.296,000/= as pleaded.

c) Costs of this suit and Interest.

d) Any other relief the court deems fit to grant.

2. The plaintiff's claim against the defendant arises from an alleged road accident which occurred on or about the 2nd day of August 2017 along Mbagathi road while the deceased was travelling as a passenger aboard motor vehicle registration no. KCF 988A Subaru Legacy. The defendant is alleged to have driven the aforesaid motor vehicle in a reckless and negligent manner causing it to veer off the road and to overturn.

3. As a result of the accident the deceased suffered fatal injuries. The particulars of the defendant's negligence are outlined at paragraph no. 5 of the plaint dated 30th August 2018

4. The defendant filed a defence dated the 28th November 2018 on 29th November 2018 denying all the allegations leveled against him by the plaintiff while attributing the occurrence of the said accident to the negligence of the deceased. He intimated in the said defence that he is a stranger to the fact that the deceased suffered any damages, injuries or loss as a result of the alleged accident and puts the plaintiff to strict proof.

5. The parties complied with the pre-trial requirements under Order 11 of the Civil Procedure Rules and filed issues, statements of witnesses, and pretrial questionnaires.

6. The plaintiff called two witnesses. PW1 (Collins Mwangi) is a longtime friend of the defendant and a brother to the deceased in whose company she was on the fateful day. He stated that he is an IT consultant and lives in Langata Nairobi. He adopted his witness statement dated 30th August 2018 and filed on 5th September 2018 as his evidence in chief.

7. He testified that on 5th August 2017 his late sister Hilda Wambui Mwangi was a passenger in the defendant's motor vehicle registration number KCF 988A and that he was in a different car though they were moving in the same direction. That after the roundabout at Kenyatta Hospital he slowed down to give way for the said motor vehicle which overtook him as it was being driven at a high speed.

8. He followed them as they were going in the same direction. He decided to stop at a certain corner from where he saw dust and he could also hear continuous hooting. On the right side of the road he saw the defendant's vehicle which was on fire. He stopped and went for a fire extinguisher but the fire had already been put off by good Samaritans.

9. He found the defendant and his co-driver standing next to the vehicle looking confused. He checked it but could not see his sister so he decided to go back to his vehicle. Later the defendant came to him walking as he announced Hilda's death, saying he was sorry and asking him to forgive him. He blamed the defendant for the accident saying the defendant's vehicle veered off the left side of the dual carriageway and crossed over to the other side as evidence that the defendant did not have proper control of the vehicle.

10. In cross examination by M/s Muithiraniah counsel for the defendant, he stated that he saw the accident vehicle and it had little damage on the side where the deceased had sat. That the other side of the vehicle had serious damage of shattered windows and that he never found his sister in the car. He confirmed that the defendant's co driver was injured on the leg and the defendant appeared dazed. He also told the court that they used to go out frequently with the defendant and was not aware of any other accident involving the defendant.

11. PW2 (Fredrick Mwangi Wamwea) is the father of the deceased. He too adopted his witness statement signed on 30th August 2018 as his evidence in chief. He testified that on 2nd August 2018 PW1's friend Husna called his wife informing them that Hilda had been involved in a road accident along Mbagathi road and that she had been injured. Their neighbors took them to the scene and that is where he saw the defendant's damaged vehicle. He found the body of his daughter in a pool of blood and her head was severely damaged.

12. He called some of his relatives, friends and the police who assisted in moving the deceased to Umash Funeral Home. He told the court that the deceased was a third year Electrical engineering student at the University of Nairobi and was also doing computer studies in Westlands at the time of her death. He blamed the defendant for the accident and claimed against him the resultant loss and damages they have suffered together with the costs of the suit. He produced by consent documents listed in the plaintiff's list of documents dated 30th August 2018 and the same were marked as PEXB1-PEXB16 respectfully.

13. The following is the list of exhibits:

1. Limited Grant of Letters of Administration *ad litem* issued on 28th May, 2018 by the High Court of Kenya through the Registry at Nairobi in Probate and Administration Cause No. 664 of 2018.

2. Post- mortem report

3. Certificate of Death no. 0558248

4. Permit for Burial no. 0881403

5. Kenyatta University Funeral Home Admission and Acceptance form for Bodies of 3/8/2017, Clearance Form of 11/8/2017 and Dispatch Declaration Form of 11/8/2017.

6. Police Abstract Report dated 3rd November, 2017.

7. Letter from the office of the Chief Mugumoini Location.

8. Notice under the Insurance (Motor vehicles Third Party Risks) Act dated 26th February, 2018

9. Demand Letter dated 8th March, 2018

10. University of Nairobi Online Access Registration Form, Admission Letter dated 20th August, 2014, Letter of Acceptance Form, Declaration for Admission, Sponsorship Form, Student Identity Card Transcripts.

11. Taxpayer Registration Certificate no. 12073354

12. Police Clearance Certificate no. 699674 of 31/7/14

13. IAT Certificate of Competence

14. Driving License, no 2521191

15. Bundle of Academic Certificates and Certificate of Merit

16. Bundle of Receipts of payment

vii) Petition for Limited Grant of Letters of Administration ad litem Kshs. 30,000/=

viii) Umash Funeral Services Kshs. 75,000/= for storage, Hearse and Post –Motern examination, transport to KUFH

ix) KUFH Kshs. 13,000/= for reconstruction, preservation, embalming et.al.

x) Amazing Funeral Services Kshs. 35,000/= for coffin

xi) Catering

xii) Obituary

14. In cross examination he stated that his daughter was outside the car as she had been removed when he arrived at the scene. He reiterated the deceased's academic excellence even though no transcripts were produced. He was sure his daughter had a bright future. He did not know if the investigations were completed as the police abstract did not show who was to blame for the accident due to incomplete investigations. He confirmed that the vehicle was damaged but he did not know the extent of the damage.

15. The defendant testified as DW1 (Mutuma Munene Meja). He adopted his witness statement dated 14th March 2019 as his evidence in chief. He testified that he is an advocate of the high court of Kenya and resides in Kiambu County. That on 1st August 2017, they had come from Garden City in the company of many friends and were driving back home.

16. He was driving his vehicle registration no. KCF 988A and was in the company of Feisal and the deceased. As they headed to Langata and after the 2nd turn he felt the vehicle pull to the right. There was a knock on his side and he became unconscious. Feisal his co-driver opened the door for him after the impact. They went to hospital even though he was not really injured.

17. He stated that the deceased who was seated on the back left of the vehicle was thrown out of the car as she had not fastened her seat belt. They found her outside, lying in a pool of blood and he covered her with a lesso as he went to look for PW1. He stated that he has been driving since he was 14 years and he got his driving licence at the age of 18 years. He denied ever being involved in any accident before and said he was never charged in respect to this accident.

18. On being cross examined by Miss Mukami the plaintiff's counsel, he said he was not sure if his vehicle was inspected after the accident. Further the insurance company took the vehicle and settled the claim as the car had been written off. He confirmed that the deceased was in his vehicle and had not worn a seat belt. He explained that the motor vehicle left it's lane to the right lane and that the deceased did not contribute to the way he drove or managed the vehicle.

19. He further stated that there was a tyre burst though he did not plead it in his defence. He could not tell how many times the motor vehicle rolled. The insurance company did not share the assessment report with him.

20. In re-examination by M/s Muithiraniah, he stated that the deceased was an adult and if she had worn her safety belt her injuries would have been minimized.

21. Upon the close of the case both counsel filed submissions.

22. Mwangi & Mwaura advocates for the plaintiff filed submissions dated 7th July 2021. M/s Mukami for the plaintiff submitted that the plaintiff had established a prima facie case of negligence. That it is not in dispute that the defendant's vehicle veered off the left side of the Mbagathi dual carriageway and crossed over the divide and came to rest on the far side of the right side of the dual carriageway. She further submitted that the defendant did not rebut this in his evidence nor the defence filed. Counsel submitted that the defendant's allegation of a tyre burst in his witness statement and evidence did not flow from his statement of defence as it was not pleaded. She argued that the defendant could therefore not introduce a new case.

23. On this counsel cited on the case of **Kenya Orient Insurance Co. Ltd v Rashid Libondo Hamisi & another (2018) eKLR** where the court while reiterating the principles that parties are bound by their pleadings referred to the Court of Appeal decision in **Independent Boundaries Commission and another v Stephen Mutinda Mule and 3 others (2014) eKLR** and ***Malawi Railways Ltd vs Nyasulu [1998] MWSC 3.***

24. On the principle of the doctrine of res ipsa loquitur, counsel submitted that the defendant failed to explain that the accident took place without negligence on his part and he must be found 100% blameworthy. To support this counsel relied on the case of **Richard Kanyango & 2 Others v David Mukii Mereka (2007) eklr** where the Court of Appeal stated as follows:

> *"On the issue of liability I feel no doubt at all that the defendants were negligent. The plaintiff submits that in the ordinary course of things vehicles do not leave the road and ram into trees off the road. The plaintiff submits that this case comes within the principles of res ipsa loquitur, and I entirely agree. The classic formation of that doctrine was made in* ***Scott v London F St. Katherine Docks CO. (1865) 3 H & C 596*** *where it was said:-*
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> > *"But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things, it does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care."*
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> *In the instant case the vehicle left the road and rammed into a tree off the road. In the circumstances, the onus lies on the defendants to disapprove negligence. But the defendants did not offer any evidence to explain that the accident took place without negligence. In paragraph 3 of the defence, the Defendants admits (sic) that the accident occurred but deny all the allegations of facts and particulars of negligence pleaded in paragraph 4 of the plaint.*

But they led no evidence how the accident happened or could have happened without fault on their part. Accordingly as said, the defendants were in breach of their common law duty of care to Mukii and were liable for his injuries and subsequent death."

Also see **P N M & Another (the legal personal representative of estate of L. M. M.) v Telkom Kenya Limited & 2 Others (2015) eKLR**

25. She submitted that the defendant's oral testimony was that the deceased sat in the back left seat and did not wear a seat belt. She argued that the defendant was duty bound to prove this allegation and even go further and demonstrate how non-wearing of the seat belt contributed to the accident. She submitted that from the evidence and pleadings its not clear at what point the defendant as the driver noticed that the deceased (his passenger) was not wearing a seat belt.

26. Counsel further submitted that the defendant orally introduced the issue of the extent of injuries sustained by the deceased. This is not contained in his statement of defence and should be disregarded by the court. He referred the court to the case of **Kenya Orient Insurance Co. Ltd v Rashid Libondo Hamisi & Another** (supra)

27. On the extent of the injuries sustained by the deceased leading to her demise, counsel referred to the post mortem report (PEXB2) which showed that she had died from the said accident injuries. She relied on the case of **Rosemary Mwasya v Steve Toto Mwasya & another 2018 eKLR** where the trial Judge found that: -

"*The defendant has admitted in her pleadings that there was an accident and only claimed that the same was not caused by her own negligence but by the negligence of a third party whom she categorically stated she would enjoin but she did not do so. She also submitted that the 2nd plaintiff as the deceased guardian should have ensured that the deceased had tied her seat belt. The 2nd plaintiff on the other hand claims that indeed the deceased had tied her seat belt. Though the parties refer to the issue of seat belt, the same does not exonerate the defendant from negligence on her part. I find that the defendant was negligent and is wholly to blame for the accident."*

28. Counsel submitted that if the defendant's evidence on the seatbelt was to be considered then his lack of care for the deceased would be more poignant since he could have seen the deceased without a belt and yet failed to ask her to belt up. She further submitted that in the defendant's word the deceased was an adult and that he did not consider it his responsibility to ask her to wear a seatbelt. That shows that the defendant's attitude comes across as incredibly care free and which amounts to a callous abdication of his duty of care to the deceased and her family.

29. Counsel submitted that the plaintiff has successfully discharged the burden of proof against the defendant and made out a prima facie case on a balance of probability against him. She therefore urges the court to find the defendant 100% liable for the accident and the death of the deceased.

30. On quantum of damages, counsel relied on the case of **Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (deceased) v Kiarie Shoe Stores Limited (2015) eKLR** citing the unanimous decision in **Kemfro Africa Ltd t/a Meru Express Services 1976 & another v Lubia & another(no.2) [1985] eKLR** where it was held that: -

"***6.*** *An award under the Law Reform Act is not one of the benefits excluded from being taken into account when assessing damages under the Fatal Accidents Act; it appears the legislation intended that it should be considered.*

7. *The Law Reform Act (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the defendants of the deceased persons by the Fatal Accidents Act. This therefore means that a party entitled to sue under the Fatal Accidents Act still has the right to sue under the Law Reform Act in respect of the same death.*

8. *The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the Fatal Accidents Act are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the Fatal Accidents Act, the trial judge bore in mind or considered what he had awarded under the Law Reform Act for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."*

31. Counsel while relying on the case **Yh Wholesalers Ltd & Another v Joseph Kimani Kamau & Another (2017) eKLR** urged the court to award Kshs. 50,000/= for pain and suffering as the deceased died on the spot. Relying on the same case she sought for an award of Kshs. 100,000 for loss of expectation of life.

32. On the issue of damages for lost years, she submitted that the courts have established the principle that the estate of the deceased is entitled to lost years, income that would have been earned by the deceased, less the living expenses, assuming one lived and worked upto the age of retirement. On this counsel relied on the cases of:

i) **Steve Tito Mwasya & Another (both suing as legal representative of the estate of S K T (deceased) v Rosemary Mwasya (2015) eKLR.** ii) **Emmanuel Wasike Wabukesa v Muneria Ndiwa Burman (2019) eKLR.**

33. In ***Sheikh M Hassan v Kamau Transporters [1982-88] I KAR 946,*** *the court laid down guidelines for assessing damages for lost years under the Law Reform Act. The guidelines are, inter alia, that:*

(i) *The sum to be awarded is never a conventional one but compensation for a pecuniary loss.*

(ii) *It must be assessed justly and with moderation,*

(iii) *Deduct the victims living expenses during the "lost years" for they would not form part of the estate.*

(iv) *A young child's present or future earnings in most cases would be nil.*

(v) *An adolescent would usually be real, assessable and small.*

(vi) *Calculate the annual gross loss.*

(vii) *Apply the multiplier (estimated number of "lost working years" accepted as reasonable in each case).*

(viii) *Deduct the victim's probable living expenses of a reasonably satisfying enjoyable life for him or her."*

As the Court appreciated in that case, subtle mathematical calculations based on events or contingencies of a life which a deceased victim will not live are out of place and the judge must make the best estimate on the known facts and the prospects at the time of his death.

*[**10**] In the instant case, the claim was for damages for lost years payable to the estate of the deceased whose life was shortened by the tortious act of the respondent. It was not a claim for loss of dependency by the appellant under the Fatal Accidents Act. The factors to be taken into account in assessing loss of dependency and the extent of such loss are distinct from the factors to be considered in computing the pecuniary loss to the estate. Indeed, the two categories of damages are of a different nature and are governed by different statutes. As already stated, in determining the quantum of the global award, the learned Judge was guided by the case law relating to assessment of loss of dependency under the Fatal Accidents Act. This was an error in principle which resulted in an inordinately low award. In* ***Kenya Breweries v Saro [1990] eKLR*** *the court further said:*

> ***"…****In Kenya society, at least as regards Africans and Asians, the mere presence in a family of child of whatever age and of whatever ability is itself a valuable asset which the parents are proud of and are entitled to keep intact."*

Although the deceased had not even started schooling, it is probable that she would have lived a normal life and be engaged in an income generating venture or in a profession and save money for a rainy day at least for some years. Considering the value of money today and the improbable of life, a sum of Kshs. 500,000 would be a reasonable compensation to the estate."

34. Counsel urged the court to take judicial notice of the fact that the current retirement age in Kenya is 60 years and that the courts have normally taken 25 years as the age for start of employment. She relied on the case of **Steve Tito Mwasya & another (**supra**)** where the age of 25 years was applied for a 19 year old deceased and multiplier of 30 years was adopted on the presumed retirement age of 55 years. She also relied on the case **P. N. M. & another (the legal personal representative of estate of L. M. M.) v Telkom Kenya Limited & 2 Others** (supra) where the court adopted 30 years for a 26 year old.

35. She further submitted that the deceased's work would have been technical which is a relevant factor in ascertaining the multiplier. Such worker could go to private practice after retirement and that should be put into consideration when ascertaining the multiplier. On this counsel relied on the case of **Yh Wholesalers Ltd & Another** (supra) She further relied on the case **Crown Bus Services Ltd & 2 Others v Jamila Nyongesa and Amida Nyongesa (Legal Representative of Alvin Nanjala (deceased) (2020) eKLR** where the court stated thus: -

> *"In this case in the absence of any debilitating health concerns the court shall make only a small reduction of four (4) years on the public sector retirement age of 60 so that the multiplier of 35 years is used in the computation. The court notes that in one decision relied on by the appellant herself, namely* ***West Kenya Sugar Co. Ltd v. Falantina Adungosi Odionyi (Suing as the legal representative of Patrick Igwala Odionyi-deceased) [2020] eKLR,*** *a multiplier of 33 were used for a deceased aged 21 years as in the present case. The deceased herein working in the private sector may well have worked beyond the retirement age of 60."*

36. On the issue of multiplicand, counsel relied on the case **Steve Tito Mwasya & another** (supra) where the court held as follows:

> *"It has been suggested that a salary of Kshs. 123,750 per month be used with a multiplicand of 30 years less living expenses of 1/3. The plaintiff did not tender any documentary evidence to establish this point. However, the plaintiff has presented documents showing that the deceased undertook studies learning towards the study of accountancy or finance. I think the appropriate salary to use is that of an accountant or finance officer from the extract of the salary survey of Kenya presented by the plaintiff where such employees earn an approximate monthly salary of ksh.118,546/=. The deceased was aged 19 at the time of her death. I will presume that had she begun to work at the age of 25 years she would have retired at the age of 55 years. I think in the circumstances a reasonable multiplicand to apply is 30 years. Both the plaintiff's and the defendant agree that the dependency ration should be 1/3. On the head of lost years I make the award as follows:*
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> *118,564X30X1/3X12=14,227,680."*

37. She further relied on the case of **Rosemary Mwasya v Steve Tito Mwasya & another (**supra**)** where the court of appeal held: -

"*As for the multiplicand, the only guide the learned Judge had before him was the survey on salaries. The Judge settled for the salary applicable to accountants as that was the profession the deceased would have pursued had death not claimed her life. The figure chosen of Kshs. 118,546/= took into consideration yearly increments had the deceased successfully followed her career. The only error we note the trial Judge committed in arriving at the final figure was the failure to factor in, the element of taxation"*

38. Counsel submitted that she relied on the salary survey accessed at https://mywage.org/kenya/career/kenya-jobs-elecrical-engineers,that gave a salary range of Kshs.76,800/= (lowest) and highest with range of 226,000/= with an average of Kshs.148,000/= which increases with years of experience to Kshs. 201,000 for 10 to 15 years and Kshs.212,000/=for 20 + years of experience. She therefore submitted that it was expected that the deceased would have worked for 35 years before retirement. She therefore urges the court to adopt as multiplicand the gross figure of Kshs.212,000/= and the tax element and a third living expenses which would not form part of the estate of the deceased to be deducted.

39. She submitted that the tax would come to Kshs.55,983/= as per the Kenya Revenue Authority PAYE calculation leaving an after figure of Kshs. 156, 017/= and from this amount a sum equivalent to 1/3 after the tax figure of Kshs. 52,006/= to be deducted for living expenses leaving a net monthly figure of Kshs. 104,011/= available to the deceased's estate. Hence lost years would work out as 104,011 x 12 x 35=43,684,620/=

40. She therefore urges the court to enter judgment in favour of the plaintiff and make awards as follows: -

a) Liability 100% against the defendant

b) Special damages Kshs.296,000/=

c) Damages for pain and suffering Kshs. 50,000/=

d) Damages for loss of expectation of life Kshs.100,000/=

e) Damages for lost years Kshs. 43,684,682/=

f) Cost and interests.

41. The firm of M. W. Muli & Co. Advocates appearing for the defendant filed submissions dated on 27th July 2021.M/s Muithiraniah identified four issues for determination to be as follows:

1. *Liability*
2. *Quantum of damages*
3. *Special damages*
4. *Costs and Interests*

42. On the issue of liability counsel cited **section 107 of Evidence Act** which provides that: -

"*Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

43. She further cited the case of **Evans Mogire Omwansa v Bernard Otieno Omolo & Another (2016) eKLR** where the court observed that:

"*The provisions of the Evidence Act came to play that he who asserts must prove. It was the appellant's duty to tender satisfactory evidence to discharge the burden placed upon him. It is not enough to say that since the opposing part has not testified, my testimony must be taken as truthful. It must be proved."*

44. Counsel submitted that the plaintiff did not call the investigation officer and an independent witness to give details of the accident. The police abstract alone was not sufficient. She contended that the plaintiff did not witness the accident and so his evidence needed corroboration.

45. On this counsel cited the case of **Postal Corporation of Kenya Civil Appeal No. 129 of 2010** where the court had the following to say:

"*……..My concern is the casual manner in which PW4 presented her evidence. To start with she was not the investigating officer. Then, she failed to present the case file which would have unravelled the nature and measure (extent) of the investigations conducted by the police. All she said was that the case was still pending under investigations and no one had been charged with a traffic offence. These facts were reflected in the police Abstract form (P. Exhibit 7) which the witness produced.*

But I grapple with the question; why did the police not find it prudent to draw a sketch plan/map of the scene of the accident?

Although, the police did not arrive at the scene immediately after the accident, both PW3 and DW1 were available to point out to them how the accident occurred at the scene. There were also other onlookers who probably could have shed light to the police on how the accident occurred."

46. She further relied on the case of **Statpack Industries v James Mbithi Munyao Civil Appeal Case No. 152 of 2003** where the court stated thus:-

"Coming now to the more important issue of "causation", it is trite law that the burden of proof of any fact or allegation is on the Plaintiff. He must prove a causal link between someone's negligence and his injury. The Plaintiff must adduce evidence from which, on a balance of probability, a connection between the two may be drawn. Not every injury is necessarily a result of someone's negligence. An injury per se is not sufficient to hold someone liable for the same."

47. Counsel submitted that the post mortem summary notes and death certificate of the deceased showed that she died of head injuries and that PW1 and the defendant were clear that the damage on where the deceased was seated was minimal. She further submitted that it's the defendant's assertion that the deceased had not used the safety belt and therefore placed her life in danger. On this she relied on the case of **Oscar Omondi Onoka v H.S Amin & Company Limited (2011) eKLR** where the court in upholding the trial court's award of liability in the ration of 70:30 as against the respondent /defendant stated that the appellant may not have been in control of the vehicle but he was in control of himself and he should have secured the seat belt until the motor vehicle came to a stop.

48. She contends that the plaintiff did not discharge his duty in proving that the defendant was negligent and therefore prays that the suit against the defendant be dismissed. In the alternative she urges that should the court be inclined to apportion liability it should award it in the ratio of 60:40 against the defendant.

49. Counsel further submitted that it was clear from the postmortem summary notes and the death certificate that the deceased had died of head injuries. That the evidence of PW1 and the defendant showed that the damages on the motor vehicle where the deceased was seated were minimal and this supports the assertion by the defendant that the deceased had not used a seatbelt and by so doing placed her life in danger. On this counsel relied on the case **Oscar Omondi Onoka (**supra**)**.

50. On the issue of quantum of damages and in particular pain and suffering counsel argued that the court has to take into account the pain one under went before passing away. She referred to the case of **Joseph Kivati Wambua v SVM & another (Suing as the legal representative of the estate of EMM-deceased) (2021) eKLR** where the court stated that: -

"The appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness. In the instant case, there was no cross-examination of the witnesses in order to bring out this evidence. A distinction ought to be made between a case where the deceased passes away instantly and where the death takes place sometimes after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during which time he was conscious and was in pain, an award for pain and suffering would not be nominal."

51. She went on to submit that an award of Kshs.20,000/= was reasonable as the deceased died instantly at the scene of the alleged accident. On this counsel relied on the case of **Chabhadiya Enterprises Ltd & another v Sarah Alus Mwachi (Suing as Legal Administrator and Personal Representative of the Estate of the late Faiza Musa – deceased (2018) eKLR.** The court did not disturb the trial court's award of Kshs.30,000/= for a deceased who passed away after being taken to hospital.

52. On the loss of dependency counsel relied on the case of **Mwanzia v Nagalali Mutua and Kenya Bus Services (Msa) Ltd & another (2015) eKLR** quoted by Koome J (as she was known then) in **Albert Odawa v Gichenji Nakuru HCCA No. 15 of 2003 (2007) eKLR** where she expressed the following view:

"The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do"

53. Counsel submitted that the plaintiff in his bundle of documents did not produce the transcripts of the deceased to show she was indeed in school and performing well. She further submitted that there was no documentation to support or even indicate how much the deceased would have earned if she secured a job considering that the rate of unemployment even with those with formal education is high.

54. She therefore prays that the court abandons the multiplier approach and applies the global sum of Kshs. 1,000,000/= which is sufficient for this ward. On this counsel relied on the case **Zachary Abusa Magoma v Julius Asiago Ogentoto & Jane Kerubo Asiago (2020) eKLR** where the appellate court awarded a global sum of Kshs.1,500,000/= where the deceased was about to sit for her final college exams before graduating when she met her death.

55. Counsel contends that the plaintiff had sought to rely on the salary survey accessed via a website which they vehemently object to the reason being that the said document was not produced during the hearing and furthermore it is not a document whose veracity and authenticity can be verified. She further submitted that presenting a document at the time of submissions amounts to an ambush which is not permitted and therefore humbly submits that the said plaintiff's document on salary survey be struck out.

56. On special damages, counsel submitted that the same must be pleaded, proved and that the amount specifically prayed for and receipts produced as evidence of the amounts paid was acceptable.

Analysis and Determination

57. I have carefully considered the plaint, the defence, the evidence on record including the exhibits, submissions and authorities by both counsel. I find the following to be the main issues for determination:

i. *Whether the said accident occurred as a result of the negligence of the defendant.*

ii. *What quantum of damages should be made under the Fatal Accidents Act and under the Law Reform Act, if any.*

iii. *Who should bear the costs.*

Issue no i

i. Whether the said accident occurred as a result of the negligence of the defendant.

58. Neither PW1 nor PW2 were at the scene when the accident occurred. The defendant blames the deceased for failing to wear a seat belt, hence exposing herself to danger. He also blamed the occurrence of a tyre burst as the cause of the accident. PW1 told the court that the defendant was speeding and he even overtook him.

59. There is no dispute that the accident in question occurred. There is also no dispute that the deceased was a passenger in the defendant's motor vehicle. There is further no dispute that the defendant was the driver of motor vehicle registration KCF 988A. It is not disputed that PW1 did not witness the accident. When he arrived at the scene the accident had already occurred.

60. The issue here is how the accident occurred. The defendant has blamed the occurrence on a tyre burst and the deceased's failure to wear her seat belt. It is clear from the evidence on record that the defendant and his co- driver came out of the motor vehicle with very minor injuries. According to PW2, the police were called to the scene.

61. Besides the police abstract (PEXB6) which only indicates that as at 3rd November 2017 when the document was issued investigations were still being conducted, there is no evidence from the police. The investigating officer was not called to tell this court how the accident occurred, what caused it and who was to blame for it.

62. Further, besides the evidence of the defendant as to what may have happened there is no other evidence. The defendant may have been speeding as stated by PW1 but what caused the vehicle to sway from one side of the road to the other? The officers who conducted the investigations were not availed to explain what their findings were.

63. At paragraph 7 of his defence the defendant states thus:

"Further and without prejudice to the foregoing, the defendant avers that if the accident occurred as alleged (which is denied) then the said accident was wholly or substantially caused and or contributed by the deceased."

Particulars of negligence of the deceased

a) *Failure to wear a seat belt.*

b) *Failure to take reasonable steps to ensure her safety."*

The main element mentioned in the defence and witness statement is that of the deceased not wearing a seat belt.

64. The chances of this being true are high because PW1, PW2 and the defendant have indicated in their evidence that the deceased had been thrown out of the vehicle. Her body was found in a pool of blood. The other two passengers had remained intact in the vehicle. However, the issue of a tyre burst was never raised in the statement of defence. It was only raised in the witness statement and cross examination. If indeed this was a genuine plea I am sure it would have been pleaded in the defence. Failure to plead it shows it was non existent and this court will not entertain it, as it would be in violation of the basic rules of procedure. see **IEBC & another** (supra); **Kenya Orient Insurance Company Ltd** (supra).

65. The plaintiff through his counsel has argued that if indeed the deceased had not worn her seat belt, then the defendant who was the driver should have ensured compliance. The deceased was an adult aged 21 years and a University student. She ought to have known that wearing a seat belt as this was a mandatory requirement for every passenger in a vehicle and for her own safety. See **Oscar Omondi Onoka** (supra). I have also considered that PW1 and his friends including the deceased, the defendant and others had had their monthly meeting of motor enthusiasts on 1st August 2017 at Garden City Mall roof top. They left the place at about 10.30pm. It is not clear what they had been taking and what their state of mind was.

66. The plaintiff's counsel urged the court to rely on the doctrine of *res ipsa* liquitor meaning "the thing speaks for itself". The Black's Law dictionary 8th Edition at page 1336 states:

> "T*he phrase 'res ipsa loguitur' is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact, for a defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury or court in light of common sense and experience, inferring that the accident was probably the result of the defendant's negligence, in the absence of an explanation or other evidence which the jury or court believes."*

67. Do the circumstances of this case raise an inference to connote an element of negligence on the part of the defendant to qualify for the application of the doctrine of *res ipsa* Loquitor as submitted by the plaintiff? Negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, and includes any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except conduct that is intentionally, disregardful of others' rights. The term denotes culpable carelessness. It means the deceased as a passenger had no control over the manner in which the defendant drove/managed and controlled the accident vehicle prior to the accident.

68. In **Embu Public Road Services Ltd vs Riimi (1968) EA 22** the Court of Appeal stated that:

> "*where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for accident was consistent only with an absence of negligence.*"

69. I have considered all the evidence adduced and none of the witnesses of the plaintiff has stated how the accident actually occurred. It was the duty of the plaintiff to clearly state and prove the actual negligent acts of the defend. All facts put together whether there was a tyre burst as claimed or not the impact and the resultant accident confirms that the defendant was driving very fast and failed to control his car.

70. On the other hand there are very clear indications that the deceased had not worn her seat belt. Had she been wearing it, she may never have been thrown out of the vehicle and may be the injuries may not have been fatal. My finding is that both the defendant and the deceased contributed to the accident which claimed the deceased's life. I will therefore apportion liability in the ratio of 70:30 against the defendant.

Issue no (ii) ***What quantum of damages should be made under the Fatal Accidents Act and under the Law Reform Act, if any.***

Pain and suffering

71. Damages under this head are awarded on the basis of how long the deceased suffered pain before her death. She died at the scene of accident. The plaintiff sought Kshs. 50,000/= under this head. The defendant on the other hand urged the court to award Kshs. 20,000/=.

72. I find relevance in the cases of:

i) **Nancy Wanyonyi Maina v Stephen Thungu & another HCCC No. 487/99**

ii) **Alice Mboga v Samuel Mbuti Njoroge HCCC No. 351 /99 NKR** among others.

Most courts have made awards ranging between Kshs. 30,000/= - Kshs.150,000/= depending on the circumstances of each case. The deceased died at the scene but after quite some pain. I find an award of Kshs. 50,000/= to be adequate.

73. Both counsel in their submissions urged the court to award Kshs. 100,000/= under loss of expectation of life as a conventional sum. I have no reason to make me deviate from their proposal and so award Kshs 100,000/= under that head.

Lost years

74. In the bundle of academic certificates (PEXB15) are Leaving certificates for both primary and secondary schools. They both show that the deceased was born on 1st May 1996. She was therefore aged 21 years old when she died. The academic documents also confirm that she was a student at University of Nairobi studying Engineering under registration no F17/34818/2014. She was therefore a 3rd year student. Counsel for the plaintiff urged the court to apply a multiplier of 35 years as the deceased would have worked up to age 60 years after starting work at 25 years. For the multiplicand she suggested a salary of Kshs. 212,000/= less kshs 55,983 (PAYE) and Kshs 52,006/= (living expenses). The defendant was of the view that a global sum of Kshs 1,000,000/= should be awarded.

75. I have considered both submissions and the authorities cited. First of all the plaintiff did not produce before this court any document to support the claim for kshs. 212,000/= and his counsel in her submissions referred to a salary survey document found at some website. Salary information in the Public Service is found with the Salary Remuneration Commission (SRC).

76. Secondly such information should have been brought up in evidence for the defendant to interrogate it. Instead the plaintiff only mentioned it in its submissions. Even what counsel claimed to have annexed to her submissions was never indeed annexed and is therefore not in the court record. This court cannot refer to a document which is not part of the court record.

77. The scenario in Kenya now is that jobs are very scarce. Even getting a job at age 30 years is a nightmare. Due to the difficulties in getting jobs in the current Kenya it would not be a reality to make a finding that the deceased would have been employed at age 25 years and retired at age 60 years. The case of **Haniel Mugo Muriuki v Morris V. Morris Min Nyaramba HCCC No. 12408 of 2005** would have

been of help but it was decided when jobs were available in Kenya upon graduation. In the Haniel case the deceased was a University student aged 24 years and a multiplier of 25 years was adopted.

78. Due to the lack of sufficient material on the public service salary scale of an Electrical Engineer and followed by the obvious unavailability of jobs in the job market, I find it not practical to assess the lost years by use of a multiplier and multiplicand. I am persuaded on this by the case of **Marko Mwenda v Bernard Mugambi and another Nairobi HCCC No. 2343 of 1993** where Ringera J (as he then was) stated:

> *"In adopting a multiplier the Court has regard to such personal circumstances of both the deceased and the dependants as age, expectations of earning life, expected length of dependency and vicissitudes of life. The capital sum arrived at by applying the multiplicand to the multiplier is then discounted to allow for the fact of receipt in a lump sum at once rather than periodical payments throughout the expected period of dependency. The object of the entire exercise is to give the dependants such an award as would when wisely invested be able to compensate the dependants for the financial loss suffered as a result of the death of the deceased…The multiplier approach is just a method of assessing damages and not a principle of law or dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the ages of the dependants, the net income of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are unknown or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a court of justice should never do. Such sacrifice would have to be made if the multiplier approach was insisted upon in this case."*

79. Following what I have stated above I find the option of an award of a global sum to be more appropriate in the circumstances of this case. Besides the level of joblessness in Kenya I have also considered life preponderables and vicissitudes that can shorten one's life besides the accident and the awards made under the Law Reform Act. I find an award of Kshs 8,000,000/= for lost years to be sufficient in the circumstances of this case.

80. The plaintiff pleaded special damages in the sum of Kshs 296,000/=. The law is that special damages must not only be pleaded but must be proved. The particulars of the special damages are at paragraph 5 of the plaintiff. I have gone through the receipts produced herein as PEXB16. The ones available are as follows:

i. Umash Funeral Services Kshs 75,000/=

ii. Reconstruction preservation & embalming Kshs 13,000/=

iii. Coffin Kshs 35,000/=

iv. Limited grant of letters of administration ad litem Kshs 810/= (confirmed from the registry as no receipt was filed)

v. Special damages total to Kshs. 123,810/=

81. The following are the awards made:

i. Pain and suffering.....Kshs 50,000/=

ii. Loss of Expectation of life.....Kshs 100,000/=

iii. Lost years.....Kshs 8,000,000/=

iv. Special damages.....Kshs 123,810/=

Total.....Kshs 8,273,810/=

Less 30% contribution.....Kshs 2,482,143/=

Balance.....Kshs 5,791,667/=

82. I therefore enter Judgment for the plaintiff against the defendant in the sum of Kshs 5,791,667 (Five million, seven hundred and ninty one thousand, six hundred and sixty seven, shillings only) plus interest and costs.

Orders accordingly.

DELIVERED ONLINE, SIGNED AND DATED THIS 8TH DAY OF OCTOBER, 2021 IN OPEN COURT AT MILIMANI NAIROBI.

H. I. ONG'UDI

JUDGE