REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 33 OF 2017

DOUGLAS MBAE MWAMBA.....1st APPELLANT

JOSEPHINE GACHERI TIGANIA.....2ND APPELLANT

(Both suing as the legal representatives and Administrators of the Estate of Patrick Mwiti Mbae)

-VERSUS-

PETER MUSYOKA NDETI.....RESPONDENT

(Being an Appeal from the judgment and decree of Hon L. Kassan, SPM in Mavoko

CMCC No. 544 of 2015 delivered on 2nd March, 2017)

BETWEEN

DOUGLAS MBAE MWAMBA.....1st APPELLANT

JOSEPHINE GACHERI TIGANIA.....2ND APPELLANT

-VERSUS-

PETER MUSYOKA NDETI.....RESPONDENT

JUDGEMENT

1. The appellants in this appeal were the plaintiffs in the lower court. They brought the suit in their capacity as the personal representatives of the estate of the deceased herein. According to the plaint, on or about the 9th March, 2013, the deceased was lawfully driving motor vehicle registration number KBN 182N, Isuzu Lorry along Nairobi-Mombasa Road when the defendant drove/managed and/or controlled motor vehicle registration number KAQ 520D Toyota Saloon which was owned by the Respondent so negligently, carelessly and dangerously that an accident occurred involving motor vehicle registration number KAQ 520D and KBN 182N Isuzu FRR Lorry occasioning the deceased severe and fatal injuries. The particulars of negligence were pleaded. It was further pleaded that as a result, the deceased who was 37 years sustained very severe bodily injuries from which he died. The particulars pursuant to statute under ***Fatal Accidents Act*** and Special Damages were particularised and the appellant sought damages, both general and special as well as the costs and interests of the suit.

2. In his defence, the Respondent denied ownership of motor vehicle registration number KAQ 520D and denied driving the said vehicle. He therefore denied the allegations of the said accident and the allegations of negligence against him as well as the injuries that the deceased sustained. He however pleaded that the said accident was as a result of gross negligence and/or poor driving on the part of the deceased and particularised the facts constituting the said negligence. He therefore denied that the Appellants suffered any loss and prayed that the suit be dismissed with costs.

3. Suffice it to say that the Appellants replied to the said defence reiterating what was alleged in the plaint.

4. According to PW2, **Josephine Gacheru**, the deceased who died on 9th March, 2013, was her husband. According to her, the deceased, who was a driver with motor vehicle registration number KBN 182N, was involved in an accident at Athi River and was found dead after falling off. It was her evidence that they had two children, **NK** and **S** aged 12 and 3 years who were in school in [Particulars Withheld]

Primary.

5. It was her evidence that the deceased used to earn Kshs 30,000.00 per month and used to provide for the family. It was her evidence that the spent Kshs 147,000/- in burial expenses and she marked the receipt for Kshs 40,000/-. She also marked the birth certificates for the children as well as the deceased's death certificate and the grant. Also exhibited was a letter to the effect that the children were going to school.

6. In cross-examination, she stated that she was told about the accident by the police as she was not at the scene. The information was relayed to her by friends. She stated that the accident occurred on a busy highway along Mombasa Road. She however insisted that the Defendant was negligent. Though she was working in a salon, she stated that she was earning very little money but had no evidence that the deceased used to earn Kshs 30,000.00. She however stated that she spent Kshs 40,000/- in filing the succession cause though she did not have the receipt for the same. She similarly did not have copy of the records of the motor vehicle nor a n agreement for sale to prove ownership of motor vehicle registration number KAQ 520D. According to her she spent Kshs 15,000.00 in transporting the body from Nairobi to Meru. She denied any knowledge of carjacking incident. In re-examination she explained that the receipt for 40,000/- was for the advocate's costs while she spent Kshs 7,000/- for the storage of the body.

7. PW1, **Cpl. James**, confirmed that an accident occurred on 9th March, 2013 between KBN 182N, Isuzu Canter and KAQ 520D in which the driver of motor vehicle KBN 182N lost his life. According to him the accident was caused by the driver of motor vehicle KAQ 520D, **Peter Ndeti**. As a result, it was recommended that the said driver be charged with causing death by dangerous driving. According to him the OB did not mention anything about car-jacking and that the said **Peter Ndeti** never made any allegation to that effect. He however stated that the driver of KAQ 520D was not arrested as he fled and escaped after the said accident with motor vehicle plate number.

8. In cross-examination, he stated that the accident occurred at 1400 am. He confirmed that the name of the driver of KAQ 520D was not indicated and that he was not at the scene and never recorded the OB. He however insisted that the driver of KAQ 520D caused the accident. While there were occupants in the lorry there were no passengers in KAQ 520D. He confirmed that the accident occurred on a busy road. Referred to OB No. 2/9/3/13 he stated that the accident was reported by **Peter Ndeti**. He however stated that he was unaware of the said OB since he was in court with only the Traffic OB and he was unaware if KAQ 520D was carjacked. Though they had recommended that the driver of the said vehicle be charged, he was unaware if he was in fat charged. He however reiterated that they did not arrest the driver who fled with the number plate. According to him, they got the registration number from the insurance certificate. Though he did not see the photos of KAQ 520D, it his testimony that the vehicle was extensively damaged. In his evidence, the owner of the said vehicle was traced through the cell phone.

9. The defence, on its part relied on the evidence of DW1, **Peter Musyoka Ndeti**. According to him, he was not involved in an accident on 9th March, 2013. On that day, he was carjacked on the night of 8th March, 2013 while he was from Machakos heading towards Mlolongo. He was driving motor vehicle reg. no. KAQ 520D and at Kyumbi Bus Station, he was flagged down by 3 men who requested for a lift to Mlolongo a request which he accepted and the three men sat at the back. At Simba Cement one of the men told him to stop and he produced a pistol. DW1 then slowed down and the person on his right jumped out of his door, grabbed DW1 and threw him outside while the one on the left snatched the car and they drove the car away.

10. It was his evidence that he had two phones one of which got lost in the car while he remained with one which he used to call a friend, **Mr Mutuku**. Together with a friend, **Wambua James**, they walked along the path till his friend, **Mutuku** arrived and picked them up and took them to the police station where he recorded his statement vide OB 2/09/0103/13 after which he was given a note to go for medical examination at a dispensary. He proceeded to Shallom Hospital where he was examined and allowed to go home after treatment. It was his evidence that he was carjacked and robbed with violence and he exhibited a P3 form. He testified that he had driven the vehicle for over 28 years to 30 years and had never been charged with reckless driving as he had never gotten involved in any accident. He marked a copy of his driving licence and stated that he was not **Peter Ndeti** but **Peter Musyoka Ndei**. According to him, he got to know of the accident later when he was called by police officers based at Athi River who informed him that his car had been involved in an accident after which he went and identified the same and gave out his driving licence. It was his evidence that after being carjacked, he was able to drive his vehicle but on the night of the accident, he was not in control of his vehicle and he was not aware of the accident. He confirmed that the vehicle was extensively damaged. He disclosed that neither served with NIP nor charged in any criminal court. He explained that he had left Machakos at around 10pm and met the three men at around 11pm on the night of the hijack.

11. In cross-examination, he confirmed that motor vehicle reg. no. KAQ 520D was his though he reiterated that his name was **Peter Musyoka Ndei**. It was his evidence that when he reported the hijack, he was not aware that the police were investigating the accident incident and it was only after he reported that he was informed of the accident on the same night of the hijack. Referred to the police abstract filled on 4th April, 2013, in respect of the accident on 9th March, 2013, he confirmed that it was recommended that he be charged. He however insisted that he reported earlier. He referred to his P3 form and letter from shalom as supporting his evidence though the author of the said documents were not present when he was carjacked.

12. DW2, **PC Okoti**, testified that on 9th March, 2013 while at Athi River they received a report of a fatal accident that involved 2 motor vehicles KBN 182N Isuzu Lorry and KAQ 520 Toyota in which one Patrick, the driver of KBN died. According to him, at the time of the said accident, the driver of KAQ was not at the scene and the vehicle was towed to the police station. The same night at 2.38am, **Peter Mukaya** and **James Wambua** reported a case of carjacking of KAQ 520D vide OB 9/13. It was his evidence that the driver of KAQ went to the police station and they never prosecuted him and by the time of his testimony, the case was pending under investigation. It was his evidence that **Muchemi** and **Kageni** were injured and were treated and discharged. According to him, the incident time was changed and post mortem was done. In his evidence, **Peter Musyoka** was held in possession of KAQ at the time of the accident as he was missing and only the occupants of Isuzu and passengers were at the scene.

13. In cross-examination, he stated that he was not in a position to confirm if **Peter Musyoka** was driving at the time of the accident. However, at the time the officers visited the scene, no one was in KAQ 520D. However, at 2.30am DW1 reported a carjacking at Simba Cement saying that 3 gun men confused him. He confirmed that from the repot, the driver of KAQ was to blame since he drove against the

traffic flow and appeared not to have been conversant with the road. In his evidence the driver of KAQ 520D was **Peter Ndeti Musyoka**. The carjack was however, referred to the CID hence the witness could not say whether it was confirmed or not since they left the matter to the CID.

14. DW3, **James Wambua Mutuku**, a mason at Machakos Catholic garage, testified that on 9th March, 2013 he was called by **Peter Musyoka** and he left Machakos at 9-10pm. At a petrol station near the bumps, they were stopped by 3 men who asked for a lift. The 3 men got into the vehicle and they drove off. However, the person on the left asked DW1, **Fr. Ndeti**, to stop the car and when DW3 looked, he saw guns. They were then forced out of the vehicle which drove off. He then called another priest and they were rescued after which they went to Athi River Police Station. It was his evidence that DW1 fell on the road and was injured. They then proceeded to Shallom and three days later, the vehicle was recovered damaged. It was his evidence that they were not in the vehicle during the accident.

15. In cross-examination, he stated that it was around 10pm when they gave the three a lift at a stage. According to him DW1 is a priest with compassion. He was however not injured though he jumped. DW1 was however, pushed off the road and they were assisted by the other priest.

16. In his judgement, the learned trial magistrate found that none of the witness for the prosecution saw DW1 drive the car though it was a fact that DW1 drove the said vehicle. He however found that it was a fact that owners of motor vehicle are not the only drivers. It was noted that the prosecution (sic) did not call any witness to produce any photos of the vehicle. According to the trial court it would have been important for the court to see the photos and guess the extent of injuries of its occupants. The learned trial magistrate proceeded to state that it may not have been a good guess because at least the nature could have been formed in his mind. The learned trial magistrate speculated it was possible that the carjackers were the ones who plucked off the number plates. The trial court concluded that there was no proof that DW1 was the motor vehicle driver at the time of the accident hence he could not be held vicariously liable because carjacking is a criminal act that absolves responsibility from the victim. He proceeded to dismiss the suit but with each party bearing own costs.

17. On behalf of the Appellant it was submitted that paragraph 7 of the defence was conclusive evidence that the respondent was present at the time of the accident. However, the respondent in his evidence completely abandoned his defence and introduced fresh and new issues which were not pleaded. In his evidence the respondent testified that he had been carjacked at the time of the accident. The issue of being carjacked is nowhere in his statement of defence or any of the pleadings. It was therefore submitted that this was an afterthought and the trial court erred in accepting this kind of evidence on unpleaded issues. It was submitted that it is trite law that parties are bound by their pleadings. According to the Appellant, he had no chance to answer to the issues about being carjacked that were raised at the hearing stage hence these issues should have been disregarded by the trial court. In support of this submission the appellant relied on the decision of the Court of Appeal in Nairobi Civil Appeal No 219 of 2013 - **IEBC vs Stephen Mutinda Mule and 3 Others**.

18. It was further submitted that the trial court did not analyse the evidence and compare it with the pleadings and that the magistrate also seems not to have considered or taken into account the Appellant's submissions as well. The other grounds were:

1. THAT the learned trial Magistrate erred in law and fact in not assessing damages that would be awardable in the event the plaintiff's suit was successful

2. THAT the learned trial Magistrate erred in law and fact in disregarding the evidence of the plaintiff and their witnesses.

3. THAT the learned trial Magistrate erred in law and fact in not finding that even the act of "giving a lift" to strangers at 11.00 p.m at night was in itself negligent and ultimately led to the accident which resulted in the death of the deceased.

4. THAT the learned trial Magistrate erred in law and fact in failing to hold that the plaintiff had proved her case on a balance of probabilities as is required by law.

5. THAT the learned trial Magistrate erred in law and fact in not analysing the evidence on record exhaustively to reach a just conclusion.

6. THAT the learned trial magistrate erred in law and fact in considering irrelevant issues in arriving at his judgment. For instance, he held that there is no away an accident could occur between a lorry and a small car and the driver of the lorry dies and the driver of the small car is treated for small injuries. Apparently the magistrate held that he needed to see the photos of motor vehicle registration number KAQ 520D to ascertain the extent of the injuries of its occupants.

19. This Court was urged to consider the pleadings, proceedings, submissions and the entire record of appeal and to find that the trial magistrate clearly erred in his judgment and to allow the appeal and set aside the judgement and decree of the Magistrate be set aside and to award damages to the appellant and costs of both this appeal and Mavoko CMCC No. 544B of 2015.

20. The Respondent, on the other hand, submitted that the impugned decree of the trial Court has not been displayed and the Appellants have not provided any evidence showing that they tried to procure the same from the lower Court. In support of this submission, the Respondent relied on Section 65 of the ***Civil Procedure Act*** which provides that an appeal lies from the decree of a Court and Order 42 Rule 13 (4) (f) of the ***Civil Procedure Rules*** which provides that a decree which is the subject of the Appeal must be included in the Record of Appeal. This means that the judgment of Honourable L. Kassan – S.P.M. in Mavoko CMCC No. 544 of 2015 delivered on 2nd March, 2017 must be accompanied by a decree which is to be included in the record of appeal if there is to be an appeal against the same as stated in the Appellants' Memorandum of Appeal. In support of this position, the Respondent relied on **Ruth Anyolo vs. Agnetta Oiyela Muyeshi [2019] eKLR** when it expressed itself as follows:

"Order 42 clearly prescribes the contents of a record of appeal. Order 42, Rule 13(4)(f) provides that the record should contain the judgment, order or decree appealed from and the order (if any) giving leave to appeal. I find that this provision

requires the judgment AND decree/order appealed from to be part of the record."

21. The Respondent also relied on **Law Society of Kenya vs. Centre for Human Rights and Democracy & 12 Others [2014] eKLR** where the Supreme Court stated:

> **"The Record of Appeal is the complete bundle of documentation, including the pleadings, submissions, and judgment from the lower Court, without which the appellate Court would not be able to determine the appeal before it."**

22. Further reliance was placed on **Bwana Mohamed Bwana vs. Silvano Buko Bonaya & 2 others [2015] eKLR**, where the Supreme Court again reiterated the aforesaid sentiments stating that:

> **"[41] Without a record of appeal a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues. In the Nigerian Supreme Court case, Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others, SC. 11/2012, Judge Bode Rhodes-Vivour, JSC highlighted pertinent issues of jurisdiction:**
>
> **"A court is competent, that is to say, it has jurisdiction when–**
>
> **it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another, and**
>
> **the subject matter of the case is within its jurisdiction, and no feature in the case …… prevents the court from exercising its jurisdiction; and**
>
> **the case comes before the court initiated by the (due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction" (emphasis supplied).**
>
> **[42] The foregoing passage sets proper context for the Appellate Court's Ruling in the instant matter (at page 14) when it properly concluded that, due to non-compliance with the mandatory provisions of Rule 87(1), it lacked jurisdiction to entertain the appeal.**
>
> **[43] We understand the learned Judges to have been saying that the omission of the mandatory documents from the record, had the effect of rendering the Court incapable of adjudicating upon the issue placed before it on appeal, as certain conditions set by law had not been met. The Court could not exercise its jurisdiction where lawful, prior requirements had not been fulfilled. That conclusion, by no means, imports the inference that the Court of Appeal misapprehended the constitutional or statutory basis of its powers under Article 164 and Section 85A of the Elections Act."**

23. In addition, the Respondent relied on **Ruth Anyolo vs. Agnetta Oiyela Muyeshi (supra)** where the Court when faced with a similar situation as the present case stated as follows:

> **"24. The upshot of this decision is that the court had satisfied itself that the decree had been filed but the same was an omission of the court. Order 42 Rule 13 is clear that the appeal was to be admitted upon satisfaction of the court that the necessary documents had been included in the record. However, in the above decision, the court allowed the appellant leave to file a supplementary record of appeal. In the present case there is no such opportunity. In the present case there is an absence of such opportunity, but in my mind, I would have thought that Article 159 (2) (d) would have afforded the appellant refuge on the basis that the omission is a procedural technicality which does not go to the root of the matter. I am however bound by the doctrine of stare decisis and must defer to the Supreme Court position as the correct position and hold therefore the appeal is incompetent due to the absence of the decree in the record."**

24. It was therefore submitted that as the Record of Appeal herein lacks a decree of the subordinate Court, the same is incompetent and this Court lacks the jurisdiction to hear and determine the same and the appeal should therefore be dismissed with costs.

25. It was further submitted that the learned trial magistrate considered and determined issues that were open for determination and that the impugned Judgment and decree herein addressed the issue of who was the driver of motor vehicle registration number KAQ 520D at the time of the accident in question and whether the Respondent was hijacked on the night of the accident in question.

26. While appreciating that the general rule is that a Court is bound to determine issues which flow from pleadings, it was contended that the rule is not without exception and that the exception is that a Court will determine issues which have not been pleaded if the parties raise and address unpleaded issues and leave them to the Court to decide or by consent the parties invite the Court to determine an unpleaded issue. For this proposition, the Respondent relied on the decisions of the Court of Appeal in **Magnate Ventures Limited vs. Alliance Media (K) Limited & Others [2015] eKLR**, **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others [2017] eKLR** and **Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs. Isabella Wanjiku Karanja & 2 others [2017] eKLR**.

27. It was submitted that in this case, as far as who was the driver of motor vehicle registration number KAQ 520D at the time of the accident is concerned; at paragraph 4 of the Plaint dated 2nd July, 2015, the Appellants pleaded that the Respondent was the driver of motor vehicle

registration number KAQ 520D. This assertion was expressly denied by the Respondent at 5 of the Respondent's statement of Defence dated 28th July, 2015. At the hearing on 26th July, 2017, PW 1 stated that the Respondent was driving motor vehicle registration number KAQ 520D in examination in chief and on cross examination, he stated that the driver of motor vehicle KAQ 520D is not indicated in the OB. DW 1 (the Respondent) adopted his witness statement dated 16th October, 2015 and in examination in chief and Re-examination, he confirmed that on the night of the accident in question, he was not driving motor vehicle registration number KAQ 520D at the time of the accident in question**.** On 24th November, 2017**,** DW 2 testified that the driver of motor vehicle registration number KAQ 520D was not found at the scene of the accident in his evidence in chief and re-examination and in cross examination, he stated that he cannot confirm if indeed the Respondent was driving motor vehicle registration number KAQ 520D.

28. Concerning the issue whether the Respondent was car jacked on the night of the accident, PW 1 in exam in chief on 26th July, 2016 stated that the Respondent never made any allegation of carjacking and during cross-examination he denied being aware of OB 2/9/3/2013 and whether the motor vehicle registration number KAQ 520D had been carjacked. DW 1 and DW 3 testified that they were carjacked in their respective testimonies and their respective witness statements which they adopted without objection at the hearing narrated this ordeal which was confirmed by DW2 in his testimony who confirmed making of a report at Athi River Police station by DW 1 on carjacking of motor vehicle registration number KAQ 520D vide OB 2/9/3/2013.

29. It was submitted that in their written submissions dated 18th January, 2017, the Appellants raised and addressed the issue of the Respondent having been carjacked. Similarly, the Respondent's written submissions dated 18th January, 2017 addressed this issue as well.

30. In view of the foregoing, and guided by the above cited Court of Appeal decisions, it was submitted that the issues of who was the driver of motor vehicle registration number KAQ 520D at the time of the accident in question and whether the Respondent was carjacked on the night of the accident in question were properly before the trial Court for determination. The issues of who drove the said motor vehicle was pleaded in the parties' pleadings and raised during the hearing and in the submissions. Similarly, the issue of whether the Respondent was carjacked was raised and addressed during the hearing and in the submissions of the parties herein. As such, the allegations by the Appellants that the learned trial magistrate went on a frolic of his own in determining the twin issues in his judgment are unfounded.

31. It was submitted that in its impugned Judgment, the trial Court found that it had not been shown that the Respondent was the driver of the motor vehicle registration number KAQ 520D at the material time. The Court also found that the Respondent had been car jacked and as such could not be held liable for the accident as he was a mere victim of a criminal act. From the testimony of PW 1 and DW 2, it is common ground that the occupants of motor vehicle registration number KAQ 520 D were not found at the scene of the accident in question. In fact, its driver is alleged to have fled the scene and never been found. It is also common ground that motor vehicle registration number KAQ 520D was found without its number plates at the scene. That the records of the owner of the said motor vehicle and its registration details were retrieved from the certificate of insurance and the matter is still pending under investigations. DW 1 (the Respondent) adopted his witness statement dated 16th October, 2015 and in examination in chief and Re-examination, he confirmed that on the night of the accident in question, he was not driving motor vehicle registration number KAQ 520D when the accident in question occurred**.** DW 3 confirmed that he and DW 1 had been thrown out of motor vehicle registration number KAQ 520D by the carjackers who fled off in the Nairobi direction.

32. It was noted that DW 1 and DW 3 were the only eye witnesses to the events of 9th March, 2013. None of the witnesses called confirmed seeing the Respondent as the driver of the motor vehicle in question on 9th March, 2013 at the time of the accident in question. Indeed, from the evidence of PW 1 and DW 2, the entries on the Occurrence book were made based on the insurance certificate found on motor vehicle registration number KAQ 520D. Furthermore, and as correctly pointed out by the learned trial magistrate, it was submitted, it was shown that DW 1 only sustained minor bruises while DW 2 had no injuries. It was confirmed by PW 1, DW 1 and DW 3 that motor vehicle KAQ 520D was extensively damaged. With motor vehicle KAQ 520D being the smaller car as compared to motor vehicle KBN 182N and DW 1 and DW 3 being unharmed while the driver of motor vehicle KBN 182N sustained fatal injuries, the same only shows that DW 1 and DW 2 were not on board motor vehicle KAQ 520D at the time of the accident in question.

33. In view of the foregoing, it was submitted that the finding that on a balance of probabilities the Respondent was not the driver of motor vehicle registration number KAQ 520D was based on the evidence on record.

34. As concerns whether the Respondent was car jacked on the night of the accident, PW 1 during cross-examination denied being aware of OB 2/9/3/2013 and whether the motor vehicle registration number KAQ 520D had been carjacked. PW 2 during cross examination on the same day denied being aware of any carjacking incident. The only persons who confirmed being aware of the carjacking were the Defence witnesses. DW 1 and DW 3 testified that they were carjacked in their respective testimonies. Their respective witness statements which they adopted without objection at the hearing narrated this ordeal and this was confirmed by DW 2 in his testimony who confirmed making of a report at Athi River Police station by DW 1 on carjacking of motor vehicle registration number KAQ 520D vide OB 2/9/3/2013. DW 1 and DW3 were the only eye witnesses to the events of 9th March, 2013. While PW 1 stated in exam in chief that the Respondent never made any allegation of carjacking, he conceded during cross-examination that he had only availed in Court the OB concerning the traffic incidence and not the carjacking incidence. DW 2 confirmed DW 1 and DW 3 made a carjacking report of motor vehicle registration number KAQ 520D at Athi River Police station vide OB 2/9/3/2013 and the matter left to the CID to investigate.

35. In view of the foregoing, it was submitted that the finding that indeed the Respondent was carjacked was based on evidence on record. This was further corroborated by the fact that the occupants of motor vehicle registration number KAQ 520D fled the scene of the accident with the car's number plates but unknowingly left the car's certificate of insurance.

36. Having found that the Respondent was not the driver of motor vehicle registration number KAQ 520D at the time of the accident and that he had indeed been carjacked, the learned magistrate could only find that Respondent was not liable for the accident in question as he was a mere victim of a crime. It was contended that the learned magistrate's finding is in line with the legal position that for an owner of a motor vehicle to be held vicariously liable for negligence of its driver, it must be proved that the driver was acting in his capacity as a servant in the course of employment or with the consent and for the benefit of the owner. This submission was based on the decision in the case of **Boniface Masila vs. Richard M. Maswii & Another [2010] eKLR** and it was submitted that the learned trial magistrate's finding was

proper in law and supported by the evidence on record.

37. According to the Respondent, all the witnesses called by the Respondent testified to the effect that the Respondent was not the driver of motor vehicle registration number KAQ 520D at the time of the accident in question and that the Respondent had been car jacked. The Respondent at paragraph 5 of his statement of Defence dated 28th July, 2015 denied being the driver of motor vehicle registration number KAQ 520D at the time of the accident in question as alleged by the Appellants. The evidence led simply proved this assertion, that is, the Respondent was not the driver of the motor vehicle in question at the time of the accident as he had involuntarily relinquished control of the same to carjackers who sped off with the said motor vehicle. In view of the foregoing, it was submitted that the assertion that the Respondent's evidence contradicted his pleadings is a figment of imagination unsupported by the evidence on record.

38. It was contended that the Appellants counsel had notice of what the Defence witnesses were to testify about as questions were posed on the contents of the witness statements. Furthermore, in anticipation of the issue of being carjacked being raised by the Respondent, advocate for the Appellants posed a question on the same to PW 1 during examination in chief. Surely, if the Appellants were not aware of this assertion, how then would it be put to PW 1 by their counsel on record even before the Respondent's advocate has uttered a word on the case. In addition to the foregoing, the Appellants did not raise any objection to the Respondent's witnesses testifying or the Respondent producing the documents relied on. The same was done with consent. The Appellants' complaint on the same is simply an afterthought which ought to be disregarded.

39. According to the Respondent, the impugned trial Court's findings were based on the evidence before the Court and proper principles of law. The same emanates from a proper appreciation of the evidence on record. As such, the same cannot be faulted and this Court ought to resist the Appellants' invitation to interfere with the same as there is no basis for the same.

40. According to the Respondent, there was is no evidence tendered by the Appellants to support their claim since the Appellants did not tender in evidence any documents as the same were marked for identification as MFI 2 – 8. In support of this position, reliance was placed on **Kenneth Nyaga Mwige vs. Austin Kiguta & 2 Others [2015] eKLR** where the Court of Appeal remarked that when a document is filed, the document though on the Court file does not become part of the judicial record. The same only becomes part of the record once it is produced as an exhibit.

41. According to the Respondent, the issue of the learned trial magistrate falling into error by virtue of not assessing damages awardable has not been put before this Court for determination by the Appellants. This is because the same has not been pleaded in the Memorandum of Claim as a ground of Appeal. The Appellants have also not sought to have the Court herein assess the damages awardable to them. It was submitted that the Memorandum of Claim being a Pleading, parties are bound by the same based on the decision in **Christopher Wafula Mutoro vs. Richard Lordia Lokere [2019] eKLR** and **Magnate Ventures Limited vs. Alliance Media (K) Limited & others (supra).** As such, this court cannot proceed to assess damages payable to the Appellants as that has not been asked of it.

42. On without prejudice, it was submitted that since no evidence was tendered to prove the time of death, the injuries suffered and the circumstances of death of the deceased and as such, it was not shown that the deceased suffered any pain as a result of the accident, the Appellants are therefore not entitled to an award under this head based on the case of **Nancy Wairimu Warui & another vs. The Board of Governors Chinga Girls High School & another [2004] eKLR** and **Benson Musyoki Munyao & another vs. Omacha Enterprises Limited & another [2017] eKLR.** It was however submitted that should the Court be inclined to make an award under this head, it is discernible from the Death Certificate that the deceased died on the day of the accident in question, that is 9th March, 2013 hence the deceased died instantly and hence nothing should be awarded under this limb as the deceased succumbed instantly without experiencing any pain. This submission was based on the decision of **Virginia Wanjiku Kairu vs. Hosea Kipkemboi Sambu [2005] eKLR** where the Court noted that General damages for pain and suffering are only awarded if the deceased did not die immediately after the accident as that is when he can be said to have suffered pain. In that case, the deceased died instantly and the Court found no basis for awarding anything under the heading of pain and suffering. However, if the Court is still inclined to award a sum under this head, it is imperative to note that it could not be said that she experienced so much pain and suffering as no evidence was led to show the nature and/or extent of injuries he sustained prior to his death. Based on the case of **James Gakinya Karienye & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) vs. Perminus Kariuki Githinji [2015] eKLR** where the Court awarded Kshs. 10,000.00 being a convectional figure for the death that occurred immediately after the accident and in **Suluenta Kennedy Sita & another (suing as legal representative of the Estate of Joyce Jepkemboi) vs. Jeremiah Ruto[2017] eKLR** where the deceased died one (1) day after the accident and was awarded Kshs.10,000.00. The judgment in this case was entered in 2017. It was submitted that a sum of Kshs. 10,000.00 would suffice under this head.

43. As for loss of expectation of life, reliance was placed on the case of **Hassan Salat Gudow (Suing as Legal Representative of the Estate of Ali Hassan Salat) vs. Mohamed Adan & 2 others [2015] eKLR**.

44. In this appeal it was submitted that the Appellant did not provide evidence of the alleged income of the deceased. Equally, no evidence was led to prove the high prospects of life/success that the deceased had or his educational background or other training. There was no evidence of what the deceased was earning or if he was earning anything at all. Therefore, the Appellants did not provide the trial Court with a means of determining the deceased's lost income. In the circumstances, it was urged that the Appellants did not proved entitlement to an award under this head.

45. However, on a without prejudice basis to the foregoing, should this Court find that the Appellants are entitled to an award under this head, it was submitted that a conventional sum of Kshs. 70,000.00 is sufficient under this limb based on the decision of **Hassan Salat Gudow case (Supra)**, **Nancy Wairimu Warui & another vs. The Board of Governors Chinga Girls High School & another [2004] eKLR** and **James Gakinya Karienye & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) vs. Perminus Kariuki Githinji [2015] eKLR**.

46. As regards the award for loss of dependency, it was submitted that in the case of **Kenya Breweries Limited vs. Saro [1991] eKLR** the Court of Appeal noted that damages under this head must be kept relatively low. From the death certificate, the deceased's occupation was

indicated as driver and his residence is indicated as Imenti South. There was no evidence tendered to show the deceased's alleged income of Kshs. 30,000.00 per month. By virtue of sections 107 and 108 of the ***Evidence Act***, it was incumbent upon the Appellants to tender evidence to show that the deceased earned Kshs. 30,000.00 per month as alleged. Having failed to do so, the Court was urged to adopt the minimum wage for a driver in other areas as at 9th March, 2013 being Kshs. 8,834.20.00 as the multiplicand based on the ***Regulation of Wages (General) (Amendment) Order, 2012***.

47. From the death certificate it was noted that the age of the deceased was indicated as 37 years. The deceased herein was a driver, a risky employment in itself. Due to his regular travel habits and the usual imponderables of life which would have effect on his expectation of life if he had not died through a road traffic accident, a multiplier of 12 years is fair and reasonable based on the case of **James Munene vs. Walter Bernard (Nairobi Hccc No.3987/1987)** where the Court adopted a multiplier of 12 years for a deceased aged 36 years and **Fanuel Olege vs. James Kariuki & Another [2007] eKLR** where the High Court adopted a multiplier of 11 years for a deceased aged 39 years.

48. On dependency ratio, the Plaintiff pleaded that four (4) individuals were dependent on the deceased. No evidence was led as to what portion of his income the deceased used to provide for his dependants. Furthermore, the deceased had expenses which he expended on. During cross-examination on 26th July, 2016, the 2nd Appellant conceded that she works at a salon where she gets income. Given the above, it was submitted that it is clear that the 2nd Appellant could sustain herself and she must have catered for part of the household expenses. This was confirmed in exam in chief where the 2nd Plaintiff stated that the deceased used to provide for school fees expenses. She did not state any other expenses the deceased used to cater for. As such, it can only be taken that this is the only aspect of the house hold expenses the deceased use to cater for if there were other expenses, the 2nd Plaintiff would have stated the same.

49. In view of the foregoing, it was submitted that a dependency ratio of 1/3 should be adopted in the circumstances as the 2nd Plaintiff could sustain herself and also cater for some of the house hold expenses. Given the above, the award herein, according to the Respondent, is as follows:

Kshs. 8,834.20 * 12 * 12 * 1/3 = **Kshs. 424,041.60**

50. It was noted that in law and practice as per the decision of **Kemfro vs. A.M. Lubia & Another [1982-1988] KAR 727** that where a claimant gets awards for loss of life both under the ***Law Reform Act*** and the ***Fatal Accidents Act***, the former should be deducted from the latter to avoid a situation where the same estate benefits twice. This argument was based on the decision in **Charles Omwenga Ongiri & another v Daniel Muniko [2017] eKLR**.

51. As regards special damages it was submitted that the Appellants' particularization and claim for special damages is fraudulent and aimed at unjust enrichment hence should be dismissed entirely and only reasonable and necessary sums awarded if at all they must.

52. It was in conclusion submitted that the Appellants' Appeal lacks merit and should be dismissed with costs to the Respondent.

Determination

53. I have considered the submissions of the parties in this appeal. This being a first appellate court, it was held in **Selle vs. Associated Motor Boat Co. [1968] EA 123** that:

> **"The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."**

54. Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial Court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial Court had the advantage of hearing the parties.

55. However, in **Peters vs. Sunday Post Limited [1958] EA 424**, it was held that:

> **"Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given…Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's**

conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

56. It was therefore held by the Court of Appeal in **Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278** that:

"A member of an appellate court is not bound to accept the learned Judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

57. The first issue for determination is the competency of this appeal. It is argued that the Respondent that the appeal is incompetent for failure to comply with section 65 of the ***Civil Procedure Act*** as read with Order 42 Rule 13(4)(f) of the ***Civil Procedure Rules*** under which it is required that the record of appeal contains the decree appealed from.

58. It is important to note that some of the decisions relied upon by the Respondent are from the Court of Appeal and the Supreme Court both of which have their own Rules guiding the procedure before the said courts. For the High Court and the Magistrate's Courts, the Civil Code guiding its procedure is the ***Civil Procedure Act*** and the Rules thereunder. Whereas Order 42 Rule 13(4)(f) of the said Rules identified the decree as one of the documents to be incorporated in the record of appeal, that rule does not provide for the consequences of the failure to incorporate the said document. However, section 2 of the Civil Procedure Act which is the definition section provides as hereunder:

"decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include— (a) any adjudication from which an appeal lies as an appeal from an order; or (b) any order of dismissal for default: Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

59. It is therefore clear from the parent Act that the mere fact that a decree has not been drawn does not necessarily render an appeal to this Court incompetent if the judgment is on record as is the case in this appeal. That ground is therefore for dismissal.

60. In this appeal, it is clear that the determination of this appeal revolves around the question whether the appellants proved their case on the balance of probabilities. That the burden of proof was on the appellants to prove their case is not in doubt. In **Evans Nyakwana vs. Cleophas Bwana Ongaro (2015) eKLR** it was held that:

"As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden … is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person…The appellant did not discharge that burden and as Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side."

61. The question then is what amounts to proof on a balance of probabilities. **Kimaru, J** in **William Kabogo Gitau vs. George Thuo & 2 Others** [2010] 1 KLR 526 stated that:

"In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

62. In P**alace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR**, the judges of Appeal held that:

"Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

63. Therefore, the Appellants had the duty of proving the facts constituting negligence on the part of the Respondent even if the appellant chose to remain silent. The exception to this rule however is where the doctrine of *res ipsa loquitor* applies. In **Embu Public Road Services Ltd. vs. Riimi [1968] EA 22**, the East African Court of Appeal held that:

> **"The doctrine of *res ipsa loquitor* is one which a plaintiff, by proving that an accident occurred in circumstances in which an accident should not have occurred, thereby discharges, in the absence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident. The plaintiff, in those circumstances does not have to show any specific negligence but merely shows that an accident of that nature should not have occurred in those circumstances, which leads to the inference, the only inference, that the only reason for the accident must therefore be the negligence of the defendant. The defendant can avoid liability if he can show either that there was no negligence on his part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence of his part; or that the accident was due to the circumstances not within his control. The mere showing that the accident occurred by reason of a skid is not sufficient since a skid is something which may occur by reason of negligence or without negligence, and in the absence of evidence showing that the skid did not arise through negligence the explanation that the accident was caused by a skid does not rebut the inference of negligence drawn from the circumstances of the accident… Where the circumstances of the accident give rise to the inference of negligence the defendant in order to escape liability has to show "that there was a probable cause of the accident which does not connote negligence" or "that the explanation for the accident was consistent only with an absence of negligence."**

64. Dealing with the said doctrine, the Court of Appeal in **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004** expressed itself as hereunder:

> **"In her plaint and the amended plaint as well, the appellant had pleaded the doctrine of *res ipsa loquitor*…If a "*matatu*" is driven in a normal and at reasonable speed, there would be no reason why it would run into a hippopotamus or veer off the road and smash into a tree. If a vehicle does any of those things, some explanation ought to be offered by the driver of the vehicle. The explanation may be that the driver, for some reason of his own, was not in control of the vehicle; or it may be that the hippopotamus suddenly ran into the path of the vehicle; or it may be that through no fault of the driver, there was a sudden tyre burst, the driver lost control and the vehicle veered off the road and ran into a tree. But the explanation has to be there. The explanation can be given by the driver; or it can be given by a passenger who was in the vehicle and saw what happened; or it can be given by a bystander who saw the hippopotamus suddenly dash onto the road in front of on-coming vehicle."**

65. However, in **Mary Ayo Wanyama & 2 Others vs. Nairobi City Council Civil Appeal No. 252 of 1998**, the same Court held that:

> **"It is not right to describe *res ipsa loquitor* as a doctrine as it is no more than a common sense approach not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It is implicit in the proposition that the happening itself was *prima facie* evidence of negligence and the onus lay on the defendant to rebut that *prima facie* case. It means the plaintiff *prima facie* establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety… *Res ipsa loquitor* applies where on assumption that a submission of no case to answer is then made, would, the evidence, as it stands, enable the plaintiff to succeed because, although the precise cause of the accident cannot be established, the proper inferences on balance of probability is that the cause, whatever it may have been, involved a failure by the defendant to take due care for the plaintiff's safety. This applies also to situations where no submission of no case is made…The plaintiff must prove facts which give rise to what may be called the *res ipsa loquitor* situation. There is no assumption in his favour of such facts. The maxim is no more than a rule of evidence, of which the essence is that an event, which in the ordinary course of things is more likely than not to have been caused by negligence, is by itself evidence of negligence."**

66. In this case, there was no eye witness to the accident. That however is not necessarily fatal as long as there is credible evidence on which negligence can be inferred. Such inference may be made where the plaintiff was a passenger in the vehicle that got involved in an accident in which event *res ipsa loquitor* may be successfully invoked. (See **Esther Mukulu Matheka vs. Merania Nduta Nairobi HCCC No. 3039 of 1995)**. In fact, **Lenaola, J** (as he then was) in **Esther Nduta Mwangi & Another vs. Hussein Dairy Transporters Limited Machakos HCCC No. 46 of 2007,** held that:

> **"Although the defendant denied the accident but pleaded in the alternative that the accident was as a result of negligence on the part of the deceased, the defendant chose to call no evidence whatsoever, and that being the case the particulars of negligence on the part of the deceased were not proved and are mere allegations...The plaintiff, on the other hand pleaded the doctrine of *res ipsa loquitor* and produced documents including police abstract showing the date and place of the accident although no eye witness to the accident was called. However, since the doctrine of *res ipsa loquitor* was pleaded, the burden of proof was shifted to the defendant to disprove the particulars of negligence attributed to him."**

67. In **Public Trustee vs. City Council of Nairobi [1965] EA 758**, it was held that:

> **"The maxim *res ipsa loquitor* applies only where the causes of the accident are unknown but the inference is very clear from the nature of the accident and the defendant is therefore liable if he does not produce the evidence to counteract the inference. If the causes are sufficiently known, the case ceases to be one where the facts speak for themselves and the court has to determine whether or not, from the known facts, negligence is to be inferred."**

68. In this case, the deceased was the driver of motor vehicle registration number KBN 182N, Isuzu Lorry. The said vehicle, it is not contested collided with motor vehicle registration number KAQ 520D Toyota Saloon which was owned by the Respondent. It also appears

from the evidence on record that the accident was caused by the negligence of whoever was driving the latter vehicle since it is stated that at the time of the said accident, the same was being driven on the wrong side of the road. The point of departure, however is who was driver of the said vehicle at the time of the accident.

69. From the evidence adduced by the Appellants, the driver of the said vehicle at the time of the accident could not be determined with certainty since whoever it was disappeared from the scene soon after the accident. Barring any evidence to the contrary, the general presumption is that a vehicle is being driven by the owner of the said motor vehicle or by his authority. This was the position in **Kenya Bus Services Limited vs. Humphrey [2003] KLR 665; [2003] 2 EA 519** where the Court of Appeal held that:

> **"Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver."**

70. In this case, however, the Respondent's case is that at the time of the accident the vehicle was being driven by carjackers. In **Melitus vs. Kericho Highland Service Co. Ltd [1971] EA 318**, it was held that:

> **"Whereas there are cases where the ownership of the vehicle is a material point in deciding the owner's liability for injuries caused by the driver to a third party, the liability is based not on ownership as such, but on the relationship of the driver to the owner. If there is no nexus between the two, as (for instance) when the vehicle has been stolen, ownership by itself would not create any liability. The question of ownership if material is so only as a factor affecting the more fundamental question of the relationship between the defendant and the driver of the vehicle."**

71. Therefore, if it is true that the Respondent was carjacked, he would not be held liable for the accident. It was the evidence of the Respondent that on the night of 8th March, 2013 while he was driving his motor vehicle reg. no. KAQ 520D from Machakos heading towards Mlolongo, at Kyumbi Bus Station, he was flagged down by 3 men who requested for a lift to Mlolongo a request which he accepted and the three men sat at the back. At Simba Cement one of the men told him to stop and he produced a pistol. When he slowed down, one of them jumped out of his door, grabbed DW1 and threw him outside while the one on the left snatched the car and they drove the car away. During the incident, he was with a friend, DW3. This evidence was corroborated by DW3 who testified that though the Respondent sustained minor injuries on being pushed, he did not sustain any injuries. However, it was confirmed by PW1 that the Respondent's vehicle, when recovered was extensively damaged. That the carjacking was reported to the police was confirmed by DW2. This evidence of carjacking was not challenged by the Appellants save that they were not aware of the same. Even PW1 who produced the OB testified that he was unaware of the incident save that the OB he had was in respect of the accident.

72. The only serious issue taken by the Appellants was that the issue was not pleaded. It is trite that a party ought to lead evidence based on his pleadings and ought not to wander away from his pleadings. The Court of Appeal in **Dakianga Distributors (K) Ltd vs. Kenya Seed company Limited [2015] eKLR** rendered itself as follows:-

> **"A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The common law Library No. 5) where the learned authors declare:-**
>
> **"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."**

73. The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on ground on which his evidence has been improperly excluded. (See Esso Petroleum C. Ltd vs. Southport Corporation [1956] AC 218 at 238.)

74. In Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR, G. B. M. Kariuki J, P. O Kiage J and K. M'inoti J after making reference to authorities cited by Counsel held as follows:-

> **"As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."**

75. The court of Appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others; Civil Appeal No. 219 of 2013 (2014) eKLR while quoting with approval an excerpt from an article by Sir Jack Jacob entitled "*The present Importance of pleadings*" restated that:-**

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings…for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice…. In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

76. The same position was adopted by the Malawi Supreme Court of Appeal in ***Malawi Railways Ltd vs. Nyasulu (1998) MWSC 3****. In* ***MNM vs. DNMK & 13 others [2017] eKLR*** *it was held that*

"Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Others [1987] KLR 182,* the Court held that:

"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."

Later in ***Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed, CA No. 179 of 2010*** the Court expressed itself thus:

"It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."

77. That settled position was re-affirmed by the court of appeal in the case of **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR which cited with approval the decision of the supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings:-**

"...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

78. The death knell for parties who wander away from their pleadings was sounded by the Supreme Court in Raila Amolo Odinga & Another vs. IEBC & 2 Others 92017) eKLR where it expressed itself as follows:-

"In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side *is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."*

79. However as was appreciated in ***MNM vs. DNMK & 13 Others [2017] eKLR*** *in:*

"A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea [1970] EA 476)."*

80. The Court of Appeal in **Magnate Ventures Limited vs. Alliance Media (K) Limited & Others [2015] eKLR** had this to say on the same issue:

"In GANDY V. CASPAR AIR CHARTERS LTD [1956] 23 EACA", 139 the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:

"…the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."

And in GALAXY PAINTS CO. LTD. V. FALCON GUARDS LTD. [2000] 2 EA 385, this Court stated that the issues for

determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also IEBC & ANOTHER V. STEPHEN MUTINDA MULE & OTHERS, CA No. 219 of 2013).

The exception to the general rule that parties are bound by their pleadings, expounded in such cases as ODD JOBS V. MUBIA [1970] EA 476 and VYAS INDUSTRIES LTD. V. DIOCESS OF MERU [1982] KLR 114) arises where the parties raise and address unpleaded issues and leave them to the Court to decide."

81. The same court in **Christopher Orina Kenyariri T/A Kenyariri & Associates Advocates vs. Salama Beach Hotel Limited & 3 Others [2017] eKLR** reiterated this view in the following terms:

"Those therefore were the crisp and only issues before the learned judge. As has been stated time without number, a court will not determine or base its decision on unpleaded issues. However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See Odd Jobs v. Mubea [1970] 476, and Baber Alibhai Mawji v. Sultan Hashim Lalji & Another, CA No 296 of 2001)."

82. Similarly, the same Court pronounced itself in **Rosemary B. Koinange (suing as legal representative of the Late Dr. Wilfred Koinange and also in her own personal capacity) & 5 others vs. Isabella Wanjiku Karanja & 2 others [2017] eKLR** that:

"The law on unpleaded issues and parties being bound by their pleadings, as relates to this question, is amplified by a long line of authorities as correctly illustrated by the appellants. But there is an equally long line of authorities unequivocally asserting the power of a court to determine issues which the parties have not raised in their pleadings. They may allow the court to do so by consent, as stated, for example, in Chalicha FCS Ltd vs. Odhiambo & 9 Others [1987] KLR 182, that:

"Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."

The decision of Odd Jobs vs. Mubia, [1970] EA 476, may also apply where it was held that a court may base its decision on an unpleaded issue, if it appears during the trial that the issue was pursued and left for the court to determine."

83. The question for the Court's determination is whether the issue of carjacking was pursued and left for the trial court to determine. It is not in doubt that the issue was not expressly stated in the defence. I do not agree that the general averment that the vehicle was not being driven by the Respondents sufficed in a case where the defence was that the vehicle had been carjacked. Order 2 rule 4(1) of the ***Civil Procedure Rules*** provides that:

A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading. [Emphasis added].

84. Carjacking, in my view, is a matter amounting to illegality, which if not specifically pleaded by the Defendant, might take the Plaintiff party by surprise. The Respondent therefore ought to have specifically pleaded that he was not liable by reason of the fact that possession of the said vehicle had been taken from him forcefully in circumstances that amounted to commission of a criminal offence when the same was carjacked.

85. However, the issue of carjacking was set out expressly in the statement. That brings us to the objective for exchanging statements before hearing.

86. Order 7 rule 5 of the ***Civil Procedure Rules***, 2010 provides as hereunder:

(1) The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-

(a) An affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) A list of witnesses to be called at the trial;

(c) Written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

(2) Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11.

87. The rationale behind these provisions is to discourage trial by ambush and to ensure that the provisions of sections 1A and 1B of the ***Civil Procedure Act*** are meaningfully implemented. In the case of **Harit Sheth T/A Harit Sheth Advocate vs. Shamascharania Civil Application No. Nai. 68 of 2008** the Court of Appeal held *inter alia* that the principle aims of the provisions of sections 1A and 1B of the ***Civil Procedure Act*** and sections 3A and 3B of the ***Appellate Jurisdiction Act*** include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing.

88. In this case not only was the issue of carjacking brought to the attention of the parties very early in the proceedings, but in examining PW1 in chief, that issue was put to him by the Appellant's advocate. This was a clear indication that right from the beginning of the case. The issue was also put to PW2 in cross-examination hence, adequate notice was given to the Appellant that carjacking was an issue that the Court would have to determine even if it had not been expressly pleaded. PW1. That the parties were aware that the issue was crucial for the determination of the case can clearly be discerned from the submissions where the parties addressed the issue at length.

89. As was held in by the Court of Appeal in **Transworld Safaries (K) Limited Vs. Robin Makori Ratemo Civil Appeal No. 78 of 2005:**

> **"Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. *In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties…The mere fact that an issue does not flow from the pleadings does not mean that a court cannot base a decision on the same where it appears from the course followed at the trial that the issue has been left to the court for decision.*"** [Emphasis added].

90. Having considered the course which was adopted by the parties at the trial, I find that the determination of the issue of carjacking, though not expressly pleaded, was necessary in order to determine the dispute between the Appellants and the Respondent and it was properly dealt with by the trial Court. From the undisputed evidence of DW1 and DW3, at the time of the accident, the vehicle was not in their possession and it was not in possession of a person who was authorised to drive the same. To the contrary, the person who was driving it obtained possession through commission of a criminal offence for which the Respondents could not be held liable. The surrounding circumstances such as the fact that the Respondent was not found at the scene, the removal of the number plates and the extensive damage to the Respondent's vehicle as compared to the minor injuries sustained by the Respondent lend credence to the fact that the Respondent was not driving the vehicle at the time of the accident.

91. In the case of **Boniface Masila vs. Richard M. Maswii & another [2010] eKLR** the Court noted that:

> **"It is apparent that the trial magistrate did not properly direct herself, or analyze the evidence which was before her. The appellant's defence was that the Pickup was under the control and management of someone other than the appellant, and for whose negligence the appellant was not responsible. The identity of the carjackers was not material. All that was required was sufficient evidence to show on a balance of probability that the Pickup was under the control and management of carjackers. The evidence which was before the trial magistrate was sufficient to discharge this burden. It is clear from the appellant's evidence, that the carjackers forcefully took control of the Pickup. They were not the appellant's agents or servants, nor did they have the authority of the appellant to drive the Pickup, nor were they driving the Pickup on a mission which was for the appellant's benefit.**

92. In the premises I find that the learned trial magistrate arrived at the correct decision when he found that the Respondent was not liable.

93. On the issue whether the trial magistrate erred in not quantifying the award he would have awarded had the suit succeeded, the Court of Appeal noted in **C Y O Owayo vs. George Hannington Zephania Aduda T/A Aduda Auctioneers & Another Civil Appeal No. 2 of 2003 [2007] 2 KLR 140; [2008] 2 EA 287** that:

> **"The learned Judge never considered damages to be awarded to the appellant, for to him, the appellant deserved no award as the appellant had failed to take any remedial action in time to stop the sale of his goods, notwithstanding that the appellant had a notice of the action by the auctioneer and the respondent, which approach the court has stated was not legally tenable. The law required the Judge even if he was minded to dismiss the suit, to consider the quantum of damages he would have awarded, had he made a finding on liability in favour of the appellant. He did not do so and did not even make an attempt to do so and was therefore in error."**

94. The rational for this was explained in **Mahendra M Malde vs. George M Angira Civil Appeal No. 12 of 1981** where **Law, JA** stated that:

> **"The learned Judge did not, as he should have done, assess the damages, which he would have awarded the plaintiff had he been successful. The Court of Appeal has often stressed the necessity for this to be done. Where a claim for general damages is dismissed, courts of first instance should state what damages would have been awarded if the claim had been allowed; the reason being that when a successful appeal is brought then in the absence of agreement the question must be referred back to the High Court, with possible further appeal against quantum, all this involving unnecessary expense and delay."**

95. Whereas it was an error on the part of the trial court not to have assessed the damages he would have awarded had the Appellant succeeded, in light of the decision I have arrived at nothing turns on that error, since the rationale for that requirement is to save the Court and the parties unnecessary expense and delay that is likely to be occasioned where the decision of the trial court is reversed on appeal which may necessitate the process of assessment of damages. However, Section 79A of the ***Civil Procedure Act*** provides that:

> ***No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.***

96. Having considered the issues raised in this appeal, I find the same not merited. Consequently, the same fails and is dismissed but with no order as to costs as the issue upon which the Respondent succeeded was never pleaded. Judgement accordingly.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 9TH DAY OF NOVEMBER, 2021

G V ODUNGA

JUDGE

Delivered the absence of the parties.

CA Susan