REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 70 OF 2018

TECHARD STEAM & POWER LIMITED.................APPELLANT

VERSUS

MUTIO MULI AND MUTUA NGAO

(Suing as Personal Representatives of the Estate of

JOHN MAKAU NGAO)..RESPONDENTS

Being an Appeal against the Judgment and Decree of the Senior Principal Magistrate Hon. L.P Kassan delivered on the 30th day of May, 2018 in the Principal Magistrate's Court at Mavoko in Civil Suit No. 972 of 2016.

BETWEEN

MUTIO MULI AND MUTUA NGAO

(Suing as Personal Representatives of the Estate of

JOHN MAKAU NGAO)..PLAINTIFFS

AND

TECHARD STEAM & POWER LIMITED……………DEFENDANT

JUDGEMENT

1. The Respondents herein, in their capacity as personal representatives of the Estate of **John Makau Ngao** (hereinafter referred to as "the deceased), filed a suit against the appellant in Mavoko Principal Magistrate's Court being Civil Suit No. 972 of 2016 in which they sought General Damages under the ***Fatal Accidents Act*** and the ***Law Reform Act***, Special Damages, Costs and Interests.

2. According to the plaint, on or around 7th December, 2015, the Deceased was lawfully riding motor cycle registration no. KMCL 052Z along Nairobi-Namanga road when slightly passed Shell bridge, the Defendant's driver, servant and/or agent who was from the opposite direction and in the course of his employment drove motor vehicle registration No. KBY 323J, which was registered in the name of the Appellant, so carelessly, negligently and/or recklessly by entering into a feeder road without giving right of way to the deceased thus knocking him and causing him fatal injuries. The particulars pursuant to statute law and negligence were pleaded.

3. It was pleaded that the action was brought on behalf of the widow, two daughters both aged 32 years and a son aged 24 years. According to the Respondents, at the time of his death, the deceased was aged 50 years, married with three children and was earning Kshs 15,000/= per month from his *bodaboda* business. It was averred that the deceased enjoyed good health and lived a happy life.

4. As a result of the deceased's death, his estate suffered loss and damage particulars whereof were pleaded.

5. In support of their case, the Respondents called three witnesses. The first witness who testified as PW1 was **Mutio Muli**. In her witness

statement, she stated that she was the deceased's widow and that the deceased passed away on 9th December, 2015 at Kenyatta National Hospital after a road traffic accident on 7th December, 2015 along Namanga Road near Shell Petrol Station. According to her upon being injured, the deceased was rushed to Athi River Shalom Community Hospital before being transferred to Kenyatta where he passed on after two days. She stated that the deceased, who was aged 52 years, was the sole breadwinner for the family and was a motorist dealing in meat with monthly income of Kshs 15,000/= which the family had lost.

6. In her testimony PW1 produced the documents which were marked as exhibits and disclosed that the deceased used to give her Kshs 5,000/= per month and that they had three children. As a result of the deceased's death her business and that of the deceased collapsed and they lost upkeep. It was however her evidence that she never witnesses the accident. She prayed for compensation.

7. In cross examination she stated that she spent Kshs 5,000/= and Kenyatta National Hospital which money was contributed at home.

8. PW2 was **Alex Mwanza Nzinga**. According to his statement, on 7th December, 2015 while engaged in his *bodaboda* business heading to Kitengela from Shalom Hospital, upon approaching Alpharama junction, a motor vehicle which was ahead of him, while trying to enter the junction on the right side as one faces Kitengela from Shalom Hospital failed to give way and knocked a motorist who had a right of way heading towards Shalom Hospital from Kitengela. According to the said statement, which was adopted as evidence, the motor vehicle which knocked the cyclist was registration no. KBY 323J and the cyclist that was knocked was **John Makau Ngao**. It was his statement that the said vehicle stopped after the accident and assisted in taking the injured person to Shalom Hospital. According to him the driver of the said vehicle was to blame for carelessly driving the said vehicle and failing to give way to motorists who had the right of way.

9. In his oral evidence, PW2 reiterated the foregoing and stated that the driver turned to Salama junction without indicating as a motor bike which was approaching from the opposite direction had the right of way. According to him, he did not know the deceased prior to the accident.

10. In cross-examination he stated that he was behind the said vehicle and that there was no other vehicle from the opposite direction. He stated that the motor bike hit the said vehicle on the front left side as the said vehicle had already turned as the motor bike arrived. According to him it appears that the driver thought the motor bike was still far as it did not stop and hit the motor bike. While admitting that there is a feeder road at the scene, he testified that the vehicle had not reached the feeder road. According to PW2, he was 18 metres away from the said vehicle which was speeding. It was his evidence that there was no other eye witness at the scene. It was however his evidence that the motor bike was on his proper side of the road.

11. The third witness for the plaintiff was **PC Kihoi** who testified as PW3 who was called to produce the police abstract report. According to him the rider was involved in a road accident with motor vehicle reg. no. KBY 323J pick up. As a result of the accident, the rider was seriously injured and died later. He confirmed that one **Collins Owino** was charged with causing death. It was his testimony that the vehicle was along Namanga road heading towards Kitengela when it turned to the right while the motor cycle was from Kitengela towards Nairobi. It was his testimony that the driver did not give way hence the accident. Therefore, the driver was to blame since the motor cycle was on the left side and there were no other vehicles on the road. The motor vehicle according to him ought to have given way.

12. On the part of the Appellant, they called **Collins Owino** as DW1. According to his statement which he adopted, he was employed by the appellant as a driver having worked with the appellant since October, 2014. On 7th December, 2015 at around 10.30 am he was driving the appellant's motor vehicle reg. no. KBY 232J Nissan Pickup along Nairobi-Namanga road towards Namanga direction on his way to Alpharama Company, in the company of his fellow employee, **Antony Shikokoti Muhatia** who was seated next to him. It was his statement that he was traveling at a slow speed of 5 kph and the vehicle was loaded with 500 kgs of the appellant's products. The weather condition according to him was dry while the traffic flow was moderate.

13. Near Shell area there were some vehicles ahead of him and other oncoming ones. He slowed down switched on the offside indicator warning light that he intended to turn right onto the rough road and stopped as he waited for the oncoming vehicles to give him the right of way. As he entered into the road, suddenly a third party motor cycle rider who was overlapping on the nearside verge from the rear of the *matatu* travelling towards Mombasa road, which had given him the right of way, collided with his vehicle's nearside body and stopped almost immediately. DW1 and his colleague came out, realised the rider who was carrying meat inside the rear of his motor cycle had sustained head injuries and they rushed him to Shalom Hospital for treatment before he was transferred to Kenyatta National Hospital.

14. According to him the police officers from Athi River visited the scene and commenced investigations while both the vehicle and the motor bike were detained at the station but the vehicle was later released. He disclosed that he was however served with the Notice of Intended Prosecution. He however blamed the rider for the accident.

15. In his oral evidence he reiterated the foregoing and stated that the rider hit him after he had stopped on the rough road.

16. In cross-examination, DW1 confirmed that he was charged with causing death and that he was on his defence. He admitted that he was heading towards Kitengela and that the rider had the right of way though a vehicle had stopped for him to turn.

17. DW2 was **Antony Shikoti Muhatia**. According to his statement, on 7th December, 2015 at around 10.30 am he was travelling in their company motor vehicle reg. no. KBY 323J Nissan Pickup which was being driven by DW1, along Nairobi-Namanga road, loaded with the company products for delivery at Alpharama Company. According to him the weather condition was dry with moderate traffic. According to him they were travelling towards the general direction of Namanga from the general direction of Nairobi. Around Shell area, the driver slowed down and indicated that he was turning to the right into the rough road and the oncoming vehicle, flashed and gave him way as he turned into the rough road. However, the rider collided with the said vehicle as he was overlapping. After the accident they took him to Shallom where he was admitted for treatment. Later they recorded their statements at Athi River Police Station. According to him the ridder was to blame because had he not overlapped the accident would not have taken place.

18. In his oral evidence he stated that the motor cyclist hit them while they were on the rough road and that no one was following them from behind. According to him the cyclist hit them on the rear left side. According to him, the cyclist was to blame because they had been allowed to turn right.

19. After hearing the evidence, the learned trial magistrate found that since the vehicles coming from the opposite direction had the right of way, even if DW1 had indicate that he was turning to the right, he was supposed to wait for any oncoming car to pass. He accordingly, found the appellant 100% liable for the accident.

20. The court then proceeded to award the Respondents Kshs 120,000.00 for pain and suffering, Kshs 100,000.00 for loss of expectation of life, loss of dependency in the total sum of Kshs 1,560,000.00 and special damages in the sum of Kshs 70,000.00.

21. Aggrieved by the said judgement the Appellant now appeals to this court on the following grounds:

> **a) <u>THAT</u> the Learned Magistrate erred in fact and in law in finding the Appellant wholly liable for the accident in issue despite evidence on record demonstrating that the deceased (John Makau Ngao) caused and/or substantially contributed to occurrence of the accident.**
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> **b) <u>THAT</u> the Learned Magistrate erred in fact and in law in awarding a sum of Kshs. 120,000/- for pain and suffering on the basis that the deceased died two days after the accident whereas, there was no evidence that during that time the deceased was conscious neither was there any evidence that the deceased experienced pain and suffering during the two days.**
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> **c) <u>THAT</u> the Learned Magistrate erred in fact and in law awarding Kshs. 100,000 as damages for loss of expectation of life and Kshs. 120,000/= for pain and suffering under the Law Reform Act and never took into account damages awarded under the Fatal Accidents Act following the binding decision of the Court of Appeal in the case of *Kemfro Africa Ltd and another v Lubia and another [1976–1985] 1 EA 184.* The amount was excessive.**
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> **d) <u>THAT</u> the Learned Magistrate erred in finding that the deceased used to earn Kshs. 15,000/- a month whereas there was no evidence on record and/or there was no credible evidence to that effect.**
>
> **e) <u>THAT</u> the Learned Magistrate erred in applying an extremely high multiplier of thirteen (13) years in calculating damages for loss of dependency considering that the deceased was in an advanced age of 50 years engaged in a dangerous occupation as a motorcyclist.**
>
> **f) <u>THAT</u> the Learned Magistrate erred in finding that the deceased spent two-thirds (2/3) of his earnings on maintenance or financial support of his dependants whereas all of the deceased's children were grown up and there was no evidence put on record that the deceased maintained or supported such grown-ups financially.**
>
> **g) <u>THAT</u> the Learned Magistrate erred in applying a multiplier of two-thirds (2/3) in estimating damages for loss of dependency, which multiplier was too high in the circumstances and therefore awarded damages for loss of dependency that were too high.**
>
> **h) <u>THAT</u> the learned magistrate erred in awarding Kshs. 1,560,000/= which was an extremely high award that calls for interference by this Honourable High Court.**

22. It was submitted on behalf of the appellant that the learned trial magistrate ought to have found that the deceased contributed substantially to this accident. According to the appellant, it was clear that when approaching the junction, the deceased rider should have slowed as he was riding at a high speed characteristic of *"Boda boda riders"*. This is enhanced by the evidence of PW2 to the effect that the deceased rider had not actually reached the feeder road when he was hit contradicting the Police Officer's statement that the driver of KBY 320Z hit the rider while turning on the feeder road.

23. According to the petitioner, the evidence of DW1 was corroborated by DW2 that DW1 switched on the indicator and stopped before turning into the rough road. To the petitioner, the evidence of PW2, **Police Officer PC Kihoi,** cannot be used to determine liability and the Respondent by not calling the investigating officer left a serious vacuum on liability yet the burden of proof was upon the Plaintiff and not on the Defendant. In support of this submission, the appellant relied on the decision of **Khamoni J.** in **<u>High Court Civil Case No. 656 of 2002 Francis Njoroge Njonjo vs. Irene Muroki Kariuki and 7 Others</u>** and the decision of **Musinga, J** (as he then was) in **<u>Nakuru High Court Civil Case No. 186 of 2002 - Margaret Wanjiru vs. S. Karanja & Another.</u>**

24. It was therefore submitted that the evidence of the Police Officer in the instant Appeal was not one which can be admissible in evidence since he was not the investigating Officer, who was never called to give evidence; he was never involved with investigations; he did not produce the Police file in court or any sketch plans in absence of Investigating Officers evidence and Police file; the Police abstract showed that the case was still pending under investigation (P.U.I); he did not also produce a Police Occurrence Book (O.B); his evidence on liability is questionable and beyond comprehension; he did not produce before the court any proceedings of a traffic case, ruling or judgment with any conviction to stamp on 5.47A of the ***Evidence Act***; in the judgment of the trial court at page 102, the court stated that the accused was charged of causing death by dangerous driving yet there was nothing before the court to confirm this position.

25. The appellant faulted the learned trial magistrate for his findings that he accepted the evidence that the driver of KBY 320Y had put his indicators before turning and that all the tyres of KBY were all off the main road and the point of impact was at the rear of the vehicle as the basis of finding the driver 100% liable. Further, the learned magistrate failed to note that there was no evidence before him from Police Occurrence Book or Police file or even the evidence of the Investigation Officer, **P.C Mweni**, to determine the point of impact considering that both DW1 and DW2 stated that the deceased rider was speeding, overlapping and hit their vehicle after they had indicated and turned.

He further faulted the finding that the driver of KBY 100% was to blame when there was no evidence of any charge, conviction and sentence and ad in light of the evidence of PW2.

26. According to the petitioner, there is no concrete explanation as to why the vehicle was hit from the rear if at all the overlapping evidence was not considered. In the appellant's view, this is a case where the deceased contribution could not have been less than 70% to blame although his submissions are that he was 100% to blame.

27. As regards quantum, it was submitted that there was no evidence to show that as time at that the deceased was conscious. Further no reason was given for this award. The appellant therefore proposed Kshs. 50,000/= based on HCC No. 1 of 2006 - **<u>David Ndung'u vs. Westly</u>** where the deceased died after two days and was awarded Kshs. 50,000/=. With respect to loss of expectation of life, it was submitted that the learned trial magistrate ought not to have awarded Kshs. 100,000/= for a 50-year-old person whose working life was up to 60 years. Accordingly, it was proposed that **Kshs. 50,000/=** ought to have been awarded under this head.

28. Under ***Fatal Accidents Act***, it was submitted that the guiding principle under this head is found in the court of appeal judgment in **<u>Nyeri being Civil Appeal No. 251 of 1996 - Cecilia W. Mwangi & Another vs. Ruth W. Mwangi</u>** where justice **Tunoi, Shah & Pall JJ** had this to say at page 8 of their judgment regarding proof of damages quoting the statement of **Lord Goddard C.J.** in the case of **<u>Bonham Carter vs. Hyde park Hotel (1948) T.L.R 177</u>**.

> **"Plaintiff's must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down particulars and so to speak, throw them at the head of court, saying, this is what I have lost. I ask you to give me these damages…The Plaintiff stated in the superior court that she used to make a net profit of Kshs. 52,000/= before the accident and after the accident she lost all that…she would have had some accounts books and income tax returns. She produced none of these during trial this is not the way to prove loss of earnings."**

29. The appellant further relied on the case of **<u>Evans Muthaita Ndiva vs. Father Rino Meneghello & Another HCC No. 1319 of 1992</u>** where the judge stated thus:

> **"There was no proof of income produced to the court to establish the deceased earned Kshs. 12,000/= as a businessman…I would have awarded this sum if proof of income had been established."**

30. It was therefore submitted that the Court ought to find that the assertion (of earnings of Kshs. 15,000/= per day) has not been proven and the same should be disregarded. The trial court allowed a sum of Kshs. 15,000/= when there was absolutely no evidence to support this. Other than him being a *Boda boda* rider, no evidence was tendered other than that or PW1 to satisfy the trial court that the deceased was indeed earning a living from the *Boda boda* business. In his submission, the Respondent had submitted a salary of Kshs. 15,000/= being that of a *"waiter"*. The deceased was not a waiter and put before court no evidence of employment casual worker or otherwise. The appellant therefore proposed Kshs. 1,500/= on *exgratia* basis.

31. As regards the multiplier, it was submitted that the trial court was at fault for noting that the deceased was 50 years old as at the time of death and proceeding to award a multiplier of 13 years. According to the appellant, the deceased had 10 years to reach the retirement age of 60 years and courts have severally held that a multiplier is not determined by arithmetical subtraction of 60 years minus age (50) which is this case would be a multiplier of 10. A multiplier is determined by taking consideration to factors akin to life such as the deceased could have died of other causes or vicissitudes of life, and in this case they proposed a multiplier of 5.

32. With regard to the ratio, it was submitted that the 2/3 usually given for a married person is only if his children depended on him. The deceased was said to be a married man. However, there was no proof to that the deceased was married. The "wife" did not give evidence to this effect. No birth certificates were given to show the age of the children but looking at paragraph 7 of the plaint, the particulars given pursuant to statute were that he left behind adult children none of whom was called to court to show why they were being provided for when above 24 years (adults). It was not submitted that any of them was in school either. Based on **<u>Voi High Court Civil Appeal No. 6 of 2014 - Chania Shuttle vs. Francis Muingai Karanja</u>** where the deceased had adult children and the court applied a dependency ration of 1/3, the appellant made a similar proposal. Therefore, under ***Fatal Accident Act***, the proposed calculation was 1,500 x 12 x 5 x 1/3 = 30,000.

33. It was submitted that courts have severally held that where the dependents are the same under both the ***Law Reform Act*** and ***Fatal Accident Act***, awards under both statutes should not be awarded. And they relied on **<u>Court of Appeal in Nairobi Civil Appeal No. 21 of 1984 -Kemfro Africa Limited vs. Lubia and Olive Lubia</u>**, **<u>Court of Appeal in Kisumu CA No. 49 of 2000 - Dilip Asal vs. Harma Muge & Diocese of Eldoret</u>**, **<u>HCCC No. 112 of 1998 - (RD) Saklma Said vs. Nable</u>** and **<u>Court of Appeal in Civil Appeal No. 14 of 1889 - Kamaru and Another vs. Mwangondu and Another</u>**.

34. For these reasons, it was submitted that the Plaintiffs are only entitled to the fatal accident claim which we have submitted totals of Kshs. 30,000/=.

35. According to the appellant however, the Plaintiffs are not entitled to any award having not proved entitlement under the ***Law Reform Act*** and ***Fatal Accidents Act*** since the Plaintiffs have not proven their case on a balance of probability.

36. With regard to special damages, it was submitted that though the Learned Magistrate awarded Kshs. 70,000/=, the only proof by documents was Kshs. 550/= being Motor Vehicle Search and filing fee for grant Kshs. 830/=. Accordingly, the Learned magistrate should have allowed Kshs. 1,330/= only.

37. In opposing the appeal, it was submitted that the evidence of PW2 and PW3 having corroborated each other, the same were concrete and water tight to convince the court that the appellant was 100% liable. It was submitted that it was not in doubt that the deceased was the one who had the right of way and under the Traffic Rules the appellant was expected to give way by allowing the deceased to pass before joining

the junction.

38. To the Respondent as the actual investigating officer had been transferred and was not available to testify, PW3 ought not to be discredited. In any event PW3 relied on the contents of the OB. Having testified that DW1 was charged and placed on his defence, that was sufficient to hold him 100% liable. Without the evidence of the driver who purportedly gave way, it was submitted that the allegation of overlapping on the part of the deceased cannot hold.

39. Based on authorities it was submitted that the award of damages was reasonable.

Determination

40. I have considered the issues raised 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."**

41. 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.

42. On the power to interfere with factual findings of the trial court, it was therefore held by the then East African Court of Appeal in **Ramjibhai vs. Rattan Singh S/O Nagina Singh [1953] 1 EACA 71** that:

> **"This Court will not disturb a finding of a trial Judge merely because of an irregularity in the format of the judgement if it thinks that the evidence on the record supports the decision."**

43. 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."**

44. 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."**

45. In this appeal, it is clear that the determination of this appeal revolves around the question whether the respondents proved their case on the balance of probabilities. That the burden of proof was on the respondents 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."**

46. 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."**

47. In **Palace 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."**

48. It was contended that the investigating officer ought to have been called to testify instead of PW3. I agree with the decision of **Khamoni J.** in **High Court Civil Case No. 656 of 2002 Francis Njoroge Njonjo vs. Irene Muroki Kariuki and 7 Others** where he expressed himself as follows:

> **"in her submissions concerning the 6th Defendant, M/s Oburu has relied on the evidence of PW5, a Police Constable Joseph Mutungi who produced copy of the Police Abstract and Occurrence Book from Parkland Police Station concerning that accident. They were P Exhibit 15 and P Exhibits 16 and 17. PW5 was not the Investigating Officer and was not attached to Parklands Police Station during the time of the accident. His evidence was therefore based on those three documents he was given to produce in the court and the Plaintiff's Counsel has pointed out that the documents included information that the Investigating Officer found the 6th Defendant responsible for causing the accident that was why the 6th Defendant faced charges of causing death by dangerous driving**."

49. I also associate myself with the decision of **Musinga, J** (as he then was) in **Nakuru High Court Civil Case No. 186 of 2002 - Margaret Wanjiru vs. S. Karanja & Another** that: -

> **"On the same day the first witness for the Plaintiff, Police Inspector Kibii Keror attached to Traffic Section Naivasha testified. He produced Police Traffic File A.R. No. 15 of 1983 which related to the accident involving the aforesaid motor vehicles. No one cross –examined him on anything and neither did he state anything else other than identifying himself and producing the file. I think the Plaintiff should have made better use of that witness given that the issue of liability was seriously contested. The witness should have been requested to state what the police findings were at the scene of the accident and should also have been requested to give his opinion as to who was to blame for the accident. His evidence would of course not have been conclusive not binding upon the court but would have assisted the court in determining the issue of liability. A party who calls a police officer to produce a police file should do everything possible but within the knowledge and/or information of the officer, to examine him with a view to shedding some light into the issue in dispute rather than just dump a police file before the court and require the judge to study all the statements in the file, sketch plan drawings, photographs and whatever else may be contained in the file,"**

50. However, proof of negligence being on a balance of probabilities does not solely depend on the evidence of the investigation officer. Negligence can be proved notwithstanding the fact that the accident in question was never reported to the police since there is no nexus between a report of an accident to the police with proof of negligence. While such report and the steps taken thereafter may be proof of the occurrence of the accident in question, where there is independent evidence proving that an accident took place and that it was caused by the negligence of the defendant, the failure to call the investigations officer is not necessarily fatal in accident claims. In **Peter Kanithi Kimunya v. Aden Guyo Haro [2014] eKLR** it was held:

> **"A police abstract is not proof of occurrence of an accident but of the fact that following an accident, the occurrence thereof was 'reported' at a particular police station**."

51. In this case there was evidence of PW2, an eye witness to the accident who narrated how the accident took place. According to him, he was behind the motor vehicle being driven by DW1 when the said vehicle without indicating took a right turn thereby colliding with the deceased who was riding a motor bike from the opposite side. Accordingly, the Respondents' case cannot be dismissed merely on the ground

that the investigations officer did not testify. It is not in doubt that the deceased was riding from the opposite side. It is also not in doubt, and it was in fact admitted by DW1 that the deceased had the right of way. Therefore, ordinarily, DW1 would have been liable for the accident since he was expected to give way to the deceased.

52. DW1 however testified that he in fact had been given way by the *matatu* which was coming from the same direction as the deceased but the deceased, in attempting to overlap collided with his vehicle. That may be so; however, notwithstanding the fact that the *matatu* had given way to DW1 to turn into the rough road, DW1 still had the duty to ensure that the road was clear before taking advantage of the said *matatu's* magnanimity. It was his failure to do so that clearly led to the accident in question. That notwithstanding the deceased also ought to have taken steps to avoid the said accident. There is no evidence that he did so. In **Isabella Wanjiru Karangu vs. Washington Malele Civil Appeal No. 50 of 1981 [1983] KLR 142**, it was held that there can be no excuse for the driver's complete failure to see the pedestrian, or for the pedestrian's complete failure to see the car. It was similarly held in **Suleimani Muwanga vs. Walji Bhimji Jiwani and Another [1964] EA 171,** by **Udo Udoma, CJ** that that:

> **"It is clear from the evidence, I find, that by the driver of the Volkswagen bus turning as he did, he was, in the circumstances of this case, driving his vehicle in a most dangerous manner across the road. It is clear on the evidence that the driver of the omnibus was also not keeping a proper lookout while attempting to overtake the Volkswagen; for if he did, he would have seen clearly in time to slow down his vehicle when the driver of the Volkswagen bus put out his hand indicating that he was turning to the right side of the road. If, on the other hand, the driver of the omnibus did keep a lookout, he must have been travelling at such a speed, which is considered unreasonable in the circumstances of this case, which probably accounts for his inability to bring his bus to a stop in time to avoid the collision."**

53. In my view, in the absence of what steps if any, the deceased took to avoid the accident, some negligence ought to have been attributed to him and in this case taking into account the conduct of DW1, that contribution ought to be 20%. Accordingly, the appeal on liability succeeds to that extent.

54. An issue was taken as to whether DW1 was charged and if for what were the results. DW1 himself testified that he was actually charged with causing death and that he was placed on his defence. Therefore, the appellant's submissions that the results of the investigations were unknown cannot, in light of that concession, be correct.

55. As regards the relevancy of a conviction of a traffic offence to a civil claim in respect of negligence, it was held by the Court of Appeal in **Chemwolo and Another vs. Kubende [1986] KLR 492; [1986-1989] EA 74** in which **Platt, JA** opined that:

> **"It was not for the Judge to read the proceedings in the Traffic case as if the evidence recorded there was the final position in the case since not only is it notorious that different aspects of the evidence emerge during a civil case, while not disturbing a conviction, but it is also well known that both parties to an accident might have driven carelessly and each could be convicted of careless driving for their respective types of carelessness. It was therefore premature to come to the conclusion that not even *prima facie* case of contributory negligence could be established. It would have been right to have held that there was some evidence upon which a triable issue as to contributory negligence arose on the strength of the proceedings in the traffic case…It was correct for the learned Judge to refer to the conviction because section 47A of the Evidence Act (Chapter 80) declares that where a final judgement of competent court in criminal proceedings has declared any person to be guilty of criminal offence, after expiry of the time limited for appeal, judgement shall be taken as conclusive evidence that the person so convicted was guilty of that offence. But that does not matter because it may also be that the other party was also guilty of carelessness and despite the other party's conviction, the issue of contributory negligence may still be alive if the facts warrant it and this may affect the quantum of damages."**

56. According to **Apaloo, JA** (as he then was) in the same case:

> **"It was not competent for the Judge to merely peruse the record of the criminal trial and conclude that a *prima facie* case on contributory negligence cannot be established. If the averments of contributory negligence are proved at the trial, the Court may well feel that the plaintiff was in part to blame for the accident and the Court would then come under a duty to assess his own degree of blameworthiness and depending on the Court's assessment of responsibility for the accident, such apportionment may affect, perhaps in a substantial manner, the quantum of damages to which the plaintiff is entitled. Or it may affect it in a negligible way. Whatever it is, there is a triable issue on the plea of contributory negligence."**

57. Accordingly, in **Ochieng vs. Ayieko [1985] KLR 494**, **O'kubasu, J** (as he then was) held that:

> **"Looking at the evidence before it, the court is entitled to make its own independent evaluation and come to its own conclusion. It does not mean that since the defendant was acquitted in the traffic case by the Resident Magistrate's Court then he is not liable. The Court has to look at the evidence as a whole and reach its own conclusion. The fact that the defendant was acquitted in the traffic case is certainly significant and cannot be ignored."**

58. **Mwera, J** (as he then was) in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007** was of the opinion that:

> **"Much as other court proceedings can be placed before a trial court as an exhibit, the trial court is bound to proceed and determine a dispute before it on the evidence of witnesses who appear before it…Admitting in evidence by consent a record of previous proceedings does not mean that all the contents of those proceedings automatically become evidence in the subsequent proceedings. It is always open to advocates in a civil suit to agree upon facts as to which no evidence is called, or to agree to accept a statement by a witness in other proceedings as being a true statement of facts deposed to therein,**

although the witness is not called as a witness in the civil suit, provided this agreement is absolutely clear and unambiguous. It is not for the Judge to read proceedings in traffic case as if the evidence recorded there was the final position in the case. Not only is it notorious that different aspects of the evidence emerge during a civil case, but it is also well-known that both parties to an accident might have driven carelessly for their respective types of carelessness. If the contents of a record of traffic proceedings arising out of a motor accident cannot become evidence in a civil suit arising out of that accident, equally the contents of a police file in respect of police investigations in the accident cannot become evidence in a civil suit even if such file is put in evidence by consent…The practice by advocates, not to call the relevant witnesses but opt to produce as exhibits proceedings like in the traffic case or police investigation files is to be deprecated. Therefore the learned trial Magistrate was not bound to accept the evidence of the eyewitness in the traffic case, as final in the civil case before him."

59. It must always be remembered that the decision of who to charge where there is a collision occurs rests on the police and the parties have no control over that decision. Therefore, the fact that the police decide to charge one driver and not the other cannot be taken to be conclusive evidence of who between the two drivers is culpable. This was the position adopted by the Court of Appeal in **Calistus Ochien'g Oyalo & Others vs. Mr. & Mrs. Aoko Civil Appeal No. 130 of 1996**, where it was held that police do conduct their investigations for their purpose and a party cannot be expected to direct them on how to do it.

60. I therefore do not read too much into the fact that the Appellant was charged and acquitted of the traffic offence.

61. As regards quantum of damages, the Court of Appeal in **Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> **"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."**

62. It was therefore held by the same Court in **Sheikh Mustaq Hassan vs. Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:

> **"The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect…A member of an appellate court when naturally and reasonably says to himself "what figure would I have made?" and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other Judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own…"**

63. Similarly, in **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, the Court of Appeal held that:

> **"In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."**

64. The principles which ought to guide a court in awarding damages were set out by the Court of Appeal in **Southern Engineering Company Ltd. vs. Musingi Mutia [1985] KLR 730** where it was held that:

> **"It is trite law that the measurement of the quantum of damages is a matter for the discretion of the individual Judge, which of course has to be exercised judicially and with regard to the general conditions prevailing in the country generally, and prior decisions which are relevant to the case in question to principles behind the award of general damages enumerated… The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion judgement and experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of the appellate tribunal to pose for himself the question as to award he, himself would have made. Having done so, and remembering that in this sphere there are invariably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment…It is inevitable in any system of law that there will be disparity in awards made by different courts for similar injuries since no two cases are precisely the same, either in the nature of the injury or in age, circumstances of, or other conditions relevant to the person injured. The most that can be done is to consider carefully all the circumstances of the case in question, and to consider other reasonably similar cases when assessing the award…it need hardly be emphasized that caution has to be exercised when paying heed to the figures of awards in other cases. This is particularly so where cases are merely noted but not fully reported. It is necessary to ensure that in main essentials the facts of one case bear comparison with the facts of another before comparison between the awards in the respective cases can fairly or profitably been made. If however it is shown that cases bear a reasonable measure of similarity then it may be possible to find a reflection in them of a general consensus of judicial opinion. This is not to say that damages should be standardized or that there should be any attempt to rigid classification. It is but to recognize that since in court of law compensation for physical injury can only be assessed and fixed in monetary terms the best that Courts can do is to hope to achieve some measure of uniformity by paying heed to any current trend of considered opinion.**

65. With respect to fatal accidents, in **Beatrice Wangui Thairu vs. Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988** (unreported), **Ringera J.** as he then was, held at page 248 that:

> **"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchases. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."**

66. The principles which ought to guide a court in awarding damages in fatal accident claims under the head of loss of dependency was dealt with by **Ringera, J** (as he then was) in **Grace Kanini vs. Kenya Bus Services Nairobi HCCC No. 4708 of 1989** where it was held that:

> **"The court must find out as a fact what the annual loss of dependency is and in doing so, it must bear in mind that the relevant income of the deceased is not the gross earnings but the net earnings. There is no conventional fractions to be applied, as each case must depend on its own facts. When a court adopts any fraction that must be taken as its finding of fact in the particular case and in considering the reasonable figure, commonly known as the multiplier, regard must be considered in the personal circumstances of both the deceased and the defendant such as the deceased's age, his expectation of working years, the ages of the dependants and the length of the dependant's expectation of dependency. The chances of life of the deceased and the dependants should also be borne in mind. The capital sum arrived at after applying the annual multiplicand to the multiplier should then be discounted by a reasonable figure to allow for legitimate concerns such as the widow's probable remarriage and the fact that the award will be received in a lump sum and if otherwise invested, good returns can be expected."**

67. It was contended that since there was no evidence that the deceased was conscious after the accident the award of Kshs 100,000.00. It is true that the general rule is that the award for pain and suffering depends on whether after the accident, the deceased suffered any such pain. In **Suleimani Muwanga vs. Walji Bhimji Jiwani and Another** (supra) that:

> **"No award would be made in regard to head for pain and suffering, because the court is satisfied that immediately after the accident, the deceased was unconscious. She was removed and taken to hospital in that state and died immediately on admission. There is no evidence that she was even able to speak to anybody after the accident, and that she could ever have been conscious of any pain."**

68. In this case there was no evidence that the deceased was either conscious or unconscious. Accordingly, there is no basis upon which I can interfere with the award under this head.

69. As regards loss of expectation of life, it was held in **Uganda Electricity Board vs. Musoke [1990-1994] EA 581** that:

> **"Award for loss of expectation of life is made on the basis of loss of prospective happiness by the deceased and the following are the principles for making an award under this head of damages: -**
>
> **1. Before any damages are awarded in respect of the shortened life, of a given individual, it is necessary for the Court to be satisfied that the circumstances of the individual life were calculated to lead on balance, a positive measure of happiness of which the victim has been deprived by the defendant's negligence. If the character or habits of the individual were calculated to lead him a future of unhappiness or despondency that would be a circumstance justifying a small award.**
>
> **2. In assessing damages for this purpose the question is not whether the deceased had the capacity or ability to appreciate that his future on earth would bring happiness. The test is not subjective, and the right sum to award depends on an objective estimate of the kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. No regard must be to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.**
>
> **3. The main reason why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no confident estimate of prospective happiness can be made. When an individual has reached an age to have settled prospects, having passed the risk and uncertainties of childhood and having in some degree attained an established character and firmer hopes, his or her future becomes more definite and the extent to which good fortune may probably attend him at any rate becomes less incalculable.**
>
> **4. Stripped of these technicalities, the compensation is not being given to the person who was injured at all, for the person who was injured is dead. The truth is that in putting a money value on the prospective balance of happiness in years that the deceased might have lived, the Judge is attempting to equate incommensurables. Damages, which would be proper for a disabling injury, may be much greater than for deprivation of life. These considerations lead to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, a very moderate figure should be chosen.**
>
> **In this case it is necessary to consider what kind of life the deceased would have enjoyed had he not been killed. There is no evidence that the deceased would have had an unhappy life. The deceased was aged fourteen and was still in primary."**

70. It is true that the deceased was 50 years old. He was awarded Kshs 100,000.00 for loss of expectation of life. In my view, considering comparable awards, I am not satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.

71. With respect to loss of dependency, it was submitted that no proof in form of statement of accounts were produced to prove the amount that the deceased was earning. However, in **Jacob Ayiga Maruja & Another vs. Simeon Obayo (2005) eKLR** the court held:-

> **"……..we do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving his earnings is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways…we reject any contention that only documentary evidence can prove these things."**

72. Regarding documentary proof, the Court of Appeal in **Wambua vs. Patel & Another [1986] KLR 336** appreciated that in that case the evidence of the deceased earnings was:

> **"…a very poor account. Although he appeared to be a man of enterprise and somehow exposed to banks and did business with a state commission, that is, the Kenya Meat Commission, he kept no books of account or any business book. So all his income and expenditure were all stored up in his memory. He has apparently not heard of income tax and never paid any in his 24 years cattle trade. It should require no ingenuity to see that figures he gave as his earnings supplied from his memory bank, may well be exaggerated. The figures he gave as his business earnings and expenditure must be considered with great care. Nevertheless, the court is satisfied that he was in the cattle trade and earned his livelihood from that business. A wrongdoer must take his victim as he finds him and the defendants ought not to be heard to say that the plaintiff should be denied his earnings because he did not develop more sophisticated business methods. Whereas damages for loss of earnings must be established by satisfactory evidence and the evidence should appreciate that, the court should approach the consideration of the plaintiff's evidence with caution and must not allow him to "pluck a figure from the air", a victim does not lose his remedy in damages merely because its quantification is difficult."**

73. In this case the evidence was that the deceased was earning Kshs 15,000.00. However, in determining the multiplicand, it was held in by **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** that:

> **"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."**

74. It was therefore held by the Court of Appeal in **Gerald Mbale Mwea vs. Kariko Kihara & Another Civil Appeal No. 112 of 1995** that the issue of dependency is always a question of fact to be proved by he who asserts.

75. Therefore, in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, **Ringera J.** as he then was, was:

> **"…constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case (underline mine). When a trial court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case. Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and counsel appearing before courts may be forgiven for assuming them to be the law. They are not. It takes a discerning court to put the law back to track."**

76. In **Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47**, it was the opinion of the Court of Appeal that:

> **"There is no two-thirds rule as dependancy is a question of fact. The sum to be awarded is never a conventional one but compensation for pecuniary loss…"Dependancy" or "dependency" is the relation of a person to that by which he is supported…The extent to which a family is being supported must depend on the circumstances of each case and to ascertain it the Judge will analyse the available evidence as to how much the deceased earned and how much he spent on his wife and family. There can be no rule or principle of law in such a situation…But for people with smaller incomes, certain expenses are constant, such as food, school fees and the like. Therefore, the realistic rate of dependency would be greater in proportion to the total family income than would be in the case of a highly paid person…In the instant case one fifth was far too low, even though its effect was mitigated by a generous multiplier and that it represented a wholly erroneous estimate. A just figure of dependency here would have been one half."**

77. In this case PW1 testified that she was being given Kshs 5,000.00 by the deceased. In those circumstances, the issue of dependency ratio does not arise as the multiplier in known.

78. As the deceased was 50 years old, it is my view that a multiplicand of 10 would have been reasonable in those circumstances.

79. Though it is trite that special damages must be strictly proved, in **Mary Shesia Kivairu vs. Jeffa Enterprises Ltd & Another Kakamega HCCC NO. 17 of 2004, G B M Kariuki, J** (as he then was) awarded Kshs 30,000.00 as reasonable funeral expenses though the same was not proved but there was no doubt, as in this case, that expenses must have been incurred towards the funeral. I am of the same view.

80. Accordingly, the award that ought to have been made to the Respondents was as hereunder:

(a) Pain and Suffering Kshs 100,000.00

(b) Loss of expectation of life Kshs 100,000.00

(c) Loss of dependency Kshs 5,000.00 x 12 x 10 = Kshs 600,000.00

(d) Special damages 31,330.00

81. This brings the total to Kshs 825,064.00 after taking into account the 20% contribution. In the premises the appeal succeeds to that extent. As correctly pointed out by the learned trial magistrate, the general damages will accrue interest from the date of the judgement of the lower court while the special damages will do so from the date of filing of the suit at court rates.

82. As regards costs, although this Court directed the parties to furnish it with soft copies of the pleadings and submissions in word format, only the appellant complied. Section 1A(3) of the ***Civil Procedure Act*** provides as hereunder:

> ***A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.***

83. One of the overriding objectives of the ***Civil Procedure Act*** is the facilitation of expeditious resolution of the civil disputes governed by the Act. The direction that Advocates and parties do furnish the Court with soft copies of their pleadings and submissions is geared towards that same objective and where they fail to comply therewith, it amounts to a failure to comply with a statutory mandate which may call for a penalty in costs or deprivation of costs even where the same would have been granted. In fact, in such circumstances, the court may well invoke its powers under section 56 of the ***Advocates Act*** and penalise advocates in costs personally. Accordingly, though the appellant has only partly succeeded, there will be no order as to the costs of this appeal.

84. It is so ordered.

Read, signed and delivered in open Court at Machakos this 18th day of June, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Shijenje for Mr Mochama for the Respondent

Miss Mbuvi for Mrs Ngala for the Appellants

CA Geoffrey