REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL SUIT NO. 45 OF 2015

MARY WANJIRU MAINA (*Suing as administrator ad litem of the*

***Estate of the late* JANE WANJIRU MAINA.....PLAINTIFF**

VERSUS

LILIAN W. MACHARIA.....1ST DEFENDANT

DEARN KIMATHI.....2ND DEFENDANT

JUDGEMENT

1. The plaintiff herein, **Mary Wanjiru Maina**, has instituted this suit in her capacity as the administrator of the estate of **Jane Wanjiru Maina** (deceased) pursuant to the provisions of the ***Law Reform Act***, Cap 26 and the ***Fatal Accidents Act***, Cap 32, on their behalf and on behalf of the dependants and the estate of the deceased.

2. The plaintiff pleaded that the 1st defendant was the beneficial owner of motor vehicle registration number KBK 486L (hereinafter referred to as "the said vehicle") which was at all material times being driven by his duly authorised servant or agent, **Dearn Kimathi**, the 2nd Defendant herein.

3. It was pleaded that on or about 16th September, 2012 along Mombasa-nairobi Road at Lukenya at around 4am, the deceased was a lawful passenger in the 1st Defendant's said motor vehicle when the 2nd Defendant as the 1st Defendant's duly authorised servant or agent acting in the course of employment so negligently and recklessly drove, managed or controlled the said vehicle that it overturned and rolled. The plaintiff proceeded to set out the particulars of negligence, Particulars Pursuant to the said two Statutes and special damages.

4. It was pleaded that the said accident was wholly caused by the negligence of the 2nd Defendant as the 1st Defendant's driver or agent hence the 1st Defendant was vicariously liable.

5. The Plaintiff therefore seeks special damages in the sum of Kshs 121,085/=, damages under both fatal Accidents Act and Law Reform Act, interests thereon and costs of the suit.

6. Only the 1st Defendant entered appearance and filed the defence. In her defence, the 1st Defendant denied that she was the registered owner of the said motor vehicle and that the 2nd defendant was her agent, servant, employee or driver. She further denied the occurrence of the accident. In the circumstances she denied the particulars of special damages set out in the plaint.

7. According to the Plaintiff's statement she was the mother of the deceased and she obtained a Grant of Letters of Administration Ad Litem in Nairobi Succession Cause Number 2340 of 2013.

8. According to her on or about 16th September 2012, she received information that the deceased had been involved in a road traffic accident along Nairobi-Mombasa Highway near Lukenya. It was her evidence that she came to learn that the deceased was a passenger in Motor Vehicle Reg. Number KBK 486L which she discovered belonged to the 1st Defendant based on a search at the Registry of Motor Vehicles. It was her statement that as a result of the accident, her daughter passed away and this was confirmed by the death certificate. She disclosed that she obtained a police abstract report confirming the said accident.

9. According to the Plaintiff, at the time of the accident, the deceased was 25 years and was just about to graduate from Karatina University College with a bachelor of Science in Horticulture Science and management. She had completed her coursework and her graduation was set for 7th November, 2012 and had obtained employment from M/S Fine Media at a gross salary of approximately Kshs 30,000.00 per month. According to the plaintiff, she was dependent on the deceased and had lost the support extended by the deceased to her and to the deceased's siblings.

10. As a result, she averred that the deceased's expectations of a long and happy life were brutally and ultimately lost and her estate suffered loss and damage.

11. Before this court, the plaintiff adopted the contents of the said statement as her evidence in chief. She testified that a day before the date of the accident, the deceased communicated to her that she was going to see her sister in Nairobi and the next information she received was that the deceased was involved in an accident and died on the spot and her body was taken to Machakos Mortuary. The plaintiff then sent her son to obtain a police absatrct which she produced as exhibit. The followingday they took the body to Kenyatta University Mortuary and were billed for the same. After that they proceeded to Muranga for the burial prepparations and obtained the buruial permit. It was her evidence that the biody was at Kenyatta University Mortyuaryu for one week and she produced the payment receipt for Kshs 8,000/= and clearance form as an exhibits.

12. She testified that after the burial she went to Machakos for death certificate which she produced and then instructed an advocate to conduct a search which was done and the certificate issued. The said advocate then wrote demand letters and upon the failure to compensate her,, she proceded to file the suit. Before then she obtained Grant of Letetrs of Administration Ad Litem to enable her file the case on 30 th September, 2013 and she produced the same.

13. She therefore prayed fpor compensation for her daughter who died young and had just started working and was assiting her. She produced a leter from Karatina Univeristy to prove that she was a student there as well as the deceased's payslip showing that she was employed. It was her evidence that prior to that the deceased also worked at Finleys and produced a letter to that effect. At the time of the accident, the deceased had just gotten a job and had not yet settled in marriage and had no children. She was 25 years then and had completed her studied in April and was due for graduation in November that year.

14. In cross-examination the plaintiff stated that she learned of the accident from her son based on the information received from the people who were at the scene. She however did not visit the scene and did not know how the accident occurred. According to her she sued the defendants because the deceased died in their vehicle. Referred to the police abstract, she stated that it showed that the matter was pending under investigation and she was not aware whether the driver was charged. According to her the deceased was working at Fine Media and her payslip indicated that she was earning Kshs 24,458/= net and had worked there for 1½ months but had not started supporting her. However, the deceased had informed her that she would support her. She confirmed that she only produced a receipt for Kshs 8,000/- from Kenyatta University Mortuary explaining that some of the expenses had no receipts.

15. In re-examination she stated that as per the police abstract the accident was caused by the driver. It was her evidence that there were very many funeral expenses but she did not receive all the receipts for the same apart from the one from Kenyatta University Mortuary.

16. PW2, **Cpl James Kathurima**, testified as PW2. According to him, he was based at Athi River Traffic Base. He appeared on behalf of the Divisional Traffic Officer, Athi River. According to the OB there was an accident that occurred on 16 th September, 2012 along Nairobi-Mombasa Road at Lukenya Area. The said accident was self-involving and the motor vehicle involved was Reg. No. KBK 486L Toyota Fielder. The driver of the said vehicle was D. Kimathi and as a result of the said accident, a pedestrian, **Jane Wanjuru Maina**, died on the spot. It was his evidence that he was not the investigating officer but the investigating officer indicated that the driver was the cause of the accident since he lost control of the vehicle due to speed and hit a rail bridge thus causing the accident. The defendant's statement indicated that it was dry.

17. In cross-examination the witness stated that the accident occurred in 2012. He confirmed that he did not take part in the investigations at any stage and only attended the court on behalf of the DTO in answer to the summons to produce the OB and the abstract. In his evidence, he stated that he was not aware that two vehicles were involved. According to him, sometimes when an accident occurs in the night, entries are made the following day. It was his evidence that if an accident involves two vehicles the entry would only be one. It was his evidence that the OB indicated that the driver saw another vehicle which had hit a rail bridge and in attempt to avoid the accident, the vehicle overturned. It was his evidence that there was another accident both of which occurred in the night.

18. In re-examination, he confirmed that the vehicle in which a passenger died was KBK.

19. After the plaintiff closed the case, the Defence called the 2nd Defendant, **Dearn Kimathi** as DW1. He also relied on his witness statement dated 28th August, 2016 in which he stated that he was a taxi driver working for the 1st Defendant in motor vehicle Reg. No. KBL 486K Toyota Fielder which was involved in an accident at Lukenya along Nairobi- Mombasa Highway on or about 15th September, 2012.

20. According to him, he was requested by an agent of Safaricom to take him and his female colleagues to Machakos for some errands. He then called the 1st Defendant who brought the vehicle and they left at 1100hours for Machakos. According to him they were in Machakos until late in the evening when his clients were done with their errands and after supper they left at 22000 hours headed for Nairobi. At about 2300 hours while approaching the scene of the accident at a speed of about 80kph the accident occurred.

21. According to him it was very dry and he was driving with the aid of the driver's headlights and everybody in the vehicle buckled their safety belts when he was bumped from behind by a lorry registration number KAU 468L ferrying sand towards their direction. He lost control of the vehicle and the vehicle rammed into the rail guards at Lukenya Bridge. He tried to swerve to the left but the same vehicle rammed onto his vehicle ripping off its nose cut causing it to spin but finally stopped. Upon checking he found the two ladies who were seated at the back were missing as the boot was wide open but their male counterpart was seated on the co-driver's seat was present. They

then got out to check them and he noticed that the third party lorry had rolled a few meters from the seasonal river. On further checking he saw a lady lying down breathless while the other one was on the grass on the right side of the road. The fatally injured lady was on the left.

22. According to him the vehicle's final position was on the right side of the road while the fatally injured lady was on the left. According to him the male passenger vanished upon learning of the demise of the lady.

23. According to DW1, the driver of the lorry registration number KAU 468L was to blame for the accident.

24. In his oral evidence, DW1 stated that the accident was not self-involving as alleged but his vehicle was hit from behind by the said lorry causing him to lose control. When he swerved back onto the road the lorry hit him on the nose cut of the car and it rolled. According to him he was doing about 80kph hence was not over speeding. According to him, there was no way he could have avoided the accident. It was his evidence that he was not charged with any traffic offence and that no one was charged.

25. In cross-examination, he denied that the lorry found when the accident had taken place. He therefore stated that the contents of the OB and the police abstract were not correct. It was however, his evidence that he did not know that he was supposed to join the lorry to the proceedings.

26. He therefore prayed that the suit be dismissed.

27. It was submitted on behalf of the Plaintiff that the very fact of the occurrence of this accident was confirmed by DW who admitted the occurrence of the accident using the subject motor vehicle and reported the accident to the police. Indeed, PW 2 did also confirm that Occurrence Book entry number 4 referred to during his testimony, that an accident was reported at the Athi River Police Station where the motor vehicle registration number KBK 486L was in a self-involved accident with one passenger, **Jane Wanjiru Maina**, being fatally injured. He produced a Police Abstract (PEX 1) which confirmed the fact of occurrence of this accident involving the subject motor vehicle and the deceased. Thus, it has been sufficiently proved on a balance of probabilities that the Deceased was fatally injured as a result of the accident that took place on the said 16th September 2012 being a passenger in the subject motor vehicle registration number KBK 486L.

28. According to the plaintiff, from the evidence adduced, it can be conclusively said that the 1st Defendant is the registered owner of the subject vehicle as no evidence has been produced to prove the contrary and neither has any of the Defendants denied the 1st Defendant's ownership. Accordingly, it was submitted that the 1st Defendant is vicariously liable for the actions of the 2nd Defendant as she authorized the 2nd Defendant, driver, to take the Deceased and her colleagues as is stated in the 2nd Defendant's witness statement which was produced and adopted as his testimony before this Court.

29. It was submitted that the occurrence of the accident and the involvement of the subject motor vehicle, KBK 486L, are not in dispute; neither is the fact that the Deceased was a passenger on the said motor vehicle and on the date of the accident which resulted to her death. What is in dispute is the negligence or otherwise of the 2nd Defendant in driving the subject motor vehicle on the date of the accident together with the extent of liability of the Defendants. According to the plaintiff, the 2nd Defendant was negligent as is particularized in paragraph 6 (a) – (i) of the plaint dated 11th September 2015 and filed on 14th September, 2015. More specifically as testified by PW2 on reliance of the Occurrence Book entry number 4 of 16th September 2012 wherein it was indicated that the 2nd Defendant lost control of the vehicle due to speeding. PW2 also testified that the accident as reported in the Occurrence Book was in fact self-involved, which is corroborates the report that the 2nd Defendant was speeding therefore he failed to exercise due care and attention while driving. The fact that the 2nd Defendant disputes the Occurrence Book report does not sway the balance of probabilities to his favour as mere denial does not in itself sway the balance in favour of the 2nd Defendant's allegations and the Plaintiff relied on section 107 of the ***Evidence Act***. Accordingly, the Plaintiff did prove through production of the Occurrence book that indeed the 2nd Defendant lost control due to driving at a high speed hence causing a self-involved accident. However, the Defendant failed to produce any evidence to show that in fact, he was hit by another car as he alleged which vehicle was to be blamed for the accident. Therefore, he failed to discharge his burden of proof that he was hit by another vehicle from behind therefore the accident was allegedly not self-involved.

30. The plaintiff contended that she has discharged her burden of proving that the 2nd Defendant was driving at a high speed as was reported in the Occurrence Book entry number 4 of 16th September 2018 which Occurrence Book entry was used to generate the police abstract (PEX1). The police abstract did not blame any other vehicle for the accident as alleged by the 2nd Defendant in his testimony. In fact, the police abstract clearly indicates that the accident was self-involved no other vehicle was said to be involved in the accident with the subject motor vehicle. There was no objection raised for the production of the police abstract therefore, the contents therein cannot be denied which contents are a production of the Occurrence Book entry. In this regard the plaintiff relied on **Kaluki Mwendwa & another v Abdfinazir Hassan Abdirehman & Another [2017] eKLR** where **Nyamweya, J** cited the Court of Appeal sitting at Kisumu decision in **Wellington Nganga Muthiora vs Akamba Public Road Services Ltd & Another (2010) e KLR** and **Jotham Mugalo vs. Telkom (K) Ltd, Kisumu HCCC No. 166 of 2001**.

31. Further reliance was placed on **P N M & another (the legal personal Representative of estate of L M M v Telkom Kenya Limited & 2 others [2015] eKLR** where **Aburili, J** cited the Court of Appeal, case of **Joel Mugo Apila v East African Sea Food Limited, CA 309/2010 (2013) eKLR.**

32. Though the plaintiff appreciated that in the above mentioned cases, the court was referring to the police abstract being used as a means of proving ownership of the motor vehicle by the Plaintiff, it was her case that the same principle applies in the case herein where the 2nd Defendant denies the contents of the Occurrence Book which generated the police abstract which abstract clearly indicated that there was no other car involved in the accident. Thus, the Defendants cannot be heard to say that there was another car to be blamed for the accident without any substantive proof of the said allegations. Either way, if the Defendants were genuine, nothing would have stopped them from simply instituting third party proceedings against the alleged lorry.

33. It was contended that if the 2nd Defendant's allegation was sincere which we submit it is not, that he was not driving at a high speed, then the accident would not have been severe as it was since if the car was hit by a lorry from behind, it would not have "turned" as much as he alleged during cross-examination. To the plaintiff, it would require for the subject motor vehicle to be speeding such that if it is hit by another speeding motor vehicle, a lorry as alleged, with more weight, then the net effect would be that the smaller vehicle will be severely damaged with the occupants therein grievously injured as was the case herein. Which therefore brings us back to the same position that, the 2nd Defendant was in fact speeding thus negligent as he failed to take due care and attention while driving. This would only reduce their liability but not with the Plaintiff but with the owner of the alleged other vehicle who is not a party to this suit. All in all his denial of the fact that the accident was self-involved and that is was as a result of losing control due to speeding has not been sufficiently proved on a balance of probability. Whichever way we look at it, the 2nd Defendant negligently drove the motor vehicle which led to the occurrence of the accident that led to the demise of the Deceased. As indicated by him, the road was "*very dry*" so visibility was okay and they had all "*buckled their seat belts*".

34. It was therefore submitted that the plaintiff has sufficiently proved on a balance of probabilities that the 2nd Defendant was negligent with the 1st Defendant vicariously liable. The plaintiff also relied on *res ipsa loquitur*, and cited **Margaret Waithera Maina vs. Michael K. Kimaru [2017] eKLR** and ***Charlesworth & Percy on Negligence***, 12th edition. According to the plaintiff, the Defendants are jointly and severally 100% liable based on **Rose Makombo Masanju v Night Flora alias Nightie Flora & Another [2016] eKLR**.

35. Regarding quantum, it was submitted that the evidence is on record from both PW1 and 2 is that the Deceased died on the spot due to haemorrhagic shock from chest and abdominal injury (RTA). Due to the severe injuries she suffered leading to her death on the spot, it was submitted that she must have endured immense pain and suffering before her death. Based on **Cecilia Rachier & Esther Olwalo Vs. Floyd Peter Raval [2001] eKLR** and **Alice O. Alukwe Vs. Akamba Public Road Services & 2 Others HCCC No. 26 of 2005 [2013] eKLR**, the deceased sustained fatal injuries and died on the spot and the court awarded Kshs. 50,000/-, the court was urged to award Kshs. 100, 000.00 as compensation for pain and suffering. With respect to loss of expectation of life, it was submitted that the deceased was aged 25 years and by virtue of the accident herein, she was deprived of normal life expectancy by the wrongful acts of the Defendants and/or their agents. She was at the prime of her life, strong, healthy and working formally at Fine Media Limited where she had just began working in August 2012 before her demise on 16th September 2012. She still had a bright future having also completed her degree certificate at Karatina University College. It was urged that an award Kshs. 150,000/- under this head would reasonably compensate the deceased's estate based on **Alexander Okinda Anagwe (suing as the administrator of the estate of Patricia Kezia Anagwe deceased) vs. Reuben Muriuki Kahuha, City Hopper Ltd, Michael A. Craig & Rueben Kamande Mburu [2015] eKLR**.

36. Under ***Fatal Accidents Act***, it was submitted that this suit herein has also been bought on behalf and for the benefit of the dependents of the Deceased herein. She was unmarried and used part of her salary to support her widowed mother. The Deceased did internship at Finlay's Horticulture Kenya Limited and she had just gotten a job with Fine Media Limited where she had worked for a few weeks (1½ months) before her demise. As per her Payslip PEX 12, she earned a net salary of Kshs. 24, 458.00. The court was urged to compute dependency using the multiplier approach and the plaintiff relied on the decision of **Koome J**. in **Albert Odawa vs. Gichimu Gichenji Nakuru HCCA No. 15 of 2003 [2007] eKLR** with reference to **Ringera, J's** dictum in **Mwanzia vs Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another.**

37. In this case herein, there is certainty as to the age of the Deceased, the amount of annual or monthly dependency and the expected length of the dependency. The Deceased was aged 25 years working at Fine Media Limited where she had started employment having completed her 4th year degree examinations. Given the fact that she would have gotten a better job after graduation and on acquiring her degree certificate in the private sector, she could have continued working till the age of 65 years with a much better pay. However, since life has its own uncertainties the court was urged to adopt a multiplier of 35 years based on **Alexander Okinda Anagwe (suing as Legal Administrator of the Estate of Patricia Kezia Anagwe (deceased) vs. Reuben Muriuki Kahuha & 3 others HCCC No. 1550 of 2005** and **Alice O. Alukwe Vs Akamba Public Road Services & 2 Others HCCC No. 26 of 2005 [2013] eKLR** where the court adopted a multiplier of 30 years for the deceased who was 24 years at the time of her death employed as an executive secretary earning 10,000/- without much to be said on her education. This Court was urged to adopt a multiplier of 35 years and a multiplicand of Kshs. 24,458/- and a dependency ratio of 1/3 Consequently, the Court to compute loss of dependency as follows:

Kshs.24,458 x 12 x 35 x 1/3 = 3,424,120/-

38. Regarding funeral expenses, it was submitted that this Court does make a reasonable award where no receipts were produced to prove the claim for funeral expenses based on **Lucy Wambui Kihoro (suing as personal representative of Deceased Douglas Kinyua Wambui) Vs. Elizabeth Njeri Obuong HCCC237 of 2013 [2015] eKLR** and **Premier Diary Limited vs. Amarjit Singh Sagoo & another [2013] eKLR** where the Court of Appeal held that:

> **"We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs to be interred according to the custom of the particular community involved."**

39. In the plaintiff's view, an award of Kshs 70,000/= under this head would be reasonable.

40. Since special damages of Kshs 11,585/- was proved the court was urged to award the same.

41. The Defendants on their part submitted that neither of the plaintiff's witnesses called to testify for the plaintiff's case was present at the scene of the accident. The investigators of the accident were neither near the scene of the accident and had no eyewitness to interview other than the 2nd defendant, who they didn't. As per the OB entry number 5 on the material day, another accident was recorded as having occurred at the same place the plaintiff's accident happened which augments the 2nd defendant's narrative of another motor vehicle namely

KAU 468L being a lorry ferrying sand which rammed into the vehicle the 2nd defendant was driving from behind thus causing the said accident.

42. It was submitted that the 2nd defendant who is a qualified driver was going at a modest speed of 80km/h when the aforementioned lorry slammed into his vehicle twice, once on the back end and a second time on the front nearside, ripping off its nose and causing him to lose control of the motor vehicle and veer off the road. As per the inspection of the defendant's motor vehicle, the nearside wing and the attached tire were ripped off with the bonnet also dented towards the front side- a clear indication the vehicle was bumped by a hard moving object. Additionally, the defendant's vehicle had the colour of the third party lorry, registration number KAU 468L imprinted at the bottom of the left windscreen pillar.

43. It was submitted that the *police abstract* produced before this court did not put blame on the 2nd defendant. In fact, it indicated that the matter was still under investigation. Despite the multitude of evidence alluding to the third party motor vehicle being the cause of the said accident, there has been no attempt by the plaintiff to prove to whom this vehicle in question belongs to or even enjoin them in this suit. It is the policy of the plaintiff to sue the right parties, with the defense not obligated to take out third party notice.

44. It was submitted that the defendants having denied causing the accident, the plaintiff has failed to sue the correct party as regards liability.

45. As regards quantum of damages, it was submitted that it is trite law that civil suits are meant to compensate for the loss suffered but not to enrich or punish either party. For this reason, awards should be commensurate to the damage suffered and should also be in consonance with other previous awards in cases where similar loss was sustained. In this case, the plaintiff claims to have suffered damages as a result of the accident. Whereas the occurrence of death was not disputed, the Defendants argued that the defendants had no part in it whatsoever. However, in the event that this Honourable Court finds any degree of liability on the part of the defendant's, they submitted that the deceased died on 16th September 2012 as per the death certificate adduced. This date corresponds with the date of the accident. There has not been adduced any records of hospitalization or any medical proof contradicting the fact that the deceased died on the spot. For this reason, it was opined that the deceased did not suffer pain and suffering are considering the deceased's distress lasted for at best hours. Thus, the sum of 10,000/- is more conventional in circumstances where the deceased dies either instantly or on the same day of the accident based on A**wadh Ahmed** vs. **Shakil Ahmed Khan** Mombasa HCCC No. 287 of 1990, Kshs. 10,000/=, **Mary Njeri Murigi vs. Peter Macharia & another [2016] eKLR**, ***Grace Wanjiru Gichuki –vs- Peter Gateru Macharia HCCC NO.1 of 1999*** *and* ***Fredrick Gataka Mungai –vs- George N. Kibunyi and Anor HCCC No. 1993 of 1990.***

46. With regards to loss of dependency, the Defendants noted that the plaint alleges the deceased was earning a gross income of 24, 458/- per month which it is also claimed that she used to support her mother. However, PW1, the deceased's mother, stated clearly that while the deceased was in employment at the time of her death, she was still dependant on her. She proceeded to indicate that the deceased had just completed her studies and was yet to graduate and seemingly had not gotten to a position where she could help PW1. Hence, the tabulations presented by the plaintiff or any additional testimony of PW1 at the time of producing the payslip for the decease is an afterthought and should be disregarded by this court. To the Defendants, the deceased had no family of her own, no children and was unmarried. The issue of dependency should not, therefore, arise in light of the glaring evidence of no dependency.

47. However, in the event this court declines to agree with the defendants' submissions above on dependency which is based on courtroom testimony of PW1, it was urged to settle on a dependency ratio of 1/3 with a multiplier of 20 years based on the fact that there is no guarantee that the deceased would have lived to work to the retirement age of 55 years. To the Defendants, this court has the discretion to adopt a multiplier that it can justify and one that can dispense justice and not appear to unjustly enrich the plaintiff based on ***Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku & Another*** **NYR CA Civil Appeal No. 35 of 2014 [2014]eKLR** The deceased was aged 25 at the time of her demise. She was deprived of a life by the acts which the defendants reiterate were not their doing.

48. As regards loss of expectation of life it was submitted that the deceased may have appeared strong, healthy and working. However, this court was never presented with any latest medical assessment reports of her indicating her health or physical status. Any claim, therefore, that the deceased was healthy or would have lived to a full life expectancy is a conjecture, farfetched and devoid of proof. It was therefore the Defendants' view that Kshs.80,000.00 would suffice but if this court must factor in inflationary trends, an award on this head should not exceed Kshs.100,000.00.

49. To the Defendants, a claim for expenses in a suit for recovery of damages should fall under special damages and the same must be pleaded and specifically proven. In the absence of proof of such expenses, this court has no basis whatsoever in awarding any amount towards the same. A plaintiff who is awake to the fact that they might need to bring an action for compensation on behalf of a deceased's estate will be mindful of keeping all the necessary records and documentation needed in support of such claim. A court of law does not exist to cure the careless and ignorant behaviour of the plaintiff as regards this issue. This court should not come up with imaginary figures in terms of funeral expenses and impose the same upon the defendants to the unjust benefit of the plaintiff. It was therefore submitted that this court should not exercise its discretion in awarding special damages where they are not specifically pleaded and proven.

Determination

50. I have considered the evidence adduced by the parties herein. In my view the only issues that fall for determination are whether the Defendants are liable for the accident and if so the quantum of damages.

51. In this case, the plaintiff's case was that the accident was self-involving. In this regard the plaintiff called the police records from where it was shown that was the position. PW2's evidence was that the accident was self-involving and according to him, this was what was indicated in the OB. Though another accident was reported on that day in the same area, that was a separate accident from the one in which the deceased lost her life. The particulars of the police abstract only revealed that one vehicle, Reg. No. KBK 486L, was involved in the accident.

52. The Defendants' case on the other hand was that there was a collision between the said vehicle and motor vehicle registration no. KAU 468L lorry in circumstances that showed that it was the lorry that cause the accident. In other words, the accident was caused by the negligence of a third lorry vehicle. Unfortunately, this issue was never pleaded in the defence that was filed in this suit. There was no mention at all of the involvement of a third party vehicle in the accident.

53. Order 15 Rule 2 of the ***Civil Procedure Rules*** provides that:

The court may frame the issues from all or any of the following materials—

> ***(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;***
>
> ***(b) allegations made in the pleading or in answers to interrogatories delivered in the suit;***
>
> ***(c) the contents of documents produced by either party.***

54. It is therefore clear that issues in a suit arise, from pleadings or evidence both oral and documentary. However, issues in a suit only arise when a material proposition of fact or law is affirmed by the one party and denied by the other. Therefore, as the Appellant admitted that the suit parcels were registered in the names of the Respondent's the issue of ownership of the suit parcels did not arise as it was, from the evidence adduced, not affirmed by the Respondents and denied by the Appellant.

55. It was further submitted that the issue of ownership was not pleaded and therefore the learned trial magistrate ought not to have dealt with the same. That there is a need for pleadings to be as precise as possible cannot be doubted and this requirement applies both to civil proceedings as in any other proceedings including constitutional petitions. In **M N M vs. D N M K & 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:**
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> **"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 vs. 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."**
>
> **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)*. However, that was clearly not the case in this appeal.**

56. 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."***

57. The system of pleadings, it is important to note, 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. (See ***Bullen & Leake and Jacob: Precedents of Pleadings,*** 2th edn. page 3). 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 a ground on which his evidence has been improperly excluded. (See **Esso Petroleum Co. Ltd vs. Southport Corporation [1956] AC 218 at 238.).**

58. Similarly, the Court of Appeal in **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 others [2014] eKLR** while quoting with approval an excerpt from an article by **Sir Jack Jacob** entitled ***"The Present Importance of Pleadings"*** stated:-

> **"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."

59. Therefore, the general rule is that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgement on the issues arising from the pleadings and that parties are generally confined to their pleadings unless pleadings are amended during the hearing of a case. See **Galaxy Paints Co. Ltd vs. Falcon Guards Ltd [2000] 2 EA 385** and **Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 Others Civil Appeal No. 37 of 2003 [2004] 2 KLR 183.**

60. It follows that the issue of the involvement of a third party vehicle in the accident having not been pleaded cannot be the basis of this judgement. In any case, I agree with **Wambilyangah, J** in **Loyce Anyona Olum vs. Benjamin Kimondo Kisumu HCCC No. 105 of 1993** that a defendant ought to apply for a third party notice if allegations are made against the third party.

61. Therefore, based on the state of the pleadings and the evidence placed before this court, I find that the accident was self-involving and in the absence of any reasonable explanation as to what caused the accident, the 2nd defendant's negligence was the cause of the accident hence the 1st Defendant is vicariously liable.

62. In this case, there was no evidence that the deceased passed away immediately after the accident. I therefore agree that an award of Kshs 10,000.00 being general damages for pain and suffering is reasonable.

63. In **Joyce Mumbi Mugi vs. The Co-Operative Bank of Kenya Limited & 2 Others Civil Appeal No. 214 of 2004,** the Court of Appeal made an award of Kshs 100,000.00 under loss of expectation of life which I also find reasonable.

64. 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."

65. The same Judge in **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)**, in which **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. In this case, the appellants have taken issue with the dependency ratio. In this case, the pleadings are clear that the deceased was 25 years old. In **Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported)** the court 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."

67. 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."**

68. As regards the multiplicand, **Ringera, J** (as he then was) in **Marko Mwenda vs. Bernard Mugambi & Another Nairobi HCCC No. 2343 of 1993** held 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."

69. In this case the deceased was unmarried and there was a possibility that she would with time marry and have her own family. Accordingly, whereas parents have an expectation of being assisted by their children, it is my view that being unmarried it is not unreasonable to assume that she could have assisted the plaintiff with ½ of her income. Accordingly, I adopt the one half as the dependency ratio. As was held in **Marko Mwenda vs. Bernard Mugambi & Another** (supra):

> **"Like in every African child, the deceased child is expected to continue assisting her parents financially many years into the unknown future.**"

70. As regards the multiplier, the deceased was aged 25 years. I agree with **Ringera, J** 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."**

71. I adopt a multiplier of 20 years and a multiplicand of Kshs 24,458.00.

72. In the premises the award for loss of dependency ought to have been as follows:

24,458.00 x 12 x 20 x ½ = 2,934,960.00

73. I agree that some expenses must have been incurred in respect of the funeral which I assess in the sum of Kshs 50,000.00. To this Kshs 11,585/- as proved special damages is to be added.

74. In the premises the total award should be as follows:

(1) Pain and Suffering……Kshs 10,000.00

(2) Loss of Expectation of Life…….Kshs 100,000.00

(3) Loss of Dependency……..…….Kshs 2,934,960.00

(4) Special damages……..…….Kshs 61,585.00

Total…….. Kshs 3,106,545.00

75. As regards the double award, as stated in **Marko Mwenda vs. Bernard Mugambi & Another** (supra) 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. Similarly, the Court of Appeal in **Eliphas Mutegi Njeri & Another vs. Stanley M'mwari M'atiri Civil Appeal No. 237 of 2004** held that:

> **"As regards the failure of the Superior Court to take into consideration the award under the Fatal Accidents Act when arriving at the award under the Law Reform Act the principle is that the award under the Fatal Accidents Act has to be taken into account when considering awards under the Law Reform Act for the simple reason that the dependants under the Law Reform Act are the same beneficiaries of the estate of the deceased in the latter Act. Although section 2(5) of the Law Reform Act states that the damages under this Act are in addition to those made under the Fatal Accidents Act the fact that the same parties benefit from awards under both Acts cannot be ignored. If this is not done then there is a danger of duplication of awards…Accordingly, the award of Kshs 890,000/- reduced by Kshs 100,000/- to Kshs 790,000/-."**

76. What is required of the court is therefore not to deduct one award from the other but to take into account the possibility of double compensation. Following in the footsteps of the Court of Appeal I would similarly discount Kshs 100,000.00 from the total award leaving a balance of Kshs 3,006,545.00. plus costs and interests.

77. Judgement accordingly.

Read, signed and delivered in open Court at Machakos this 22nd October, 2019.

G.V. ODUNGA

JUDGE

In the presence of:

Mrs Morara for Mr Khavangali for the Defendant

CA Geoffrey