



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT NUMBER 316 OF 2011

WILTER CHEMUTAI TORONGEI.....PLAINTIFF

**(SUING AS PERSONAL REPRESENTATIVE OF ESTATE OF WESLY KIPLANGAT
(DECEASED))**

VERSUS

W.E. TILLEY MUTHAIGA LIMITED..... DEFENDANT

THE ATTORNEY GENERAL3RD PARTY

JUDGMENT

Background and the Pleadings

1. On the 1st November 2009, two vehicles collided along the Mai Mahiu-Narok road resulting to five fatalities. The deceased, the Late Wesley Kiplangat Rotich was a passenger in one of the two vehicles registration KBB 172M.

The driver of the said vehicle one Richard Kiprotich died in the accident. The other vehicle is Motor vehicle registration KAM 397T. Its driver also died.

2. According to the police abstract obtained from the Mai Mahiu police station and produced by a police officer from the said station, its owner was the National Security Intelligence Service(NSIS) a Department within the Ministry of State for Provincial Administration and Internal Security (as it was then called), and at the material time was being driven by its employee as stated above.

The Attorney-General was thus sued as the 2nd Defendant by virtue of the said vehicle being a Government vehicle under the doctrine of vicarious liability.

3. The plaintiff in her statement of claim placed negligence upon the defendant vicariously in the manner of its driver driving the vehicle. She stated particulars of negligence and sought damages under the Law Reform Act and the Fatal Accidents Act for the loss of her husband and support to the deceased's dependents, herself and three minor children. She also pleaded special damages being funeral expenses.

The defendant upon service denied liability in negligence and blamed the other vehicle and issued 3rd party proceedings against the owner of the said vehicle, KAM 397T, The Honourable the Attorney-General.

4. On its part, the Attorney-General(3rd party) denied knowledge of the accident and ownership of the

vehicle Registration number KBB 172 M and therefore denied liability in negligence and or damages arising from the accident. Its statement of defence is dated the 22nd June 2012.

5. On the 20th November 2012 by an order of the court, it was ordered:

1. That this suit be tried as a TEST suit on the issue of liability.

2. That the outcome of the instant suit on liability be binding in Naivasha PMCC No. 482 of 2010, Naivasha CMCC No. 780 of 2010 and Nairobi CMCC No. 4959 of 2010 and Nairobi CMCC No. 4959 of 2010.

3. That pending hearing and determination of their instant suit on liability the said suits are stayed.

6. The plaintiffs case

The plaintiff testified as PW1. She produced a grant of letters of Administration issued in **Succession Cause No.60 of 2010** in the **High Court of Kenya at Kericho** on the 13th January to confirm her *locus standi* to bring the suit. She testified that she was the wife of the deceased with whom they had three minor children. She produced their birth certificates as exhibits.

Her testimony was that she was not an eye witness to the accident but that the deceased had left their home at Bomet County with a Mr. Mutai to go to Limuru on official duty, that at 5.00p.m. she received information that her husband was involved in an accident and asked to go to Naivasha District Hospital. That on arrival on the 2nd November 2009, she was informed that her husband had died in the accident. She identified his body at the mortuary and thereafter she and the family buried him on the 7th November 2009. She produced a bundle of receipts being burial expenses.

7. It was her evidence that her late husband was an employee of National Hospital Insurance Fund and his salary was Kshs.60,000/= per month. She produced the last payslip for the month of October 2011 and others. She obtained a police abstract that showed the vehicle the deceased was travelling in as a passenger, Registration No. KBB 172M. She produced its records obtained from Kenya Revenue Authority stating ownership at the material time as the **Defendants**. It was her evidence that she gathered that the above vehicle had collided with another, Registration No. KAM 397M owned by the defendant. Other documents that the plaintiff produced as exhibits were the Death Certificate and Post mortem report. She blamed the driver of motor vehicle Registration Number KAM 397T for negligence and sought compensation in damages.

8. **PW2** one **Adam Jilma** was a police officer from Naivasha traffic base. He was not the investigating officer. He testified that the investigating officer Ken Marambi had died the previous year.

From the police file record, he testified that the accident involved motor vehicle Registration No. **KBB 172M a Toyota pick-up** and **KAM 397T**. a Mitsubishi canter at around Suswa, at about 4.00p.m, that three occupants of motor vehicle KBB 172M died, and he named them as **Richard Kiprotich Mutai – the driver, Lucyline Rotich and Wesley Kiplangat, deceased in this case.**

9. That two occupants of motor vehicle registration No. KAM 397T Harry Mwangangi Musyoka also died, that motor vehicle registration number KBB 172 M was being driven from Narok direction while KAM 397 T was being driven towards Mai-Mahiu, and that they both collided head on and both landed on the left side as one faces Narok direction and that both drivers died.

Reading from the occurrence book for the day, he stated that motor vehicle Registration KBB 172M was owned by the National Security Intelligence Service (NSIS) and KAM 397T was owned by Tilly Transporters. He produced the police abstract and the occurrence book for the day.

Upon cross examination, he stated that Government vehicles are not registered with KRA and others have no registration numbers for security reasons.

10. On further cross examination by counsel for the Attorney General, State Counsel Mr. Kirui, he stated that the investigating officer who went to the scene of accident confirmed that the vehicle KBB 172M was a Government vehicle and that there were no records to confirm the same. It was his evidence that the only survivor from KAM 397T was one Mary Odhiambo and she recorded her statement at the police station.

11. Defence Case

Defence evidence was adduced by two witnesses.

DW1 was Mary Odhiambo, the only survivor from the accident. That she was a passenger in motor vehicle Registration KAM 397T, that she had hired the vehicle from Nairobi Ruaraka to take her household goods to Homabay and that she was sitting at the front cabin with the driver and could see in front clearly.

She testified that while around Suswa she saw a vehicle in front that tried to overtake another vehicle but instead, it lost control as it was on high speed, that it crossed the road in a zig-zag manner and came to the lane of the vehicle she was travelling in, the Mutsubishi canter and collided head on .

That she lost consciousness and when she recovered, she found the two vehicles outside the road on the far left side of the road and that the Canter broke into two and the driver was dead. She recorded a statement that was filed on the 2nd September 2014. She requested the court to adopt the statement as her evidence.

12. Upon cross examination, she stated that it is the Pick up Registration Number KBB 172M that was trying to overtake another vehicle when it lost control crossed the road onto the Canter's lane and they both moved outside the road where they collided. She testified that the driver of the Pickup did not apply brakes and thus collided with the Canter. She could not estimate the speed of the Canter she was travelling in and further that her driver did nothing to try to avoid the accident.

13. DW2 was Jared Bwana Arita

He described himself as an investigator and employee of Accident and General Investigators who had been instructed by Intra Africa Insurance Company the insurer of motor vehicle Registration No. KAM 397T the Canter lorry to investigate ownership of motor vehicle KBB 172M.

He testified that he visited Naivasha police station where the accident was reported and also Kenya Revenue Authority (KRA) and paid Kshs.500/= for an official search of motor vehicle Registration KBB 172M. He produced the receipt paid for the search.

He stated that results were that the vehicle ownership was not registered with KRA and was informed that the vehicle belonged to National Security Intelligence Service and that for security reasons, it was not registered. He testified that he was a retired inspector of police with 15 years experience in investigations.

He testified that he visited the scene of accident on the 6th November 2009 and found both vehicles rested on the far left side of the road as one faces Narok, the correct side of motor vehicle KAM 397T and drew a sketch plan. He produced it as DEx 3.

It was his evidence that the driver of the vehicle KBB 172M was an intelligence officer then based at National Security intelligence Service Headquarters Nairobi, the late Richard Kiprotich Mutai who died in the accident.

He produced the investigation report dated 25th January 2016 as exhibit defence.

14. On cross examination by Mr. Kirui (for A.G.), he stated that it is the police who gave him the information that the vehicle KBB 172M belonged to the Special Branch(NSIS) and that Kenya Revenue Authority(KRA) did not give him its records citing security reasons though he had paid for the search.

He stated that there are times that records of motor vehicles are not provided by KRA due to criminal activities and security issues.

He stated that at the time of his report the police had not completed their investigations a fact stated in the police abstract.

15. Upon close of the parties cases, counsel filed written submissions.

15. The background and facts of this case are fairly straightforward.

There is no dispute that an accident occurred on the material date and place as pleaded involving the two motor vehicles, registration No. KBB 172M, a Pick-up and KAM 397T a Mitsubishi Canter lorry which vehicles were being driven towards Narok direction and from Mai-Mahiu towards Narok respectively.

It is also not in dispute that the deceased was a passenger in motor vehicle registration No. KBB 172M whose driver was one Richard Kiprotich Mutai deceased, and an employee of the NSIS a department within the Ministry of Provincial Administration and Internal Security(as it was then called), nor it is disputed that both drivers died in the accident and further that the only survivor of the accident was one Mary Odhiambo DW1.

17. I have carefully considered the evidence adduced and submissions filed by all counsel. The issues that comment to me for determination are as follows:

1. Ownership of Motor vehicle Registration No. KBB 172M wherein the deceased was a passenger at the material date, time and place.

2. Whether the accident was caused by the sole negligence of the owner and/or agent/authorised driver of motor vehicle registration No. KBB 172M or whether the owner and/or driver of motor vehicle Registration No. KAM 397T contributed to the negligence and thus the accident.

3. If the answer in (2) above is in the affirmative, the percentage of contributory negligence attributable to each of the two defendants.

4. Whether the plaintiff proved negligence against either or both the defendants on a balance of probabilities.

5. Quantum of damages

6. Costs

18. **Analysis of Evidence Ownership of motor vehicle registration No. KBB 172M** was disputed by the 3rd party in its statement of defence. This party also disputed the occurrence of the accident. Evidence was tendered that the motor vehicle records in respect of the vehicle KBB 172M were not provided despite having been applied for, and payment made. It is instructive to note that the driver of the said vehicle at the material date and time was an employee of National Security Intelligence Service, a fact not disputed, he died from the road accident on the 1st November 2009 at Suswa along the Narok-Nakuru Highway. This fact was also not controverted by any of the Defendants nor the and 3rd party.

19. According to the Investigator DW2, Jared Bwana, and a former police officer and investigator for 15

years, he got the information that the vehicle belonged to the National Security Intelligence Service from the police station, who had stated that some Government vehicles are not registered with the Kenya Revenue Authority(KRA) for Security reasons, and that the police department as law enforcers always have access to particulars of motor vehicles held by KRA.

He stated that he visited the scene of accident where he found the two vehicles rested outside the road on the left side as one faces Narok, meaning the lane of motor vehicle Registration Number KAM 397T.

On the point, the 3rd party the Honourable Attorney General by counsel submitted that without records of ownership of the vehicle, the Attorney General cannot be held to have been the owner. He however did not attempt to assist the court on the ownership dispute, or to disapprove or otherwise. This in my view shifts the burden of proof to the party to prove otherwise.

20. I have considered the **Traffic Act Chapter 403 Laws of Kenya**. Sections 5-14 show that there are instances when vehicles are exempted from registration and as such no certificate or record of ownership is provided to prove such ownership.

Section 5 of the said Act states:

“The authority shall keep records of all motor vehicles and trailers registered in Kenya, and shall cause every licensing officer to keep records of all vehicles registered by him.”

Section 11 states:

“The Minister may, by notice in the gazette, exempt any vehicle class or description of vehicle from the provisions of this part.”

21. The police abstract that was produced by the police officer (PW2) stated the ownership of the vehicle as the NSIS Department, Transport Office Headquarters Nairobi and its driver as an NSIS employee.

It is common ground that government vehicles are ordinarily driven by Government employees. This case is no exception as none was demonstrated. I agree with the plaintiffs submissions that when records of a motor vehicle are not provided, police records will be adopted in proof of ownership.

22. It is trite that a certificate of search is *prima-facie* evidence of ownership of a motor vehicle and that it is not the only method of confirmation of ownership. I am guided by **Section 8 of the Traffic Act** that states:

“The person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle.”

This could be by way of a hire purchase agreement, or a sale of the vehicle and none registration of the new owner who in effect becomes the beneficial owner and a person in possession pursuant to the sale agreement.

23. Justice Warsame J (as he then was) in the case **Jotham Mugalo -vs- Telkom (K) Ltd HCCC No. 166 of 2001**(unreported), supported and upheld the above proposition. Justice A.C. Mrima in **SAA (minor suing through his father and next friend MLN -VS- Agroline Hauliers Ltd (2015) e KLR** also upheld the same position, **that**

“on a balance of probability a police abstract is also prima facie proof of ownership of a motor vehicle, and stated further that the document being a public document(the police abstract) shifts the onus to the party alleging otherwise to disprove its contents.

24. The 3rd party did not attempt to disapprove the records as appears in the police abstract and no evidence at all was tendered to bring any contradictory documentary evidence to the contents in the police

abstract. That issue having been pleaded in its defence, the 3rd party was under a duty to tender evidence to support its assertion that the vehicle did not belong to itself. See also **Section 107, 108, 109 and 116 of the Evidence Act**, to the same effect.

25. To that extent, it is my finding that the 3rd party (Hon. Attorney General) was the owner of motor vehicle registration No. KBB 172M at the material time and the deceased driver, was its duly authorised driver as agent and servant of the National Security Intelligence Service Department, a Government agency then under the Ministry of State for Provincial Administration and Internal Security.

26. The second issue for determination is whether the accident was caused by the sole negligence of the Defendants driver and/or whether the 3rd party vehicle contributed to the occurrence of the accident.

The only survivor and eye witness to the accident DW1 testified that she witnessed the occurrence of the accident and her evidence was not shaken in cross examination. It was her evidence that being seated in the front cabin with the driver in motor vehicle KAM 397T, she saw the Pick-up KBB 172M trying to overtake another vehicle that was in front of it, but it lost control, drove in a zig-zag manner at a high speed, and moved onto the lane of motor vehicle KAM 397T, then both collided head on. When she recovered it was her evidence that she found both vehicles outside the road on the left side. The investigator PW2 visited the scene of accident and found both vehicles rested outside the left side of the road as one faces Narok direction. This piece of evidence was unchallenged, and uncontraverted.

27. The investigating officer who visited the scene soon after the accident too confirmed the two vehicles had a head on collision and both landed outside the left side of the road.

There could be no other explanation other than what the eye witness testified, and supported by the sketch map drawn by the investigator.

28. In my view, it appears most likely that when the driver of motor vehicle KAM 397T saw the other vehicle coming to hit it head on, it moved to the far left to avoid the accident, but KBB 172M lost control and zig-zagly moved to the left too and there, the two vehicles collided and rested. This is depicted in the sketch map drawn by the investigating officer. No challenge was tendered in this respect.

The evidence was not challenged at all by any other party. It stands uncontroverted.

29. The 3rd party did not call any evidence. The plaintiff having not been an eye witness relied on the police evidence and the investigation report, which unfortunately had indicated that investigations were not complete and the investigating officer having died last year as stated by PW2 an officer from the Naivasha police station. The Occurrence Book (OB) produced as exhibit stated how the accident occurred. It was recorded one day after the accident. The 3rd party did not fault the contents of the occurrence book (OB) nor did it challenge evidence tendered. DW1 upon cross examination by 3rd party counsel Mr. Kirui stated that the driver of motor vehicle registration No. KAM 397T did nothing to try to avoid the accident. I have seen the statement this witness recorded which she asked the court to adopt as her evidence. In her oral evidence, she reiterated what she stated in her statement, that the driver of the vehicle did nothing to avoid or avert the accident.

30. Accidents do not just happen without fault. One party or both must have acted improperly. The court is under a duty to discern the circumstances leading to the accident. If it is a collision, one or both drivers must be held liable unless the circumstances are explained so clearly as to exonerate one or both. This rarely happens save when one can prove, for instance an act of God or matters beyond human ability and understanding.

31. When the evidence adduced is not clear as to which of the parties is to blame, the blame should ordinarily be apportioned equally. The evidence on record does not present the above scenario. I am clear in my mind that the driver of the Pick-up registration No. KBB 172M lost control, moved onto the path and lane of motor vehicle registration No. KAM 397T, and collided head on upon impact dragged

both vehicle outside the road to the left where they rested. No evidence to the contrary was tendered.

32. The defendant being the owner of the vehicle KAM 397T in my considered opinion has proved on a balance of probability that the cause of the accident was substantively the reckless, careless and negligent driving of the 3rd party vehicle, that was carelessly overtaking, leading to lose of control and thus the accident in the manner stated in the pleadings and evidence tendered save for the statement by the only eye witness and survivor that the driver of the defendant did nothing to avoid the accident.

For that, and for the 3rd party defence that it denied all particulars of negligence by adopting the defendant's defence of contributory negligence in the alternative, I find that the defendant's driver contributed minimally to the accident. I consequently apportion liability at 93% against the 3rd party, the Attorney General and 7% against the Defendant, W.E. Tilley Muthaiga Ltd.

33. Having so found, it is my further finding that the plaintiff has proved her case to the required standard, upon a balance of probability against both the defendant and the 3rd party to the percentages stated.

I say so because, although the plaintiff did not testify on the cause or occurrence of the accident, and for good reason that she was not an eye witness, her witnesses, the police department, which was under a duty to investigate the cause of the fatal accident, did so and presented its findings to the court. The evidence was corroborated by the defendants witnesses. This is further supported by the law that a passenger has no control in the manner of driving or control of a motor vehicle and cannot therefore be held to be negligent in the manner a vehicle is driven.

34. In the case **C.A. No. 140 of 2010 Ben Mengesa -vs- Edith Makungu Lande (2013) e KLR**, the court held that a passenger cannot be held liable in an accident as he is not in control of the vehicle. The only time a passenger maybe held to be liable in my view, is when for instance it is shown that he did not fasten his seat belt or was trying to jump out of the vehicle when it has not stopped. That way, some contributory negligence could be attached to him.

35. In this case, no evidence was tendered to suggest any contributory negligence by the deceased. The circumstances are such that the deceased having been a passenger could not have caused or contributed to the occurrence of the accident in any way.

36. The 3rd party's defence filed on 26th June 2012 did not raise the issue that the deceased was not an authorised passenger in its vehicle Registration No. KBB 172M, and no evidence was adduced to that effect.

It is trite that parties are bound by their pleadings. As I stated above, the 3rd party did not call any evidence. In its submissions, filed on the 1st July 2016 it was submitted that the deceased was not an authorised passenger, and that its driver had no authority to carry unauthorised passengers. Having not pleaded the above, it is my view that submissions cannot be tendered to support issues that are not pleaded.

I find that having not called any evidence the 3rd party did not prove that the driver of its vehicle was not authorised to carry the deceased. For a party to succeed it has to shown that the agent was not acting within the scope of his employment and authority.

See -vs- Francis Mutua Mbuvi & Another (2014)e KLR, Needless to repeat that the driver of the NSIS (3rd party) vehicle was an employee of the NSIS, and without hesitation I find it safe to conclude that the driver had authority to drive the said vehicle and was in the cause or scope of his employment when the accident happened.

37. In the case **Kenya Bus Services Ltd -vs- Dina Kawira Humphrey C.A No. 295 of 2000(2003) e KLR**, while discussing the issue of vicarious liability, the court held that it is the existence of the

relationship of the master and servant which gives rise to vicarious liability where a vehicle causes damage by negligence.

In the absence of evidence to the contrary, there is a presumption that a vehicle is driven by the owners authority by its duly authorised driver and agent and therefore the owner is always held vicariously liable for the negligence of its authorised driver. See the **Kenya Bus Case** above.

38. I have stated that no evidence was called to rebut the above presumption that the driver was an employee of the 3rd party and that he was driving with its authority. In the scope of and during his cause of employment and duty.

In **Kaburu Okelo & Partners -vs- Stella Karim Kobia & 2 Others (2012)e KLR**, the Court of Appeal held that:

“vicarious liability arises when the tortious act is done in the scope of or during the course of one’s employment or authority.”

39. Following the above, I find that the 3rd party vehicle was being driven by the driver, an employee of the 3rd party with full authority and within the scope of or during the course of his employment. I further come to the conclusion that the plaintiff has proved her case on a balance of probability against both the defendant and the 3rd party at the percentage stated above, and therefore entitled to compensation in damages.

40. Quantum of damages

The deceased was an employee of the National Hospital Insurance Fund(NHIF) earning a salary of Kshs.60,000/= per month. He left behind his wife the plaintiff and three minor children. He was 32 years old. He was said to have been a healthy and able youngman. His last months payslips were produced as exhibits.

His children birth certificates were produced to prove dependency. The plaintiff and wife of the deceased as I stated above was suited to bring this suit for compensation under both the Law Reform Act and the Fatal Accidents Act.

The deceased dependents lost the financial support and the estate too suffered loss as a result of the defendants and 3rd parties agents negligence.

The above material facts are not in dispute.

41. Damages under the Law Reform Act

The plaintiff proposed a sum of Kshs.100,000/= damages for pain and suffering. The Defendant did not submit a specific sum on this subhead. The 3rd party did not submit at all on the issue of *quantum* of damages.

Damages under the Law Reform Act are awarded for the benefit of the deceased's estate.

The court has not been told how long the deceased suffered pain before he succumbed to the injuries. As such, I shall not award any damages under this subhead.

The deceased was 32 years old. He would have lived a happy working life save for the accident and other uncertainties of life. No evidence was led that he was unhealthy. His life was considerably shortened. The plaintiff proposed Kshs.300,000/= for loss of expectation of life.

I shall award a sum of Kshs.240,000/= being a reasonable sum in the circumstances.

See **Nakuru C.A. No.1 of 2006 David Ndungu -vs- Wesley Kikptalam Kiptoo (2010) e KLR.**

42. Damages Under the Fatal Accident Acts, Chapter 32 Laws of Kenya.

Damages under the Act are awarded for the benefit of the deceased Dependants who lost the financial support of the deceased. The Dependants as I have stated above were minor children and the deceased's wife. The plaintiff proposes an income of Kshs.80,377/50 against a multiplicand of 2/3 and a multiplier of 28 years.

43. The principles applicable in the assessment of damages were set out in the case **Beatrice Wangui Theuri -vs- Ezekiel Bargetuny & Another NRI HCCC No. 1638 of 1985.** In summary, *the principles are that the court has to consider the age of the deceased, and that of the dependents, the net income of the deceased, and the balance of active working life called the multiplicand. The court is then to multiply the annual income with the multiplicand and the multiplier then discount the amount reached if the beneficiaries are the same that ought to benefit from the award on Law Reform Act as to award both would be to give the beneficiaries double compensation.*

44. I have considered the principles above and proposals given by the plaintiff and the defendant.

The defendant's proposals are an income of Kshs.58,678/= a multiplier of 10 years and 2/3 multiplicand. The defendant has urged that granting high awards would endanger the economy and the insurance industry.

I have considered all the submissions and authorities cited.

Each case must be determined on its peculiar circumstances and due regard to precedent.

The deceased had a balance of working life of 28 years to reach the Government official retirement age of 60 years due regard to vicissitudes of life. His salary would have increased with time from the Kshs.58,678/= he was earning at 32 years. Having a young family, it is my view that he probably spend 2/3 or more of the same for the welfare of the family, towards education and upkeep of his minor children and his wife.

45. I have seen the last month's payslips of the deceased as an employee of National Hospital Insurance Fund(NHIF). His gross salary was Kshs.74,365(October 2009 payslip) and the taxable income was Ksh.70,784/70. Statutory deductions are NHIF Kshs.320/=, NSSF Kshs.200/= and P.A.Y.E. Kshs.15,167/=. The balance after statutory deductions is the NET income, Kshs.55,097/70 (say Kshs. 55,000/=). I have taken into account the taxable income as stated in the payslip that leaves a NET salary of Kshs55,000/=. I shall adopt this income and 2/3 multiplicand while on the multiplier I shall adopt 25 years as reasonable. See authorities below.

In arriving at the above, I have considered the fact that the work of an accountant or accounts clerk poses few risks if any, and the fact that no evidence was lead that the deceased would not have worked for the period to reach retirement age of 60 years currently.

I have also considered that even after 60 years, the deceased would probably continued to do private jobs even upto 70 years and beyond. I have also considered the following authorities.

Daniel Kuria Nganga -vs- Nairobi City Council (2013) e KLR – The court adopted a multiplier of 25 years for a deceased who died at 32 years of age, and a supervisor at her work. This was in May 2013, (by J. Ougo).

46. A multiplier of 25 years was adopted by the court for a 32 year old by J. Majanja in September 2012 in **Civil Case No.754 of 2005 Cornelia Elaine Wamba -vs- Shreeji Enterprises Ltd (2012) e KLR.**

47. Applying my mind to the above and all circumstances to this case, I am persuaded that a multiplier of 25 years would be appropriate and reasonable.

Having determined **loss of Dependency** would be worked out as follows:

$$55,000 \times 12 \times \frac{2}{3} \times 25 = \mathbf{11,000,000/=}$$

48. **Special damages**

The plaintiff pleaded a sum of Kshs.120,000/= being funeral expenses.

However, a consent judgment on the special damages was recorded between the parties on the 30th July 2014 in the sum of Kshs.80,000/=. That settles the issue.

49. Consequently, there shall be judgment for the plaintiff against the defendant and the 3rd party as follows:

(a) Liability

The 3rd party shall shoulder **90%** contributory negligence while the Defendant bears the balance of **10%**.

(b) Damages under the Law Reform

- Pain & suffering – Nil
- Loss of expectation of life - Kshs.240,000/=

(c) Damages under the Fatal Accidents Act

- Income – Kshs.55,000/=
- Multiplier – 25 years
- Multiplicand – $\frac{2}{3}$

Loss of dependency

$$55,000 \times 12 \times 25 \times \frac{2}{3} = \mathbf{11,000,000/=}$$

Less Damages under

Law Reform Act = 10,760,000/=

(Kshs.240,000/=)

(d) Add: Special Damages = 80,000/=

Total Kshs. = **10,840,000/=**

(e) The above sum shall be subjected to percentages on contributory negligence as stated in (a) above,

Thus by the defendant Kshs.108,400,000/=

By the 3rd party Kshs. 9,756,000/=

(f) Interest at court rates shall apply from the date of this judgment.

50. Costs of the suit shall be to the plaintiff, payable by the defendant at 10% and by the 3rd party at 90%.

51. I have stated in Paragraph 5 of this judgment that this suit is a TEST SUIT. The judgment in respect of liability between the defendant and the 3rd party as determined above shall apply to the cases stated thereon.

Dated, signed and delivered this 2nd Day of February 2017.

JANET MULWA

JUDGE