



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
CIVIL APPEAL NO. 527 OF 2013
GENERAL MOTORS EAST AFRICA LIMITED.....APPELLANT
VERSUS
EUNICE ALILA NDESWA.....1ST RESPONDENT
SOFIA MUSIMBI INDASI.....2ND RESPONDENT

J U D G M E N T

Introduction

This appeal No. 527 of 2013 was consolidated with Civil Appeal No. 544 of 2013. Both appeals arise from the judgment and decree of the Chief Magistrate's Court at Nairobi Milimani Commercial Court in Civil case No. 1425 of 2008 made by **Hon. T.W.C. Wamae Chief Magistrate delivered on 3rd October 2013 by Hon M. Murage, Chief Magistrate.**

The appellant in this appeal is also the 1st Respondent in HCCA 544/2013 and was the 1st defendant in the lower court whereas the appellants in the Appeal No 544/2013 were plaintiffs in the lower court case and have only appealed against the award of damages awarded to them. The 2nd respondent in HCCA544/2013 was the 2nd defendant in the lower court.

Background

By a plaint dated 21st February 2008, the respondents herein who are the legal representatives of the estate of the late Edward Mugotiza Indasi filed proceedings in the lower court against the appellant herein General Motor Limited and James Muchiri Waweru who is the second respondent in appeal No.544/2013, seeking special and general damages under the Fatal Accidents Act and the Law Reform Act. The respondents' case in the lower court was predicated on the accident which occurred on 23rd December 2006 along Juja Road. They claimed that the occurrence of the said accident was due to the negligence and or dangerous driving of Motor vehicle Registration Number KAE 704E Isuzu Matatu.

The appellant herein denied the claim and contended that as at the material time of the accident pleaded, it was not the owner of the accident motor vehicle registration Number KAE 704E, having only financed its purchase by one Joshua Mbao in October, 1995 and that the registration of the said motor vehicle in the appellant's name was only for securing the financing interests of the appellant.

The matter proceeded for full hearing both on liability and quantum. The trial court found the appellant and James Muchiri Waweru jointly and severally liable for the accident on account that the appellant was the registered owner of the motor vehicle whose driver was also found negligent, and James Muchiri Waweru for being the beneficial owner of the accident motor vehicle. The court found that the appellant vicariously liable for acts of the James Muchiri Waweru, and entered judgment against them jointly and severally at 100% on liability while awarding the respondents herein general damages of Ksh 750,000.

Being aggrieved by that decision, the appellant lodged an appeal in this court challenging the judgment of the trial court on several grounds.

- 1. That the learned magistrate erred in finding that the motor vehicle registration number KAE 704 E belonged to the appellant.***
- 2. That the learned magistrate erred in finding that the appellant is vicariously liable.***
- 3. That the learned magistrate erred in granting the respondents the prayers sought in their plaint as against the appellant.***
- 4. That the learned magistrate erred in absolutely failing to make reference to the authorities produced by the appellant.***
- 5. That the learned magistrate erred in awarding the respondent cost against the appellant.***

The appellant prayed that this appeal be allowed with costs and judgment in the lower court be set aside.

Mr. Abala advocate was for the appellant, Mrs Omolo advocate represented the 1st respondent whereas Miss Gitau advocate represented the 2nd defendant in the lower court who is also the 2nd respondent in the appeal No.544/2013. All parties agreed to have the appeals consolidated and disposed of by way of written submissions. The respective parties' advocates dutifully filed their submissions and this court is now called upon to determine the appeal based on those written submissions.

The appellant submitted on three headings. 1) Error in determining ownership of the suit motor vehicle registration KAE 704E as at 23rd December 2006; 2) Error in determining the question of liability; and 3) Error in awarding damages in favour of the respondents.

It was submitted on behalf of the appellant that the trial court erred in determining that the appellant was the owner of the accident motor vehicle registration KAE 704E as at 23rd December 2006. The appellant avers it tendered evidence in respect of ownership of the suit motor vehicle showing that the accident motor vehicle did not belong to the appellant at the material time of the accident, which evidence the trial magistrate should have believed.

It was further submitted that on 10th September 2012, the appellant called a witness, DW1 who produced copies of records dated 20th September 2010 and 27th February 2012 respectively which showed that the accident motor vehicle did not belong to the appellant. That the appellant had sold the motor vehicle to one Joshua M. Ngamau before 23rd December 2006.

The appellant also submitted that due to the difficulty in ascertaining the authenticity of the copy of records produced, the court on its own motion directed parties to avail an independent witness from the office of Registrar of Motor vehicles to shed more light on the ownership of the said motor vehicle as at 23rd December 2006. That the independent witness confirmed that the motor vehicle in question was registered in the names of General Motors on 14th January 1995 and the same transferred on 23rd October 1995 to Joshua Ngamau and NIC Bank.

The appellant submitted that the learned magistrate misdirected herself by holding that there was no evidence tendered to support the appellant's evidence of sale of the suit motor vehicle. The appellant

further submitted that the respondents failed to discharge the burden of proof in proving that the appellant was the absolute owner of the material accident motor vehicle. This court was referred to the decision in the case of **WELLINGTON NGA'NGAMUTHIORAVS. AKAMBA PUBLIC ROAD SERVICE LTD & ANOTHER KISUMU HIGH COURT CIVIL APPEAL NO.78 OF 2003.**

The appellant also submitted that the learned magistrate failed to take into account in weight the scale of probability that whereas the independent witness conceded to the fact that the copy of records issued to the respondents by his colleague Ken Omwenga was genuine, the independent witness did not know under what circumstances that copy was obtained and could only assume that it had been generated from the previous system which only reflected the original owner, and which system was no longer in use.

It was further submitted on behalf of the appellant that the trial magistrate erred in determining the question of liability. It was contended that since the appellant was not the registered owner of the accident motor vehicle at the time of the accident, it could not be held vicariously liable for the actions of the 2nd respondent who, it was contended, it had not been proved that he was the agent, driver or servant of the appellant or that he was at the time of accident engaged in employment with the appellant. The appellant relied on the case of the **ORMROD VS.CROSVILLE MOTOR SERVICE LTD (1953) 2 ALL E.R 753, MORGAN VS. LAUNCHBURY AND OTHER (1972) 2 ALL ER 606, ANYANZWA VS.GASPERIS (1981) KLR 10.**

The appellant submitted that the trial court erred in awarding damages in favour of the respondents against the appellant when the respondents had not discharged the burden of proving that the appellant was or at all the owner of the accident motor vehicle at the material time. It further submitted that in the circumstances of the case subject of this appeal, the 1st respondent was not entitled to general damages under the Law reform Act and Fatal Accidents Act. The appellant submitted that under section 3 of the Fatal Accidents Act, damages under the Act can only be recovered as against the person held liable. The appellant also submitted that any justification for an award of damages under the Law Reform Act should similarly be hinged on the apportionment of liability which the appellant contested.

In conclusion, the appellant urged this court to allow this appeal and set aside the judgment and decree for damages issued by the subordinate court on the basis that the learned magistrate misdirected herself on the question of **vicarious liability and ownership of the accident motor vehicle.**

In response to the appellant's submissions, the respondents submitted that failure to enjoin James Muchiri Waweru who was the Second Defendant in the lower court as a party in this appeal renders the appeal fatal and incurably defective. The respondents submitted that the lower court findings on the ownership of the accident motor vehicle cannot be faulted as they had produced a search certificate showing that the subject motor vehicle was registered in the name of the appellant, not only at the time of the accident but also conducted an official search before the filing of the suit. The respondent argued that the appellant produced two search certificates showing that the subject matter was registered in the name of Joshua Mbau Ngamau and NIC Bank. They contended that the two searches were conducted after the suit was filed hence they could not be genuine.

The appellant also submitted that the independent witness called by the court was of no assistance as he simply confirmed that the certificate produced by both parties was genuine. Further, that the appellant did not avail documents of transfer of the material motor vehicle from the appellant to the alleged Joshua Mbau Ngamau to prove their allegation that the motor vehicle had been transferred to him prior to the material accident. The respondents relied on section 107 and 116 of the evidence Act and submitted that the law is clear that he who alleges must prove.

The respondents argued that the appellant was under the duty to prove its allegation by producing a copy of the agreement for sale, a copy of the duly executed transfer of ownership document and evidence as to the identity of Joshua Mbau Ngamau. The respondents submitted that the appellant having failed to do so, the alleged sale to Joshua Mbau Ngamau was a fiction.

The respondents also submitted that the appellant filed a notice to admit facts in which it indicated that it

financed the purchase of the said motor vehicle to James Muchiri Waweru, the 2nd Defendant in the lower court yet in the appellant's defence it alleged financing the purchase to Joshua Mbau Ngamau. That the notice to admit facts further alleged that the appellant handed over possession of the suit motor vehicle to the 2nd respondent in October 1995. That the said notice further stated that the appellant was jointly registered with the 2nd defendant as the owner.

The respondents submitted that the appellant failed to institute third party proceedings against the said Joshua Mbau Ngamau hence it failed to exercise its legal rights as set out under Order 1 rule 15(1) and Order 1 rule 10(2) of the Civil Procedure Rules. They also stated that the appellant failed to lead evidence as required under section 107 and 116 of the Evidence Act.

Appeal No. 544 of 2013

Appeal No. 544 of 2013 was filed by the Respondents Eunice Alila Ndetswa and Sofia Musimbi Indasi herein. The appeal arises from the same judgment and decree passed on 3rd October 2013 challenging the trial magistrate's award of general damages under the Fatal Accidents Act and the Law Reform Act. The appellants/respondents in that appeal submitted that the damages awarded in their favour against General Motors Limited and the 2nd Defendant James Muchiri Waweru were inordinately low. The appellants/respondents herein argued that the learned magistrate erred in law in awarding inordinately low damages since the death certificate for the deceased Edward Mugotiza Indasi showed that he was a mechanic by profession and the evidence of PW1 and PW2 confirmed the same. They submitted that credible evidence given on oath is admissible and relevant unless evidence to the contrary is adduced. That the lower court was under a duty to adopt the minimum wage of a mechanic to reach to a suitable multiplicand. The appellants/respondents also alleged that the court failed to consider loss of consortium which was pleaded.

James Muchiri Waweru, the 2nd respondent's in HCCA 544 of 2013 submitted that the court found the appellant vicariously liable for the acts of negligence of the second Defendant and further found both defendants jointly and severally liable at 100% and awarded Ksh 150,000 as damages for pain and suffering, Ksh 100,000 for loss of expectation of life and Ksh 500,000 global figure for loss of dependency. He submitted that the court did not award any special damages.

The 2nd respondent submitted that on the loss of expectation of life the court was properly guided in reaching its decision. Under the loss of dependency the 2nd respondent submitted that although the wife of the deceased testified that the deceased was a mechanic who earned Ksh 800-900 per day but that no evidence was adduced to support the claim which lead the trial court to award a global figure of Ksh 500,000. The 2nd respondent submitted that that amount was erroneously awarded. On special damages, the respondent submitted that this court should uphold the lower court's decision since the claim was not specifically pleaded and proven. The court was referred to the case of **LEVI AGUNDA ABWENI VS. APEX DISTRIBUTORS' LTD AND WILSON MUSIWA MUDOGO (2001) ECLR, PETER M. MAILANY VS. MOHAMMED HASSAN MUSA & 2 OTHERS (1998) ECLR.**

In conclusion the 2nd respondent urged the court to vary the decision of Honorable T.W Murage to the extent of disallowing the loss of dependency claim.

In response to those submissions by the respondents that the appellant in this appeal had failed to enjoin the 2nd defendant James Waweru Muchiri as a respondent, the appellant in the supplementary submissions submitted that it had already made the 2nd defendant a respondent by serving him with a notice of appeal so there was no further requirement of making him a party. That the 2nd defendant /respondent was an independent co-defendant in the lower court and as such could file his own appeal if he was aggrieved by the judgment and decree of the trial court. On this issue the appellant relied on the Court of Appeal decision in the case of **SULTAN HASHAM LALJI & 2 OTHERS VS AHMED HASHAM LALJI & 4 OTHERS (2006) ECLR.**

The appellant further submitted that the respondents failed to discharge their obligation under section 107 of the Evidence Act. The appellant stated that from the evidence adduced by both the appellant and the independent witness the appellant did not own or possess the suit motor vehicle. As such, the burden of proof then shifted to the respondents to give any evidence to the contrary against the appellant but that they had failed. The appellant also submitted that the evidence adduced by the respondents did not meet the threshold required to prove ownership or transfer of motor vehicle and contended that in this case, the documentary evidence produced by the appellant and the independent witness was sufficient proof that ownership of the said motor vehicle was transferred to a third party long before the material accident.

On quantum of damages, the appellant submitted that the court should not disturb the quantum awarded by the trial court for the same is essentially a matter of opinion of judgment and experience which the trial court diligently applied its mind. On special damages and damages for loss of consortium, the appellant submitted that the same ought to have been pleaded and therefore the trial court could not award what was not pleaded.

I have carefully perused and considered the record including the lower court pleadings, submissions and the judgment. I have also carefully considered the grounds of appeal. In my view, the main issues raised in this appeal are:

- 1. Whether at the time of the accident the appellant was the owner of Motor Vehicle KAE 704E?*
- 2. Whether the appellant was vicariously liable for the accident?*
- 3. What damages were payable in the circumstances and how much.*
- 4. What orders should the court make*

Analysis

As a first appellate court, my duty, as espoused under section 78 of the Civil Procedure Act of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind.

I am also enjoined to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at my own independent conclusion, bearing in mind the fact that unlike the trial court, I had no advantage to see and hear witnesses as they testified. This principle of law was well settled in the case of **Selle – Vs – Associated Motor Boat Co. Ltd (1968) EA 123** where **Sir Clement De Lestang** stated that:

*“This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 demeanor of a witness is inconsistent with the evidence in the case generally (**Abdul Hammad Sarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)**).” See also **Peter Vs Sunday Post(1958) 428**.*

This court is equally alive to and shall be guided by the decision in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**, where the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

“I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion.”

On issue number one, no doubt, the ownership of the accident motor vehicle Registration No. KAE 704E is highly contested. PW1 testified that she received information that her husband had been knocked down by motor vehicle KAE 704E and died. She reported the matter to the police station and later instructed her advocates to do a search of the said motor vehicle to establish its ownership. The search which was carried out before instituting suit in the lower court for damages revealed that the motor vehicle was registered in the name of General Motors Ltd, the appellant herein who was the 1st defendant in the lower court. The said search was produced in court as **PEX4(c)**. The witness also produced a demand letter as **PEXH 7** written to the appellant and copied to the 2nd defendant and Gateway insurance Company.

DW1 testified and produced a copy of records from the Registrar of Motor Vehicles dated 20/9/2010 which showed that motor vehicle registration No. KAE 704E was registered in the name of Joshua Mbau Ngamau and NIC Bank. The letter was produced as **DEXH3 (a)**. The witness denied that the appellant owned the said motor vehicle as at 23/12/2006. The witness also testified that the appellant only financed the purchase of the accident motor vehicle.

PW2 an employee of the Kenya Revenue Authority responsible for the registration of the material accident motor vehicle testified as an independent witness called by the court on its own motion, following the conflicting records from KRA as produced by PW1 and DW1 on the registration of the accident motor vehicle. Pw2 told the court that the motor vehicle was registered in the appellant's name in January 1995 as the first registered owner and the ownership later changed to Joshua Mbau Ngamau and NIC Bank in October, 1995. In cross examination, PW2 stated that the record produced in Court by the respondents showed that in December 2006 the motor vehicle was owned by the appellant.

Under Section 8 of the Traffic Act Cap 403 Laws of Kenya, the person in whose name a vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle. In **NANCY AYEMBA NGAIRA vs. ABDI ALI Civil Appeal 107 of 2008[2010] eKLR, Ojwang, J**(as he then was) observed that:

“There is no doubt that the registration certificate obtained from the Registrar of motor vehicles will show the name of the registered owner of a motor vehicle. But the indication thus shown on the certificate is not final proof that the sole owner is the person whose name is shown. Section 8 of the Traffic Act is fully cognizant of the fact that a different person, or different other persons, may be the de facto owners of the motor vehicle – and so the Act has an opening for any evidence in proof of such differing ownership to be given. And in judicial practice, concepts have arisen to describe such alternative forms of ownership: actual ownership; beneficial ownership; and possessory ownership. A person who enjoys any of such other categories of ownership, may for practical purposes, be much more relevant than the person whose name appears in the certificate of registration; and in the instant case at the trial level, it had been pleaded that there was such alternative kind of ownership. Indeed, the evidence adduced in the form of the Police Abstract, showed on a balance of probabilities, that 1st defendant was one of the owners of the matatu in question.”

The Court of Appeal in **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 OF 2010[2013] eKLR** observed that:

“In any case in our view, an exhibit is evidence and in this case, the appellant's evidence that the Police recorded the respondent as the owner of the vehicle and Ouma's evidence that he saw the vehicle with words to the effect that the owner was East African Sea Food were not seriously rebutted by the respondent who in the end never offered any evidence to challenge or even to counter that evidence. We think, with respect, that the learned Judge in failing to consider in depth the legal position in respect of what is required to prove ownership, erred on point of law on that aspect. We agree that the best way to prove ownership would be to produce to the court a document from the Registrar of Motor vehicles showing who the registered owner is, but when the abstract is not challenged and is produced in court without any objection, its contents cannot be later denied.”

“We think that the appellant had, by the evidence it led, proved on a balance of probability, that it was not the owner of KWJ 816 at the time the accident occurred since it had sold it. Our holding finds support in the decision in OSAPIL VS. KADDY [2000] 1 EALA 187 in which it was held by the Court of Appeal of Uganda that a registration card or logbook was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle was registered was presumed to be the owner thereof unless proved otherwise. The appellant had, indeed, proved otherwise.”

Applying the above decisions to the present appeal, the respondents’ documentary evidence which included copy of records obtained before filing suit showed that the appellant was the registered owner of the accident motor vehicle as at the time of the material accident. The appellant also produced a copy of records and the court called a Kenya Revenue Authority official who confirmed that evidence of registration being in the name of Joshua Mbau Ngamau and not the appellant. The appellant explained that it only became registered owner to protect its interests as it had guaranteed the purchase of the vehicle by Joshua Mbau Ngamau and later in October 1995 relinquished ownership thereof.

The respondent’s evidence by way of a police abstract, produced as **PEXH 6** showed that the “owner” of the Motor vehicle registration number KAE 704E was **James Muchiri Waweru** of Box 9, Kiriaini as at 30th March 2007. The police abstract also showed that the said motor vehicle was insured by **Gateway insurance Company Limited, Policy No 022/089/009314/05/06**. The respondents also produced a copy of records from the Registrar of Motor Vehicles dated **April 5th 2007** which showed that **General Motors Ltd**, the appellant was the owner of the material accident Motor vehicle. To counter that evidence, the appellant in support of their defence case produced a copy of records dated **20th September 2010** which showed that **Joshua M. Ngamau** was the registered owner of the material accident motor vehicle.

The accident complained of is alleged to have taken place on 23rd December 2006 although the police abstract report says it occurred on 24th December, 2006 at 8.30 PM. The same was reported under OB NO. 14 of 24/12/2006. As no issue was raised concerning the date of accident, I leave it at that since its occurrence and the involvement of the deceased is not denied

The record shows that the appellant filed a notice to admit facts dated 9th March, 2009 which required the 2nd defendant, **James Muchiri Waweru** to admit that the appellant herein financed the purchase of the motor vehicle and its joint registration with him was to secure the appellant’s financing interest. The notice to admit also required the 2nd defendant **James Muchiri Waweru** to admit that the appellant sold and handed over the possession and control of the motor vehicle to him in October, 1995, long before the material accident which occurred in 2006.

My view on the notice to admit facts is that that document is neither evidence that was tendered nor a pleading. The said notice obviously contradicts the defence by the appellant that it had transferred the motor vehicle to Joshua M. Ngamau. In my view, that notice to admit facts which was not responded to by the 2nd defendant did not amend the defence filed by the appellant that it had sold the accident motor vehicle to Joshua M. Ngamau. I therefore find it immaterial taking into account that no party raised that issue in their defence but only picked it up in their submissions on appeal herein. Parties do not provide new evidence in submissions and therefore one cannot adduce evidence by way of a submission to challenge evidence or documents which in this case did not form part of the pleadings.

Prima facie, and on a balance of probabilities, the appellant was one of the owners of motor vehicle registration No. KAE 704E by virtue of the registration, according to the respondent’s copy of records obtained in 2007, which the independent witness PW2 confirmed to be a genuine document signed by his colleague Mr. Omwenga. The independent witness was however quick to point out that although the said copy of records showed the appellant to be the registered owner at the time of accident, the witness did

not know under what circumstances the record was issued and that previously, the system used to extract records only showed the first registered owner, which system was no longer in use.

On the other hand, the police abstract obtained regarding the occurrence of the accident in question showed that the owner thereof and the insured was the 2nd defendant and respondent in **HCCA 544 of 2013 Mr. James Muchiri Waweru**. The respondents herein even pleaded him as the driver or beneficial owner of the accident motor vehicle.

In view of the conflicting records from the Registrar of Motor Vehicles, in my most considered view, the case of **JOEL MUGA OPIJA Vs EAST AFRICAN SEA FOOD LIMITED CIVIL APPEAL NO. 309 OF 2010[2013] eKLR** is very relevant to the facts herein.

The respondent's own evidence as per their document, the police abstract showed that the 2nd defendant was the owner of the accident motor vehicle supported by the endorsement on the said police abstract that his insurance Company was Gateway insurance Company Ltd. This evidence was never rebutted by the 2nd defendant, and who, in the end never offered any evidence to challenge or even to counter that evidence.

In view of the above evidence adduced by the by the respondents, I think, with respect, that the learned trial magistrate erred in failing to consider in depth the legal position in respect of what is required to prove ownership of a motor vehicle, and therefore erred on a point of law on that aspect.

I agree that the best way to prove ownership of a motor vehicle at the time of accident would be to produce to court a document from the Registrar of Motor vehicles showing who the registered owner was, but when there are two different conflicting copies of records from the same source, with the person who is alleged to be the owner denying ownership or interest whether legal or beneficial in the material motor vehicle, and the particulars contained in the police abstract are not challenged and is produced in court without any objection, its contents cannot, in my view, be later denied.

Undeniably, ownership by registration change from time to time. Nonetheless, the evidence in this case, taken as a whole, pointed to the greatest possibility that despite the appellant and **Joshua M. Ngamau** being the registered owners of the accident motor vehicle at the time when the two copies of records were issued, there is nonetheless no evidence to prove that the two had absolute identifiable interests in the said motor vehicle at the material time of accident.

There was also no evidence that the said motor vehicle was jointly owned by the appellant and second defendant James Waweru Muchiri.

There was, in my view, material contradiction in the evidence of all the three witnesses who testified on the issue of registration of the motor vehicle. And where the *viva voce* evidence of two witnesses conflicts, the testimony of one witness may be preferred over that of another, on the basis that the preferred evidence should be given more weight. In this case, I find that the evidence of PW2 the Kenya Revenue Authority official was the preferred evidence that should have been given more weight since the Mr. Omwenga who issued the initial copy of records did not testify to explain under what circumstances he issued the copy of records which records were inconsistent with those produced by PW2. Nonetheless, the fact that the vehicle was registered in **Joshua M. Ngamau's** name cannot change the view of this court as there was no evidence that **Joshua M. Ngamau** had an identifiable legal or equitable interest in the accident motor vehicle. Although the respondents challenge the appellant for failing to issue thirty party notice to the Joshua Ngamau, I find that the burden of proof lay with the plaintiffs/respondents to prove ownership of the accident motor vehicle.

Besides, Under Order1 Rule 3 of the Civil Procedure Rules,

All persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly or severally or in the alternative, where if separate suit, were brought against such

persons any common question of law or fact would arise.

Under Rule 4 (in material part)

“Judgment may be given without amendment..

a.

b. Against such one or more of the defendants as may be found to be liable according to their respective liabilities under Rule 5, it shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him”.

Again in Rule 7, of Order 3, **“where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.**

The appellant had no counter claim against the respondent and did not have to be compelled to enjoin a third party against whom it had no claim over. The court, faced with such a situation, was duty bound to analyze the facts of the case based on the evidence available, to determine the rights of the parties before it. As I have stated before, there was abundant evidence on ownership of the accident motor vehicle, not just by way of copy of records, but also the police abstract, which the trial magistrate made no reference to.

I am persuaded, on the evidence on record taken as a whole that the 2nd defendant was the beneficial owner of the accident motor vehicle, who was in actual possession and use thereof at the time of accident. This is so, as one could not be the insured of a motor vehicle that he was neither legally nor beneficially entitled to. In Kenya, there is so far, no non-owner’s insurance cover. It is for that reason that Section 76A of the Insurance Act, Cap 407 Laws of Kenya provides that :

“upon change of ownership of a motor vehicle, an insurer shall-

a. Only issue a temporary cover for a period not exceeding three months, pending the registration of the motor vehicle in the name of the new owner;

b. Not renew the temporary cover or issue any annual policy in respect of the motor vehicle, unless the new owner provides proof of the registration of the motor vehicle in his name by the registrar of Motor Vehicles.

However, section 78 provides that

78. subject to this Act, failure on the part of an insurer, broker or agent to comply with any provision of this Act shall not invalidate any policy issued by an insurer.

In other words, even though there was no registration of the accident motor vehicle effected in favour of the 2nd defendant, the insurance policy issued to him as the owner was nonetheless valid and could not be invalidated simply because there was no compliance with section 76A that obliges the insurer to only issue a temporary cover for a period not exceeding three months on the new owner, pending registration, and not to renew the cover in favour of the new owner unless they prove registration in their name.

An insurance policy for Public Service Vehicles like the accident motor vehicle herein is obtained under the Insurance Motor Vehicle 3rd Parties Risks Act Cap 405, where the owner of a motor vehicle takes out a policy of insurance to indemnify him and other authorized persons in respect of liability to third parties intended to be protected for injuries or death to them in the use of the Motor Vehicle on the road.

In this case, It was not shown that **Joshua M. Ngamau** or the appellant were the insured thereof to protect them from any claims that may arise following an accident. In my view, as the appellant and

Joshua Ngamau had no interests in the accident motor vehicle, unlike the 2nd defendant, they were under no duty to insure it, and that the 2nd defendant could only insure the said motor vehicle if he was its owner thereof.

I reiterate that the Police abstract issued to the respondents upon the accident is clear that the owner thereof was **James Muchiri Waweru**. The respondents in their paragraph 5 of the plaint stated that “... ***the 2nd defendant was at all material times to the suit the driver of the motor vehicle and or the beneficial owner of the subject motor vehicle.***”

The 2nd defendant in his statement of defence filed on 4th June, 2008 pleaded that he was a stranger to the allegations contained in paragraph 5 of the plaint regarding him being the driver and or beneficial owner of the accident motor vehicle and therefore denied that he was in any way jointly liable with the 1st Defendant appellant who was pleaded as the registered owner of the accident motor vehicle. The 2nd defendant went on to plead, in the alternative, and without prejudice to the denials, that the deceased was wholly or substantially to blame for the accident and set out 5 acts of contributory negligence against the deceased. At paragraph 13 of his defence, the 2nd defendant denied the allegation by the respondents/plaintiffs that they had served his insurers with a statutory notice of institution of suit as required by law.

In his submissions in the lower court and in this court, the second defendant expressly and positively submitted that he was the driver of the accident motor vehicle. See page 22 of record of appeal where it is submitted:

“LIABILITY

“the plaintiffs have in paragraph of their plaint listed particulars of negligence against the 2nd who was the driver of M/v KAE 704E as at the time of accident.”

At page 2 of his written submissions dated 15th December, 2014 the 2nd defendant submits “***the 1st respondent herein was sued as the owner and the 2nd respondent as the driver of the said motor vehicle on the said material date.***”

The 2nd defendant does not deny anywhere that he was the driver of the accident motor vehicle at the time of accident. Instead, he affirms what the respondents pleaded. He also in the submissions in the lower court blamed the deceased for being negligent as per his defence he however opted not to testify to prove how negligent the deceased was yet he was the driver who knocked the deceased.

Question of vicarious liability

For a court to find that the appellant was vicariously liable for acts of the 2nd defendant, first, it had to be proved conclusively that the motor vehicle belonged to the appellant whether beneficially or otherwise and that the 2nd defendant was the driver, agent or servant of the appellant herein at the time of the accident.

The trial magistrate on finding that the motor vehicle belonged to the appellant as the registered owner, and the 2nd defendant as the beneficial owner, and that the 1st defendant/appellant herein was vicariously liable for the negligent acts of the second defendant and therefore that the two were jointly and severally liable in negligence, was not, in my view, informed by any evidence on record as to whether or not the 2nd defendant was the appellant’s driver, agent or servant.

The appellant’s contention is that since it was neither the registered nor the beneficial owner of the accident motor vehicle at the time of the accident and that as it had no identifiable interest in the vehicle, it could not be held vicariously liable for the actions of the 2nd defendant who was the beneficial owner of

the said motor vehicle, independent of the appellant.

For vicarious liability against the appellant to be established, the respondents were under a legal burden to prove, as was illustrated in the case of **Morgan – Vs – Launchbury (supra)** that:-

“In order to fix liability on the owner of a car for the negligence of a driver, it is necessary to show either that the driver was owner’s servant or at the material time the driver was acting on the owner’s behalf as his agent. To establish agency relationship it is necessary to show that the driver was using the car at the owner’s request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”

In this case, I reiterate that there was no such evidence of agency/principal; master/servant or any relationship of whatever nature, between the appellant and the 2nd defendant, or that the accident motor vehicle was being driven on the authority of or for the joint benefit between the appellant and the 2nd defendant.

In **KENYA BUS SERVICES LTD Vs DINA KAWIRA HUMPHREY CIVIL APPEAL No. 295 of 2000 [2003] eKLR**, the court observed thus:

According to the pleadings, we are concerned here with the master’s liability for his servants’ torts. In such a case, it is the existence of the relationship of the master and servant which gives rise to vicarious liability – see PRITOO V. WEST NILE DISTRICT ADMINISTRATION[1968] EA 428 at page 435 paragraphs E-F). In KARISA V. SOLANKI[1969] EA 318 the Predecessor of this Court said at page 322 paragraph 9 G.(emphasis added)

“Where it is proved that a car has caused damage by negligence, then in the absence of evidence to the contrary, a presumption arises that it was driven by a person for whose negligence the owner is responsible (see Bernard v. Sully(1931) 47 T.L.R. 557). This presumption is made stronger or weaker by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was still being driven for the joint benefit of the owner and the driver”.

The plaintiff/respondents were also under a duty to prove vicarious liability of the appellant for acts of the 2nd respondent by adducing evidence that showed that the 2nd defendant was acting in the cause of and scope of employment at the time the acts of negligence were committed/omitted. As was set out in the case of **TABITHA NDUHI KINYUA V FRANCIS MUTUA MBUVI & ANOTHER CIVIL APPEAL No. 186 of 2009[2014]eKLR**, the court stated:

“The principle of vicarious liability is an anomaly in our law because it imposes strict liability on an employer for the delict of its employee in circumstances in which the employer is not itself at fault. An employer will be held to be vicariously liable if its employee was acting within the course and scope of employment at the time the delict was committed..... (emphasis added).

The test for establishing whether an employer is vicariously liable for his/her servant’s negligence was set out in this Court’s decision in Joseph Cosmas Khayigila –vs- Gigi & Co. Ltd & Another, - Civil Appeal No. 119 of 1986 as follows:-

In order to fix liability on the owner of a car for the negligence of the driver, it was necessary to show either that the driver was the owner’s servant or that at the material time the driver was acting on the owner’s behalf as his agent. To establish the existence of the agency relationship, it was necessary to show that the driver was using the car at the owner’s request, express or implied or on his instructions and was doing so in performance of the task or duty thereby delegated to him by the owner.”(emphasis added).

In this case the plaintiff's witness PW2 James Peter Mburu testified that he witnessed the accident. He told the court that the deceased who was his neighbor was standing ahead of two matatus at the bust stop with the intention of crossing the road when he was hit by motor vehicle Registration No. KAE 704E which was trying to overtake the Matatu. The driver of the motor vehicle, whom the witness did not know by name, took the deceased to hospital. The witness accompanied them to Kenyatta National Hospital and later informed the deceased's widow.

From the evidence on record, there is not a single witness who testified that he saw the 2nd defendant drive the accident motor vehicle or that he was an employee, agent or servant of the appellant at the material time of the accident or that he was using the vehicle on authority whether real or ostensible, of the appellant. It was, therefore, an anomaly on the part of the trial court to assume the agency/principal or master servant relationship between the 2nd defendant and the appellant while at the same time finding that the 2nd defendant was the beneficial owner of the accident motor vehicle, and in the absence of any evidence to suggest that such a relationship ever existed between the two.

I do not therefore agree with the lower court finding that the appellant was vicariously liable for the acts of the driver or beneficial owner of the accident motor vehicle as there was no master/servant or principal /agent relationship or any other form of relationship or authorization of the 2nd defendant by the appellant to drive or use the accident motor vehicle.

Although I agree with the trial magistrate that the appellant was among the registered 'owners' of the said motor vehicle, I hold the view that ownership by registration is not conclusive evidence of ownership at the time of accident and neither is that registration *per se* sufficient to create liability for negligence on the part of the appellant herein.

The evidence before the court below does not sustain the notion that the driver of the motor vehicle that caused the accident was an agent /servant of the appellant or was acting on behalf of the appellant at the material time of the accident. I am fortified on this point by the decision **IN MORGAN – VS – LAUNCHBURY(1972) ALL ER 606** where it was held, *inter alia*, that,

“To establish agency relationship it is necessary to show that the driver was using the car at the owner's request express or implied or in its instruction and was doing so in the performance of the task or duty thereby delegated to him by the owner.”

I am also persuaded by the decision in **Anyanzwa & 2 Others – Vs – Lugi De Casper & Another (1981) KLR 10** where the court stated that;

“Vicarious liability depends not on ownership but on the delegation of task or duty.”

In this case, there was no evidence of delegation of duty by the appellant to the 2nd defendant. And having found that the motor vehicle beneficially belonged to the 2nd defendant, it would be illogical for the appellant to delegate a task of driving or using a motor vehicle on its very owner!

In **KABURU OKELO & PARTNERS V STELLA KARIMI KOBIA & 2 OTHERS [2012] eKLR** the Court of Appeal (Appeal from a judgment of the High Court at Nairobi - Rawal J) O'Kubasu, Waki & Onyango Otieno, JJ A July 13, 2012, where the issue for determination was, among others, *What level of control over the negligent acts of person A would lead to a finding that person B, who is directing person A on the doing of those acts, as being held vicariously liable for the negligence, the Court of Appeal held inter alia, that :*

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

The evidence on record pointed to the 2nd defendant as the one in possession, use and beneficial owner of the accident motor vehicle as per the police abstract which also disclosed that he was the insured thereof.

Although the second defendant filed a defence denying the claim, he did not adduce any evidence to support those pleadings and to controvert that evidence contained in the police abstract as produced by the plaintiff. He did not even cross examine the plaintiff on her evidence and neither did he attend court on 25th may 2013 to cross examine the independent witness called by the court to shed light on the controversy surrounding registration of the motor vehicle.

This court finds that had the second defendant been a total stranger to the pleadings by the respondents and the appellant, he could not have pleaded that the respondents had not served his insured with a statutory notice of institution of suit. This court also finds it strange that the second defendant who submits that he was the driver of the accident motor vehicle was not being represented by an advocate at the expense of the appellant, if at all the appellant was the owner thereof or if the appellant had any identifiable interest to protect.

Where there is agency or master and servant relationship, it would naturally occur that the second defendant would be interested in protecting the interests of his master/principal hence, the need to have a common legal representation to further those interests and to avoid a situation where the master/principal's interests are jeopardized. In this case, it is even more surprising that the 2nd defendant did not challenge that judgment by the trial magistrate that found him liable as the beneficial owner of the motor vehicle.

In my view, the respondent's suit disclosed no cause of action against the appellant herein. As to what a cause of action is, **Pearson J in Drummond Jackson – Vs – Britain Medical Association (1970)2 WLR 688 at pg 616** defined cause of action as:

“A cause of action is an act of the part of the defendant, which gives the plaintiff his cause of complaint. Therefore, what the plaintiff needed to show was that he had a prima facie case against the defendants. The principles set down in D.T. Dobie & Co Ltd – Vs – Muchina & Another (1982) KLR 1 are clear that if a pleading does not disclose any reasonable cause of action or defence ... it ought to be dismissed.”

Albeit it was submitted that Joshua Ngumbau was another registered owner thereof, and that therefore the appellant should have joined him in the proceedings as a third party, that was so according to the copy of records but as I have stated before, there was no evidence linking the said Joshua Ngumbau and or the appellant to the actual ownership, beneficial or possessory ownership of the accident motor vehicle at the material time of accident.

This court does not buy into the submission by the respondents that the appellant should have issued third party notice to the purported registered owner to whom it had passed possession of the vehicle in 1995 as there was no accountability on the part of the appellant or the said Ngumbau, on a balance of probabilities and it would have served no useful purpose to enjoin the said Ngumbau. In other words, there was no cause of action disclosed against the two individuals. In addition, the appellant had not claimed any contribution, indemnity or relief from a third party. The respondents should have, following those incessant denials by the appellant inquired into the alternative ownership, bearing in mind the fact that the police abstract named the 2nd defendant as owner and insured whereas the copy of records simply showed ownership by registration.

The inference that this court draws from the evidence on record as a whole is that the ownership by the appellant and Joshua Ngumbau as per the conflicting records fell in the category of the exception to the general rule in section 8 of the Traffic Act Cap 403 Laws of Kenya and as espoused in the case of **Osapil – Vs – Kaddy [2000] 1EALR 187** that:

“A registration card or log book was only prima facie evidence of title to a motor vehicle and the person whose name the vehicle is registered was presumed to be the owner thereof unless proved otherwise.”

Okwengu J. in CA 34/2002 in SAMUEL MUKUNYAKAMUNGEVS JOHN MWANGIKAMURU

was categorical and I am persuaded by her holding that:

“Section 8 of the Traffic Act is a clear recognition that often time’s vehicles change hands but records are not adjusted to reflect the actual position.”

The learned Judge further observed that:

“ I find that the trial magistrate was wrong in holding that only a search certificate from the Registrar of Motor vehicles could prove ownership of motor vehicle. I find a police abstract report having been produced showing the respondent as the owner of motor vehicle KAH 264 A, and evidence having been adduced that letter of demand sent to the Respondent elicited no response from him denying ownership of the motor vehicle, and the respondent having offered no evidence to contradict the information on the police abstract report, the appellant had established on a balance of probability that MV was owned by the Respondent.”(emphasis added).

IN WELLINGTON NGANGA MUTHIORA VS AKAMBA PUBLIC ROAD SERVICES AND ANOTHER CA KISUMU 2010 ECLR the Court of Appeal held that

“ where a police abstract was produced and there was no evidence adduced by a defendant to rebut it and not even cross examination challenged it, the police abstract being a prima facie evidence not rebutted could be relied on as proof of ownership in the absence of anything else as proof in civil cases was within the standards of probability and not beyond reasonable doubt as is in criminal cases. However, where it is challenged by evidence or in cross examination the plaintiff would need to produce certificate from the registrar of motor vehicles or any other proof such as an agreement for sale of the motor vehicle which would only be conclusive evidence in the absence of proof to the contrary.”

On the submission that the appellant should have joined the 2nd defendant to the appeal in 527/2013, it is my view that the misjoinder is not fatal and is in any case cured by the consolidation of the two appeals herein where the 2nd defendant is a party to the second appeal. Even if that were not the case, there is no evidence of the appellant pleading that it had a cause of action against the 2nd defendant, and neither did the 2nd defendant plead or adduce evidence that tended to link the appellant to the ownership of the accident motor vehicle.

The appellant all along maintained its vigorous stance that it did not know the 2ⁿ defendant and that he was neither its agent, servant nor that they were in any way connected to the ownership of the accident motor vehicle. From the onset the two were independent parties to the suit. In my view, joining the 2nd defendant to this appeal by the appellant would therefore have served no useful purpose. I am fortified by the decision in **Sultan Hasham Lalji Vs Ahmed Hasham Lalji and 4 others** (2006) eCLR the Court of Appeal, Bosire, Githinji and Otieno JJ.A stated:

“This ground is not intelligible. The company was a co-plaintiff in the suit. Its claim against the applicants was not struck out and is still subsisting. It cannot therefore be a party in the appeal as an appellant. In any case, the company as a legal person could have filed its own appeal if it was aggrieved by the order of the superior court. The respondents have no duty to join the company in the appeal as an appellant.

Similarly, the respondents could not name the company as respondents in the appeal because the ruling appealed from was not made in favour of the company. The respondents were only required by Rule 76(1) to serve a copy of the notice of appeal on the company if it was directly affected by the appeal. The respondents indeed served a copy of the notice of appeal on the company.....”

Further, in **CA 92/1993 FRANCIS NZIOKA NGAO VS SILAS THIANI NKUNGA** the Court of

Appeal held *inter alia*, that:

“the driver of the motor vehicle is not the respondent under the traffic act.”

I reiterate that the 2nd defendant did not plead or testify that he was the agent, servant or driver of the appellant or that he was in the cause of his employment with the appellant or drove the accident motor vehicle on the appellant’s behalf or with its authority authority. The court record shows that on 10/9/2012 Mr. Ogolla advocate informed the court that “the 2nd defendant was not in court and that he was not informed of today’s date.” The court then on its own motion ruled that “the court takes it that the 2nd defendant has no evidence to offer. There is no good reason for his non attendance. Close of 2nd defendant’s case. Submissions on 27th September, 2012.”

There is no evidence to show that the 2nd defendant was moved by the fact that his case was closed without him testifying and no effort was made by him to seek out the court to have his testimony in defence. However, the 2nd defendant dutifully filed his written submissions, which submissions I find, upon careful perusal, were crafted in a cautious and guarded manner omitting any mention on the respondent’s pleadings and evidence that he was beneficial owner of the motor vehicle. He does not challenge the evidence in the abstract and plead that he was the beneficial owner of the accident motor vehicle. He only mentions that the evidence was to the effect that he was the driver of the accident motor vehicle, which, again, from his submissions one cannot decipher on whose behalf he was driving the motor vehicle at the time of accident.

Submissions, in my view, cannot be taken to be a party’s evidence as it was not taken on oath and neither was it subjected to cross examination by the adverse parties to test his demeanor, credibility and or the veracity of his averments.

The question that begs an answer is whether or not the 2nd defendant had any interest in the outcome of the hearing by choosing when to participate and when not to do so in the proceedings where he was a defendant. His evasiveness in the proceedings in the court below invites this court to make an inference *that where a key witness fails to testify, the decision-maker may draw an inference that the witness did not testify because the testimony would have been adverse to the interests of the party who, otherwise, would have been expected to call the witness.* This inference on the failure to testify I have weighed against all the other evidence presented, not that the testimony by the 2nd defendant was not necessary to establish any case or that there was any reasonable explanation for the failure to testify.

In my view, the 2nd defendant must have evaded to testify and be cross examined because he had material evidence that was particularly and uniquely available to him, which evidence would not have helped his case, or which would have been beneficial to his adversary in the case.

As I have stated above, the 2nd defendant’s submissions in the appeal 544/2013 as consolidated herein, were carefully couched in a cautious and selective manner contrary to the pleadings by stating that ***“the 1st respondent herein was sued as the owner and the 2nd Respondent the driver of the said motor vehicle on the said material date.”*** He goes further to support the findings of the trial magistrate on quantum under loss of expectation of life and as against loss of dependency, he submits that it was not proved hence the 500,000 awarded was erroneously and should be set aside. This he submits without minding the fact that he did not file any cross appeal against the judgment of the trial magistrate as appealed against on quantum by the respondents.

In my view, the carefully worded and evasive submissions by the 2nd defendant were intended to steal a march on the appellant herein and to hoodwink the court into finding that indeed he was the driver and not owner of the accident motor vehicle, and therefore, the agent or servant of the appellant so that liability can be carried vicariously by the appellant. It is not sufficient to be a driver. One has to be an agent or servant or driver with ostensible or express authority of the owner thereof.

For the above reasons, I find that the appellant has succeeded in persuading this court that he was not the owner of the accident motor vehicle and therefore no liability could be attributed to him whether jointly or severally with the 2nd defendant. I also find that for reasons given above, the appellant was not vicariously liable for acts of negligence attributed to the 2nd defendant as there was no relationship of agent/principal or master servant established against the two defendants in the lower court. I also find that it was not established that the 2nd defendant ever drove or used the accident motor vehicle with authority of or for the benefit of the appellant and neither was did the appellant have any identifiable interest in the accident motor vehicle capable of protection or attaching liability to the appellant.

Appeal on Quantum

On the issue of quantum as appealed by the respondents in CA544/2013, the respondents herein who are the appellants in that appeal challenged the award on the grounds that on the heading of the loss of expectation of life, the trial magistrate made an award of Ks. 100,000 which award was inordinately low in the circumstances; that she erred in making a global figure of Ks 500,000 as loss of dependency which was too inordinately low and without using multiplier and multiplicand principles; she erred in failing to make an award for loss of consortium and special damages of expenses pleaded in paragraph 9 of the plaint.

It is trite law that an appellate Court can only interfere with an award of damages where it is demonstrated that the trial court in reaching the award based its decision on wrong principles or that the award is so inordinately high or low as to be a wholly erroneous estimate of the injury suffered (See **KEMFRO AFRICA LIMITED T/A MERU EXPRESS SERVICE GATHOGO KANINI .V. A.M. LUBIA AND OLIVE LUBIA [1982-1985]1 KAR 727**).

Ordinarily, an award of general damages is an exercise of judicial discretion which is based on the injuries sustained and comparable awards made in the past for comparable injuries. In **Simon Taveta v Mercy Mutitu Njeru civil Appeal 26 of 2013 [2014] eKLR** the Court of Appeal observed thus:

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

The respondents/appellants complain that loss of consortium was not considered by the trial magistrate. In my view; the respondent did not lay any evidence to prove loss of consortium other than simply mentioning it in her plaint in paragraph 8 thereof. In the case of (**DAVID BAGINE V MARTIN BUNDI CA No. (Nrb) 283/1996**, the Court of Appeal referring to Lord Goddard CJ **in Bonhan Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177**) held that-

“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.”

I find that no proof of loss of consortium was availed to court to enable it assess the loss and proceed to dismiss that ground as baseless.

On the submission by the respondents in their appeal that the award of **500,000 for loss of dependency** was inordinately too low, bearing in mind that the deceased who was aged 20 years was a mechanic earning between 800 to 900 per day, it is on record and the widow and her witness indeed testified to that fact of the deceased’s employment which was not controverted by the appellant and the 2nd defendant.

There is an established formula for calculating loss of dependency and giving global figures is not one of them. On that basis, I fault the trial magistrate for applying wrong principles of law in assessing general damages for loss of dependency.

In this case, although the appellant did not disclose how much the deceased was giving her per month,

where there is no documentary evidence of employment, the court would consider reasonable income for a casual laborers as a base for income because it would have been unreasonable not to allocate any sum of income to the deceased who used to go out and eke out a living daily. The case of **WAMBUA VS PATEL AND ANOTHER, [1980] KLR 336** cited with approval in **KIMATU MBUVI VS AUGUSTINE KIOKO CA203/2001** is clear that it is not just documentary evidence that can prove earnings and that to maintain that stand would do a lot of injustice to many illiterate Kenyans who do not keep records and yet earn livelihoods in various ways.

The appellants did plead the deceased's daily earnings of Ks 800 as a mechanic. PW 2 also confirmed the deceased's employment. There was evidence that the 1st respondent was his widow. She took out limited grant for purposes of institution of suit jointly with her mother in law, the second respondent/appellant SOFIA MUSIMBI INDASI. The 1st respondent/appellant also testified and produced a birth certificate for her daughter, the deceased's only child. In my view; the relationship of dependency was established on a balance of probabilities.

The respondents did provide authorities to guide the lower court in assessing income where there is no documentary evidence to prove income and profession. I agree that in this case, adopting the minimum wage of an ungraded mechanic artisan to reach a suitable multiplicand would be appropriate. The respondents proposed Kshs15, 593 per month. However, the gazetted legal notice No 70 of 2nd July, 2012 under the Labour Institutions Act No. 12 of 2007 attached to the appellants' submissions in the lower court does not make provision for mechanic artisan. The closest that is available is provision for skilled and unskilled employees- lorry driver or car driver earning Ksh 264.50 per day and Ksh 6239.70 per month. I will, under the circumstances, adopt the daily wage for lorry driver or car driver which is Ksh 264.50 per day and Ksh 7935 per month as the deceased's reasonable net earnings at the time of his demise.

The deceased must have been spending part of the money on himself and providing for his family as well. I would give 2/3 to his family as dependency ratio. As a mechanic, he would work, in the absence of proof of any ill health, past 60 years as he was not in formal employment. I would, in the circumstances give multiplier of 40 proposed by the respondents.

Thus **loss of dependency 7935 by 12 months by 40 years by 2/3= 2,539,200** which figure sets aside and substitutes the trial magistrate's global figure of Ksh 500,000 erroneously arrived at.

On loss of expectation of life, the court below awarded ks100, 000 against 250,000 proposed by the respondents and 60,000 by 2nd defendant. The trial magistrate was guided by and did refer to the decisions as cited by both parties, I see no reason to interfere with the trial courts' discretion as it has not been demonstrated that she erred in principle or that the award was manifestly low.

On special damages, the plaintiffs/respondents herein did give particulars of the expenses incurred in paragraph 9 of the plaint but they did not provide the figures for each expense. At the hearing, the plaintiff was recalled to produce receipts for the pleaded special damages. In my view, the respondents did not specifically plead the special damages and therefore they could not adduce evidence to prove what they did not plead. They did not seek to amend the plaint at the hearing to provide specific figures which they were to produce receipts to strictly prove as required by law hence, their claim is baseless and I dismiss the ground hereof.

In the end, I find merit in the appellants appeal No 527 of 2013, set aside the judgment and decree of the lower court on liability against the appellant and substitute it with an order dismissing the respondents' Eunice Alila Ndetswa and Sofia Musimbi Indasi suit against the appellant General Motors with costs. The appellant shall also have costs of this appeal.

As the 2nd respondent James Waweru Muchiri did not challenge the decision of the lower court on its findings that have been challenged by the appellant, I make no reference to his liability which of course, stands as pronounced by the trial magistrate that he was the beneficial owner of the accident motor

vehicle.

In Appeal No. 544/2013 I dismiss the entire appeal as against the 1st respondent General Motors therein who is the appellant in HCCA 527 of 2013. I allow the respondents'/appellants' Eunice Alila Ndetswa and Sofia Musimbi Indasi appeal against the 2nd respondent/2nd defendant James Muchiri Waweru on loss of dependancy by setting aside the award of Ksh 500,000 global figure awarded by the trial magistrate and substituting thereof with an award of Ksh **2,239,200** in favour of the appellants Eunice Alila Ndetswa and Sofia Musimbi Indasi. I dismiss their appeal on damages for loss of consortium claimed by the 1st appellant Eunice Alila Ndetswa as no evidence was led to prove the same, though pleaded.

I also dismiss the appeal against the award on **loss of expectation of life**. And uphold the trial magistrate's award of **Ksh 100,000**.

The award for **pain and suffering** as awarded by the lower court remains undisturbed at **Ksh 150,000**.

In total, I award damages in the sum of **Ksh 2,789,200** in favour of the appellants in HCCA 544/2013 Eunice Alila Ndetswa and Sofia Musimbi Indasi against the 2nd respondent /defendant James Waweru Muchiri. I also award them cost of the suit in the court below to be paid by the 2nd Defendant James Waweru Muchiri together with interest on the general damages at court rates calculated from the date of judgment in the lower court until payment in full. The respondents Eunice Alila Ndetswa and Sofia Musimbi Indasi shall also have costs of their appeal in HCCA 544/2013 borne by the 2nd respondent James Waweru Muchiri.

Overall, having dismissed the respondent's claim against the appellant General Motors in the lower court, the appeal by the respondents only succeeds as against the 2nd defendant/ 2nd respondent in HCCA 544.

The appellant General Motors shall only have costs of the appeal against the respondents in HCCA 527/2013.

Dated, signed and delivered at NAIROBI this 7th day of May, 2015

R.E.ABURILI

JUDGE