REPEBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL APPEAL NO. 126 OF 2009

P I (SUING AS A NEXT OF KIN OF C M (DECEASED)…APPELLANT

VERSUS

ZENA ROSES LTD…….1ST RESPONDENT

SAMUEL KIPLIMO TANUI…….....…….....2NDRESPONDENT

(Being an Appeal from the Judgment and Decree of the Honourable G. M. Mutiso Resident Magistrate, dated and delivered on 14th August, 2009

in Kapsabet Principal Magistrate's Court PMCC No.558 of 2006)

JUDGMENT

The appeal before the Honourable Court for determination emanates from the judgment of the learned Resident Magistrate G. M. Mutiso in Kapsabet PMCC No.588 of 2006 which was delivered on 14th August 2009. By a plaint dated 6th November, 2006 the plaintiff sought the following relieves:-

a. **Special damages of Kshs.27,400/-.**
b. **General damages under Law Reform Act and Fatal Accident Act.**
c. **Damages for lost years and loss of dependency.**
d. **Costs and interests.**

On the other hand, the defendants/respondents filed a joint statement of Defence and denied the claim and urged the court to dismiss the plaintiff's claim with costs.

The matter was set down for hearing and learned trial magistrate dismissed the suit with costs. In dismissing the suit the trial magistrate made the following findings:

> **"In Mary AyooWanyama and Others –Vs- Nairobi City Council (Court of Appeal at Nairobi Civil Appeal No.2 of 1998, the Court of Appeal held that a person who was not at the scene at the time of the accident cannot prove negligence. Though the plaintiff pleaded res ipsa loquitur, the plaintiff's submissions do not explain why that doctrine is relied upon. The doctrine of res ipsa loquitur requires an eye witness to explain what happened after which the presumption of negligence can be inferred. But nothing was explained as to how the accident occurred. For these reasons I find that the plaintiff has failed to prove on a balance of probabilities that the 2nd defendant was negligent. No certificate of search was produced to prove that the 1st defendant was the owner of the vehicle, so issues (i) and (ii) are answered in the negative. That being the case, I need not consider issue No.2. The**

plaintiff has failed to prove his case against the defendant on a balance of probabilities. I therefore dismiss this case with costs to the defendant." (See the judgment of the trial court at page 22 of the Record of Appeal).

The Appeal

The appellants' appeal has outlined 10 grounds of appeal. The said grounds may be summarized into the following two major grounds.

- **That the trial magistrate erred in law and fact in holding that the appellant failed to prove his case on a balance of probability.**
- **That the learned trial magistrate erred in law and fact in failing to take into account principles in the doctrine of *res ipsaloquitur* as pleaded by the appellant.**

SUBMISSIONS BY THE PARTIES

Appellant's submissions

The appellant's Counsel relied on written submissions dated 24th June, 2014 and filed in court on the same date. He submitted that the appellant's case was dismissed without due regard to the law and the appellant's overwhelming evidence. On this end, he relied on the case of **Samuel GikuruNdungu –Vs- Coast Bus Co. Ltd. CA** at Nairobi **Civil Appeal No.177 of 199** where the Court of Appeal reinstated the suit that had been dismissed by the High Court and went ahead to assess damages and the case of **Geoffrey ChegeNuthu –Vs- M/S Anveral& Brothers, C.A.** at Nakuru **Civil Appeal No.68 of 1997** where the Court of Appeal reinstated the suit that had been dismissed by the High Court and ordered a retrial before a different judge.

Respondent's submissions

The respondent's counsel equally relied on his written submissions dated 2nd July, 2014 and filed in court on the 4th July, 2014. Counsel submitted that whoever alleges must prove as provided by Section 107 of the Evidence Act, Cap 80 Laws of Kenya. To this end, counsel cited various authorities which include the following:- **Timsales Ltd. –Vs- HarunWafulaWamalwa, Nakuru HCCA No.95 of 1995** where the learned Judge Musinga J while relying on the case of **Wareham t/a A.F. Wareham & 2 Others –Vs- Kenya Post Office Savings Bank (2004) 2KLR 91 CA),** reiterated that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules and that the burden of proof is on the plaintiff and the degree of proof is on a balance of probabilities. (See AnyaraEmukuleJ in**Timsales Ltd –Vs- HarunThuoNdungu (2010) eKLR , H.C.** at Nakuru**Civil Appeal No.02 of 2005); KiemaMutuku –Vs- Kenya Cargo Handling Services Ltd. (1991) 2 KAR 258** where the Court of Appeal held that our law has not reached theage of liability without fault and **Mary AyooWanyama& 2 Others –Vs- Nairobi City Council Civil Appeal No.252 of 1998** where the Court of Appeal held, ***inter alia***, that the plaintiff must prove facts which give rise to what may be called the ***res ipsa loquitur***principles.

The respondent's counsel further submitted that the plaintiff's case was based on the tort of negligence and that for one to succeed in such a claim, one must prove each and every one of the particulars of negligence. He argued further that the appellant did not adduce any evidence with regard to what caused the accident and who was to blame for the same. Counsel submitted that the appellant's reliance on the doctrine of ***res ipsalouitur*** is baseless as there was no proof of facts which gave rise to what may be called the ***res ipsa loquitur*** situation. And finally the respondent's counsel submitted that appellant lacked the ***locus standi*** to institute this suit.

The respondent's counsel further relied on the following authorities: **ThuraniraKarauri –Vs- Agnes**

Ncheche (1997) eKLR, C.A. at Nyeri **Civil Appeal No.192 of 1996** where the Court of Appeal held that the plaintiff's reliance on the police abstract on proof of ownership of a motor vehicle was not sufficient and that the plaintiff was supposed to produce certificate ofsearch signed by Registrar of Motor Vehicles as proof of ownership; **TeresiaWairimuKirima –Vs- Father Remeo& Another (2913) eKLR H.C.** at Nairobi**ELC Case No.585 of 2013**, where Gacheru, J. while relying on **Troustik Union International and Another –Vs- Alice Mbeyaand Another, Civil Appeal No.145 of 1990, The Builders Ltd. –Vs-PetronillaOjiamboOdori Civil Appeal No.170 of 1992,** and **Jonathan OrengoObiayo –Vs- Moses OndiegiOkoth, Civil Appeal No.146 of 1990** reiterated that a suit filed by an administrator before obtaining Grant of Letters of Administration is incompetent and it should be struck out; **M'mbula Charles Mwalimu –Vs- Coast Broadway Company Ltd (2012) e KLR, H.C at Mombasa Civil Appeal No.160 of 2010** where learnedMwongo, J while relying on the decision by Ringera J in the case of **Grace KaniniMuthini –Vs- Kenya Bus Services Ltd. & Another HCCC 4708 of 1989** dismissed the appeal on the ground that negligence had not been proved and liability could be attributed to the respondent. He held that the respondent did not plead or rely on the *maxim of resipsaloquitur*, which is the applicable maxim where all the facts are not known and that he did not find that the maxim was applicable in circumstances such as where both driver and cyclist had respective control of their movements and that the probability of the negligence of each is either equal or otherwise apportionable.

And lastly, the respondent's counsel relied on **Trouistik Union International and Another –Vs- Mrs. Jane Mbeyu and Another, C.A. at Nairobi Civil Appeal No.145 of 1990** where the learned judges **ApalooKwach, Cockar,Omolo&Tunoi, JJA**held that the position in common law is that '**actio*personalismoritor cum persona*'**, that is, a personal action dies with the person and one only becomes a personal representative of the deceased estate on acquisition of the letters of administration in accordance with the provisions of the Law of Succession Act, Cap.160, Laws of Kenya.

The evidence

This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See **Sumaria&Another –Vs- Allied Industrial Ltd (2007)2KLR** and**Selle& Another –Vs- Associated Motor Boat Co. Ltd. & Others 91968) EA, 123**. It then behooves this court to summarize the evidence that was tendered before the trial court.

The plaintiff called only one witness one P K I who was the plaintiff suing as the next of kin of C M (deceased). His testimony was that he was the uncle of the deceased and that on the 6th September, 2006 while at home he received information that the deceased had been knocked down by a vehicle along Kapsabet – Chavakali Road. He was given the registration number of the vehicle as KAR 920 Y Nissan hard body. His evidence was that the vehicle was being driven by one Samuel KiplimoTanui who was the 2nd defendant. He testified that the 2nd defendant was charged with a traffic offence namely, causing death by dangerous driving, vide Traffic case **No.1427 of 2006 – Republic –Vs- Samuel Kiplimo** at Vihiga Law Courts. He proceeded to the scene where he found the deceased had already died. He produced the death certificate and a copy of burial permit in respect of the deceased. He testified that at the scene, he found blood on the left side of the road. He thereafter proceeded to the police station where he was issued him with a police abstract dated 7th September, 2006 which he produced as an exhibit. He also produced a copy of Grant of Letters of Administration together with a receipt for postmortem expenses. His testimony was that the deceased at the time of her death was aged 6 years and was in the Kindergarten. He blamed the 2nd defendant for driving the vehicle too fast and in a reckless manner. He urged the court to compensate him for the loss of the child.

In cross-examination, he stated that he did not find the body at the scene when he visited the same and that the deceased had died instantly. He stated that he did not have an official certificate of search from the Registrar of Motor Vehicles and at the time of his testimony in the trial court, the judgment in the traffic case had not been delivered. He stated that the deceased was his dependant and although she had a mother, she was sick and was aware about the case. He also stated that he did not know what the future of the deceased would have been.

The defence did not call any witness.

Having summarized the brief evidence, I find that the first issue for determination is whether the learned trial magistrate properly applied the doctrine of ***res ipsaloquitur*** in dismissing the appellant's case. The Black's Law Dictionary 9th Edition page 1424 defines *Res Ipsa Loquitur* as "***the thing speaks for itself".*** In explanation on application of the doctrine, the Dictionary adds, ***"the doctrine providing that, in some circumstances, the mere fact of an accident occurrence raises an inference of negligence that establishes a prima facie case".***

The case law on the application of the doctrine of Res Ipsa Loquitur is rich but I will cite a few cases to demonstrate how the courts have interpreted its application.

In **Keats NjugunaMuchiri –vs- Mash Express Ltd. (2008) eKLR H.C. at Machakos Civil Case No.65 of 2005** the learned Lenaola, J held as follows:-

> **"There is no evidence to suggest anything other than that the said motor vehicle belongs or belonged to the defendant and that being a public service vehicle it was being driven by the defendant's agent or servant lawfully authorized to do so. The question is, can the doctrine of res ipsa loquitur be applicable to this case?**
>
> **As I understand it, the said principle is applicable where a party claims that the fact of the accident happening speaks for itself. The defence on the other hand can only then rebut that assertion and "avoid liability by showing either that there was no negligence on their part that the accident was due to circumstances beyond their control" –** See **Kago –Vs- Njenga C.A. 1/1979 eKLR and MsuriMuhdin –Vs- Nazzdr bin Seif el Kasabu& Another (1960) E.A. 201.**
>
> **In Kago (supra), the court found that since the accident was caused by a tyre burst, there could not be negligence properly to be attributed to the appellant. In Embu Public Road Service –Vs- Riimi (1968) E.A. 22 however, there was found to be negligence on the part of the bus driver who had failed to take corrective action as a competent driver should have and so the fact of the bus overturning after a tyre burst was found to have been due to his negligence.**
>
> **In the present case, sadly, no defence whatsoever has been raised. The accident has been denied, the particulars of negligence and damages have been denied and yet no evidence has been led to rebut the plaintiff'sevidence pleaded and later proved in oral evidence. This court can only but agree with the plaintiff that where there is no attempt at rebutting the application of the principle of res ipsa loquitur then once pleaded the same applies – See also Muchoki –Vs- A,G, (2004) 2 KLR 518."**

In **Jeremiah MainaKagema –Vs – Kenya Power and Lighting Co. Ltd. (1991) eKLR, H.C. at Nairobi Civil Case No.1090 of 1994**, the learned Judge AlnashirVisram, as he then was, observed as follows:-

> **" Res ipsa loquitur does not mean, as I understand it, that merely because at the end of a journey a horse is found hurt, or somebody is hurt in the streets, the mere fact that he is hurt implies negligence. That is absurd. It means that the circumstances are, so to speak eloquent of the negligence of somebody who brought about the state of things which is complained of."**

In **Jackline A. Obondo –vs- Kenya Bus Services & Another (2007) eKLRH.C. at Kericho Civil Case No.88 of 2004,**Kimaru, J observed as follows:-

> **"However, upon evaluating the evidence on record, it is clear that when the plaintiff boarded the said motor vehicle at Bondo, she expected to be ferried safely to her destination,**

> **Nairobi. She did not reach safely to her destination. The bus which she was travelling in was involved in an accident as a consequence of which she was injured. I agree with the finding of the Court of Appeal in the case of Embu Public Road Services Ltd. –Vs-Riimi (1968) EA 22 where it was held that where an accident occurs and no explanation is given to the defendantwhich could exonerate him from liability, then the court would be at liberty to apply the doctrine of res ipsa loquitur and hold the defendant liable in negligence."**

From the foregoing, it is my view that the appellant could rely on the doctrine of res ipsa loquitur if he was able to demonstrate the following:-

1. If he established a prima facie case.
2. If his case is not rebutted.
3. If he established that the defendant is the owner of the subject motor vehicle.
4. If he demonstrated his *locus standi* in the case.

Prima facie case

The bare meaning of the word resipsa loquitur which is that the case speaks for itself is entrenched and founded in the establishment of a prima facie case. See **ObedMutuaKinyili –Vs- Wells Fargo & Another (2014) @KLR, H.C.**at Mombasa **Civil Case No.48 of 1999** in which Kasango, J while citing the Black's Law Dictionary stated that:-

> **"The phrase ipsa loquitur is a symbol for the rule that the fact of the occurrence of an injury, taken with the surrounding circumstances, may permit an inference or raise a presumption of negligence, or make out a plaintiff's prima facie case, and present a question of fact for defendant to meet with an explanation."**

In **Nandwa –Vs- Kenya Kazi Ltd (1988) KLR, 488** as cited by Koome J, in **Regina Wangechi –Vs-Eldoret Express Co. Ltd (2008) e KLR,** it was held that:-

> **"In an action for negligence, the burden is always on the plaintiff to prove that the accident was caused by the negligence of the defendant. However, if in the course of trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendant, the issue will be decided in the plaintiff's favour unless the defendant provides some answer adequate to displace that inference."**

In the instant case the appellant was able to demonstrate that an accident occurred on the 6th September, 2006 involving motor vehicle registration No. KAR 920 Y as per the police abstract issued to him. He was also able to demonstrate that the 2nd respondent was charged with the offence of causing death by dangerous driving. He also discharged the burden that the deceased died as a result of the accident. As such, *prima facie*, he had a case against the respondents.

Rebuttal of the plaintiff's case

The respondents did not tender any evidence of whatsoever nature to rebut the appellant's case and as was held in **Embu Public Roads Services Ltd. –Vs – Riimi (1968) EALR, 22** as cited by Koome J, in **Regina Wangechi –Vs- Eldoret Express Co. Ltd. (Supra)** where the Court of Appeal stated that:-

> **"The doctrine of res ipsaloquitur is one which a plaintiff, by proving that an accident occurred, in the circumstances in which an accident should not have occurred thereby discharges in the presence of any explanation by the defendant, the original burden of showing negligence on the part of the person who caused the accident'',**

The respondents not having tendered any evidence, it followed that the appellant's case remained un-rebutted. The presumption drawn thereof is that the 2nd respondent having been an authorized driver of

the 1st respondent, carelessly or negligently drove the subject motor vehicle as a result of which the accident occurred. Moreover, all exhibits produced by the appellant were not objected to.

Proof of ownership of the motor vehicle in question

The judgment was dismissed on among other grounds, that the appellant did not produce a certificate of search of the motor vehicle from the Registrar of Motor Vehicles. That issue is factual because in any case no search certificate was produced by the appellant.

Courts have held divergent views on this issue. Some courts have observed that the failure to produce the certificate of search meant that proof of ownership of a motor vehicle has not been discharged. See the case of**ThuraniraKarauri –Vs- Agnes Ncheche (1997) @ KLR, C.A. at Nyeri Civil Appeal No.192 of 1996** in which the Court of Appeal held that it is only by production of a certificate of search issued by the Registrar of Motor Vehicles that can stand as proof of ownership of a motor vehicle. They had this to say:-

> **"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry. Mr.Kimathi, for the plaintiff, submitted that the information in the police abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."**

A more recent decision has considered the case of **ThuraniraKarauri** as an obiter dictum being the case of **Joel MugaOpija –Vs – East African Sea Food Ltd. (2013) @ KLR, CA Kisumu Civil Appeal No.309 of 2010** where Judges OnyangoOtieno, Azangalala and Kantai, JJA delivered themselves as follows:-

> **"The learned Judge overturned this finding as she held that production of police abstract alone was not enough proof of ownership of the vehicle.**
>
> **We have anxiously considered this aspect of this appeal as it is a legal matter as to what constitutes evidence that would establish ownership of a motor vehicle involved in an accident particularly in a situation such as obtained in this appeal before us. In the case of ThuraniaKarauri –vs- Agnes Ngeche (Civil appeal No.192 of 1996) (UR) which was annexed to the submissions of the respondent in the Senior Resident magistrate's court, this court differently constituted stated**:-
>
> > **"The plaintiff did not prove that the vehicle which was involved in the accident was owned by the defendant. As the defendant denied ownership, it was incumbent on the plaintiff to place before theJudge a certificate of search signed by the Registrar of motor vehicles showing the registered owner of the lorry. Mr. Kimathi, for the plaintiff submitted that the information in the Police Abstract that the lorry belonged to the defendant was sufficient proof of ownership. That cannot be a serious submission and we must reject it."**
>
> **We find of persuasive value the view held by Ali Aroni J. when she considered a similar issue of ownership in the case of Collins OchungOndiek –Vs- Walter OchiengOgunde – [HC Civil Appeal No.67 of 2008,] (UR). She distinguished Thuranira's case from the case that was before her as follows:-**
>
> > **"In as much as the abstract form is not conclusive evidence of ownership of a motor vehicle, the court notes that defence did not take the issue of ownership seriously**.
>
> **……..**

> **The case of Thuranira Karauri –Vs- Agnes Ngeche can be distinguished from the current case in many ways, it had several loop holes, it was time-barred and no proof of extension of time was produced in evidence, other material documents were produced in breach of provisions of Section 35 of the Evidence Act which is not the case here."**

We agree, many reasons led to the decision in Thuranira's case the main one being that the suit was time barred.

In the more recent case of Ibrahim Wandera –Vs- P. N. Mashru Ltd, (Civil Appeal No.333 of 2003) (Unreported) this court, again differently constituted considered a similar scenario. In that case only the appellant testified and on appeal the issue of whether ownership was proved was raised. Coincidentally, the advocate for the appellant was the same as is in this case and some of the grounds advanced in the Memorandum of Appeal were very close to the grounds raised in this appeal. This court stated as follows:-

> **"The issue of liberty was not specifically raised as a ground of appeal before the superior court. Tanui J. proceeded as though the appellant had not presented evidence on ownership of the accident bus. The learned Judge, with respect to him, did not at all make any reference to the police abstract accident report which the appellant tendered in evidence. In that document the accident bus is shown as KAJ 968 W, with Mashiru of P. O. Box 98728 Mombasa as owner. This fact was not challenged. The appellant was not cross-examined on it. It means the respondent was satisfied with that evidence."**

In fact, in that case Mr. Menezes who represented the appellant applied to challenge the admissibility of the police abstract but without success. That he did so, demonstrated the importance of the contents of the abstract as to ownership.

Lastly, in the case of Lake Flowers –Vs- Cila Francklyn Onyango Ngonga (suing as the personal legal representative of the estate of Florence Agwingi Ogam (deceased) and Josephine Mumbi Ngugi (2008) e KLR which was also on the same issue, it was held:-

> **"Without the appellant adducing evidence at the trial to counter what the 1st respondent blamed its driver for, it was difficult for it to contest the liability blamed against it by the superior court and/or (sic) attempt to partly or wholly blame the 2nd respondent for the accident on this appeal. Neither can it deny the ownership of the Mitsubishi Canter without any evidence to counter the Police Abstract produced by the 1st respondent which shows it to be the owner of that motor vehicle."**

It is noteworthy, that Bosire JA. sat in Thuranira's case (supra), Wandera's case (supra) and in the Lake Flower's case. It would appear that like us, he treated the comments in Thuranira case as orbiter. It is clear to us that there has been a move from the rigid position that was pronounced, albeit as orbiter, in the Thuranira case. 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'sevidence 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 evidenceto 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."

In **Simon Hungu& Another –Vs- Vincent BarasaWafula& Another (2014) e KLR, H.C. at Nakuru,**

Civil Appeal No.118 of 2000, the learned Judge AnyaraEmukule, while relying on the decision in **Joel Muga Opija** case, (supra), noted as follows:-

> **"Firstly it was contended that the first respondent did not prove the ownership of the vehicle registration number KAK 196 D and instead chose to rely on the police abstract which is not conclusive proof of ownership. Counsel relied on the holding of the Court of Appeal at Nyeri in Thuranira Karauri –Vs- Agnes Ncheche CA 192 of 1996 where the court rejecting the submission that the information in the police abstract was sufficient proof of ownership, held:-**
>
> ***"As the defendant had denied ownership of the motor vehicle, it was incumbent upon the plaintiff to place before the judge a certificate of search signed by the Registrar of Motor Vehicles showing the registered owner of the lorry."***
>
> **The plaint and the police abstract both indicated that the second appellant was the owner of the motor vehicle Joel Mua Opija –Vs- East African Sea Food Ltd. (2013) e KLR :-**
>
> **…….I do note as submitted by counsel for the respondent that the allegations of ownership was not specifically denied in the defence nor was it raised in the submissions filed in the lower court. The 2nd appellant did not cross-examine the plaintiff on the contents in the abstract as regards ownership or lead any evidence to counter the contents therein. Consequently, it is my view that the plaintiff was able to establish on a balance of probability that the 2nd appellant was the owner of the motor vehicle registration KAK 196 D."**

As noted in the **Joel Muga Opija** case (supra), the case of **Thuranira Karauri** (supra) is an obiter as the courts appear to be moving from the rigid position that ownership of a motor vehicle can only be proved through a certificate of search from the Registrar of Motor Vehicles.In the instant case, the respondents did not attend court either in their individual capacity or through their agents to controvert the particulars of ownership of the motor vehicle as was reflected in the police abstract issued to the appellant. The same clearly showed that the motor vehicle was at all material time owned by the 1st respondent and was being driven by the 2nd respondent. Bearing in mind that the burden of proof in a civil case is on a balance of probability, it is my view that the appellant was able to discharge the burden in proof of ownership of the motor vehicle.

Whether the plaintiff had locus standi

Under Section 2 of the Law Reform Act, a person entitled to bring a cause of action against a deceased person is either a parent or the next of ***kin of a personal representative of the deceased.*** Sub-section 1 provides that:- ***"subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estates; ……"***

Sub-section 5 provides that:-

> **"The rights conferred by this Part for the benefit of the estate of the deceased person shall be in addition to and not in derogation of any rights conferred on the dependents of the deceased persons by the Fatal Accidents Act Cap 32 or the Carriage by Air Act, 1932, of the United Kingdom, and so much of this part as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those acts as it applies in relation to other causes of action not expressly accepted from the operation of sub-section (1)."**

While Section 4 of the Fatal Accidents Act in part provides that:-

> **"(1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to provisions of Section 7, be brought by and in the name of executor or administrator of the deceased……"**

An executor or administrator of an estate of a deceased person is that person who has been issued with the Grant of Letters of Administration (limited or full). In the instant case, the appellant, though not a parent of the deceased, was issued with Limited Grant of Letters of Administration which automatically made him a personal representative of the deceased. He therefore, had the *locus standi* to bring the suit on behalf of the deceased's estate as a personal representative.

Having made the above observations, it followed that the appellant was able to prove on a balance of probability that the respondents were jointly and severally liable for the accident that occasioned the fatal injuries to the deceased. The task then left for this court is to assess the amount of damages payable to the appellant both under the Law Reform Act and the Fatal Accidents Act.

The appellant had sued the respondent jointly and severally for;

a. **Special damages of Kshs.27,400/-.**
b. **General damages under the Law Reform Act and Fatal Accidents Act.**
c. **Damages for lost years and loss of dependency.**
d. **Costs and interest.**

Under the Law Reform Act, damages payable may fall under the following categories:-

i. Loss of expectation of life.
ii. Pain and suffering.
iii. Funeral expenses.

While under the Fatal Accidents Act damages payable are:-

i. Loss of dependency/lost years.

I will not follow any order in making the determination on the quantum of damages awardable.

Pain and suffering

Needless to say the deceased died instantly and did not most likely suffer any pain prior to her death. A conventional figure of Kshs.10,000/- will do.

Loss of future earnings/loss of dependancy/lost years

I have combined the three awards because it is important that I first determine the best method to tabulate such awards. I have previously stated that damages are clearly payable to the parents of a deceased child irrespective of the age of the child and irrespective of whether there is or there is no evidence of pecuniary contribution. See **Kenya Breweries Ltd. –Vs- Saro (1981) KLR 408,** a decision of the Court of Appeal sitting in Mombasa which delivered itself as follows:-

> **"In the Kenyan society, at least as regards Africans and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a variable asset which the parents are proud of and are entitled to keep intact."**

The same observation was made by Kneller, JA in **Hassan –Vs- Nathan MwangiKamau Transporters & 5 Others (1986) KLR, 457** who noted that:-

> **"The fact of the matter is, however, that today parents and children in most Kenyan families do expect their children when adults to help their parents if they need it and, in my view, that should be encouraged and not fulminated against as a system of genontocracy at its worst."**

What remains unsettled to-date is the most desirable principle to apply in tabulating loss of dependency or lost years where children are the deceased.

In **Hassan –Vs- Nathan Mwangi Kamau Transporters & 5 others (supra)** in the judgment of Kneller, JA and which Hancox and Nyarangi, JJA adopted, the court took issue with the trial judge for adopting to tabulate expected earnings of the deceased with the salary of a high court judge. In that case, the deceased who died aged 17 years, had completed High School and had been admitted to the University of Nairobi to pursue architecture. The Court of Appeal then noted that comparable earnings of other architects was the most prudent to use in considering what would have been the expected earnings of the deceased. In the case of **Kenya Breweries –Vs- Saro (supra)** a conventional figure of Kshs.100,000/- was awarded where the deceased died aged six (6) years.The appellant had appealed against the award which he felt was inordinately too high. On appeal, the judges were of the view that, in assessing general damages, the age a deceased child must be taken into account. They had this to say:-

> **"……..the age of a deceased child is a relevant figure to be taken into account so that in the case of say a thirteen (13) year old boy already in school and doing well in his studies, the damages to be awarded would naturally be higher than those awardable in the case of a four (4) year old one who has not been to school and whose abilities are not yet ascertained. That we think is a case of common sense rather than law……."**

The evolving jurisprudence shows that both the High Court and Court of Appeal have not adopted a uniform principle on how to tabulate general damages where the deceased is a minor. Even as early as 1986 in the case of **Luduwa (Suing by her next friend) and Another –Vs- Ayuku& Another (1986) KLR, 394**, a judgment of Apoloo, J – High Court, the court considered that an award of only Kshs.8,000/- under loss of expectation of life in the case of a minor aged only one month who had died alongside her mother. In granting the figure, the court said that she had lived for just a month and her prospects of a future happy life are less than her mother's. However, loss of dependency was awarded for death of her mother which was tabulated based on her average earnings and a multiplier of twenty five (25) years used. Nothing was awarded for lost years or loss of dependency in respect of this minor.

In my view, it is true to say that the future of a minor is unknown as opposed to that of an adult who is engaged in an occupation that earns him or her a living. It can also be contrasted with that of a middle aged person who may be in college or in whose life there is indication of what kind of livelihood he would engage himself/herself in when he grew up. For the case of minors, it is my view that tabulation for damages for loss of future earnings and lost years can be gauged depending on what evidence is brought before the court. For instance, a good case can be argued where evidence is shown that the minor is in school, well performing and that it is hoped, based on his or her performance, would engage himself or herself in this or that occupation. That is why evidence before a trial court must not be led in a casual manner thinking that the court would make an assumption of what earnings the minor may get in future or what he would become once he grew up. It is not sufficient to just state that the minor was either in kindergarten, primary or secondary school. A good case would be argued when evidence is brought to show or persuade the court that despite the fact that the minor was in the tender years of school, it was hoped that he would have a good future when he grew up. In the present case unfortunately, no iota of evidence was tendered to demonstrate what the performance of the deceased was both in school and in life. The plaintiff did not also lead evidence stating what he expected the future of the deceased to be. The only evidence that he adduced was:-

> **"I pray that we be compensated for the loss of the child. She was six years and in kindergarten. I also pray for costs and prayer C in the plaint."**

In cross-examination, he testified thus:-

"We do not know how the future would have been."

In the foregoing, I think, the most prudent principle to apply in awarding general damages for loss of dependency is to give a global sum. I will award a sum of Kshs.300,000/- under this head.

Loss of expectation of life

For loss of expectation of life, I shall also award a conventional figure. Having regard to my observations that it was unknown what the future of the deceased would have been, I think a figure of kshs.80,000/- is reasonable.

Funeral expenses

These shall be awarded as a matter of course and I think Kshs.20,000/- is reasonable.

In the result,this appeal succeeds. I set aside the entire judgment of the learned trial magistrate and award the following:-

a. Pain and suffering	Kshs. 10,000.00
b. Loss of dependency	Kshs.300,000.00
c. Loss of expectation of life	Kshs. 80,000.00
d. Funeral expenses	Kshs.20,000.00
e. Special damages as proved in the sum of	Kshs. 5,400.00

Total	**Kshs. 405,400.00**
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The appellant is also awarded costs of the suit before the trial magistrate and of this appeal.

DATED and **SIGNED** this 22nd day of June, 2015.

G**. W. NGENYE – MACHARIA**

JUDGE

DELIVERED at **ELDORET** this 6th day of July, 2015.

G. K. KIMONDO

JUDGE

In the presence of:-

1. No appearance for the appellant.

2. Mr. Mwinamo for Mr. Owiny for the respondents.