REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO.419 OF 2011

P N M

J K M (The legal personal

Representative of estate of

L M M (DECEASED)…….....….PLAINTIFF

VERSUS

TELKOM KENYA LIMITED ….……1ST DEFENDANT

SAMUEL NDIRANGU……..2ND DEFENDANT

GODGREY GATERI NGURE…….3RD DEFENDANT

JUDGMENT

The claim herein is for both general and special damages arising out of Road Traffic Accident which occurred on 17th March 2011 along Ruiru-Githunguri Road involving motor vehicle registration number KXL 621. The accident resulted in the demise of one L M M who was a passenger in the said motor vehicle. The claim is brought by P N M and J K M who are brother and widow to the deceased L M M, as legal and personal representatives of the deceased's estate under the provisions of the Fatal Accident Act and the Law Reform Act.

The plaint dated 29th September 2011 and filed in court the same date claims that the 1st defendant Telcom Kenya Ltd was the registered owner of the accident motor vehicle, the 2nd defendant Samuel Ndirangu was the user, beneficial owner and or insured of motor vehicle registration number KXL 621 Isuzu Canter and that the 3rd defendant Godfrey Gateri Ngure was the authorized driver, agent and or servant then in control of the accident motor vehicle.

The plaint alleges that on 17th March 2011 the deceased L M M was a lawful passenger in the above motor vehicle along Ruiru-Githunguri Road when the 3rd defendant then driving, managing or controlling the said motor vehicle carelessly and or negligently drove the said motor vehicle that he caused an accident after it lost control and overturned as a consequence of which the deceased

sustained fatal injuries. The plaintiff particularized the driver's negligence as:

a. Driving at an excessive speed in the circumstances.
b. Failing to keep any or any proper look out.
c. Failing to steer the said motor vehicle registration No. KXL 621 Isuzu Canter properly and or have any proper and sufficient control of the motor vehicle.
d. Causing or permitting the said vehicle to overturn.
e. Failing to stop, slow down, to swerve or in any way other was so to manage or control the said vehicle so as to avoid the accident.
f. Failing to apply the brakes sufficiently or in time or at all.
g. Failing to drive the vehicle with due care and attention towards the safety of other road users namely the plaintiff passenger as may be reasonably expected.
h. In as far as will be applicable the plaintiffs will rely on the doctrine of *res Ipsa Loquitor*

It was further pleaded that the deceased left behind his widow J K M aged 26 years and son M M M aged 2 years. The defendants filed a joint statement of defence dated 27th November 2011 on 28th November 2011 denying that they owned and or drove the accident motor vehicle as alleged and put the plaintiff's to strict proof. They also denied that the 3rd defendant was the agent or servant of the 1st or 2nd defendant, putting the plaintiffs to strict proof.

The defendants also denied the averments that an accident ever took place involving the subject motor vehicle KXL 621 Isuzu Canter or that it occurred in the manner pleaded and on a without prejudice basis contended that if at all any such accident occurred as pleased then it was wholly and or substantially caused and or contributed to by the deceaded namely;

a. Exposing himself to a risk of danger which he knew or ought to have known;
b. Failing to ensure his safety while travelling in the said motor vehicle.
c. Failing to strap himself with a safety belt as is expected of a prudent passenger.
d. Riding as a passenger without due care to his own safety when he knew or ought to have known.
e. Travelling in the said motor vehicle without knowledge and or authority from the defendants.
f. Being negligent.

The defendants denied all other averments in the plaint including any loss and damages allegedly suffered by the plaintiffs and notice of intention to sue and prayed for dismissal of the suit by the plaintiffs with costs.

The plaintiffs filed reply to defence dated 15th December, 2011 on 23rd December 2011 joining issues with the defendants' defence and reiterating the contents of the plaint as pleaded.

The suit commenced for hearing as 10th March 2015 after parties complied with pre-trial requirements and the suit certified as ready for trial.

The 2nd plaintiff J K M testified as PW1. She stated on oath that she worked as a farm hand and was the widow to the deceased L M. They had been married in 2009 and were blessed with one male issue M M M. She adopted her witness statement recorded on 29th September 2011 as her evidence in chief wherein she stated that her deceased husband died while on duty. That he worked for Brookside Dairy Limited as a field clerk earning kshs 14,228.25 and that she learnt of his death on 17th March 2011 at 8.00am when she received a phone call from the deceased that he had been involved in an accident along Ruiru- Githunguri road. She proceeded to Kiambu District Hospital where he had been admitted but found him transferred to Thika Memorial Hospital and on arrival found that he had sustained serious injuries to both legs awaiting surgery. His condition worsened and he was taken to Aga Khan for specialized treatment. He died from the injuries on 21st March 2011. He was the family sole breadwinner. The police at Githunguri Police station issued her with a police abstract. She later arranged for his burial with his employer. Brookside Ltd catered for all his burial expenses. She produced his letter of employment and pay slip as P exhibit 2 and 3. She was issued with burial permit and death

certificate which she produced as exhibits 3b and 3b. A post mortem was carried out on the deceased's body at Aga Khan Hospital. She produced copy of the post mortem reports as exhibit 4. The plaintiff also produced their son's birth certificate exhibit 5b and child immunization card as exhibit 5a. She also produced the area chief's introductory letter to enable her obtain grant of letters of administration to enable her sue on behalf of the deceased's is estate as exhibit 6a and grant of letters of administration intestate as exhibit 6b. The plaintiff also produced search certificate of copy of records to show ownership of the accident motor vehicle as exhibit 7b together with receipt as exhibit 7a.

She testified that according to the copy of records Telkom Kenya Ltd was the registered owner of the accident motor vehicle but the police abstract showed the owner thereof to be Samuel Ndirangu the 2nd defendant. She then instructed her advocates who notified the insurance Company and the defendants before instituting this suit. She produced those demand notices as exhibits 8a, 8b and 8c. The plaintiff also produced a receipt for shs 1,125 court fees for grant from Naivasha Court in succession cause No. 92/11 dated 18th April 2011 as exhibit 9. She stated that the deceased used to pay their house rent, feed them and pay fees for their son who was now in class one. That he was then aged 2 years. She prayed for compensation for his loss plus costs of the suit.

In cross examination, by Mr Nyaburi advocate for the 1st defendant, PW1 responded that it was the police abstract which gave particulars of the accident motor vehicle and its ownership by Samuel Ndirangu and driver as Godfrey Gateri Ngure.

PW1 also stated that her deceased husband used to earn ksh 14,997.47 and used to pay their house rent of shs 5000/-, gave her 3000/- for shopping and kshs 4000/- for subsistence use. She stated that he had a house in Ruiru. She maintained that the deceased was involved in an accident on 17th March 2011 and died on 23rd March 2011 and that before his death she was not working but was now a casual labourer.

In cross examination by Mr Macharia advocate for the 2nd defendant, PW1stated that the deceased used to give her extra money, shs 4000/- which she used to pay fees and make uniform for her son. She stated that she had no receipt for rent albeit she lived in Magumo in a rental house which is in Kanangop far from home. She stated that their son was 2 years at the time of his father's demise and was attending school albeit she had no documents to prove the fact of schooling.

PW1 also stated that the deceased's earnings used to be deducted and maintained that at the time of accident, he was a lawful passenger on duty. She stated that she did not sue his employer because it was not the owner of the accident motor vehicle, according to the police abstract and that she learnt that he was with a Mr Maina in the accident motor vehicle. She also stated that she did not know whether the deceased's employer had hired the accident motor vehicle for use and or whether he was an illegal passenger in the accident motor vehicle.

In re-examination by Mr Masese, the plaintiff (PW1) stated that the copy of records showed Telkom (K) Ltd was the owner of the accident motor vehicle but according to police abstract records, the 2nd defendant was its owner. She stated that a Mr Maina used to work with her husband at Brookside and that she had sued both the legal and beneficial owner of the accident motor vehicle. She maintained that her husband was a responsible spouse. The plaintiff also called PW2 NO. 37912 PC Boaz Cheriwa who testified and produced a police inquiry file for the material accident. He stated that according to the police records the owner of the motor vehicle KXL 621 Isuzu Canter was Samuel Ndirangu while the driver at the material time was Godfrey Ngure Gateri who had a driving licence. The witness stated that he did not investigate the accident. It was investigated by PC Moffat who had since been transferred to another station.

PW2 further testified that according to the police report and records, the driver lost control of the motor vehicle, hit an electric post and it turned and faced Ruiru direction. The passenger in the motor vehicle was Lucas Mugo who was injured. He was rushed to Kiambu District Hospital and later transferred to Aga Khan University Hospital but died after some days. PW2 testified that the investigating officer

recommended that there was no sufficient evidence to charge the driver with a traffic offence so the file was forwarded to the State Counsel for directions and the State Counsel directed that the driver be charged with causing death by dangerous driving and the driver was arraigned before Githunguri Court, was tried, convicted and fined kshs 15,000/- in default to serve 6 months jail term.

PW2 testified that the deceased was reportedly an employee of Brookside Company and had gone to collect milk from Githunguri as shown by the employer's letter dated 20th March 2015. He produced police abstract and duplicate police file as exhibits 10 and 11 respectively. He admitted being paid witness expenses of kshs 10,000/- for that day.

In cross examination by Mr Nyaburi advocate, PW2 stated that the record showed the owner of the motor vehicle was the 2nd defendant and that ordinarily, the driver is the one who furnishes the name of the owner.

In cross examination by Mr Macharia advocate for 2nd and 3rd defendants PW2 stated that from the evidence in the police file, the driver of the motor vehicle stated that the vehicle hit a pot hole and lost control and hit an electric pole. Further, that the directive to charge the driver of the accident motor vehicle came from the State Counsel who stated that charges must be preferred because death had occurred. The witness further stated that the driver pleaded guilty to the charge and that in his 28 years service as a police officer he had not come across drivers who would plead guilty out of ignorance, rather than go through a full trial. He also stated that the State Counsel did not give reasons why he thought Moffat was wrong.

In re- examination by Mr Masese, PW2 stated that according to the file, three other people plus the driver recorded statements and he did not know whether the investigating officer carried out further investigations and that the particulars of ownership of the motor vehicle must have been given by the driver and were therefore correct.

At the close of the plaintiff's case, the 1st defendant did not call any witness to testify neither did the 2nd and 3rd defendants. All the parties agreed to have the1st defendants witness statements filed adopted as evidence in chief and its documents as filed produced by consent.

The defence closed their cases and parties filed written submissions to guide the court determine the issues of liability and quantum.

The plaintiff filed a list of 8 issues for determination dated 19th April 2012. These are:

1. Did the accident occur?
2. Was the deceased a lawful passenger in motor vehicle KXL 621.
3. Did the deceased die as a result of the subject accident?
4. Had the deceased any beneficiary at the time of the accident.
5. Did the deceased die immediately after the accident, if not, when
6. Was the deceased liable for the accident?
7. Had the deceased's estate suffered any loss and damage?
8. Are the defendants jointly and severally liable for the accident herein?

The defendants did not file any list of issues for determination. In their submissions, the plaintiffs' counsels narrowed the issues to only 2, liability and quantum.

On liability, the plaintiffs submitted that they had proved their case against the defendants jointly and severally on a balance of probabilities and urged the court to find in their favour.

First was the question of ownership of the deceased motor vehicle KXL 621 which they submitted was owned by the 1st defendant by registration and by the 2nd defendant beneficially owing to the sale by the 1st defendant to the 2nd defendant albeit no transfer had been effected. In their new, failure to

transfer motor vehicle to the 2nd defendant within 7 days from date of sale made the 1st defendant a proper party to the suit as the legal owner thereof.

On whether the 3rd defendant was liable for the accident in negligence it was submitted that the 3rd defendant's conviction for the offence of causing death by dangerous driving was sufficient proof of his negligence. Further that the driver was under a common law duty and obligation to exercise a high degree of care towards other road users and passenger and that had he exercised such care and caution, the accident would have been avoided.

It was also submitted that the defendants failure to testify to challenge the plaintiffs' evidence left the plaintiffs' evidence unchallenged and the court must accept it as the gospel truth. It was further submitted that there were no surrounding circumstances leading to the accident to show that the deceased who was a passenger contributed to the accident's occurrence as alleged in the defence. The plaintiffs urged the court to find the 1st and 2nd defendants vicariously liable for the negligence of their agent, servant/driver at 100 % for the accident.

On quantum, the plaintiffs submitted that their claim was based on the Law Reform Act and Fatal Accident Act. Under the Law Reform Act, it was submitted that the plaintiffs had letters of administration *ad litem* hence they had legal capacity to sue on behalf of the deceased's estate. Further, that the plaintiff was the widow who survived the deceased and they had one male issue who depended on him. That the deceased was aged 26 years hence she was entitled to:

i. Under pain and suffering, kshs 200,000/- as the deceased died 5 days after the accident hence he must have suffered great pain before succumbing to the fatal injuries.
ii. Loss of expectation of life the plaintiff prayed for kshs 250,000/-.
iii. Loss of dependency: The plaintiff sought ksh 3,870,080 using a multiplier of 34 years. He was 26 years earning kshs 14,228.25 and using the dependency ratio of 2/3.

The plaintiffs also prayed for special damages **"as pleaded and proved."**

They relied on the case of Maurice **Oduour Ogeda v John Juma Abungu & Another HCC 375/99 Kisumu.**

The 1st defendant filed its submissions on 10th June 2015. It was contended that:

The 1st defendant was not vicariously liable for the accident involving motor vehicle KXL 621 and resultant loss. On this issue, the 1st defendant maintained that under Section 8 of the Traffic Act, registration of motor vehicle is only prima facie evidence of ownership thereof and not conclusive evidence of ownership. It was contended that the evidence tendered by PW1 and PW2 was clear that the beneficial owner of the accident motor vehicle was the 2nd defendant who had bought it from the 1st defendant at an auction on 19th May 2004 hence ownership had passed to him and it was therefore immaterial that the transfer thereof had not been effected. They relied on the case of **Lukungu v Lubia** Uganda Supreme Court case No**. 4/2001 LLR No. 162(SCU)** where it was held in part:

> ***"……in order for the appellant to fix liability on the respondent for the negligence of Kawuma it was necessary to show that the driver was using the vehicle at the owner's request, either express or implied or on his instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner".***

It was contended that neither was the 1st defendant the beneficial owner of the accident motor vehicle nor was the vehicle in its custody nor possession at the material time of accident.

Further, that the police abstract showed the 2nd defendant as the owner of the accident motor vehicle and the 3rd defendant as its driver hence the 3rd defendant was not an agent or employee of the 1st

defendant. The 1st defendant also relied on **Securicor Kenya Ltd v Kyumba Holdings Ltd (2005) e KLR** in which the Court of Appeal considered similar circumstances as the ones in this case and held that the doctrine of vicarious liability could not apply in such situation-citing with approval **Launchbury & others vs Morgans & Others**. It was therefore submitted that the plaintiffs' suit against the 1st defendant should be dismissed with costs.

On what appropriate reliefs the court should grant:Under the Law Reform Act, it was submitted by the 1st defendant that kshs 30,000/- was sufficient damages for pain and suffering relying on **Loice Wangui Macharia v Hussein Dalacha & Another Nakuru HCC 382/2001 (2007) e KLR.** Under loss of expectation of life, the first defendant proposed shs 70,000/- relying on **Kisii HCCA 113/2012 Makano Makonye Monyancha v Hellen Nyangena(2014) and Lucy Wambui Kihoro v Elizabeth Njeu Obuong (2015) e KLR .**

Under fatal Accidents Act the 1st defendant proposed a multiplier of 20 years, a dependency ratio of ½ and earnings of shs 7,000/- per month all totaling 840,000 relying on the cases of **Lucy Wambui Kiroro v Elizabeth Njeu Obuong (supra) ; Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 Others (2006) e KLR ; and Joseph Wachira Maina & Another v Mohamed Hassan (2006) e KLR.**

In total, the 1st defendant proposed a sum of kshs 970,000/- but nonetheless sought dismissal of the suit against it on the ground that liability had not been established against it.

The 2nd and 3rd defendants filed their written submissions dated 20th June 2015 on 25th June 2015. It was submitted on their behalf that the plaintiffs had not proved liability against the 2nd and 3rd defendants. Further, that the investigation file showed the cause of accident was a pot hole on the road and that there was no eye witness who saw how the vehicle was being driven prior to the accident occurring and that no evidence was led to prove why the driver of the accident motor vehicle was charged 5 months after the accident was reported.

Further, it was submitted that the court is left guessing what caused the accident and mere charging of the driver thereof with a traffic offence was not proof enough that he was wholly to blame for the accident. They relied **on Halsbury's Laws of England 9 Edition at page 620**. Further, that the deceased could have been negligent for failure to belt up and that was the reason he did not survive while the driver survived. The 2nd and 3rd defendants also submitted that no evidence was led to prove ownership of the accident motor vehicle and that PW1 was not sure who its drivers was. On quantum, the 2nd and 3rd defendants proposed kshs 100,000/- for pain and suffering, replying on **Alice Mboga vs Samuel Mbuti Njoroge HCC 351/99 Nakuru** and **Nancy Wanyonyi Maina vs Stephen Ndungu & Another HCC 487/99.** They proposed shs 75,000/- for loss of expectation of life and on loss of dependency, it was proposed that the court adopts multiplier of 12 years, dependency ratio of ½ and 14,228 earnings = 1,024,416 all totaling 1,199,416.

I have carefully considered the plaintiffs' claim, the pleadings, oral testimonies in court, documents produced in support and the defences as filed, defence witness statements as adopted in evidence and bundle of documents produced by consent of the parties' advocates and their respective rival written submissions as filed and exchanged.

In my view, the following are the main issues for determination, with several ancillary questions that will be considered therein.

1. Who was the owner of the accident motor vehicle KXL 621 at the material time of the accident.
2. Whether the 3rd defendant was the driver of the accident motor vehicle.
3. Who is liable for the accident.
4. What damages would be payable in the circumstances and how much.
5. What orders should the court make.
6. Who should bear the costs

On the first issue of who was the owner of the accident motor vehicle, the plaintiff testified and produced a copy of records from the Registrar of motor vehicles showing that Telkom Kenya Ltd the 1st defendant herein was the registered owner of motor vehicle registration KXL 621. The plaintiff also called PW2 a police officer from Githunguri police station who testified and produced police abstract and the duplicate police file for the material accident. The above documents and records show that the owner of the accident motor vehicle was Samuel Ndirangu who was also the insured of the accident motor vehicle KXL 621 with Kenindia Assurance Company Limited under Policy No. P/112/081/0880/2004/930/07 from 30th July 2010 to 29th July 2011. The police records also showed that the driver of the accident motor vehicle was Godfrey Gakuru Gateri and a copy of his valid driving licence No. 0885837 is filed in the police records. The said police file also show that on 22nd March 2011 the said Godfrey Gakuru Gateri was served with notice of intended prosecution pursuant to Section 46 of the Traffic Act for allegedly driving motor vehicle KXL 621 dangerously. The police file also reveals that the accident was self involved and the said driver Mr Godfrey Gakure recorded his statement to the effect that he was at the material time of the accident driving motor vehicle KXL 621 Isuzu canter belonging to Samuel Ndirangu, which motor vehicle does the work of carrying goods and that on the material day of accident he was driving the said vehicle along Ruiru –Githunguri road going to Githunguri to collect milk accompanied by David Kiarie and Lucas Mugo, his co-workers at 5.00am when he was involved in the material accident which occurred as a result of him swerving to avoid a head on collision with an oncoming vehicle which had full lights, in the middle of the road, as a result of which he hit an electric post and it fell on the driver's side. David Kiarie Ngeche a passenger in the fateful accident motor vehicle also recorded his statement with the police confirming what the driver stated. He stated that he was asleep when the accident occurred and was only awakened by a loud bang. He stated that the deceased was his co-worker at Brookside Dairies Ltd and they were on duty collecting milk from famers and collection centers for onward transportation to the factory.

The police file also show that the initial report of the accident was made at 7.10 am on 17th March 2011 to Githunguri police station by Godfrey Gakuru Gateri the driver of the accident motor vehicle who stated that he was with his passenger loader L M the deceased herein who sustained fracture of left leg and taken to Kiambu District Hospital where he was admitted.

The above evidence clearly answers the following issues in the affirmative:

1. That the driver of the accident motor vehicle KXL 621 was Godfrey Gakuru Gateri, the third defendant herein.
2. That the deceased was a lawful passenger in the accident motor vehicle as he was lawfully on duty employed by Brookside Dairies Ltd and was at the material time in the course of his duties going to collect milk from the field for and loading it for delivery to his employer.
3. That the accident motor vehicle was registered in the name of the 1st defendant Telkom Kenya Ltd
4. That the 2nd defendant was the beneficial owner of the accident motor vehicle at the material time odf accident.

The deceased's employment with Brookside Dairies Ltd was also confirmed by exhibit 2(a) a letter to NSSF by the company indicating that he was their employee until his demise on 21st March 2011 urging them to pay the funeral grant to his beneficiary. Exhibit 2 (b) the deceased's pay slip for March 2011 too confirmed his employment with Brookside Dairies Ltd. The third defendant driver also confirmed in his statements to police that the vehicle was being used to collect milk for Brook side Dairies and that the deceased was his co-employee.

On ownership of the accident motor vehicle, the analysis of evidence reveals that the 2nd defendant was the insured of the accident motor vehicle and that he was the 3rd defendant's employer. The 1st defendant's bundle of documents dated 1st February 2013 filed on 15th February 2013 and produced in evidence by consent of all the parties advocates on record show that the accident motor vehicle KXL 621 was sold by the Dikemwa enterprises Ltd at a public auction to the 2nd defendant, on behalf of the

1st defendant Telkom (K) Ltd.

The question therefore that arises is who was the actual owner of the accident motor vehicle and whose agent was the 3rd defendant in view of the two positions- 1st defendant being registered owner whereas the 2nd defendant being the beneficial owner thereof. This court finds that albeit the search certificate/copy of records produced by the plaintiff showed that the 1st defendant Telkom Kenya Ltd was the registered owner of the accident motor vehicle at the material time, it is clear from the evidence gathered by the police investigating the accident, and the driver's own statement and the vehicle's insurance policy cover with Kenninduia Assurance Co. Ltd, that the owner thereof was the 2nd defendant who was the beneficial owner as the vehicle was then being used for his benefit not the 1st defendant's benefit. The latter had sold the accident motor vehicle and its possession and use thereof passed to the 2nd defendant. Section 8 of the Traffic Act Cap 403 of the Laws of Kenya provides that:

> **" the person in whose name a vehicle is registered shall, <u>unless the contrary is proved,</u> be deemed to be the owner of the vehicle."**

In this case, prima facie, the 1st defendant was the registered owner of the accident motor vehicle. Nonetheless, the contrary was proved, that the said vehicle had at the material time of the accident been sold and possession and use delivered to the 2nd defendant.

In **Nancy Ayemba Ngana v Abdi Ali HCCA 107/2008(2010) e KLR** 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 cognizant of the fact that a different person, or different other persons, may be the defacto owners of the motor vehicle, and so the Act had an opening for any evidence in proof of such differing ownership to be given.***
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> ***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.***
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> ***Indeed, the evidence adduced in the form of a police abstract showed on a balance of probabilities, that the 1st defendant was one of the owners of the matatu in question..***

The Court of Appeal, very recently in the case of **Joel Mugo Apila v East African Sea Food Limited, CA 309/2010 (2013) e KLR** also observed that :

> " ***In any case in our view, an exhibit in 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 a 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."

The same Court of Appeal in the case of **Securicor Kenya Ltd v Kyumba Holdings Ltd** (supra) stated earlier that :

> ***" We think that the appellant, had by the evidence it led, proved on a balance of probabilities 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 on Osapil v Kaddy (2000) 1 EALA 187 in which it was held by the Court of Appeal of Uganda 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 was registered was presumed to be owner thereof unless proved otherwise."***

Applying the principles set out in the above decisions to the present case, the plaintiff's testimony and the 1st defendant's documents produced in court without any objection showed that the 1st defendant was the registered owner of M/v KXL 621 as shown by copy of records. Nonetheless, there was evidence in the police records which included the driver-3rd defendant's own statement and 1st defendant's documents showing that the accident motor vehicle was sold to the 2nd defendant by the 1st defendant at a public auction conducted by Dikemwa Enterprises Ltd on 19th March 2004 being Item No. 141 on the list of motor vehicles auctioned. The 2nd defendant was also proved to be the one who was beneficially entitled to the proceeds of the business of carrying goods, for which, his driver, the 3rd defendant did on his behalf for hire and the motor vehicle was also insured in the 2nd defendant's name by Kenindia Insurance Company Limited. The accident undeniably happened on 17th March 2011 seven years after the 1st defendant parted with possession of the motor vehicle by way of sale to the 2nd defendant , albeit its log book had not been changed to reflect the new owner. It cannot, therefore be true as contended by the 2nd defendant in his submissions that he was not the owner of the accident motor vehicle. The uncontroverted evidence overwhelmingly and on a balance of probabilities showed that the 2nd defendant was the beneficial owner of the accident motor vehicle at the material time of the accident on 17th March 2011, and not the 1st defendant, Telkom Kenya Limited. If that were not the case, why did the 2nd defendant insure the subject motor vehicle?

On the question of vicarious liability, in **Morgan V Lauchbuy (supra**) the court held:

> ***" 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 the 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 on its instructions and was doing so in the performance of the task or duty thereby delegated to him by the owner".***

From the police investigation file produced by PW2, the relationship between the 2nd and 3rd defendant fitted the description provided for in the above case of **Morgan V Lauchbuy.** The 3rd defendant's own statement of D-4 made to the police and contained in the police file produced herein states how the accident occurred while he was in lawful employment of the 2nd defendant and in the cause of his duties, working for the benefit of the 2nd defendant. His driving licence is photocopied and also filed together with his statements.

The above evidence clearly show that there was a master/servant relationship between the 2nd and 3rd defendants and the 3rd defendant was in the couse of his employment when the material accident occurred. It therefore follows that the acts or omissions of negligence of the 3rd defendant makes the 2nd defendant vicariously liable. I am also fortified on this point by the decision of the Court of Appeal in the cases of **Pritoo v West Nile District Administration (1968) EA 428 at page 435 paragraph E-F and Karisa V. Solanki (1969) EA 318 page 322 paragraph 9 G** that:

> ***" 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 TLR 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 lend 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."***

Another decision setting out parameters for vicarious liability is **Tabitha Nduhi Kinyua V Francis Mutua Mburi & Another CA 186 of 2009 (2014) e KLR** where 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 employer was acting within the course and scope of employment at the time the delict was committed. Tthe test for establishing whether an employer is vicariously liable for his/her servant's negligence was set out in this court's decision on Joseph Cosmas Khayigila V Gigi & Company Ltd & another - CA 119/86 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 the performance of the task of duty thereby delegated to him by the owner."***

Therefore, there being no relationship of master and servant or between the 3rd defendant and the 1st defendant and the fact that the motor vehicle did not belong to or was being used on the instructions or for the benefit of the 1st defendant, I find that the 1st defendant is not vicariously liable for the acts of the 3rd defendant regarding the material accident.

On the issue of who was to blame for the accident, the plaintiff clearly, was not at the scene of the accident and therefore was not expected to testify as to the occurrence of the accident. She however called PW2 a police officer who produced a police file which contained investigations report into the occurrence of the accident. The said filed revealed that the driver of the accident motor vehicle-the 3rd defendant Godfrey Gateri Ngure was charged in court, convicted and fined kshs 15,000/- in default to serve 6 months imprisonment for the offence of causing death by dangerous driving before a Githunguri court. The 1st and 2nd defendants denied liability and in their joint defence blamed the deceased for failing to belt up; being an unauthorized passenger; being negligent; exposing himself to a risk of danger which he knew or ought to have known; and riding as a passenger without due care.

However, the defendants did not offer any evidence to show how negligent the deceased was and therefore how he contributed to the accident's occurrence. In their submissions, the 2nd and 3rd defendants alleged that the accident was solely caused by a pot holed road.

Indeed the law is clear that he who alleges must prove hence it was incumbent upon the plaintiff to prove negligence or negligent acts on the part of the driver of the accident motor vehicle .

The 3rd defendant's statement with the police did not blame the deceased for the accident or at all. He attributed the accident to the fact that the swerved to avoid a head on collusion with an oncoming motor vehicle which had full lights on and in the middle of the road. As a result, he hit an electric pole and the vehicle fell on his left side of the road. David Kiarie Ngeche who was the deceased's co-worker and fellow passenger who sat between the driver and the deceased stated to the police that he was asleep at the time of accident and that only awoke following a **loud** bang only to find himself trapped in a motor vehicle which had an accident. He could not tell the speed at which the motor

vehicle was being driven so he could not have assisted any party to this case on the issue of liability. The 3rd defendant driver of the fatal accident stated that he was driving at 20 kilometer per hour and when he saw the oncoming vehicle in the middle of the road, he swerved, hitting the pot hole and the vehicle fell. The impact was at the deceased Lucas Mugo's side. He also stated in his statement dated 19th March 2011 to the police that he lost control of the vehicle after being blind folded by full lights from the opposite direction.

The police investigated the accident and drew sketch plan on 17th March 2011. The sketch plan shows that the road was 10.7 meters wide, and that there were pot holes on the left side of the road facing Githunguri. Further, they found that the accident motor vehicle hit an electric pole which was 4 meters from the edge of the road facing Githunguri and landed there. The investigating officer CPL Richard Eupa recorded his statement on 24th March 2011 after inquiring from the 3rd defendant driver and found that there was no evidence sufficient enough to support a charge and recommended that the file be disposed of by way of an inquest and sought advice from the Principal State Counsel Nyeri vide letter of 15th June 2011. Nonetheless, the Provincial CID officer in forwarding the police file to the State Counsel recommended to the Principal State Counsel that the 3rd defendant be charged for causing death by dangerous driving even after DCIO Kiambu agreed with the investigating officer's recommendation that there was no sufficient evidence to support a charge. The state counsel vide letter dated 22nd June 2011 agreed with PCIO's recommendations that the 3rd defendant be charged with causing death by dangerous driving, which directive was acted upon culminating in the conviction of the 3rd defendant by a court of competent jurisdiction. The 2nd and 3rd defendants contend that the belated charges against the 3rd defendant were an afterthought and that there was no evidence to warrant that charge.

On the submission that there was no evidence to warrant the 3rd defendant being charged with the offence of causing death by dangerous driving, Section 47 A of the Evidence Act enacts that:

> ***" A final judgment of a competent court in any criminal proceedings which declares any person guilty of a criminal offence shall after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest shall be taken as conclusive evidence that the person so convicted was guilty of that offence s charged."***

It is not disputed that the 3rd defendant was convicted on his own plea of guilty of the offence of causing death by dangerous driving. The question is whether that conviction is conclusive evidence that he was to blame for the accident, particularly where no evidence was tendered by him to the contrary.

The issue of whether or not the convict was guilty of the offence cannot be subject of a subsequent inquiry. However, it does not necessarily mean that the convict is 100% liable in negligence. As shown by the correspondence between the investigating officers and the State Counsel, the decision to charge one for an offence is usually in the discretion of the police and the prosecution and the mere fact that one is charged with a criminal offence and convicted does not necessarily mean that the person cannot plead contribution - See **Robinson v Oluoch (1971) EA 376.**

in **Francis Mwangi vs Omar Al-kurby CA 87/1992**, the Court of Appeal was clear that a conviction is conclusive evidence of negligence but does not rule out the element of contributory negligence. In this case, albeit the defendants pleaded contributory negligence, no evidence was led to prove contributory negligence. Consequently, the conviction of the 3rd defendant driver became conclusive evidence of negligence.

Furthermore, the defendants never pleaded in this case that the accident was inevitable or caused by an act of God. Secondly, the standard of proof in criminal (traffic) cases is higher than that required in civil cases. Third, is that there is no evidence that the 3rd defendant was in any way under duress or

compulsion to plead guilty to the serious charges of causing death by dangerous driving. Fourth is that accident do not just happen. There must be a cause. In this case, the available police records show that the accident occurred at or about 2.00am. The 3rd defendant's statement under inquiry was that he drove at 20 kilometers per hour and that he lost control of the motor vehicle after hitting a pot hole on swerving to avoid a head on collision with an oncoming motor vehicle which blinded him with full lights on.

Even assuming that, as submitted by the 2nd and 3rd defendants, the accident was caused by the pot hole, if the driver was driving with due care and attention, he would have avoided hitting a pot hole or upon hitting the pot hole, the motor vehicle would not have lost control. Every driver on a public road owes the road users a duty of care to ensure he does not expose any such user, whether passenger, pedestrian or other motorists, to any danger. In **HCC 22/2009- Robert Gitau Kanyiri vs Charles Kahiga & 2 Others**, where the driver's defence was that he hit a pot hole, swerved to the right and the accident happened because of numerous pot holes which he was avoiding to hit and hitting others. The court found the driver negligent and observed:

> ***"……noting the conditions of the road and bearing in mind the presence of other road users, it was negligent of the 1st defendant to swerve to the right in order to avoid pot holes when the oncoming vehicle was close."***

In the instant case, I find that from the accident sketch plan, the pot holes were on the road extending to the left side and a driver driving on the said road did not have to swerve to the left to avoid them. To avoid those pot holes, one needed to swerve to the right. The motor vehicle landed on the left side of the road after hitting an electric post. It is for that reason that I find the 3rd defendant's report at 7.10 am vide OB No.2/17/3/2011 of self involved serious traffic accident that:

> ***" he was driving motor vehicle registration No. KXL 621 Isuzu Canter, along Githunguri Ruiru Road and on reaching Miguta area, he lost control of the vehicle and veered off the road to the left side, where he hit an electric post. The vehicle overturned and landed on the right side, its front part was extensively damaged, while its loader Lucas Mugo who was on board sustained a fracture on the leg. He was rushed to Kiambu District Hospital for treatment and Motor vehicle towered to Githunguri Police station to await inspection"*** accurate.

The above was an initial report made by the 3rd defendant to the police station. Later on 19th March 2011 at 2.30 p.m. the same driver 3rd defendant recorded his own statement as D-4 to the effect that a vehicle which was coming from the opposite direction flashed its full lights thereby blind folding him completely. He therefore lost control of his vehicle and hit an electric pole on the rear side.

The 3rd defendant never mentioned that the accident was caused by pot holes. The inference that this court draws from all the three versions of how the accident occurred, all given by the 3rd defendant to the police is that whereas 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, nonetheless, if in the course of trial there is proved a set of facts which raise 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. See **Nandwa V Kenya Kazi Ltd (1988) KLR 468.**

In my view, therefore, the plaintiff through the doctrine of Res Ipsa Loquitur has proved that the material accident occurred in circumstances in which it should not have occurred thereby discharging in the absence of any other explanation by the defendant, the original burden of showing negligence on the part of the 3rd defendant driver who caused the accident, and leading this court to infer that the only reason for the accident must therefore be the negligence of the part of the 3rd defendant driver.

The plaintiff relied on the doctrine of *res ipsa loguitur* (the thing speaks for itself, which doctrine

provides that in some circumstances, the mere fact of an accident's occurrence raises an inference of negligence so as to establish a prima facie case. In **Blacks Law Dictionary 8th Edition at page 1336,** it states:

> ***" The phrase 'res ipsa loguitur' 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 a defendant to meet with an explanation. It is merely a short way of saying that the circumstances attendant on the accident are of such a nature as to justify a jury or court in light of common sense and experience, inferring that the accident was probably the result of the defendant's negligence, in the absence of an explanation or other evidence which the jury or court believes."***

On the other hand, negligence is the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation, and includes any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except conduct that is intentionally, or want only disregardful of others' rights. The term denotes culpable carelessness.

In the view of this court, it does not take the science of relativity to observe that if one is driving at a speed of 20 kilometers per hour and suddenly comes across a pot hole, whose depth is not even indicated, the likely chances of a motor vehicle loosing control and rolling over are almost nil. Further, it is the view of this court that only high speed would cause a vehicle that hits a pot hole to loose control especially if the driver was not anticipating such a hole on the road. He will be taken by surprise and therefore the chances of loosing control and rolling off are very real and high.

That is what most probably happened in this case and is clearly implied in the doctrine of *Res Ipsa Loguitur* and indeed by the defendant's statement to the police and the results of investigations into the accident. That being the case, the 3rd defendant together with his principal, the 2nd defendant cannot, by any stretch of imagination contend in their defence and submissions filed that the accident did not occur, or that the deceased was to blame for the accident, or that negligence was not proved. The evidence of PW2 was clear that from the police inquiry file, an accident occurred. In addition, the doctrine of *res ipsa loquitur* raises a prima facie case, which the 2nd and 3rd defendants did not rebut that the accident occurred because of the reckless speed whether or not the driver knew the condition of the road at that time of the night.

In **Embu Public Road Services Ltd vs Riimi(1968) EA 22** the Court of Appeal stated that:

> ***"where the circumstances of the accident give rise to the inference of negligence then the defendants, in order to escape liability, has to show that there was a probable cause of the accident which does not connote negligence or that the explanation for accident was consistent only with an absence of negligence."***

In this case albeit the 3rd defendant driver of the accident motor vehicle chose not to testify on the occurrence of the accident, there is every indication in the police investigations file and especially the sketch plan that the driver was in high speed when he hit a pot hole and lost control thereby loosing control of the motor vehicle and hitting an electric post and hence the fatal impact.

No evidence was led to prove that the deceased, in any way or manner, contributed to the accident, for which the driver thereof voluntarily pleaded guilty to charges of causing death by dangerous driving and was convicted and fined by a Githunguri court.

In my view, it matters not that the driver was charged with a traffic offence 5 months after its occurrence. The incident and its cause had to be investigated by traffic police and appropriate advise or directions sought from the relevant authorities, and at senior levels including the prosecution department. When the authority/directive to charge the driver was received, the police acted as appropriate and they obtained a conviction.

In view of that, the plaintiff in this civil case whose duty is to prove her case on a balance of probabilities and not on a beyond reasonable doubt, in my view, proved on a balance of probabilities that under the circumstances, the 3rd defendant driver of the accident motor vehicle was to blame for the accident wherein the deceased sustained fatal injuries. I therefore find that the 3rd defendant was to blame for the material accident and hold him liable at 100%. I also find that there was sufficient evidence to prove that the 3rd defendant was at the material time of the accident an employee, servant or agent of the 2nd defendant and in the course of his employment with the 2nd defendant. He drove the accident motor vehicle for the benefit of the 2nd defendant. Consequently, the 2nd defendant is vicariously liable for the negligent acts of the 3rd defendant and I hold them jointly and severally liable at 100%.

On what quantum of damages are payable to the plaintiffs, the 1st plaintiff produced a death certificate to show that the deceased died on 21st March 2011 at Aga Khan University Hospital, Nairobi. He was aged 26 years . The post mortem form contained in the police file too confirm his date of death as 21st March 2011 at 10.00 am due to cardio respiratory failure due to pulmonary oedema due to motor vehicle accident. His occupation is recorded as Animal Health Technician. Both plaintiffs herein Juster Kanini Manene and Peter Njau Merita obtained a grant of letters of administration intestate from Naivasha Chief Magistrate's Court vide Succession cause No. 9 of 2012 on 30th March 2012 after obtaining a limited grant ad litem from Nakuru HC Probate and Administration Cause No. 89/2011 on 16th June 2011 for purposes of filing suit herein on 29th September 2011.

There is also proof that the deceased was survived by the 2nd plaintiff, his widow, as confirmed by the Assistant Chief Bamboo Sub Location letter of 30th march 2011. The plaintiff has one male issue, Maxwell Merita Mugo aged 2 years at the time of the deceased's demise. A birth certificate No. 717560 was produced showing that the deceased was his father and the 1st plaintiff his mother. He was born on 13th January 2009 according to the birth certificate issued on 17th may 2012. The plaintiff also produced child immunization card for the minor confirming his date of birth at Kijabe Hospital. the 1st plaintiff Peter Njau Merita is pleaded as brother to the deceased. There is no reason why a brother of the deceased was enjoined to these proceedings. He was not named as a dependant. This court does not find him a necessary party in as much as he may be a co-administrator of the deceased's estate particularly where it is not disputed that the 2nd defendant is a widow of the deceased. There was no evidence led to show that he was the deceased's dependant whether directly or indirectly. Neither did he testify to establish his level of dependency on the deceased. Nonetheless, under the;law of succession Act, as the estate of the deceased involves a minor, it would be necessary to have a second administrator of the estate of purposes of protecting the interests of the minor.

The suit was brought under the Fatal Accidents Act (cap 32) and the Law Reform Act (Cap 26). It was brought on behalf of the dependants of the deceased under the Fatal Accidents Act and on behalf of the estate of the deceased under the Law Reform Act.

In the plaint, the dependants are clearly listed as:

1. J K M-widow 26 years.
2. M M M – son 2 years

The deceased was earning a salary of 14,997.47 according to the pay slip for March 2011 produced as exhibit 2(b).

For loss of dependency, the plaintiff submitted that the court should use the multiplier of 34 years and a dependency ratio of 2/3 all totaling 3,870,080 and cited several authorities which are considered.

On pain and suffering and loss of expectation of life, the plaintiff proposed 200,000 and 250,000 respectively.

The defendant proposed damages as follows :under loss of dependency a multiplier of 20 years and a dependency ration of ½ at the income rate 7,000/- of kshs 840,000 after deducting the deceased's living expenses as set out in the case of **Lucy Wambui Kihoro V Elizabeth Njeri Obuong (2015) e KLR.** They also relied on **Mary Kerubo Mabuka v Newton Mucheke Mburu & 3 others (2006) e KLR and Joseph Wachira Maina & Another v Mohamed Hasan Nakuru HCCA 43/2003.**

Under the Law Reform Act, the 1st defendant proposed kshs 30,000/- and 100,000/- for pain and suffering and loss of expectation of life respectively.

The 2nd and 3rd defendants jointly proposed kshs 100,000 for pain and suffering; kshs 75,000/- for loss of expectation of life under the Fatal Accidents Act and a multiplier of 12 years using a dependency ratio of ½ and earnings of kshs 14,228 thus kshs 1,199,416 for loss of dependency.

Having carefully considered the respective parties submissions on quantum and damages in line with the cited authorities, I make the following determination:-

That there is no doubt from the evidence adduced both oral and documentary that the deceased was involved in an accident on 17th March 2011 and died on 23rd March 2011 6 days later. In my view, the deceased must have endured a lot of pain before his death he sustained multiple fractures as per the post mortem report produced in evidence. Based on the authorities cited by the 2nd and 3rd defendants which I find relevant to this case , HCC 351/99 Nakuru **. Alice Mboga v Samuel Mbuti Njorogo and HCC 487/99- Nancy Wanyonyi Maina v Stephen Thungu & Another** I would award kshs 100,000/- compensation under th e head of pain and suffering. The decision of **Maurice Adiwour Ogada** relied on by the plaintiff did not state how long it took after the accident for the deceased to die. The court in that case simply stated that the deceased did not die instantly.

Under loss of expectation of life, I would award a conventional sum of kshs 100,000 based on the decision of **Makano Makonye Monyanche v Hellen Nyangena (2014) e KLR and Lucy Wambui Kohoro v Elizabeth Njeri Obuong (2015) e KLR.**

Under the Fatal Accidents Act, it is an undisputed fact that the deceased was 26 years old at the time of his demise. Counsel for the plaintiff urged the court to adopt a multiplier of 34 years whereas the 1st defendant urged 20 years and the 2nd and 3rd defendants proposed a multiplier of 12 years. There was no evidence that the deceased lived a sickly life. Nonetheless, it cannot be denied that in life there are preponderables and vissitudes that can shorten one's life, besides an accident.it is however, a matter of discretion for the court to make that decision.

I adopt the multiplier of 30 years. The deceased's pay slip for March 20011 showed that he earned a gross pay of 14,997.47 and a net pay of kshs 14,228.25. In determining the deceased's earnings, the Court of Appeal in **Peggy Frances Hayes & Others v Chunibhai J Patel and Another CA 173/1956** held:

> ***" The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased i.e his income less tax) and the proportion of his net income which he would have made available for his dependants."***

In **Constance Kanyorota Ngugi v Coast Bus Company Ltd & Another Nairobi HCC 3344/94** Mulwa J stated:

> ***" This income was based on the invoice he has compiled. He said this figure did not take into account the tax element. The figures given represented the gross income of the deceased per month. I note that it is difficult to get the correct figure of income from the records as they were and doing the best one can do, in the circumstances I would take the deceased's income to be kshs 20,000/- per month. The tax would be kshs 6,000/"***

From the above two decisions, courts have defined net income to mean gross income less tax element. In this case, the gross pay was kshs 14,997.47 and P.A.Y.E. was kshs 269.21. The rest of the deductions are NSSF and NHIF which are statutory deductions. Thus 14,997.47 less 269.21 leaving kshs 14,723.26 per month.

In this regard, the deceased's net income was kshs 14,728.26 per month.

Turning to the actual issue of dependency, the widow, PW1 testified that she wholly depended on the deceased and that he provided for her and her 2 year old son who was at the time of the hearing in class one. The deceased used to cater for all her needs including rent, shopping and subsistence. She was not working at the time of his death but she had since secured some casual job to fend for herself and her child albeit she did not indicate how much she earned from casual employment.

In **Boru v Ondu v (1988-1992) KAR 299** the court was asked to follow the pattern of court decisions showing that in claims for loss of dependency under the Fatal Accidents Act, the court had, as a rule, taken one third of the deceased's net income as his living expenses and two thirds of his net income as a dependency rule. The court rejected the rule and re-assessed that dependency is a question of fact. Hancox CJ stated in part at page 291:

> ***" The extent to which the family is being supported must depend on the circumstances of each case. To ascertain the judge will analyse the available evidence as to how much he spent on his wife and family. There can be no rule or principle of law in such a situation."***

Thus, to ascertain the reasonable multiplier in each case, the court would have to consider such relevant factors as the income of the deceased, the kind of work the deceased was doing, the prospects of promotion and his expectation of working life- See **Roger Dainty v Mwinyi Omar Hogi & Another (2004) e KLR (CA).**

In this case the deceased was employed on contract basis for 4 years, according to his pay slip P exhibit 2(b) which shows he was appointed on 16th April 2007 for 4 years. He had barely one month to complete his contractual period. There was no evidence that his contract would be automatically renewed or that he would be entitled to promotion or other higher earnings. This however does not mean that hecould not get employment elsewhere or his contract be extended for another term. Although he was an Animal Health Worker, he worked as a milk delivery clerk in the field. His academic and professional qualifications were not stated and or proved with documentary evidence.

In the **Roger Dainty v Mwinyi Omar Haji & Another (supra)** case, the court was referred to the case of **Musa Alulwa v The Attorney General & Another HCC 1597/2000** where a multiplier of 20 was applied to a 26 years old man. The Court of Appeal rejected submissions that courts have established as a matter of practice the appropriate multiplier to be applied to different age groups of victims of accidents and that what is a reasonable multiplier to be applied in our jurisdiction is a question of fact to be determined from the peculiar circumstance of each case, referring to **Boru V Ondu (supra).**

In this case, doing the best I can, I would award the plaintiff loss of dependency using a dependancy ratio of ½ worked out as follows:

14,728.26 x 30 x 12 x ½= 2,651,086.80

Pain and suffering shs 100,000.00

Loss of expectation of life shs 100,000.00

Loss of dependency shs 2,651,086.80

Total general damage = 2,851,086.80

Special damages proven ___500.00

TOTAL kshs 2,851,586.80____

Special damages as pleaded = shs 1,625. However, only shs 500/- fee for search certificate was proven and which I hereby award as above.

I also award costs of this suit and interest at court rates. Interest on general damages shall be from the date of this judgment until payment in full and on special damages from date of filing of this suit until payment in full.

I further order that before the award under loss of dependency is paid out, it must be apportioned between dependants and the minor's share invested until he attains age of 18 years or upon an order of this court on an appropriate application.

The plaintiff's claim against the 1st defendant is dismissed with costs.

Dated, signed and delivered in open court this 6th day of October 2015.

R.E. ABURILI

JUDGE

6/10/2015

Coram Aburili J

C.A. Henry

Mr Mutahi for 2nd and 3rd defendants ; holds brief for Mr Nyaberi for 1st defendant

No appearance for plaintiffs (dated given in court on 26th June 2015).

Court - Judgment read and pronounced in open court as scheduled.

R.E. ABURILI

JUDGE

6.10.2015

Mr Mutahi; We pray for 30 days stay of execution.

R.E. ABURILI

JUDGE

COURT- There shall be 30 days stay of execution of this judgment as prayed by the 2nd and 3rd defendant's counsel.

The judgment shall also be expeditiously typed and copies availed to parties upon payment of the requisite fees.

R.E. ABURILI

JUDGE

6/10/2015