Muthembwa & another (Suing as the personal representatives of the Estate of Patricia Mumbua Mutuku [Deceased) v Mutunga & another (Civil Case 396 of 2013) [2023] KEMC 112 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEMC 112 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE 396 OF 2013

CN ONDIEKI, PM

MARCH 30, 2023

BETWEEN

JONES MUTISYA MUTHEMBWA & FAITH WAKI JONES (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF PATRICIA MUMBUA MUTUKU [DECEASED) .... PLAINTIFF

AND

TITUS MUTUNGA .... 1ST DEFENDANT

ANTHONIO MUNYAO .... 2ND DEFENDANT

JUDGMENT

Part 1: Introduction

1. This matter has a tortured history. The suit was filed on 8th May 2013. The 1st Defendant entered appearance and filed a Statement of Defence but the 2nd Defendant failed. An interlocutory Judgment was thus entered against the 2nd Defendant on 6th August 2014. Hearing of the suit commenced on 27th July 2015 but on that day, the 1st Plaintiff was stood down on the motion of Counsel representing the Plaintiffs, seeking leave of the Court to file a Supplementary List of Documents. On 31st October 2016, hearing continued with the 1st Plaintiff being examined-in-chief and cross-examined and closing the day with the second Plaintiffs' witness. On 4th June 2018, the Defendants failed to attend a further hearing of the Plaintiffs' case without assigning a reason and the hearing thus proceeded ex parte in which the third Plaintiffs' witness (Police Constable Rachel Ochieng) testified and thereafter, the Plaintiffs' case was closed. On the even date, the Court deemed the 1st Defendant's case closed. However, this opened a new phase of delay. On 25th June 2018, the 1st Defendant filed an application seeking an order to set aside the ex parte proceedings and re-open the 1st Defendant's case for purposes of tendering evidence. On the date appointed for hearing of the application on 11th July 2018, again the 1st Defendant failed to

attend Court and the application was thus dismissed for want of prosecution and the Court proceeded to fix a Judgment date to be 6th September 2018. On 6th September 2018, Judgment was indeed delivered by my learned sister, Hon. I.M. Kahuya, SRM. On 5th October 2018, again, the 1st Defendant filed an application seeking to set aside the ex parte Judgment and the application was finally granted on 14th February 2019. The ex parte Judgment was thus set aside and the 1st Defendant was permitted to call the same PW3 to give evidence for the 1st Defendant. After extending the 1st Defendant several unsuccessful opportunities to secure the attendance of the said defence witness, the witness finally appeared on 8th December 2022 and testified for the 1st Defendant (as DW2).

2. An act of a person which is the immediate cause of harm to another, whether intentionally or not, not being a breach of duty arising from a contractual or personal relationship, and which is either contrary to law or an omission of a specific legal duty or violation of an absolute right, entitles the injured party to maintain a cause against the infringing party for damages.[1] Provided the claimant proves that as a result of the conduct of the Defendant, whether direct or indirect, the harm was the immediate cause of and that the claimant has suffered legal damage (presenting in multiple forms including pain, suffering, loss of amenities, disfigurement, severe emotional distress, loss of consortium, loss of income, loss of future earnings, loss of dependency et alia) and this is where rubber meets the road for claimants.

Part II: The Plaintiffs' Case

3. Vide a Plaint dated 7th May 2013 and filed on 8th May 2013, the Plaintiffs brought this action against the Defendants seeking Judgment for general damages under the *Fatal Accidents Act* and the *Law Reform Act* (for pain and suffering; for loss of dependency and loss of expectation of life); special damages in the sum of Kshs. 194,050; costs of this suit; and interest on the foregoing heads.

4. The Plaintiffs aver that they are personal representatives of the estate of Patricia Mumbua Mutuku (hereinafter "the deceased"). Whereas Jones Mutisya Muthembwa was the husband of the deceased, Faith Waki Jones was the daughter. The Plaintiffs aver that at all times material to this suit, the 1st Defendant was the beneficial owner of the motor vehicle registration number KAR **** and the 2nd Defendant the registered owner thereof. The Plaintiffs claim that on or about 28th January 2010, the Plaintiff was lawfully and carefully driving motor vehicle registration number KAJ **** with the deceased wife on board as a passenger along Nairobi – Mombasa Road when at Syokimau area, motor vehicle registration number KAR **** was driven so negligently that the driver thereof permitted it to collide with motor vehicle registration number KAJ **** thereby occasioning fatal injuries to Patricia Mumbua Mutuku. The Plaintiffs aver that they will rely on the doctrines of vicarious liability and res ipsa loquitur. As a result of the aforesaid accident, the Plaintiffs claim that the deceased who was 44 years old and working as a secretary, earning Kshs. 63,758 per month, left Jones Mutisya Muthembwa (husband); and Faith Waki Jones (daughter) as dependants. The Plaintiffs claim that they incurred the following special damages: (i) funeral expenses – Kshs. 178,350; (ii) obtaining letters of administration - Kshs. 15,000; (iii) police abstract – 200; and (iv) motor vehicle search – Kshs. 500, totalling to Kshs. 194,050. In a rejoinder to the Statement of Defence, the Plaintiffs have denied contributory negligence.

5. In the hearing of the Plaintiff's case, Jones Mutisya Muthembwa (PW1) adopted his witness statement dated 7th May 2011 and filed together with the Plaint, as his evidence-in-chief. The statement rehashes the contents of the Plaint. In addition, PW1 states that he was driving towards Nairobi and when he reached the Weigh Bridge in Syokimau area, he decided to use the feeder road on the left hand side since there was heavy traffic on the main highway. He states that the feeder road is meant for vehicles

[1] Sir Fredrick Pollock, *The Law of Torts: A treatise on Principles of Obligations Arising from Civil Wrongs in Common Law* (4th ed.) (1895), p. 20.

headed to Nairobi only and that there is another feeder road on the extreme right of the road which is meant for vehicles headed to the Mombasa general direction. He states that while driving on the said feeder road, the Defendants' said motor vehicle was being driven in the opposite direction (towards the Mombasa general direction) using the lawful lane is use by PW1's car. PW1 states that his car was hit on the right hand side where his wife was seated, as he was trying to avoid the collision. In support of this case, PW1 exhibited: (i) a Court Order dated 24th April 2013, which allowed the Plaintiffs to file this suit out of time as the Plaintiffs'' Exhibit 1; (ii) a grant of letters of administration intestate as the Plaintiffs' Exhibit 2; (iii) a copy of the Certificate of Death as the Plaintiffs' Exhibit 3; (iv) a police abstract was marked as PMFI 4; (v) a statutory notice cum demand notice as the Plaintiff's Exhibit 5; (vi) a copy of motor vehicle records as the Plaintiffs' Exhibit 6(a); (vii) a copy of the deceased's pay-slip as the Plaintiffs' Exhibit 7; and (viii) a bundle of receipts as the Plaintiffs' Exhibit 8.

6. In cross-examination of the Plaintiff by Counsel for the 1st Defendant, he stated that he was the driver of motor vehicle registration number KAJ ****. He stated that there is a highway and two service lanes on either side of the highway. He stated that the service lane he was using was a one-way traffic lane and not a two-way traffic lane. He stated that he was driving at approximately 60 km/h. He stated that he did not know that the speed limit was 50 km/h. He stated that he was driving about 70 metres behind the lorry and that it suddenly applied emergency breaks and he was thus constrained to swerve to the right and since the oncoming motor vehicle was already too close, there was a head-on collision. He stated that the driver of motor vehicle registration number KAR **** was not charged with any traffic offence.

7. There was no cross-examination by the 2nd Defendant, having defaulted to enter appearance and file a Statement of Defence.

8. In re-examination of the Plaintiff (on 31st October 2016), he stated that his daughter had since become an adult and can testify. He stated that the service lane was a one-way traffic lane.

9. PW2, Joseph Musyoka Ngula, adopted his witness statement dated 29th August 2016 and filed on the even date as his evidence-in-chief. He states that he is a carpenter in Syokimau area and that he witnessed the accident which occurred on 28th January 2010. He states that the driver of motor vehicle registration number KAJ **** was driving on the service lane, which is a one-ay lane meant for use by motorists driving towards the Nairobi general direction and that the driver of motor vehicle registration number KAR **** was driving the opposite direction and that suddenly, there was a head-on collision leading motor vehicle registration number KAJ **** to roll and land in a ditch. He states that he helped the occupants of motor vehicle registration number KAJ **** and in the process, police arrived. He blamed the driver of motor vehicle registration number KAR **** for driving on the wrong lane.

10. In cross-examination of PW2 by Counsel for the 1st Defendant, he stated that his business was in Mastermind Company Ltd which is approximately 500 metres from the scene of the accident. He stated that he did witness the accident and that motor vehicle registration number KAJ **** was read in colour and the 1st Defendant's motor vehicle was white in colour. He stated that PW1 is a neighbour at Kathome and thus was known to him before the accident. He stated that the 1st Defendant's motor vehicle was not being driven at a high speed.

11. There was no cross-examination by the 2nd Defendant, having defaulted to enter appearance and file a Statement of Defence.

12. There was no cross-examination by the 2nd Defendant, having defaulted to enter appearance and file a Statement of Defence.

13. In his written Submissions dated 10th January 2023 and filed on 11th January 2023 which incorporated the earlier Plaintiffs' Submissions dated 4th April 2022 and filed on 6th April 2022, learned Counsel Mr. Keyonzo instructed by the Firm of Messieurs S.M. Keyonzo Advocates representing the Plaintiffs submits that on liability, the Plaintiffs have proved on a balance of probability that the accident occurred and that the deceased picked the fatal injuries therefrom.

14. Regarding damages for pain and suffering, it is submitted that the deceased succumbed to the injuries on the same day and this Court is urged to award Kshs. 150,000, citing *Benedicta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR.

15. Regarding damages for loss of expectation of life, Counsel urges this Court to award Kshs. 100,000, without citing any authority.

16. Regarding quantum damages of loss of dependency, it is submitted that the deceased was44 years, working as secretary and she had 16 years to retirement. It is submitted that he monthly net salary was Kshs. 48,189. It is submitted that in his witness statement, PW1 stated that the deceased used to spend a larger portion of her income on family upkeep between Kshs. 15,000 and 20,000. This Court is thus urged to adopt a ratio of 1/3. This Court is thus urged to award Kshs. 3,521,976 worked out as follows: 48,189 x 12 x 16 x 1/3= Kshs. 3,521,976.

17. On whether the Court should deduct general damages under the *Law Reform Act*, it is submitted that there is no double compensation and the Court should thus not.

18. Finally, this Court is urged to award Kshs. 178,850 in special damages.

Part III: The 1st Defendant's Case

19. In his Amended Statement of Defence dated 5th May 2014 and filed on the even date, the 1st Defendant denied every material averment in the Plaint and put the Plaintiffs to strict proof thereof. In particular, the 1st Defendant denied ownership of the subject motor vehicle as alleged in the Plaint; particulars of negligence; particulars of special damages; and that he was served with any Demand and/or Notice of intention to sue.

20. Without prejudice to the foregoing, the 1st Defendant contends that if the said accident ever occurred and if the deceased sustained fatal injuries or suffered any loss or damage as alleged in the Plaint or at all, then the same was solely caused by negligence of the driver of motor vehicle registration KAJ ****. The 1st Defendant thus cited contributory negligence on the part of the deceased. Finally, the 1st Defendant denied that the Plaintiffs are entitled to any damages and costs.

21. In the hearing of the 1st Defendant's case, DW1, Titus Mutunga Mutisya, adopted his witness statement dated 24th July 2015 and filed on 27th July 2015 as his evidence-in-chief. He states that he was the driver of motor vehicle registration number KAR ****. He recalled that on 28th January 2010 at round 1445 hours, he was driving the said motor vehicle at about 50 km/h, at the service lane on the right side of Mombasa Road, heading towards Mombasa general direction and that suddenly, motor vehicle registration number KAJ **** which was being driven to the opposite direction emerged at about 50 metres away, trying to overlap and he applied breaks and flashed leading to a return to its lane but shortly after, it emerged again abruptly at about 3 metres away trying to overlap and he applied emergency breaks and hooted but since it was too close, there was a head-on collision. He states that two minors he was carrying were injured on the head and eyes. He states that the subject service lane is a two-way traffic and he was driving on his left side of the service lane. He blames the driver of motor vehicle registration number KAJ **** for overtaking where and when it was unsafe to do so. While

testifying in Court, he added that the service lane has a yellow line at the middle meaning that it is a two-way traffic. He stated that the driver of KAJ **** was following a lorry and it suddenly braked leading KAJ **** to hit the rear of the lorry and the driver thereof swerved to the right hence suddenly blocking the lane which he was lawfully using. He stated that he tried to apply emergency brakes but the distance was too short to avoid hitting the car and that the passenger in that car unfortunately died. In support of the 1st Defendant's case, he exhibited: (i) a police abstract as the 1st Defendant's Exhibit 1; and (ii) DW1's driving licence as the 1st Defendant's Exhibit 2.

22. In cross-examination of DW1 by Counsel for the Plaintiff, he was referred to his witness statement and he admitted that he had not recorded the fact that KAJ **** rammed into a lorry from behind before swerving to the right. He stated that he was heading to Kitengela to pick students. He stated that both service lanes on either side of Mombasa Road are two-way traffic lanes.

23. In re-examination of DW1, he stated that the driver of KAJ **** was overlapping and that by the time he spotted the vehicle, it was merely 3 metres away.

24. DW2, Police Constable Rachel Ochieng, was then attached at Embakasi Police Station but now attached to Naivasha Police Station, testified that an accident did occur on 28th January 2010 at 1450 hours along Mombasa road, in Syokimau area, involving motor vehicle registration number KAR **** Lorry and KAJ **** Datsun pick-up. DW2 stated that by the time he testified for the Plaintiffs on 4th June 2018, she had no visited the scene of the accident and that she visited the scene after the testimony. She stated that she had initially relied on the police abstract. She testified that the service lane is a two-way traffic lane and therefore motor vehicle registration number KAR **** was not being driven in the wrong direction. DW2 stated that she was unable to get the Occurrence Book to produce it in Court as an exhibit. She blamed the driver of KAJ **** for the accident. DW2 produced the police abstract as the 1st Defendant's Exhibit 3 and a receipt for payment of Kshs. 10,000 for Court attendance as Exhibit 7.

25. In cross-examination of DW2 by Counsel for the Plaintiff, she admitted that she gave evidence under oath on 4th June 2018 for the Plaintiffs and stated the contrary position regarding the state of the service lane. She stated that by that time, she had not visited the scene of the accident and was only relying on the police abstract. She stated that she visited the scene after the testimony of 4th June 2018 and realized the contrary that there was a yellow line in the middle of the said service lane.

26. In his written Submissions dated 15th February 2023 and filed on 16th February 2023, learned Counsel Mr. Ngugi instructed by the Firm of Messieurs Mose, Mose & Millimo Advocates representing the 1st Defendant proposes three issues for determination as follows: (i) Who is to blame/liable for causing the Road Traffic Accident that occurred on 28th January, 2013 involving Motor Vehicles Registration Numbers KAJ **** and KAR ****? (ii) Whether the Plaintiff is entitled to damages as sought in the Plaint? (iii) Who is liable to bear the costs of this suit?

27. Regarding the first issue for determination, on the party to blame/liable for causing the road traffic accident that occurred on 28th January, 2013 involving motor vehicles registration numbers KAJ **** and KAR ****, learned Counsel for the 1st Defendant submits through the testimony of PW1 who testified that he swerved to the right to avoid ramming into the lorry which was immediately ahead; and having testified that he was driving at 60 km/h above the recommended speed limit of 50 km/h; and having further admitted that the driver of motor vehicle registration number KAR **** was not charged for careless driving; and further, DW2 (a police officer) having testified that the service lane on which the accident occurred is a two-way traffic contrary to the assertion of the Plaintiffs, the 1st Defendant has demonstrated in evidence that he is not liable for the accident, the Plaintiffs having failed to prove negligence against him. It is submitted that the 1st Defendant proved that he drove

carefully while maintaining his lawful lane and the subject accident was solely caused by the driver of motor vehicle registration number KAJ ****, who drove negligently and recklessly by leaving his lawfully designated lane and encroaching the lawful lane of motor vehicle registration number KAR ****, thereby causing the collision. It is submitted that the traffic police officer, DW2, at the instance of the 1st Defendant attended Court and testified on 8th December 2022, as a 1st Defendant's Witness and produced the Police Abstract. It is submitted in this connection that the Police Officer testified and confirmed that indeed there are two service roads along Mombasa Road particularly at the scene of the subject road traffic accident, one service road on each side of the Mombasa Road Highway and that DW2 confirmed that at the scene of the accident, the said service road is two-way traffic and is used by Motor vehicles driving to both directions. It is submitted that DW2 confirmed during both examination-in-chief and cross-examination that as at the time she testified on 4th June, 2018, she had not visited the scene of the accident. It is submitted that DW2 stated that unlike the first time when she testified for the Plaintiffs on 4th June, 2018, by the time she testified for the second time on 8th December, 2022, she had visited the scene to familiarize herself with the scene and that in fact, on the very morning of 8th December, 2022, she had passed by the scene of the accident while coming to this Court and satisfied herself once again that the service road at the scene of accident was and is still a two-way traffic service road. It is submitted that in this connection that DW2 concluded that motor vehicle registration number KAR **** was being driven on its proper and/or lawful lane, contrary to assertions by the Plaintiffs. It is submitted that these evidence was reinforced by the driver of KAR ****, DW1 herein, who also testified that he was driving at about 50Km/h, within the maximum speed permitted. In crowning, it is submitted that in *Kennedy Macharia Njeru v Packson Githongo Njau and Anor* [2019] eKLR; Nester Shikuri v Ibrahim Okwiri Matanji [2020] eKLR; *Njue Patrick & 2 Others v Lucy Nyambura Ngige & Another* [2015] eKLR; Bungoma HCCA No. 8 of 2019, *Mohamed Muyunga v Vinoth Abwolet Eshepet*, the High Court held in all these cases that a driver who left his lawful lane and encroached on the lawful lane of the oncoming motor vehicles was negligent and 100% liable for causing the accident and this Court is urged to so find.

28. On whether the Plaintiffs are entitled to damages as prayed in the Plaint, this Court is urged to find that they are not, flowing from the foregoing findings. It is submitted further that the legal maxim or doctrine of ex turpi causa non oritur action posits that "From a dishonourable cause an action does not arise", which simply means that a Plaintiffs will be unable to pursue legal relief and damages if it arises in connection with or from their own tortious act, placing reliance in *Turbo Highway Limited v Jacob Kipkoech Biwott* [2020] eKLR, where the High Court applied the maxim of ex turpi causa non oritur action in a Road Traffic Accident case where the Plaintiff (a turn-boy) of a motor vehicle sustained injuries in a road traffic accident that arose after the motor vehicle he was traveling in lost control and rolled when the Plaintiff (a turn-boy) in the said motor vehicle engaged its driver in a fight causing the driver to lose control of the said motor vehicle and the High Court held that the in the circumstances of the above case, the Plaintiff was in no position to seek the aid of the law to recover damages for injuries sustained on account of his illegal actions of getting drunk while on duty and fight with the driver while the driver was on the driver's seat driving.

29. Finally, it is submitted that in the event this Court is not persuaded to dismiss the Plaintiffs' case, it is submitted as follows on quantum.

30. Regarding pain and suffering, since the Death Certificate indicates that the deceased died on 28th January 2010, the same day of the accident and the Post-Mortem Report confirms that the body of the Deceased was collected at Syokimau (the scene of the accident) on 28th January, 2010, at 1450 hours, which is the same date and time the accident occurred as confirmed or evidenced in the Police Abstract, a sum of Kshs. 10,000 will suffice.

31. Regarding loss of expectation of life, it is submitted that the Plaintiff confirmed he was working and their children were adults and that the Plaintiff did not prove the dependency at all and he confirmed the age of the deceased as 44 years as per the Death Certificate. It is thus submitted that factoring in the age of the deceased and the many vagaries of life like road accidents and diseases, a conventional award of Kshs. 100,000 will suffice for loss of expectation of life.

32. On loss of dependency, it is submitted that the Death Certificate indicates the deceased died at age of 44 years and that the Plaintiff confirmed he was working and their children were adults. It is thus submitted that the Plaintiff did not prove dependency at all. It is further submitted that the Deceased is alleged to have been earning a net pay of Kshs. 48,189 as per the alleged pay slip of November, 2009. It is argued that the Plaintiff could not explain how the wife was earning a higher house allowance than the basic salary in the alleged pay slip. It is thus submitted that to apply a multiplier of 8 years since the statutory retirement age was 55 years at the time of the accident and factoring in the vicissitudes and vagaries of life a multiplier of 8 years would suffice. It is submitted that the minimum wage of Kshs. 8,000 in light of the discrepancies in the basic salary and house allowance in the purported pay slip would suffice. It is finally submitted that the deceased was married and a dependency ratio of 2/3 would suffice. Counsel thus works out the loss of dependency as follows: Kshs. 8,000 x 8 x 2/3x12 = 512,000.

33. Regarding costs of the suit, it is submitted that costs ordinarily follow the event and are normally awarded to the successful party and having demonstrated that indeed the 1st Defendant was not liable for causing the subject road traffic accident and that it is the Plaintiff who is solely to blame and liable for the subject accident, it is submitted that this is a proper case for dismissal and costs of the suit ought to be awarded to the 1st Defendant as against the Plaintiff.

Part IV: The 2nd Defendant's Case

34. Despite evidence of service of the Court process, the 2nd Defendant failed to enter appearance and file a defence. For this reason, an interlocutory judgment was entered in favour of the Plaintiffs.

Part V: Issues for Determination

35. Gleaning from the Plaint; the 1st Defendant's Amended Statement of Defence; and the rival written Submissions, this Court has distilled twelve issues for determination as follows:

    i. First, whether this suit is maintainable and whether the Plaintiffs have locus standi to sue the Defendants.

    ii. Second, whether an accident involving motor vehicles registration numbers KAJ **** and KAR ****, occurred on 28th January 2010 at Syokimau area, along Mombasa-Nairobi Road.

    iii. Third, whether the deceased (Patiricia Mumbua Mutuku) was involved in the accident and fatally injured.

    iv. Fourth, whether the driver of motor vehicle registration number KAR **** was negligent.

    v. Fifth, the degree of blameworthiness/liability between the drivers of motor vehicles registration numbers KAJ **** and KAR ****.

    vi. Sixth, whether the Plaintiffs have established that the Defendants were the owners of the said motor vehicle at the material time and if yes, whether the Defendants are vicariously liable for the accident caused by the said driver.

vii. Seventh, whether the Plaintiffs are entitled to general damages for pain and suffering and the quantum thereof.

viii. Eighth, whether the Plaintiffs are entitled to general damages for loss of expectation of life and the quantum thereof.

ix. Ninth, whether the Plaintiff are entitled to general damages for loss of dependency and the quantum thereof.

x. Tenth, whether or not to award general damages under both the *Law Reform Act* and *Fatal Accidents Act*.

xi. Eleventh, evaluation of the evidence adduced in support of special damages and the quantum thereof.

xii. Twelfth, whether costs of this suit and interest on both damages and costs should be awarded to the Plaintiff.

Part VI: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

36. Regarding the suit against the 2nd Defendant, an interlocutory Judgment was entered on 6th August 2014. An interlocutory Judgment is usually entered underpinned with certain irrebuttable presumptions, key among them being that the Defendant, having had notice of the suit but failed to take steps to defend, is deemed to have admitted liability. See *Muinde v 64 Rond Carriers* (1992) eKLR, per Wambilyangah, J (as he then was); *Charles Ogendo Ayieko v Enoch Elisha Mwanyumba* Mombasa HCCC No. 1035 of 1983;*Julius Murungi Murianki v Equitorial Services Ltd. & Another* Nairobi HCCC No. 2714 of 1988; *Clearer-Humus v British Tutorial College* (1975) EA 323; *Makala Mailu Mwende v Nyali Golf & Country Club* (1989) eKLR, per Gahuchi, Gicheru and Nyarangi, JJA (as they then were); *Abdullahi Ibrahim Ahmed (suing as the personal representatives of the Estate of Anisa Sheikh Hassan (deceased) v Lem Lem Teklue Muzolo* (2013) eKLR, per G.B.M. Kariuki, JA (as he then was), Nambuye and Ouko, JJA.; *Peter Njoroge Kamau v Attorney General* (2017) eKLR, per L. Njuguna, J, G.B.M. Kariuki, JA (as he then was), Sichale and Kantai, JJA; *Felix Mathenge v Kenya Power & Lighting Company Limited* (2008) eKLR, per Tunoi, Githinji and Onyango Otieno, JJA (as they then were); and *David Maina Njoroge v Gingalili Farm Limited* (2011) eKLR, per Ouko, J (as he then was).

37. This Court thus concludes that limited to the 2nd Defendant, liability is a foregone conclusion.

38. Turning to the case against the 1st Defendant, the principal duty of this Court is to examine facts, evaluate evidence, subject the proven facts to the law and render a decision on a balance of probability. See *Lakhamshi v Attorney-General* (1971) 1 EA 118, per Spry V-P, Lutta and Mustafa JJA, as they then were) Spry, V-P, (as he then was); *Ferdinand Nd ung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 Others* (2014) eKLR, per Warsame JA.; and *Abbay Abubakar Haji v Marain Agencies Company & Another* (1984) 4 KCA 53.

39. Who shoulders the onus probandi in civil cases generally? In all cases, there is always a legal burden to prove or onus probandi incumbit ei qui dicit, non ei qui negat. This is the duty placed on the shoulders of a party in a dispute to provide sufficient proof and justification for the position taken. In civil cases, the onus probandi is always on the person who brings a claim in a dispute, originally expressed as semper necessitas probandi incumbit ei qui agit (the necessity of proof always lies with the person who will fail if no proof is adduced). The legal burden of proof lies in him who will fail if no evidence is adduced to that end. The obligation first starts with the Plaintiff who must discharge the burden

of proof placed on his shoulders to the required standard namely preponderance of probability. See sections 107, 108 and 109 of the *Evidence Act*; *Halsbury's Laws of England* 4th Edition, at page 662; *Nickson Muthoka Mutavi v Kenya Agricultural Research Institute* (2016) eKLR, per Nyamweya, J (as she then was); *Evans Nyakwana v Cleophas Bwana Ongaro* (2015) eKLR; *Vincent Okello v Attorney General Gulu* HCCS No. 4 of 1992 (1995) III KALR 129; *Treadsetters Tyres Ltd v John Wekesa Wepukhulu* (2010) eKLR, per Ibrahim, J, (as he then was); *Charlesworth & Percy on Negligence*, 9th Edition at page 387; and *Henderson v Henry E Jenkins and Sons* (1970) AC 232 at 301.

40. What is the standard of proof for civil cases generally? In civil cases, the general standard of proof is on preponderance of probability. It can vary upwards depending on the gravity of the matter. See *Henry Hidaya Ilanga v Manyema Manyoka* (1961) EA 705; and *Miller v Minister of Pensions* (1947) 2 ALL ER 372, per Denning J

41. What then is the meaning of balance of probability and what may be deemed as sufficient enough to reach or meet the standard of proof on a balance of probabilities? The balance of probability standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the even was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. See Lord Nicholls of Birkenhead in *Re H and Others (Minors)* (1996) AC 563, at page 586. Put differently, it means that the case will be determined in favour of a party who persuades the Court that the allegations he has pleaded in his case are more likely than not to be what took place and in percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. See *William Kabogo Gitau v George Thuo & 2 Others* (2010) 1 KLR 526, per Kimaru, J It can again be said that degree which is not so high as is required in a criminal case so as that a tribunal can say 'we think it more probable than not' and the burden is discharged thereby, but, if the probabilities are equal it is not. See *Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another* (2015) eKLR, where the Court of Appeal adopted the reasoning of Denning, J in *Miller v Minister of Pensions* (1947) 2 All ER 372.

42. And what is the volume of evidence required to prove a case and how is the evidence measured in civil cases? Since evidence is weighed and not numbered, no particular number or volume of evidence is prescribed. See S.C. Sarkar in *Hints of Modern Advocacy and Cross-examination* (7th Edition, 1954, at page 16) and section 143 of the *Evidence Act*. See also *Siraj Din v Ali Mohamed Khan* (1957) EA 25.

43. And what are the mechanics involved and how should a Court approach evidence? The proper way on how one should consider the evidence at the conclusion of the case is to weigh the evidence given by the Defendant against that given by the Plaintiff and to decide the case on the plane of whether the fact in contention has been proved (if the Court has been led to believe it exists or considers its existence so probable that a prudent man ought under the circumstances of the particular case to act upon the supposition that it exists). In other words, if at the end of the case, the Court considers that there is a preponderance of evidence in favour of the Defendant, a decision in favour of the Defendant should result and conversely if the preponderance is in favour of the Plaintiff. See *HMB Kayondo v Somani Amirali Kampala* (1995) IV KALR 78; and *Kesi Jindwa Karuku v Steel Makers Ltd* [2019] eKLR, per R. Nyakundi, J

44. I now embark on analysis, interrogation, assessment and evaluation of each of the twelve points for determination, seriatim.

(i) Whether this suit is maintainable and whether the Plaintiffs have locus standi

45. First, evidence was tendered that the Plaintiffs are the husband and daughter of the deceased respectively, and thus falling within the persons contemplated under section 66 of the *Law of Succession Act* and 4(1) of the *Fatal Accidents Act*.

46. Second, the Plaintiffs exhibited a Grant of Letters of Administration Intestate (the Plaintiffs' Exhibit 2), which was issued on 22nd March 2012 by Hon. Justice Asike Makhandia (as he then was) in Machakos High Court Probate and Administration Cause Number 734 of 2011. I thus find that in accord with section 53 read with sections 54, 66, 82 and 3 of the *Law of Succession Act*, the Plaintiffs obtained a Grant of Letters of Administration.

47. Wherefore this Court concludes that this suit is maintainable against the Defendants and further, that the Plaintiffs have the requisite locus standi.

(ii) Whether an accident involving motor vehicles registration numbers KAJ ** and KAR ****, occurred on 28th January 2010 at Syokimau area, along Mombasa-Nairobi Road**

48. In support of this suit, both oral and documentary evidence were adduced. In his oral testimony, PW1 testified that the accident did occur while he was driving motor vehicle registration number KAJ **** with the deceased as his passenger. This was corroborated by PW2.

49. Although the 1st Defendant denied this fact in his Statement of Defence, in his testimony (as DW1) and even in cross-examination, he admitted this fact.

50. The foregoing findings yield a conclusion that an accident involving motor vehicles registration numbers KAJ **** and KAR ****, did occur on 28th January 2010 at Syokimau area, along Mombasa-Nairobi Road.

(iii) Whether the deceased (Patricia Mumbua Mutuku) was involved in the accident and fatally injured

51. In support of this point, the Plaintiffs adduced both oral and documentary evidence. In his oral testimony, PW1 testified that the deceased was his passenger and involved in the said accident and that she succumbed to her own injuries. PW1 produced a Certificate of Death (the Plaintiffs' Exhibit 3). The Plaintiff's testimony was corroborated by PW2.

52. Although the 1st Defendant denied this fact in his Statement of Defence, in his testimony (as DW1) and even in cross-examination, he admitted this fact.

53. Wherefore this Court concludes that the deceased (Patricia Mumbua Mutuku) was involved in the accident and fatally injured.

(iv) Whether the driver of motor vehicle registration number KAR ** was negligent**

54. The Civil Procedure Rules prescribes it as mandatory not only to plead but also to outline particulars of negligence, if the Plaintiff intends to succeed on a claim based on the tort of negligence. This requirement is found in Order 2, Rule 10 of the CPR which provides as follows: "(1)Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, Defence or other matter pleaded including, without prejudice to the generality of the foregoing —(a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and (b) where a party pleading alleges any condition of the mind of any person, whether

any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies. (2) The Court may order a party to serve on any other party particulars of any claim, Defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the Court thinks just. (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the Court may, on such terms as it thinks just, order that party to serve on any other party —(a) where he alleges knowledge, particulars of the facts on which he relies; and (b) where he alleges notice, particulars of the notice. (4) An order under this rule shall not be made before the filing of the Defence unless the order is necessary or desirable to enable the Defendant to plead or for some other special reason. (5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate. (6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings."

55. This position rhymes with and seems to have drawn from the common law principles governing negligence claims. It will be recalled that Lord MacMillan, in the cause celebre decision in *Donoghue v Stevenson* [1932] AC 532, enunciated that "Negligence must be both averred and proved."

56. What amounts to a tort? And what amounts to a tort of negligence? How is negligence assessed? Was the driver negligent? These are pertinent questions I will answer under this segment.

57. An act or omission (not being merely the breach of a duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in one of the following ways:[2] (a) an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of; (b) an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the persons acting or omitting; (c) an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented; and (d) not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent. This dispute is founded on the tort of negligence (as more particularly described under paragraph (c) supra).

58. What amounts to negligence? This tort has no received a definition by any statute. In Kenya, Courtesy of section 3(1)(c) of the *Judicature Act*, we apply common law as construed and expounded in decisional law. The reading of decisional law around this area points to the direction that Courts have avoided a rigid and supposed exhaustive formulation thereof, largely because acts of negligence are infinitely and interminably variable. In this framework, there is no universally accepted definition of negligence. It follows that the catalogue of acts which constitute negligence has never closed since the days of Lord Macmillan, Lord Atkin, Lord Esher Lord Justice A.L. Smith to name but a few forerunners who entered the terra incognita area of the tort of negligence and laid down the general principles of negligence we now apply.

59. At this stage, it is instructive to observe that upon conducting an anatomy of the law of negligence at the material time in England and Scotland, with special attention to decisions rendered over time on this particular tort, in the case which is now often cited as the tabula in naufragio (a plank in a shipwreck) in negligence claims namely *Donoghue v Stevenson* [1932] AC 532, Lord Macmillan came to a conclusion that categories of negligence will never close. Proceeding on this footing, Lord Macmillan offered broad principles of general application in negligence claims. In his words, His Lordship rendered himself

[2] Sir Fredrick Pollock, *The Law of Torts: A treatise on Principles of Obligations Arising from Civil Wrongs in Common Law* (4th ed.) (1895), pages 20-21.

thus: “The law takes no cognisance of carelessness in the abstract. It concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. What then are the circumstances which give rise to this duty to take care? In the daily contacts of social and business life human beings are thrown into or place themselves in an infinite variety of relationships with their fellows and the law can refer only to the standards of the reasonable man in order to determine whether any particular relationship gives rise to a duty to take care as between those who stand in that relationship to each other. The grounds of action may be as various and manifold as human errancy and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of Judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed. The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. Where there is room for diversity of view is in determining what circumstances will establish such a relationship between the parties as to give rise on the one side to a duty to take care and on the other side to a right to have care taken to descend from these generalities to the circumstances of the present case I do not think that any reasonable man or any twelve reasonable men would hesitate to hold that if the Appellant establishes her allegations the Respondent has exhibited carelessness in the conduct of his business. For a manufacturer of aerated water to store his empty bottles in a place where snails can get access to them and to fill his bottles without taking any adequate precautions by inspection or otherwise to ensure that they contain no deleterious foreign matter may reasonably be characterized as carelessness without applying too exacting a standard. But, as I have pointed out, it is not enough to prove the Respondent to be careless in (his process of manufacture. The question is, does he owe a duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drink intended for consumption by members of the public in the form in which he issues them is under a duty to take care in the manufacture of these articles. That duty, in my opinion, he owes to those whom he intends to consume his products. He manufactures his commodities for human consumption; he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which he assumes and desires for this own ends imposes upon him a duty to take care to avoid injuring them. He owes them a duty not to convert by his own carelessness an article which he issues to them as wholesome and innocent into an article which is dangerous to life and health. It is sometimes said that liability can only arise where a reasonable man would have foreseen and could have avoided the consequences of his act or omission. In the present case the Respondent, when he manufactured his ginger beer, had directly in contemplation that it would be consumed by members of the public; can it be said that he could not be expected as a reasonable man to foresee that if lie conducted (his process of manufacture carelessly he might injure those whom he expected and desired to consume his ginger beer? The possibility of injury so arising seems to me in no sense so remote as to excuse him from foreseeing it. Suppose that a baker through carelessness allows a large quantity of arsenic to be mixed with a batch of his bread, with the result that those who subsequently eat it are poisoned, could he be heard to say that he owed no duty to the consumers of his bread to take care that it was free from poison, and that, as 'he did not know that any poison bad got into it, his only liability was for breach of warranty under his. contract of sale to those who actually bought the poisoned bread from him? Observe that I have said through carelessness and thus excluded the case of a pure accident such as may happen where every care is taken.”

60. In the same case (Donoghue case, supra), and in complementing Lord Macmillan, Lord Atkin offered broad general principles to apply in determining whether or not an act or omission amounts to negligence. His Lordship ingeniously deployed the Biblical command “love thy neighbour as you love

thyself" to present a thesis that the duty of care springs from the natural course of things that while doing or omitting to do an act, as a person of ordinary sense (now commonly known in legal parlance as a reasonable person), the person must foresee a person who may directly suffer injury from the actions or omissions and that person foreseen, is the neighbour who is the owed this duty of care in the context of this Biblical precept. In his rendition which has reverberated since, his Lordship expressed himself thus: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes a law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

61. The reasoning of Lord Atkin was built on the earlier decision of the House of Lords in *Heaven v Pender* 11 QBD 503, in which Lord Esher limited the duty of care to those when acting or omitting are proximate and will thus suffer injury, which doctrine was adopted by A. L. Smith L.J in *Le Lievre v Gould* [1893] 1 QB 497. Lord Esher (at page 497) where his Lordship stated "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property."

62. A. L. Smith L.J in turn, also developed the general the general principles further on the foundation of the decision in *Heaven v Pender* in *Lievre v Gould* [1893] 1 QB 497 in which he reasoned that "The decision of Heaven v. Pender was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that if due care was not taken damage might be done by the one to the other."

63. Is negligence actionable per se? In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that "Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the Court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly…There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

64. The law on negligence, as I discern it, is that negligence it is not actionable per se. The general picture of actionable negligence is that it is the act or omission which is foreseeable, by ordinary sense or a reasonable person, that it can cause damage and which results into actionable damage, in situations where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person.

65. In addition to the general principles applicable to a claim of negligence discussed herein above in the Donoghue case, I have deemed it necessary to sample further principles. In the English case of *Blyth v Birmingham Waterworks Company* [1856]11 Ex Ch 781, negligence was defined by Sir Edward Hall Alderson to mean "...the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The Defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done."

66. What is the purport of the position that negligence is not actionable per se? A claimant must demonstrate that the act caused damage and that the Defendant did not contribute to the damage or if the Defendant contributed, the degree of contribution should be assessed. In *Masembe v Sugar Corporation and Another* [2002] 2 EA 434, it was held that "Negligence is not actionable per se but is only actionable where it has caused damage and in that regard the primary task of the Court in a trial of a negligence suit is to consider whether the act or acts of negligence caused the damage or injury complained of; and where the damage was caused by the negligent acts of different persons, to assess the degree of their respective responsibility and blameworthiness, and apportion liability between or among them accordingly...There is no act or omission that has static blameworthiness and therefore each case must be assessed on its own circumstances and the apportionment ought to be a result of comparing the negligent conduct of the tortfeasors, to determine the degree to which each one was in fault, both in regard to causation of the wrong and unreasonableness of conduct."

67. It follows that a mere occurrence of an accident is not - ipso facto - evidence of negligence. It can as well be an error of Judgment. Errors of Judgment do not amount to careless driving. In *Simpson v Peat* (1952) 1 ALL ER 447 it was held that errors of Judgement do not amount to careless driving and that the mere fact that an accident occurs does not follow that a particular person has driven dangerously or without care and attention. This position was deployed in *Rambhai Shivabhai Patel & Another v Brigadier-General Arthur Corrie Lewin* [1943] 10 EACA 36 where it was held that the mere occurrence of an accident is not in itself evidence of negligence and that there must be reasonable evidence of negligence.

68. In the above connection, some general principles have been laid down to govern this area of law. I desire to discuss the key ones.

69. First, not even an abstract of the police records is - in and by itself - sufficient prove of negligence. It is only sufficient prove that a report of an accident was made. A Plaintiff must therefore adduce evidence to explain how the accident occurred and in particular prove negligence on the part of the Defendant or Defendant's driver. In *David Mwangi Kariuki & another v Stephen Mwangi & another* [2017] eKLR, it was held that "Admittedly such document (an Abstract of Records from of the Police) proved the occurrence of the accident by giving the salient details of the accident. It does not by any means prove how the accident occurred. It was upon the Respondent to call and tender credible evidence on how the accident occurred, and to prove negligence on the driver's part."

70. Second, is the principle of reasonable anticipation which posits that a man who drives a motor vehicle is bound to anticipate any eventuality like things, people, animals on his way and thus drive a speed which may afford avoidance of an accident. See *Tart v Chitty and co* (1931) ALL ER, pages 828 – 829, where Rowlat, J, laid the following guiding principle in determining negligence of drivers: "It seems to me that if a man drives a motor car along the road he is bound to anticipate that there may be in things and people and animals in the way at any moment and he is bound to go not faster than will permit his stopping or deflecting his course at any time to avoid any thing he sees after he has seen it." Similarly,

in Masembe case (supra), the Court restated the holding in Tart in East Africa and went on to lay the following guiding principle in determining negligence of drivers: "When a man drives a motor car along the road, he is bound to anticipate that there may be things and people or animals in the way at any moment, and he is bound not to go faster than will permit his course at any time to avoid anything he sees after he has seen it…A reasonable person driving a motor vehicle on a highway with due care and attention, does not hit every stationary object on his way, merely because the object is wrongfully there. He takes reasonable steps to avoid hitting or colliding with the object…Whereas a driver is not to foresee every extremity of folly which occurs on the road, equally he is not certainly entitled to drive on the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. He is bound to anticipate any act which is reasonably foreseeable, that is to say anything which the experience of the road users teaches them that people do albeit negligently…There may be occasions when criminal or traffic offences are committed without giving rise to civil liability."

71. Third, speed by and in itself cannot be used to infer negligence in absence of circumstances. It follows that a speed of even 30 km/h is certain circumstances which cannot permit such a speed, is too high a speed. See *Karisa and Another v Solanki and Another* [1969] EA 318, the following general principles of negligence of drivers were laid down: "The car driver, driving at a speed of about 65 mph which was not in itself negligent, when he saw the oncoming bus, whose presence on the road reduced the area available to take evasive action should any emergency occur and whose lights to some extent impaired the area of vision provided by its own lights, only reduced his speed to about 60 mph. This action was one which a reasonably careful driver, and the duty which the car driver owed to the Plaintiff was that of being a reasonably careful driver, would not have taken, as the speed in those circumstances enormously increased the potential danger of an accident. While, therefore, a speed of 60 mph is not negligence, it is that speed in the particular circumstances which constitutes negligence; and the Judge was wrong in considering the question of speed separate from the other circumstances of the case…We are not satisfied that the car driver could not and should not as a reasonably careful driver, keeping a particular keen look-out, have seen the lorry in time to have swung to the left on the verge, no matter how uncertain his knowledge of the precise terrain there, rather than run straight into the stationary lorry… Looking at the facts of the case as a whole, the Judge tended to consider the two main circumstances of speed and a proper look-out separately and not part of a comprehensive whole, and it was this failure to look at the facts as a whole which led him into the manifest error of coming to the conclusion that there was no negligence on the part of the car driver. He was clearly wrong in failing to find negligence on the part of the car driver. Consequently, the car driver found to have contributed to the accident to the extent of 20 per cent."

72. Fourth but closely connected to the third, a driver is under a common law duty of care towards not only other road users but also passengers. In *PNM & another (the legal personal Representative of estate of LMM v Telkom Kenya Limited & 2 others* [2015] eKLR, it was held that the driver was under a common law duty and obligation to exercise a high degree of care towards other road users and passengers and that had he exercised such care and caution, the accident would have been avoided. In the English case of *Bourhill v Young* [1943] AC 92, the House of Lords held as follows on the duty of care imposed on the drivers of motor vehicles: "No doubt the duty of a driver is to use proper care not to cause injury to persons on the highway or in the premises adjoining the highway but, it appears to me that his duty is limited to persons so placed that they may reasonably be expected to be the injured by the omission to take such care." In the case of *Lochgelly Iron Court Co. Ltd v Mcmillan* 1934 AC, Lord Wright held as follows: "In strict legal analysis, negligence means more than heedless or careless conduct whether in omission or commission. It properly involves the complex concept of guilty, breach and damage thereby suffered by the person to whom the duty was owing."

73. Fifth, there are situations which present difficulties in deciding whether or not this or that was negligent. Courts have enunciated a rule that a Court should not lose sight of the fact that accidents do not just happen. They are caused. In this context, in *Welch v Standard Bank Limited* [1970] EA 115, Madan, J, (as he then was) offered the following direction: "When there is no material to generate actual persuasion in the Court's mind, still the Court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The Court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two Defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the Court fail to conform to conventional rules provided, in its Judgement, the Court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the Court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion...There being nothing to enable the Court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The Court does hold so in this case." Similarly, in *Haji v Freight Agencies Ltd* [1984] KLR 139, it was held that "Where it is proved by evidence that both parties are to blame and there is no means of making a reasonable distribution between them, the blame can be apportioned equally on each...however, in the absence of clear evidence of contribution to the accident, the justice of the case would have been met by apportioning blame equally."

74. What are the elements which constitute negligence? In my discernment therefore, negligence is that act or omission which is foreseeable, by ordinary sense or a reasonable person, that it can cause damage and which results into actionable damage, in situations where the careless party owes the victim a duty of care but fails to exercise care and skill in the eyes of a bystander reasonable person. A reasonable man/person in this thesis, as applied in the Donoghue case by Lord Macmillan or a person of ordinary sense as applied in the Donoghue case by Lord Atkin can be understood as follows.

75. In the seminal works of JC Van Derwalt & JR Midgrey, on *Principles of Derelict*, 3rd Edition, at page 121, the Learned authors describe a reasonable person and reasonableness deploying the following attributes: "The criterion of the reasonable person is the embodiment of an external and objective standard of care. The qualities, experience, idiosyncrasies and Judgment of the particular actor are in principle not relevant in determining the qualities of the reasonable person. The law requires adherence to a generally uniform and objective degree of care. The reasonable person is the legal personification of the ideal standard to which everyone is required to confirm such a person represents an embodiment of all the qualities which are require of a good citizen. ...The concept denotes a person exercising those qualities which society require of its members for the protection of their interests. The reasonable person is therefore the legal personification of the ideal standards of care which the community desires its members to exercise in their daily actions and contact...The particular attributes or qualities of this mystical figure have an important bearing upon whether harm was foreseeable and whether or not steps have been taken to prevent harm."

76. And locally, a reasonable man has been described by C.B. Madan, CJ and D.K.S. Aganyanya and JE. Gicheru, JJ in *Stanley Munga Githunguri v Republic* [1986] eKLR, in the following words: "Mr Chunga asked us to read the statements in the National Assembly in the context of the debate, and to say that no assurance was ever given that the Applicant would not be prosecuted. In our view both statements, made publicly in no less a forum than the National Assembly, constituted a positive assurance that the Applicant would not be prosecuted. That is the conclusion to which the reasonable man in the market hearing those utterances would have come to. That being so the reasonable man in the market would also believe that the Attorney-General's word would be honoured. The reasonable man is the man in the market, the man on the Pangani bus or a housewife."

77. Using different words to achieve the same depiction as painted by C.B. Madan, CJ and D.K.S. Aganyanya and JE. Gicheru, JJ, Kuloba J (as he then was) in *J Kudwoli & Another v Rureka Educational and Training Consultants & 2 Others* [1993] eKLR depicts a reasonable man to mean "...a mythical being described in a number of judicial and literary metaphors, like "the man in the street", or "the man who takes the magazine at home and in the evening pushes the lawn mower in his shirt sleeves", a reasonable man is really a cool, level-headed and collected man who acts and reacts in appropriate perspective. He is not a reasonable man he who is so lax or so cynical that he would think none the worse of a person whatever was imputed to him. He is not a reasonable man he who is so censorious as to regard even trivial accusations as lowering another's reputation. He is not one who is so hasty as to infer the worst meaning from any ambiguity. He is not unusually suspicious or unusually naive. He does not always interpret the meaning of words as a lawyer for he is not inhibited by a knowledge of the rules of construction..."

78. And what does it take to prove negligence? In order to succeed in a negligence claim, the Plaintiff must establish four elements namely duty, breach of duty, legal damage and causation. The Plaintiff must demonstrate that: (a) the Defendant owed a duty to others and in particular, the claimant to exercise reasonable care (duty); (b) the Defendant has breached the duty of care through an action or omission (breach of duty); (c) as a result, the Plaintiff has suffered legal damage/legal injury (damage); and (d) the action or omission of the Defendant was the immediate cause of the legal damage (proximate cause/ causation). See *M (A Minor) v Amullenga & Another* [2001] KLR, where the Court held that "In order to succeed in an action for negligence the Plaintiff must prove: (a) That the Defendant owes the Plaintiff a legal duty. (b) That the Defendant was in breach of that duty. (c) That as a result of the breach of that duty the Plaintiff suffered damage."

79. In *Clerk and Lindsell on Torts* 18th Edition, p. 600, paragraph 4, the legal scholarly works outlines the essentials on an action for breach of statutory duty as follows: "(1) The claimant must show that the damage he suffered falls within the ambit of the statute mainly that it was of the type that the legislation was intended to prevent and that the claimant belonged to the category of persons that the statute was intended to protect. It is not sufficiently simply that the loss could not have occurred if the Defendant had complied with the terms of the statute. (2) It must be proved that the statutory duty was breached. The standard of liability varies considerably with the wording of the statute, ranging from liability in negligence to strict liability. (3) As with other torts, the claimant must prove that the breach of statutory duty caused his loss, which he will fail to do if the damage caused would have occurred in any event. (4) Finally there is the question whether there are any Defences available to the action."

80. While endeavouring to lay down a general conception of relationships, outside contractual or statutory relationships, in which then a duty of care as applied in the definition of negligence should be presumed, Lord Atkin in *Donoghue v Stevenson* [1932] AC 532, deployed the biblical ordinance of a good neighbour "love thy neighbour as thyself" to argue that the duty of care springs from the reasoning that while doing or omitting to do an act, you must foresee a person who may directly suffer

injury from your actions or omissions and that is the neighbour you should care about. His Lordship reasons as follows: "At present I content myself with pointing out that in English law there must be and is some general conception of relations, giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence whether you style it such or treat it as in other systems as a species of "culpa," is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes a law you must not injure your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

81. The reasoning of Lord Atkin was built on the earlier decision of the House of Lords in *Heaven v Pender* 11 QBD 503, in which Lord Esher limited the duty of care to those when acting or omitting are proximate and will thus suffer injury, which doctrine was adopted by A. L. Smith L.J in *Le Lievre v Gould* [1893] 1 QB 497. Lord Esher (at page 497) reasoned "That case established that under certain circumstances one man may owe a duty to another even though there is no contract between them. If one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause a personal injury to that other or may injure his property." A. L. Smith L.J in *Lievre v. Gould* [1893] 1 QB 497 says: - "The decision of Heaven v. Pender was founded upon the principle that a duty to take due care did arise when the person or property of one was in such proximity to the person or property of another that if due care was not taken damage might be done by the one to the other."

82. In *Wilson Clyde Coal Co. Ltd v English* [1937] 3 All ER 68, the doctrine of duty of care is condensed as follows: (a) Is there a relationship of proximity between the parties; (b) Was the injury to the claimant foreseeable; and (c) Is it fair, just and reasonable to impose a duty.

83. In *Caparo Industries PLC v Dickman* [1990] UKHL 2, seemingly following in the footsteps of Wilson Clyde case, a three-fold test of a duty of care was lad as follows: (a) Reasonably foreseeable; (b) There must be a relationship of proximity between the Plaintiff and the Defendant; and (c) It must be fair, just and reasonable to impose liability.

Determination

84. In the instant case, the duty of care be said to be founded on neighbour principle as established by Lord Atkin or statutory. The relevant Act in this case is the *Traffic Act* and statutory instruments thereunder including but not limited to the Highway Code. Section 47(1) of the *Traffic Act* provides that if any person who drives a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably have expected to be on the road is guilty of an offence. Section 49 (1) of *Traffic Act* provides that any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence. The text of section 47(1) of the *Traffic Act* reads as follows: "47. Reckless driving (1) Any person who drives a motor vehicle on a road recklessly, or at speed, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road and the amount of traffic which is at the time or which might reasonably have expected to be on the road, is guilty of an offence...." And the text of

section 49 (1) of the *Traffic Act* reads as follows: "49. Driving without due care and attention (1) Any person who drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road shall be guilty of an offence…"

85. From the text of sections 47(1) and 49(1) of the *Traffic Act*, motorists owe other road users and their passengers a duty of care. These provisions of the law place a specific duty of care on both the drivers and pedestrians to avoid occurrence of an accident or endangering other road users.

86. In addition, the legal place and worth of the Highway Code is enacted in section 68(3) of the *Traffic Act*. The text of this section reads: "(3) A failure on the part of any person to observe any the provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under this Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings."

87. The fulcrum upon which this suit will turn is whether, as at 28th January 2010, the service lane stretching on the left side of Mombasa-Nairobi Road, when facing Nairobi general direction - at the Syokimau area stretch - was a one-way traffic lane as so fervently asserted by the Plaintiffs or a two-way traffic lane as so zealously rebuffed by the 1st Defendant.

88. In this context, it thus becomes necessary to venture into a deep interrogation of the evidence around this issue. In this regard, PW1, PW2 and DW1 asserted that they were eye witnesses. Appallingly, it was word of PW1 and PW2 against word of DW1, and nothing more. Not even a simple sketch of the subject lane or photographs taken by an appointed Scene of Crime Officer.

89. I have studied the Ruling of my sister, Hon. I.M. Kahuya, dated 14th February 2019. The said decision set aside the testimonies of PW3 since her testimony was part of the proceedings of 4th June 2018, which were aside thereby. The said decision also set aside not only the Court Order of 4th June 2018, which closed the 1st Defendant's case but also the resultant ex parte Judgment; and re-opened the 1st Defendant's case for hearing.

90. What is titillating is that upon re-opening the defence case for hearing, the witness – a police officer - who was third Plaintiffs' witness (PW3) in the proceedings which were set aside was now called by the 1st Defendant as his second defence witness (DW2). While under examination on determinative fact whether the subject surface lane was a one-way or two-way traffic lane, DW2 presented a diametrically opposing position to what she presented on 4th June 2018, when she appeared as the Plaintiffs' witness (PW3). In the earlier version, DW2 (as PW3 then) had testified that the subject lane was a one-way traffic and the driver of motor vehicle registration KAR **** was therefore to blame for driving on the wrong side of the road. But while appearing for the 1st Defendant, DW2 testified that after re-visiting the scene after the said testimony of 4th June 2018 and even on 8th December 2022 on her way to Court, she realized that it was actually a two-way traffic lane and therefore the driver of motor vehicle registration number KAJ **** was to blame for overtaking when it was unsafe to do so. Dilemma. Dilemma.

91. Two issues arise from DW2's testimony. First, reliability, consistency and trustworthiness of DW2. Second, the state of the subject lane as at 28th January 2010 and not after 4th June 2018 or 8th December 2022, when DW2 asserted to have visited the scene. I will discuss each in turn.

92. Perpetually - and it's now elementary learning in the art of judicial seduction 101 - that any party to a suit should not lose sight of the fact that a judicial mind is always seduced with and by affirmed reliability, creditworthiness and consistence of a witness.

93. The credit of a witness may be impeached by the adverse party, by inter alia, proof of former inconsistent written or oral statements. See section 163 of the *Evidence Act*. It is instructive to note that consistency of a witness is the bedrock of credibility of that witness. In this connection, a party is at liberty to prove or demonstrate in Court that the testimony of a witness is consistent or otherwise with any former statement made by such witness before any authority legally competent to investigate the fact (like a Court), regardless whether it was made in writing or orally, provided it was made in relation to the same fact. See section 165 of the *Evidence Act*.

94. Firstly, time without number, it has been held that a party or witness should not create an impression in the mind of the Court that (s)he is not a straight-forward person or raise a suspicion about his/her trustworthiness or say something which indicates that (s)he is a person of doubtful integrity and therefore unreliable witness which makes it unsafe to accept his evidence. See the Court of Appeal decisions in *Ndungu Kimanyo v R* [1979] KLR 282 and *Khalif Haret v Republic* [1979] eKLR. And the evidence of a discredited witness is absolutely worthless. See the Court of Appeal holding in *Rashid Thomas v Republic* [2008] eKLR, per Tunoi, Onyango Otieno & Aganyanya, JJA (as they then were). Besides, a party seeking a remedy from Court should be ready and willing to give a good account of himself/herself failing which a Court would be reluctant to extend its hand to a person with dirty and unclean hands, for to do so, is to soil the hands of justice. In *Johnson Kimeli v Barclays Bank of Kenya Ltd* Kisumu HCCC No. 171 of 2003 (unreported) it was said of such parties as follows: "Where the Plaintiff is seeking a remedy from Court he must show a good account of himself for the Court would be reluctant to extend its hand to a person with dirty and unclean hands for he would soil the hands of justice..."

95. A witness of fact cannot and should not be permitted to be oscillatory - on material facts upon which a Court will place reliance - that she can nonchalantly, under oath, say this today and under the same oath again, say the diametric opposite tomorrow. That is a factual nomad. The evidence of such a witness should be shown the contempt card it, properly so, deserves. A decisive waterloo of the case of the party calling such a witness. Any party who so much values and desires success for his case should be wary of such a witness and dissociate himself therefrom, lest he taints his case by association. A party who befriends such a witness sets himself on the path to self-demolition and with such a friend, the party does not need an enemy (adversary) to kill his own case.

96. DW2 admitted that she presented a diametrically opposing position in her previous testimony in this (very) matter when she appeared then as a Plaintiffs' witness (PW3) but tried to unjustifiably rationalize the departure with an indefensible excuse for a police officer whose testimony is supposed to be authoritative in such matters, that by the time she testified on 4th June 2018, she had not visited the scene and was only relying on the police abstract. Where does this leave DW2's creditworthiness, reliability and consistence which is badly desired by the 1st Defendant? And globally viewed, where does this leave the probative value of the 1st Defendant's evidence in regard to this particular (determinative) fact?

97. This matter evokes memories of Michael Connelly's fiction. In his riveting crime and trial thriller - The Brass VerdictBottom of Form – Michael opens his Novel with a powerful statement thus: "Everybody lies. Cops lie. Lawyers lie. Witnesses lie. The victims lie. A trial is a contest of lies. And everybody in the Courtroom knows this. The Judge knows this. Even the jury knows this. They come into the building knowing they will be lied to. They take their seats in the box and agree to be lied to. The trick if you are sitting at the defense table is to be patient. To wait. Not for any lie. But for the one you can grab onto and forge like hot iron into a sharpened blade. You then use that blade to rip the case open and spill its guts out on the floor. That's my job, to forge the blade. To sharpen it. To use it without mercy or

conscience. To be the truth in a place where everybody lies."[3] Although Novels are based on imagery and fiction and although we constantly live in denial, the jury is out there. I do not find any difficulty to observe that this fiction is not far from fact and truth in the limited context of this matter. Michael Connelly has finally been vindicated and I now wake to the stark reality that when all is said and done, it is the Court that is always at trial.

98. Secondly and more importantly, even if this Court found DW2 reliable, creditworthy and consistent, the probative value of her testimony was null since it was centred not on the state of the subject service lane on the material date namely 28th January 2010, but on an unspecified date after 4th June 2018 and 8th December 2022, while she was on her way to Court. And this -primarily- explains why this Court was disinclined to accede to the 1st Defendant's request for a scene visit. During examination-in-chief, she testified that she could not trace the Occurrence Book in which the report of this accident was recorded. While She not only came bare-handed but also absolutely unhelpful and nonchalant, having presented no sketch of the subject service lane and/or photographs taken by an appointed Scene of Crime Officer and/or even an Occurrence Book and/or results of investigation. In this context, DW2, the star witness who was reasonably anticipated to be the bearer of the biblical light mounted on a lampstand[4] to light the whole house and untangle the controversy authoritatively - being a traffic officer who manned the road for many years - instead plunged this Court into evidential miasma having tucked the light under the biblical bushel.[5] Going by the indifferent testimony of DW2, it will be safe to observe that investigation into this serious road traffic accident (where a life was lost) was not accorded the seriousness it deserved.

99. Ultimately, neither the Plaintiffs nor the 1st Defendant successfully generated persuasion in the mind of this Court that as at 28th January 2010, the subject service lane was either a one-way as asserted by the Plaintiffs or a two-way traffic as asserted by the 1st Defendant.

100. Had the Plaintiffs persuaded this Court that the subject lane is a one-way traffic, it would translate that the driver of motor vehicle registration number KAR **** was driving on the wrong side of Mombasa Road and consequently, the Defendants would have been found 100% liable.

101. Conversely, had the 1st Defendant persuaded this Court that the subject lane is a two-way traffic, it would translate that the driver of motor vehicle registration number KAJ **** was either overtaking or changing lanes, when it was evidently not safe to do so, and since a Court of law should not sanction an illegal conduct and aid a claimant to reap from his own illegal conduct, the Plaintiffs' claim would have decisively been vanquished by the joint assault of the maxims ex turpi causa non oritur actio (that no action can arise from an illegal act); the maxim of nemo auditur propriam turpitudinem allegans (no one can be heard to invoke his own turpitude or no one shall be heard, who invokes his own guilt); and volenti non fit injuria (that a person who knowingly and voluntarily risks a danger cannot recover for the resultant injury) and would have in this context found 100% responsible for the accident in accord with *Kennedy Macharia Njeru v Packson Githongo Njau and Anor* [2019] eKLR, per L.W. Gitari, J; Nester Shikuri v Ibrahim Okwiri Matanji [2020] eKLR, per W. Musyoka, J; *Njue Patrick & 2 Others v Lucy Nyambura Ngige & Another* [2015] eKLR, per L.N. Mutende, J; and *Mohamed Muyunga v Vinoth Abwolet Eshepet* [2020] eKLR, per S.N. Riechi, J, where it was held that a driver who leaves his lawful lane and encroaches the lawful lane of the oncoming motor vehicle is negligent and 100% liable for causing the accident. Such a driver cannot be permitted to reap from his own illegal conduct (on

3 Michael Connelly, *The Brass Verdict* (2008).Bottom of Form

4 See Mathew 5:14-15; Mark 4:21-25; and Luke 8:16-18.

5 See Mathew 5:14-15; Mark 4:21-25; and Luke 8:16-18.

account of the maxim ex turpi causa non oritur actio) as was held in *Turbo Highway Limited v Jacob Kipkoech Biwott* [2020] eKLR, per Olga Sewe, J

102. How is this evidential impasse resolved? It has been enunciated that such a deadlock should not thwart a Court from rendering justice for it does not permit a Court of law to throw its arms in air in resignation to frustration. This where the rule that accidents do not just happen but caused, apply. And so, whenever there a collision of motor vehicles has been proven but there is no clear evidence on which driver to blame, proceeding from the premise that accidents do not just happen but rather caused, then all the drivers involved in the collision be equally blamed. In *Welch v Standard Bank Limited* [1970] EA 115, Madan, J (as he then was) enunciated a rule that "When there is no material to generate actual persuasion in the Court's mind, still the Court cannot unconcernedly refuse to perform its allotted task of reaching a determination. The collision is a fact. Any one of the alternatives mentioned may provide the right answer as to how it happened. The Court's sense of impartiality prevents the choosing of the alternatives of individual blame against either driver. It would be just to say, and it is as likely the explanation that both drivers were to blame equally as that only one of them was wholly to blame. Accidents do not happen but they are caused. It is an explanation which offers a solution of impartial practicability. Everyday, proof of collision is held to be sufficient to call on the two Defendants to answer. Never do they both escape liability. One or the other is held to blame. They would not escape simply because the Court had nothing by which to draw any distinction between them. So, also, if they are both dead and cannot give evidence enabling the Court to draw a distinction between them, they must both be held to blame, and equally to blame...Justice must not be denied because the proceedings before the Court fail to conform to conventional rules provided, in its judgement, the Court is able to discern that which is right owing to it being fair and just in the circumstances, without jeopardising the vital task of doing justice. Provided there is no transgression of this sacred duty, the Court will act justly in coming to a decision even if there is no evidence capable of procreating actual persuasion... There being nothing to enable the Court to draw a distinction between the two drivers, it is consonant with probabilities, and it is not repugnant aesthetically to a logical judicial mind, to hold that both were to blame, and equally to blame. The Court does hold so in this case."

103. The foregoing rule was followed an invoked in *Lakhamshi v Attorney-General* [1971] EA 118, where Spry V-P, Lutta and Mustafa JJA (as they then were) reiterated that in such circumstances "A judge is under a duty when confronted with conflicting evidence to reach a decision on it and in most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty, or that both parties were guilty, of negligence. In many cases, as for example, where vehicles collide near the middle of a wide straight road, in conditions of good visibility, with no obstruction or other traffic affecting their courses, there is, in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the centre of the road, the other must have been negligent in failing to take evasive action. It is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence but where it is not possible, it is proper to divide the blame equally between them."

104. And so was the case in *Anne Ndoti Mwololo & Another v Telkom Kenya Limited & 2 Others* Mombasa HCCS NO. 89 of 2005, where the Court held that "Since the deceased was a passenger, it is obvious that he had no role to play in driving of the motor vehicles which were involved in the accident. Therefore the principle of res ipsa loquitor applies in this case. As for apportionment of liability between the drivers of the two motor vehicles involved in the accident, there is no clear evidence as to how the accident occurred. What is certain is that two motor vehicles collided and as a result the deceased suffered fatal injuries. The police abstract form did not put blame on any of the drivers and the law is clear that the onus of establishing contributory negligence lies on the Defendant. Unfortunately

none of the Defendants discharged that burden evidentially. From the circumstances of this case a fair order is to apportion liability equally between the 2nd and the 3rd Defendants."

105. The same rule was deployed by the Court of Appeal in *Farah v Lento Agencies* [2006] 1 KLR 123 (also reported as *Hussein Omar Farah v lento agencies* [2006] eKLR), where Omolo, Tunoi and Githinji, JJA (as they then were) rendered themselves as follows: "In our view, it was not reasonably possible to decide on the evidence of the witnesses who testified on both sides as to who was to blame for the accident. In this state of affairs the question arises whether both drivers should be held to blame. It has been held in our jurisdiction and also other jurisdictions that if there is no concrete evidence to determine who is to blame between two drivers, both should be held equally to blame. Everyday, proof of collision is held to be sufficient to call the Defendant for an answer. Never do they both escape liability. One or the other is held to blame, and sometimes both. If each of the drivers were alive and neither chose to give evidence, the Court would unhesitantly hold that both are to blame. They would not escape liability simply because the Court had nothing by which to draw any distinction between them... The trial Court...had two conflicting versions of how the accident occurred. Both parties insisted that the fault lay with the other side. As no side could establish the fault of the opposite party we would think that liability for the accident could be equally on both the drivers. We therefore hold each driver equally to blame."

106. For a similar view, see also *James Wangugi Kigo v Waithaka Kahara* Nairobi HCCC No. 598 of 1991; *Alfarus Muli v Lucy M Lavuta & Another* Civil Appeal No. 47 of 1997; *Shadrack Kilonzo Kavoi v Gacheru Peter & 3 others* [2020] eKLR; *Haji v Freight Agencies Ltd* [1984] KLR 139; *Bernard Bosire Ondieki (Suing as administrator of Estate of Deborah Bochere Ondieki {deceased}) v Daniel Munika Makan* [2021] eKLR; and *John Simon Ashers & Anther v Nelson Okello Onjao* [2020] eKLR.

107. Wherefore I find that the drivers of motor vehicles registration numbers KAJ **** and KAR **** were equally negligent and accordingly equally blamed.

(v) The degree of blameworthiness/liability between the drivers of motor vehicles registration numbers KAJ ** and KAR ****

108. The foregoing findings on liability, translate that the lliability between the drivers of motor vehicles registration numbers KAJ **** and KAR **** shall be apportioned at the ratio of 50:50.

(vi) Whether the Plaintiffs have established that the Defendants were the owners of the said motor vehicle at the material time and if yes, whether the Defendants are vicariously liable for the accident caused by the said driver

109. The Plaintiff adduced both oral and documentary evidence that the 1st Defendant was the beneficial owner of the said motor vehicle and that the 2nd Defendant was the registered owner thereof. The Plaintiffs exhibited a copy of the records of motor vehicle registration number KAR **** (the Plaintiffs' Exhibit 6) indicating that Munyao Anthonio was he registered owner thereof. In his Statement of Defence, the 1st Defendant denied this averment.

110. As to whether the driver of the said motor vehicle was a servant, employee and/or agent of the Defendants, common law has established a doctrine of vicarious liability which commands that damages are recoverable from the master and not the servant on the premise the causal link (that is to say that the acted complained of was committed while the servant was acting under the instruction of the master in the course of employment), provided a master/servant relationship is proven and further provided that the act complained of was committed in the course of employment or duty. The master may thereafter wish to recover the damages from the servant at his own wish but within the service contract terms or internal working rules or by way of action in Court.

111. In the case of *Vincent Okello v Attorney General Gulu* HCCS No. 4 of 1992 (1995) III KALR 129, the High Court of Uganda held with respect to proof in cases of vicarious liability that "The law places the burden of proof in civil cases on he who would fail if no evidence at all was given from either side. In the instant case, the Plaintiff claimed that the Defendant's servants had seized and detained the Plaintiff's motor vehicle and that despite several demands to return it, the Defendant's said servants have not returned the Plaintiff's vehicle which claim was denied by the Defendant. By that denial the Defendant had turned the evidential wheel to the Plaintiff who would fail if no evidence was given from either side. To succeed, the Plaintiff had to adduce evidence to prove that while the Plaintiff was entitled to immediate possession thereof, the Defendant's servants had seized the Plaintiff's vehicle, that they did so in the course of their employment and that the Plaintiff had made demands for the return of the said motor vehicle but the Defendant's servants have not returned the same. Only then can the Plaintiff hope to succeed in his claim…"

112. Must the Plaintiff adduce direct evidence on this issue? In *Kenya Bus Services Limited v Humphrey* [2003] KLR 665; [2003] 2 EA 519, the Court of Appeal held 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. This presumption is made stronger by the surrounding circumstances and it is not necessarily disturbed by the evidence that the car was lent to the driver by the owner as the mere fact of lending does not of itself dispel the possibility that it was being driven for the joint benefit of the owner and the driver." More recently, in The *Board of Governors Kangubiri Girls High School v Jane Wanjiku Muriithi & Another* [2014] eKLR, it was held that when a car is proved to have caused damage by negligence, a rebuttable presumption arises that the owner is responsible for the driver's liability.

113. Who is a servant? The control test has been developed to answer this question. In the English case of *Yewens v Noakes* [1880] 6 QBD 530, Bramwell, L.J defined a servant to mean "…a person who is subject to the command of his master as to the manner in which he shall work."

114. In the above connection, in the English case of *Lister v Ramford Ice & Cold storage Co. Ltd* [1957] AC 555, Lister, a lorry driver employed by Ramford, reversed the lorry negligently and knocked down his father (Lister's father) who was also an employee of Ramford. The father recovered damages from Ramford but later, Ramford succeeded to recover damages from Lister on grounds that he had breached an implied term of his service contract that he could use reasonable skill and care during the course of driving.

115. It matters not whether the servant had no express approval of the master or that the alleged act was not done for the benefit of the master or that it was authorized or ratified by the master but outside the scope of employment. The only limitation is where the act was done outside the scope of employment like was in *Beard v London General Omnibus* [1900] 2 QB 530, where a person employed as a conductor drove the omnibus and negligently caused harm to another and this was found to be outside his scope of employment and thus the Defendant was not vicariously liable. The same reasoning applied in *Century Insurance v Northen Ireland Road Transport Board* [1942] AC 509, in which the driver was smoking outside against the prohibition of the employer and it caused an explosion which cause a huge damage to property.

116. In contrast, the English case of *Limpus v London General Omnibus Co*. [1862] 1 H. & C. 526 in his contract of service, the driver was prohibited by the employer not to obstruct other buses but the driver did it anyway. It was found that he was in the course of employment although doing acts were unauthorized by the employer and thus the employer was vicariously liable.

117. In *Mwona Ndoo v Kakuzi Ltd*. (1982-1988) 1 KAR 523, Chesoni, Ag. JA held as follows: "It was not established that the employee was on a frolic of his own since there was no evidence as to what he was doing on that road and how far that road was from the estate. Without that evidence the reasonable presumption is that he was on his master's business."

118. As already noted, although the 1st Defendant denied beneficial ownership of the impugned motor vehicle at the material time, he failed to call evidence to counter the oral and documentary evidence adduced by the Plaintiffs in this regard. The 1st Defendant actually admitted that he was the driver at the material time. The legal rebuttable presumption in favour of the Plaintiffs was thus not displaced. In accord with the holding in *Kenya Bus Services Limited v Humphrey* [2003] KLR 665; [2003] 2 EA 519 and The *Board of Governors Kangubiri Girls High School v Jane Wanjiku Muriithi & Another* [2014] eKLR, I conclude that the Plaintiffs have established that the 1st Defendant was the beneficial owner and the 2nd Defendant the registered owner of motor vehicle registration number KAR **** - at the material time - and thus jointly and severally, vicariously liable for the accident caused by the driver thereof.

(vii) Whether the Plaintiffs are entitled to general damages for pain and suffering and the quantum thereof

119. he rationale underpinning an award of damages for pain and suffering is to compensate the victim for enduring the physical and mental distress occasioned by the injuries before the trial and even after the trial. This includes but not limited to the ordinary pain that comes with the injuries, the pain that comes with treatment of the said injuries, the embarrassment arising from disability or disfigurement (if any) and the anxiety. In *Halsbury's Laws of England*, 4th Edition, Volume 12(1), page 348 at paragraph 883, the rationale is stated as follows: "883. Pain and suffering. Damages are awarded for the physical and mental distress caused to the Plaintiff, both pre-trial and in the future as a result of the injury. This includes the pain caused by the injury itself, and the treatment intended to alleviate it, the awareness of and embarrassment at the disability or disfigurement, or suffering caused by anxiety that the Plaintiffs' condition may deteriorate." The general purpose of awarding damages is reparation. Put differently, the purpose of awarding damages is to put the party who has been injured in a position believed by law and Courts to be the position as he would have been if he had not sustained the wrong for which he is receiving compensation. One of the earliest English cases which developed the principle of restutitio in integrum is *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 253. In this case, Lord Blackburn enunciated a principle to guide assessment of general damages as follows: "Compensation should be that sum of money which will put the party who has been injured in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."

120. What are the distinguishing characters between general damages and special damages? While special damages are the damages which are ascertainable and quantifiable as at the date of the legal action, general damages are neither ascertainable nor quantifiable as at the date of legal action. Drawing parallels between general and special damages, in the Court of Appeal decision in *Jogoo Kimakia Bus Services Ltd v Electrocom International Ltd* [1992] KLR 177, Gicheru, Cockar and Muli, JJA (as they then were) described the special and general damages in the following words: "The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts

set out in the pleadings. They must be specifically pleaded." Similarly, in the High Court decision in *Joseph Kipkorir Rono v Kenya Breweries Limited & Another*, Kericho HCCA No. 45 of 2003(UR), Kimaru, J had occasion to draw parallels between special and general damages as follows: "In current usage, special damage or special damages relate to part pecuniary loss calculable at the date of the trial, whilst general damages relate to all other items of damage whether pecuniary or non-pecuniary. If damages are special damages they must be specifically pleaded and proved as required by law. For a loss to be calculable at the date of trial it must be a sum that has actually been spent or loss that has already been incurred...Special damages and general damages are used in corresponding senses. Thus in personal injury claims, 'special damages' refers to past expenses and lost earnings, whilst 'general damages' will include anticipated loss as well as damages for pain and suffering and loss of amenities... Special damage is in the nature of past pecuniary losses or expenses while general damage is futuristic pecuniary loss or expenses. Therefore in the instant case the loss of income as a direct consequence of this fraud would be both a general damage as well as a special damage. General damages particularly extent thereof would be unknown at the time of the trial and must await the conclusion of the case so that they may be assessed. Special damages on the other hand consist of those losses that could be calculated at the time of the trial. Special damages must be pleaded, but so must future pecuniary loss if it may lead to surprise. Non-pecuniary damage must not be quantified in a pleading...There ought to be a distinction between past pecuniary losses or expenses already incurred and could easily be calculated by say reference to receipts obtained and anticipated future pecuniary loss or expenses which is continuing and which though one may know the multiplicand you will not normally know how long the loss will take. Such an anticipated loss is general damage, which must of necessity await the completion of the suit to be assessed by the Court. Special damages on the other hand is calculable at the date of the trial out of which a round figure will be obtained. General damages are such as the law will presume to be the direct natural or probable consequences of the action complained of. Special damages on the other hand, are such as the law will infer, from the nature of the act. They do not follow in the ordinary course but are exceptional in their character and, therefore, they must be claimed specifically and proved strictly...Specific loss of profits consequential upon the loss of use of an article for a specific period to the date of the Plaint is special damage, which must be pleaded. However, in certain circumstances loss of profits could be included within a claim for general damages...General damages consist of the nature of prospective loss of income while special damages consist of out of pocket expenses and loss of earnings or income incurred down to the date of trial and is generally capable of substantially exact calculation. Where damages have become crystallised and concrete since the wrong the Defendant could be surprised at the trial by the detail of its amount."

121. What are the determinative dynamics and variables in assessing general damages? It has been observed that a Court will always be confronted with stark difficulties in assessing general damages because of the many incalculables involved. This observation was entered in *Ugenya Bus Service v Gachiki* (1976-1985) EA 575, at page 579, where the Court observed thus: "General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task. When I ponderingly struggle to seek a reasonable award, I do not aim for precision. I know I am placed in an inescapable situation for criticism by one party or the other, sometimes by both sides. I also therefore do not aim to give complete satisfaction but do the best I can." In *Mohamed Juma v Kenya Glass Works Ltd*, CA NO. 1 of 1986(unreported) cited by W. Musyoka, J in *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased)* [2019] eKLR, Madan, JA (as he then was) stated that an award of general damages should not be miserly, it should not be extravagant, it should be realistic and satisfactory and therefore it must be a reasonable award. His Lordship expressed himself as follows: "It is not always altogether logical that general damages should be assessed in relation to the station in life of a victim.

There must be some general consideration of human feelings. The pain and anguish caused by an injury and resulting frustrations are felt in the same way by the poor, the not so rich and the rich. Again inflation is also no respecter of persons." Also, in *Bencivenga v Amino* [1986] KLR 269, Abdullah, J (as he then was) explained that "Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which the society deems fair, fairness being interpreted by the Court in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the Plaintiff including his age and any unusual deprivation he may suffer is reflected in the amount of the award…The award of damages must be fair, bearing in mind the previous decisions and moreover, each case has its own circumstances which may not be overlooked including the age of the Plaintiff and any unusual deprivation he may suffer. The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, as far as can be done by an award of money, as he would have been had the accident not happened…In cases in which there are Kenyan decisions on the point, in which the main essentials bear a reasonable measure of similarity to it, Kenya decisions should be used to the exclusion of the others, save those from the neighbouring jurisdiction with similar conditions to Kenya. Only when there are no local decisions on the point should resort be had to English and other authorities, and then only as helpful indicators… General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is very heavy task. When the Court is ponderingly struggling to seek a reasonable award, it does not aim at precision. It knows that it is placed in an inescapable situation for criticism by one party or other, sometimes by both sides. It does not therefore aim to give complete satisfaction but do the best it can. It knows that the days of small and stingy awards are gone. They were decidedly miserly in any event, like Kshs 20,000 for loss of a forearm or Kshs 50,000 for the loss of an eye. Even without the curse of inflation they were niggardly. They are remembered but ignored. We have inflation with us and we have to live with the exorbitance, which the inflation has brought into our lives."

122. So that a Court is enabled to determine the appropriate quantum for pain and suffering, the whole picture and in particular, the effect of injuries on the victim must be painted. Where possible, comparable injuries should attract comparable general damages. In the Court of Appeal of East Africa decision in *Bhogal v Burbidge* [1975] EA 285, Law, Ag. P. (as he then was), laid down the key factors to guide a Court when assessing general damages. His Lordship said that "The general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at. That is so, but some degree of uniformity must be sought in the award of damages, and the best guide in this respect is, in my view, to have regard to recent awards in comparable cases in Courts…the Kshs 300,000 awarded by the trial Judge, a figure which, with respect, I consider to be based on wrong principle when measured against the wards in other comparable awards in recent local cases."

123. As far as circumstances can allow, comparable injuries should be compensated by comparable awards. In *Tayab v Kinanu* [1983] KLR 114, while adopting the holding by Lawton LJ in Burke v Woolly [1980] Kemp & Kemp Case 15-056 and 19-007, who in turn adopted the reasoning by Lord Morris in *H. West and Son Ltd v Shephard* [1964] AC 326 at 346, Hancox, JA expressed himself in regard to comparability of awards viz a viz injuries in the following words: "Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards."

124. Subsequent decisions in have never departed or derogated from this path. To name but a few, in *Tayab v Kinanu* [1983] KLR 114, while echoing the holding in *H. West and Son Ltd v Shephard* [1964] AC 326 AT 345, Potter, JA expressed the worth and shortcoming of award of money for injuries in the following words: "Money cannot renew a physical frame that has been battered and shattered.

All that Judges and Courts can do is to award sums, which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it must still be that amounts which are awarded are to be to a considerable extent conventional…Scarcely any sum could compensate a labouring man for loss of a limb, yet you do not in such case give him enough to maintain him for life… You are not to consider the value of existence as if you were bargaining with an annuity office…I advise you to take a reasonable view of the case and give what you consider fair compensation."

125. The Supreme Court of Uganda decision in *Cuossens v Attorney-General* [1999] 1 EA 40, Oder, Tsekooko, Karokora, Kanyeihamba and Mukasa-Kikonyogo JJSC held that "The general rule regarding measure of damages applicable both to contract and tort is that sum which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation…In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been lost, or expenses which have actually been incurred up to the date of trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages and in this category falls income or earnings lost between the time of injury and the time of trial…But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of trial. It is therefore awarded as part of the general damages…An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore, important that evidence should be given to the Court of as many solid facts as possible. One of the solid facts that must be proved to enable the Court assess prospective loss of earnings is the actual income which the Plaintiff was earning at the time of the injury…The method of assessment of loss of income or earnings applies equally to claims based on personal injury as well as to those for loss of dependency arising from fatal accidents… Sometimes it is impossible, though the justice of the case requires some award to be made or arithmetic has failed to provide the answer which common sense demands…A Plaintiffs' loss of earning capacity occurs where as a result of his injury his chances in the future of any work in the labour market or work as well paid as before the accident are lessened by his injury…It is a different head of damages from an actual loss of future earnings, which can readily be proved at the time of the trial. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution of earning capacity is awarded as part of the general damages…The question is what is the present value of the risk that at future date or time the Plaintiff will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the Plaintiff had not worked before the accident) or in addition to another (where the Plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the Plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible but a Court can try to assess what earnings a Plaintiff may lose after the trial and for how long. There is no formula and the Judges must do the best they can…The assessment of damages is more like an exercise of discretion by the trial Judge and the appellate Court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would or he has taken into consideration matters he ought not to have considered or not taken into account those matters he ought to have considered and in the result arrived at the wrong decision… Loss of earning capacity is a claim on its own and the figure need not be plucked from the air because the Plaintiff would be expected to furnish the material on which a reasonable figure could be based. The

figure should be based on mathematical calculation using such relevant factors as the Respondent's age and qualifications and the nature of the injuries sustained."

126. Over time, decisional law is replete with decisions which have amplified the reasoning in the Livingstone case. There are now multiple subsets of principles drawing wisdom from the general principle and they command that in awarding damages, the full picture, the circumstances and the effect of injuries on the particular person concerned must be born in mind and that some degree of uniformity must be sought.

127. With particular focus on general damages, it is now necessary to set out the guiding principles laid in the case of *Sofia Yusuf Kanyare v Ali Abdi Sabre & Another* [2008] eKLR. In that case, R.N. Nambuye J (as he then was) set out the guiding principles as follows: (a) An award of damages is a matter of discretion on the part of the Court, seized of the matter; (b) The award should not be too high or too low; (c) It is not meant to enrich the victim, but to try as much as possible to restore him/her in the positing in which they were in, before the accident; (d) Awards in past decisions are meant to be mere guides and each case should depend on its circumstances; and (e) Where awards in the past decisions are to be taken into consideration, their age, and the rate of inflation as well as the value and the purchasing power of the Kenyan shilling should be taken into consideration.

128. In addition to the five guiding principles set out above on general damages, it is also appropriate at this stage to set out a sixth principle laid in the case of *Joseph Musee Mua v Julius Mbogo Mugi & 3 others* [2013] eKLR where the Court in concurring with the principle set out in the case of Osman Mohamed & Another v Saluro Bundit Mohammed, Civil Appeal No. 30 of 1997, where the Court stated that "Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large damages are inevitably passed to the members of the public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees."

129. A view similar to that held in the Musee case was expressed in *Kigaragari v Aya* [1976-1985] EA 224, (which was heard and determined by Nyarangi and Hancox JJA, Platt Ag. JA [as they then were]), in which Nyarangi JA, expressed himself as follows which has now come to the benchmark: "Damages must be within the limits set out by decided cases and also within the limits the Kenyan economy can afford. Large awards are inevitably passed on to the members of the public, the vast majority of whom cannot afford the burden in the form of increased insurance premiums and insurance fees."

130. In the Kigaragari case, Nyarangi, JA recommended development of a common law system in Kenya in consistent way, which system was over time developed and working hitherto. The recommendation went like this: "The Court of Appeal should develop the common law of Kenya in a consistent way as regards damages. Awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must rest heavily upon the Court. The largest Application should be given to that approach. As large amounts are awarded they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover. If the sums get too large we are in danger of injuring the body politic. As large sums are awarded so premiums for insurance rise higher and higher…It is of course desirable that so far as possible comparable injuries should be about or nearly equally compensated: However, the comparison should be confined to decisions of local Courts, other decisions e.g. overseas ones serving merely as a guide."

131. Assessment of damages is at the discretion of the trial Court. In the Court of Appeal decision in *Catholic Diocese of Kisumu v Sophia Achieng Tete* [2004] 2 KLR 55, Tunoi, O'Kubasu and Githinji, JJA (as they then were) rendered themselves as follows: "It is trite law that the assessment of general damages is at the discretion of the trial Court and an appellate Court is not justified in substituting a figure of

its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate Court can justifiably interfere with the quantum of damages awarded by the trial Court only if it is satisfied that the trial Court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

Determination

132. I now turn to consider just, fair and reasonable quantum of general damages for pain and suffering. In this regard, Counsel for the Plaintiff submits that an award Kshs. 150,000 will be adequate compensation for the pain and suffering the deceased underwent before dying on the same day, staking this proposition in *Benedicta Wanjiku Kimani v Changwon Cheboi & another* [2013] eKLR.

133. On the other hand, the 1st Defendant submits that an award Kshs. 10,000 will be adequate compensation for the pain and suffering the deceased underwent before dying on the spot, without citing any authority.

134. There is an irrebuttable presumption that the aggregate of pain and suffering is directly proportional to the span of period before one succumbs to his/her own injuries. The period taken is thus determinative variable. It is thus presumed that the longer the period, the more the pain and suffering and the converse is true. It follows that if a person dies instantly, time without number, Courts have presumed that the chance for pain and suffering was trifling and thus attracts a conservative amount of damages. The reverse holds true so that whenever there is prolonged period after the accident before the victim succumbs to his/her own injuries, the pain and suffering is deemed to be more significant and thus attracts a more significant amount of damages. This distinction has always validated itself in decisions. For instance, in *Douglas Ooga Nyansimora v Sammy Mutunga Makau & another* [2016] eKLR, a distinction was drawn between a situation where a victim dies on the same day and where a person dies after undergoing substantial pain and suffering for some time including but not limited to circumstances where the victim dies while undergoing treatment. So did the Court consider in *Paul Ouma v Rosemary Atieno Onyango & Anor* (2018) eKLR, which is deployable where the victim dies on the same day instantly and thus pain and suffering is inferred to have been nominal. The former can be demonstrated by for instance evidence that the victim underwent some treatment before death but the rather can be demonstrated that the victim was taken to mortuary immediately following the accident.

135. Whenever considering an award under this head, the Court should bear in mind the generally accepted principle that it attracts nominal damages and especially, if the death followed immediately after the accident. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR, the Court stated that "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

136. After how long did the deceased in this matter succumb to his own injuries? The Certificate of Death indicates that the deceased died on 10th September 2020 (the same day of the accident), but it does not divulge how long after. Further, it is stated in the witness statement of Stephen Wambua Kavili that "He was immediately rushed to Machakos Level 5 Hospital but was confirmed dead on arrival."

137. In *Kenya Red Cross v IDS (Suing as the Legal Representative of the Estate of MDR (Deceased)* [2020] eKLR, the deceased died after three hours of the accident (while undergoing treatment in hospital) and the Court awarded Kshs. 100,000 which was upheld on appeal.

138. In *James Gakinya Karienye & another (suing as the legal Representative of the estate of David Kelvin Gakinya (deceased) v Perminus Kariuki Githinji* [2015] eKLR, the deceased died on the spot and the Court awarded Kshs. 10,000. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR, the Court awarded Kshs. 10,000 where the deceased died soon after the accident. In *James Gakinya Karienye & Another (Suing as legal representative of Estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji* [2015] eKLR, Aburili, J awarded general damages in the sum of Kshs. 10,000 for pain and suffering where the deceased died immediately after the accident. In *Harjeet Singh Pandal v Hellen Aketch Okudho* (2018) eKLR, F.A. Ochieng, J awarded general damages in the sum of Kshs. 10,000 where the deceased had died on the spot. In *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR, the Court of Appeal upheld the Kshs. 10,000 which had been awarded on evidence that the deceased succumbed to his injuries immediately after the accident. In *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased)* [2019] eKLR, the Magistrate awarded Kshs. 10,000 on evidence that the deceased died on the spot and it was upheld by the High Court on appeal.

139. In *Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased* [2020] eKLR, the High Court on Appeal upheld Kshs. 20,000 which had been awarded by the trial Magistrate on evidence that the deceased succumbed to his injuries immediately after the accident.

140. In *Rose Wangui Machua & another v Japheth Mbiuki* [2016] eKLR, there was no evidence of how long after the deceased died and the Court awarded Kshs. 10,000.

141. In *Caleb Omara Kaiso v William Machuki Nyamoiro & another* [2020] eKLR, A.K. Ndungú, J upheld an ward of Kshs. 50,000 which had been awarded by the trial Magistrate for pain and suffering where the deceased died soon after the accident having followed the award in *Irene W Kagondu & Another v W. K. Tilley (Muthaiga) Ltd & Another* [2018] eKLR where the Court awarded Kshs. 70,000 for pain and suffering where the deceased had died on the same day.

142. In *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adellah* [2015] eKLR, R.E. Ougo, J, awarded Kshs. 50,000 for pain and suffering on evidence that the deceased had died shortly after the said accident.

143. In digest, superior Courts have not been uniform on the amount to award in circumstances where the victim dies on the spot or shortly after the accident. I thus make the same observation as was made in *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR, that the amount ranges between Kshs. 10,000 and Kshs. 100,000. This notwithstanding, the approach taken by Superior Courts in assessment of general damages flows from the decision of the Court of Appeal in *Tayab v Kinanu* (supra) which, while adopting the decision by Lord Denning in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 A11 ER 332 held that "In considering damages in presence injury claims, it is often said: The Defendant are wrong doers so make them pay up in full. They do not deserve any consideration. That is a tedious way of putting the case. The accident like this one, may have been due to a pardonable error much as may befall any of us. I stress this so as to remove the misapprehension, so often repeated that the Plaintiff is enabled to be fully compensated for all the loss and detriment such

as suffered. That is not the law. She is only entitled to what is in the circumstances a fair compensation, fair both to her and to the Defendant."

144. How should an award of damages for pain and suffering be assessed? In *Jackline Syombua v BOG Ekalakala Secondary School, Embu*, HCCC Number 118 of 2006 (Unreported) the Court had this to say about assessment of damages: "The task of assessing damages in a case such as this is a difficult one. The Court must nonetheless be guided by relevant precedents…In assessing compensatory damages, the Court will always bear in mind that the purpose of awarding damages is not to pay as it were for the loss or injury the Plaintiff has suffered. Damages only assuage the pain or loss suffered by the Plaintiff because no amount of money can replace a lost limb."

145. This Court is alive to the fact it is clothed with discretion to determine the amount of general damages. It is now settled law that discretion ought to be exercised with judiciously and in aid of justice (see *Christopher Kiprotich v Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another v Shah* [1968] EA 93 and *Mohindra v Mohindra* (1953) 20 EACA 56). Speaking of discretion, Lord Halsbury L. C., in the case of *Sharp v Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173 reasoned that "When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself."

146. As correctly observed by the Court in *West H & Sons Ltd v Shepherd* 1964 AC 326, money cannot restore the physical frame of the victim (in this case, it cannot certainly restore the life of the deceased) but it will offer solace and warmth. This Court having addressed its mind to the principles enunciated in multiple decided cases as set out above and in particular that an award on damages is a matter of discretion of the Court and that an award should be guided by the principle of restitutio in integrum and that awards in past decisions are meant to be mere guidelines and that the Court should consider the age of the past awards, the rate of inflation as well as value and purchasing power of the Kenya shilling over time and that awards should be within limits set by decided cases. In light of the conflicting positions taken by the High Court on the same circumstance which are all binding on this Court and in exercise of my discretion, I assess a sum Kshs. 50,000 as a just, fair and reasonable award of general damages for pain and suffering, subject to the 50:50 apportionment of liability.

(viii) Whether the Plaintiffs are entitled to general damages for loss of expectation of life and the quantum thereof

147. Loss of expectation of life is an hypothetical assessment of loss to the victim as a consequence of the breach of duty of care which led to a lost opportunity to obtain a benefit and/or avoid a loss. The rationale behind this award is to compensate the estate of the deceased for shortening of the expectation of life of the victim and especially the loss of a measure of prospective enjoyment of life. See the origins in *Roxe v Ford* (1937) AC 826; *Reid v Lanarkshire Traction Co*. (1934) SC 79; and *Bailey v Howard* (1938) 4 All ER. 827. In *Reid v Lanarkshire Traction Co.* (1934) SC 79, the shortening of life was accepted as a head of damage.

148. In Flint v Lovell (1935) 1 KB 354, it was held that where the injury to the claimant shortened his expectation of life, he was entitled to damages in respect of this shortening, thus establishing a head of damage since known as loss of expectation of life.

149. And what is the state of this in England? In *Kemfro Africa Ltd "T/A Meru Express Services (1976)" & Another v Lubia & Another (No. 2)* [1987] KLR 30, at page 37, Kneller, JA (as he then was) had this to say about the background of loss of expectation of life: "The Law Commission in England

proposed that (a) damages for loss of expectation of life should be abolished and (b) there should be no deduction from the damages under the *Fatal Accidents Act* in respect of benefits received from the deceased's estate. The Courts there await any consequent changes that Parliament may make in the law. We have a law Reform Commission in Kenya and it has not made such a recommendation and nor has our parliament changed the law so, in my view, it would not be right for this Court to do so."

150. In *McGregor on Damages* (2003) 17th Ed. para. 35-219/20, at common law, damages for loss of expectation of life is a distinct head from the general damages for pain and suffering. It should however be noted that this head of damages has since been abolished in England as a separate head and instead subsumed into the head of pain and suffering. See section 1(1) (a) of the *Administration of Justice Act*, 1982. Section 1(1) (b) enacted that where the claimant's life expectation has been reduced by the injuries "the Court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be caused by awareness that his expectation of life has been reduced."

151. In *Kemfro Africa Ltd "T/A Meru Express Services (1976)" & Another v Lubia & Another (No. 2)* [1987] KLR 30, at page 35, Kneller, JA (as he then was) explained the rationale of this head of damages as follows: "In England, under the *Law Reform Act,* it is the deceased's own cause which survives for the benefit of his Estate: *Rose v. Ford*, [1937] AC 826: so the estate should recover the damages the deceased would have recovered but for this death (and the expenses of his funeral). Damages for pain, suffering, loss of amenities and earnings are for the period he survived: Rose v. Ford (ibid): so if death is more or less instantaneous the only damages recoverable will be for the deceased's loss of expectation of life. *Yorkshire Electricity Board v. Naylor,* [1968] AC 529. What has to be valued is the loss of the victim's prospective happiness which Viscount Simmonds in *Benham v. Gambling,* [1941] AC 157 said: "might seem more suitable for discussion in an essay on Aristotelian ethics than in a judgment in a Court of law" and because it is unreal arbitrary award it usually is the current conventional sum. *Yorkshire Board v. Naylor*, [ibid]. It was UK pounds 200 in 1941 and UK pounds 500 in 1968."

152. What are the foundational factors in determining the amount to award for loss of expectation of life? The age of the deceased, his health, his temperament and earning power are just but a few determinative factors which should advisedly be taken into account. As a way of exemplifying, the younger the age, the more the award and vice-versa. Also, if for instance the deceased had a terminal disease, it should count to lessen the amount awardable.

153. Since our laws have been built on the common law and equity by dint of the proviso to section 3(1) of the *Judicature Act*, I wish to trace the roots of our current jurisprudence on the issue at hand. In England, there were many decisions on this head of damages before but the decision of the House of Lords in *Benham v Gambling* (1941) 1 All ER. 7, was the first to lay down the principles which should dictate assessment of damages for loss of expectation of life. The injured person was a child of two and a half. He was unconscious from the moment of the accident until his death, which occurred later on the same day. It was held that by the time he died, he had acquired an action for loss of expectation of life. The Court awarded 200 pounds for the years the child had lost in enjoyment. Since age is a factor, the result of this ward of £200 must have been considered as the apex award due to the very tender age of the deceased and for this reason awards for adults must be lesser than this amount. The House of Lords in considering the case, took into account the dictum of Asquith J (as he then was) who was the trial Judge of this case "that human life must be assumed on the whole to be an advantage rather than a disadvantage, and, if the victim has had its life reduced by a longer period, that is a graver disadvantage in respect of which larger damages ought to be awarded than if its life had been reduced by a shorter period." Viscount Simon LC said that a Court should set a reasonable and modest figure as damages for "the loss of a measure of prospective happiness" because "It would be fallacious to assume, for this

purpose, that all human life is continuously an enjoyable thing... The truth, of course, is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or Judge of fact is attempting to equate incommensurables. Damages which would be proper for a disabling injury may well be much greater than for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head, whether in the case of a child or an adult, very moderate figures should be chosen...I trust that the views of this House, expressed in dealing with the present appeal, may help to set a lower standard of measurement than has hitherto prevailed for what is in fact incapable of being measured in coin of the realm with any approach to real accuracy." This principle explains why to the present day; a modest figure is adopted for loss of expectation of life.

154. In another English decision in *Flint v Lovell* (1935) 1 KB 354, the doctors were unanimous that the Plaintiff would not live more than one year and it was held that the jury were entitled to take into account, in assessing damages for loss of expectation of life, the fact that Plaintiff's life had been materially shortened.

155. Age is a key factor in fixing the award for loss of expectations of life. In Aizkarai Mendi (1938) 1 KB 786, the facts were that nine seamen were drowned and the trial Judge awarded equal damages to each for loss of expectation of life, although their ages varied from 23 to 44 years. On appeal it was held that the age factor could not be entirely neglected. Damages were finally assessed as follows: £400 each for those under 30 years. £350 for the one aged 40 years and £300 for those between 41 and 44 years. See also *Mills v Stanway Coaches Ltd.* (1940) 2 All ER. 587 where Slesser L.J (as he then was) thought that the damages for loss of expectation of life of a healthy woman of 23 should not be above £1,000.

156. What is the test for loss of expectation of life? In *Benham v Gambling*, (1941) AC 157, while being decided at the Court of Appeal level, the Court of Appeal held that "In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects." In *Roxe v Ford* (1937) AC 826 and *Bailey v Howard* (1938) 4 All ER. 827, while concurring that some account must be paid to the age of the victim, the House of Lords rejected any strict application of an actuarial test based on the expectation of life of a person of that particular age. While appreciating that age is relevant, the House of Lords pronounced itself thus: "the thing to be valued is the prospect of a predominantly happy life." Apparently if the character or habits of the individual are calculated to lead to an unhappy or despondent future, the amount awarded should be proportionately smaller. On the other hand, "damages are in respect of loss of life, not of loss of future pecuniary prospects," and the wealth and status of the victim are logically irrelevant.

157. Back to Kenya, the principles which were enunciated in *Benham v Gambling* (1941) AC 157, have woven themselves in our local jurisprudence on this head of damages.

158. In *Mercy Muriuki & Another v Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Robert Mwangi)* (2019) eKLR, the Court observed that "The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

159. In *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) Deceased v Elijah Oketch Adellah* (2015) eKLR, R.E. Ougo, J stated as follows: "29. For loss of expectation of life the Plaintiff has proposed Kshs. 200,000/- while the Defendant has proposed Kshs. 70,000/-. The Plaintiff died at 28 years he was a young man with promise. I find the sum proposed by the Defendant is too low and award the Plaintiff Kshs. 100,000/- as loss of expectation of life."

160. In *James Gakinya Karienye & Another (Suing as legal representative of Estate of David Kelvin Gakinya (Deceased) v Perminus Kariuki Githinji* (2015) eKLR, Aburili, J awarded Kshs. 80,000 for loss of expectation of life of a 28-year-old man.

161. In *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased)* (2018) eKLR, the deceased died at the age of 38 years old. He was awarded Kshs. 100,000 by the trial Magistrate which was upheld by JA. Makau, J on appeal.

162. In *Harjeet Singh Pandal v Hellen Aketch Okudho* (2018) eKLR, F.A. Ochieng, J affirmed an ward of 100,000 for loss of expectation of life for a 29-year old man.

163. In *Kenya Wildlife Services v Geoffrey Gichur Mwaura* (2018) eKLR, R. Nyakundi, J reviewed downwards an award of Kshs. 150,000 to Kshs. 100,000 for loss of expectation of life of 13-year-old boy.

164. In *Moses Akumba & Another v Hellen Karisa Thoya* (2017) eKLR, Chitembwe J was of the view that an award of Kshs. 200,000 for loss of expectation of life for a deceased who was a fisherman was not inordinately high.

165. In Patrick Kariuki Muiruri & 3 Others v Attorney General (2018) eKLR, Sergon J awarded Kshs. 200,000 under this head.

166. In *Vincent Kipkorir Tanui (Suing as the Administrator and/or Personal Representative of the Estate of Samwel Kiprotich Tanui (Deceased) v Mogogosiek Tea Factory Co. Ltd & Another* (2018) eKLR, Mumbi Ngugi, J upheld an award of Kshs. 200,000 which had been made by the trial Magistrate.

167. In *Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased* (2020) eKLR, R. Mwongo, J affirmed Kshs. 100,000 for loss of expectation of life which had been awarded by the trial Magistrate for a 53-year-old man.

168. In *Hellen Waruguru Waweru (suing as the legal representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* (2015) eKLR, Waki, JA (as he then was), Nambuye and Kiage, JJA substituted Kshs. 70,000 which the High Court had awarded after reviewing the Magistrate's award downwards from Kshs. 100,000 and reverted to the award of Kshs. 100,000 which had been awarded by the trial Magistrate for loss of expectation of life for a 54-year-old.

169. In *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased)* (2019) eKLR, the Magistrate awarded Kshs. 100,000 and it was upheld by W. Musyoka, J on appeal for a 33-year-old woman.

170. In *Caleb Omara Kaiso v William Machuki Nyamoiro & another* (2020) eKLR, A.K. Ndungú, J upheld an ward of Kshs. 100,000 for loss of expectation of life for a 38-year-old man.

171. In *Douglas Ooga Nyansimora v Sammy Mutunga Makau & another* (2016) eKLR, Sergon, J upheld an ward of Kshs. 150,000 which had been awarded by the trial Magistrate for the deceased who was

23 years old, on authority of *Wilson Mwangi Kabiro v Charles Nyamumbo Mageto* (2015) eKLR, per Mbogholi, J who awarded Kshs. 150,000 for loss of exportation of life of a 24-year-old. I will award a similar amount in his case.

172. In *Mombasa Maize Millers Limited v WIM suing as the representative of JAM (Deceased)* (2016) eKLR, Majanja, J upheld a trial Magistrate's award of Kshs. 100,000 for a 34-year-old deceased for loss of expectation of life.

173. In *Jonnes Eshapaya Olumasayi & another v Minial H Lalji Koyedia & another* [2008] eKLR, R.N. Sitati, J (as she then was) awarded Kshs. 300,000 for a 27-year old for loss of expectation of life.

Determination

174. From the sample decisions discussed supra, the discernible trend of the conventional figure under this head ranges between Kshs. 70,000 and Kshs. 300,000, dictated by inter alia, the age and state of health of the deceased.

175. The Plaintiffs prays for Kshs. 100,000 for loss of expectation of life by the deceased, without citing an authority.

176. The 1st Defendant too submits that Kshs. 100,000 will suffice, without citing an authority.

177. It was the Plaintiff's evidence that before his death, the deceased was 44 years old and of good health. Her life having been rudely cut short, I find and so conclude but for this death, she would have been entitled to damages for loss of prospective enjoyment of life. It should be underscored that the figure of general damages awarded under this head is usually a nominal and conventional figure commanded by the maxim injuria sine damnum (to merely signify a violation of a right of the deceased) and is thus divorced from the principle of restitution in integrum.

178. I hereby award Kshs. 100,000 for loss of expectation of life, subject to the 50:50 apportionment of liability.

(ix) Whether the Plaintiffs are entitled to general damages for loss of dependency and the quantum thereof

179. What are the determinative variables in loss of dependency? In *Beatrice Wangui Thairu v Ezekiel Barngetuny & another* Nairobi HCC No. 1638 (unreported), which was cited in *James Mutuma Kirimi v P.C.E.A Kikuyu Hospital & another* [2017] eKLR, it was held that "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The Court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the Court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature ... I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial Court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case ... Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and Counsel appearing before Courts may be forgiven for assuming them to be the law.

They are not. It takes a discerning Court to put the law back to track. If I may say with admiration, such was the appellate bench in *Boru Onduu* [1982-1992] 2 KAR 288."

180. How is assessed? In *Chunibhai J Patel and Another v PF Hayes and Others* (1957) EA 748, at page 749, the Court of Appeal stated in the manner of assessment of damages under the Fatal Accident Act as follows: "The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependant, the net earnings power of the deceased i.e. his income and tax and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying a figure representing so many years purchase. The multiplier will bear a relation to the expectation of the earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for possibility or proportionality of the remarriage of the widow of what her husband left her, as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the Defendants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum that the Court should apportion among the various dependants ... It has also been submitted by the Defendant that the deceased would retire at age 55 and that there was no guarantee that he would remain in active employment in the private sector. It is true that there are indeed many imponderables of life and life itself is a mystery of existence. However, it is not in the province of this Court to determine or explore those imponderables. The duty of this Court is to apply the generally known period during or about which an employee in the deceased's occupation of an accountant would be in active work and retire.' In the government employment, the deceased would have retired at age 60 years. In accordance with employment laws and there was no other evidence to challenge this legal retirement age and the Plaintiff did not state otherwise. I would therefore take 60 years to be the common retirement age. There was no evidence of the vicissitudes of life of other imponderables or illness which would have shortened the deceased's working life to only 15 years and retire from work. The deceased was described as having lived a healthy and happy life ... In Benedita Wanjiku Kimani (*supra*) Emukule J awarded a multiplier of 16 years to+ a deceased aged 44 years at the time of his death. In *Simon Kiplimo Murey & 3 Others v Kenya Bus Service Management Services Ltd & 4 Others* (2014) eKLR where the deceased died aged 28 years working for Kenya Power and Lighting Co. Ltd and earning Kshs 40,000/- per month the Court awarded a multiplier of 25 years."

181. In computing the loss, what amount of the earning should be applied as the multiplicand? Is it the net or gross income? The net income is the figure that is applied as the multiplicand. In *Leonard O. Ekisa & another v Major K. Birgen* (2005) eKLR, Dulu, Ag. J had this to say about the multiplicand: "... It is obvious from the above two cases, that the Courts have been defining net income to mean gross income less tax element ..." In Chunibhai J Patel and Another v P. F. Hayes and Others [1957] EA 748, at page 749, the Court of Appeal stated the law on assessment of damages under the *Fatal Accidents Act* as follows: "The Court should find the age and expectation of the working life of the deceased and consider the ages and expectations of life of his dependants, the net earning power 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. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase." In Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited [2015] eKLR, Waki, JA (as he then was), Nambuye and Kiage, JJA., held that "14. As emphasized above, the net income determines the multiplicand and it is only net of statutory deductions. In this case, Hellen testified, and it is apparent from the pay-slip, that the net salary after statutory deductions was Sh. 19,373, and indeed Counsel for KSSL accepted that figure in

his Submissions. There is no reason why the High Court should have interfered with that figure." Also, in Beatrice Wangui Thairu v Ezekiel Barngetuny & another Nairobi HCC No. 1638 (unreported), which was cited in James Mutuma Kirimi v P.C.E.A Kikuyu Hospital & another [2017] eKLR, it was held that "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The Court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased." (Emphasis supplied)

182. What then is deductible? Are loans deductible? How are the statutory deductions worked out? What should be the source of this information? Loans constitute income to the deceased and should thus not be deducted from the gross income. In Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR, R. Mwongo, J held that "9. The trial Court calculated the award as follows: 13,201.55 x 12 months x 8 years x 2/3 = 844,899/-. It found that the deceased was earning a gross salary of 17,633/-. The appellant argues, wrongly in my view that all deductions for loans and other benefits would leave the deceased with a net income averaging Kshs 4267/-. This would be incorrect as all income earned by the deceased less statutory deductions constitutes income enduring to the benefit of the deceased, even if applied by the deceased to pay loans or acquire other benefits 10. I will thus treat the earnings found by the trial Court as the correct figure and will not disturb it." The approximate statutory deductions namely income tax, NHIF contributions and NSSF contributions, have been reckoned to be about one third of the gross salary. The source of these deductions should be the relevant law. In *Simeon Kiplimo Murey & 3 others v Kenya Bus Management Services Limited & 4 others* (2014) eKLR, Majanja, J stated that "I now turn to the issue of the net income. The learned Magistrate correctly pointed out that Plaintiff was bound by the pleadings which showed that the deceased's salary was Kshs 20,000/- although the proved salary was Kshs 40,000/. Although the statutory deductions were not disclosed, the Court could readily ascertain these from the relevant law. I would estimate that statutory deductions such as income tax, NSSF and NHIF would amount to about one third of the gross salary leaving a net income of about Kshs 26,000/- less a reasonable sum the deceased would spend on himself. The appellant, in the pleadings and Submissions, accepted that the amount pleaded and proved is Kshs 20,000/- and the same should have been awarded as the net income. I therefore find and hold that the multiplicand is Kshs 20,000.00."

183. What does the Court do where no documentary evidence has been exhibited to prove the profession or occupation averred? In *Nelson Rintari v CMC Group Ltd* (2015) eKLR the Court held that "... I agree a wrong doer must accept the victim as he finds him. The respondent cannot therefore urge the Court to deny the Appellants earnings because of his failure to keep records or develop a system of keeping accounts. I agree if the Respondent's Submissions are accepted this would do a lot of injustice to many Kenyans who have invested in informal sector and do not worry about keeping books of accounts. Further this would go against Article 159 (2) (d) of the *Constitution* of Kenya 2010 which obliges Courts to do justice without procedural technicalities..." The same view had been taken earlier by the Court of Appeal in Jacob Ayiga Maruja & Another v Simeone Obayo [2005] eKLR, where the Court observed that "We do not subscribe to the view that the only way to prove the profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents. That kind of stand would do a lot of injustice to very many Kenyans who are even illiterate, keep no records and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that only documentary evidence can prove these things." And so did W. Musyoka, J in *John Kipkemboi & another v Morris Kedolo* [2019] eKLR where his Lordship held that "24. From the above cases it is clear that it is not necessary for one to avail documentary evidence to prove earnings."

184. What happens where evidence is adduced to the satisfaction of the Court that the deceased was employed but there is no documentary support? Where a person is employed but the salary is not determined, reference should be made to the government wage guidelines issued from time to time. And where the stated profession does not appear in the Government wage guidelines, then a Court can adopt a global figure. In *Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others* [2014] eKLR the Court held that "Where a person is employed and the salary is not determined, his or her income may be determined by reference to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the Magistrate to rely on "municipal rates." The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the Court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J, in *Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another* quoted by Koome J, in A*lbert Odawa v Gichimu Gichenji* NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view; 'The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.' The same principle was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J, stated that: "As regards the income of the deceased there are no bank statements showing his earnings. Both Counsels have made an estimate of the same using no figures. In the Courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambla and Collins Ochieng Obambla the sum of Kshs. 700,000.00 each." Similarly, in *Philip Wanjera & Another v Ahmed Liban & Shukur Ahmed Liban (Suing for and on behalf the Estate of Habiba Liban)* [2016] eKLR, Sergon, J held that "No documentation was produced to show that she earned KShs.15, 000/= per month. While I am alive to the fact that a farmer may not have any payslips or books of accounts to prove her earnings or any documentation for that matter, the onus of proof rests with the respondent to prove that she was indeed a farmer. However, in broad interest of justice I am inclined to apply the Government Minimum Wage Guide for unskilled labourers. The Regulation of Wages (Agricultural industry) 2008 provides for KShs. 5,000/= for unskilled employee." In the same vein, in *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased*) [2018] eKLR, the Plaintiff could not produce documentary evidence to support the Plaintiff's assertions that the deceased was a watchman. JA. Makau, J held as follows: "15. In the instant case, PW1 did not produce any document to confirm the deceased was a watchman earning KShs. 10,000/= per month as a watchman. That while I am alive to the fact that watchman may be engaged by individuals or unregistered or registered security firms, most of them may not have letters of appointment nor are they issued with salary slips or sign payment vouchers as regards their earnings but it is not a requirement that proof of earnings be proved by daily earnings or on monthly basis by way of documentary evidence only such as payment voucher or payslip or books of accounts. The wrongdoer cannot be allowed to hide behind none production of documentary evidence or proof of earnings to deny his victim due compensation on the grounds of none production of documentary evidence on earnings as by allowing that, to be the only way to prove earnings, the majority of earners who are engaged in Jua Kali Sector, would be denied justice in matters in which strict proof of earnings

will be insisted on.” Again, in Jacob Ayiga Maraja and Francis Karani v Simeon Obongo (Suing as the Administrator of the estate of Thomas Denga Obondo (Deceased) [2005] eKLR, the Court of Appeal stated that “In our view, there was more than sufficient material nor record from which the learned Judge was entitled to and did draw conclusion that the deceased was a carpenter and that his monthly earnings were about KShs.4000/= per month. We do not subscribe to the view that the only way to prove the profession of a person must be by way of the production of certificates and that the only way of proving earnings is equally the production of documents. The kind of that stand would do a lot of injustice to very many Kenyans who are even illiterate, keeps no record and yet earn their livelihood in various ways. If documentary evidence is available, that is well and good. But we reject any contention that any documentary evidence can prove these things...In this case, the evidence of the Respondent and the widow coupled with the production of several reports was sufficient materials to amount to strict proof for damages claimed. Ground one of the grounds of appeal must accordingly fail on ground two, we know of no law or any other requirements that a self-employed compensator must retire at age 55.”

185. In *Sukaru Insutries Limited v Lensa Awuor Nyagumba & another* [2019] eKLR, Joseph Otieno Ogutu died at age 28. The Plaintiff did not produce documentary evidence to support an averment that the deceased was a loader. In resorting to The Regulation of Wages Order applicable at the time of the accident, AC Mrima, J held that “9. As the deceased was an adult and a loader then in the absence of any formal evidence of income a Court can safely revert to the appropriate order. In this case the appropriate category would be The *Regulation of Wages (General) (Amendment) Order*, 2013 (Legal Notice No. 197) which came into operation on 01/05/2013 and was substituted by The *Regulation of Wages (General) (Amendment) Order*, 2015 (Legal Notice No. 117) which came into operation on 01/05/2015 since the deceased died in January 2015. The deceased would then fall under Category (b) Column 3 thereof which provided for the wages for Turn boys within the then all Municipalities in Kenya as well as within Mavoko, Ruiru and Limuru Town Councils. Before the 2010 Constitution Migori town was under the Municipal Council of Migori. The monthly income inclusive of house allowance was Kshs. 13,468/50/=. Therefore, the figure of Kshs. 12,000/= adopted by the trial Court, although lower than what was provided for and the Court did not make that finding based on the *Regulation of Wages (General) (Amendment) Order*, 2013 as expected, remain fair and reasonable. The ground therefore fails.”

186. What are the determinative factors in fixing a multiplier? In *Board of Governors of Kangubiri Girls High School & Another v Jane Wanjiku Muriithi & Another* [2014] eKLR, the Court of Appeal adopted the following principles enunciated by Nambuye J (as she then was) in *Cornelia Eliane Wamba v Shreeji Enterprises Ltd & Another* – H.C.C.C No. 754 of 2005: “This Court has given due consideration to the afore set out rival arguments on the issue of choice of a multiplier and in its opinion the following are the guiding principles: - a) The choice of a multiplier is a matter of the Court’s discretion which discretion has to be exercised judiciously and with a reason. b) It is common ground that since deceased was not permanently employed in an establishment with a retirement age bracket for its staff, it is not possible to fix a retirement age. c) The nature of the profession engaged also counts. Herein it is common ground that there is no fixed retirement age in the profession of Journalism. One can work as long as he wished. d) Death through natural causes and departure for greener pastures elsewhere is also a factor.”

187. In fixing the multiplier and reckoning the difference of time to retirement, a Court may also consider inter alia the variability and vicissitudes of life like premature death from diseases. See *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased*) [2019] eKLR.

188. And so, in *Beatrice Wangui Thairu v Ezekiel Barngetuny & another* Nairobi HCC No. 1638 (unreported), which was cited in *James Mutuma Kirimi v P.C.E.A Kikuyu Hospital & another* [2017] eKLR, it was held that "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear…The Court should then multiply the multiplicand by a reasonable figure representing so many years' purchases. In choosing the said figure, usually called the multiplier, the Court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature … I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial Court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case … Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and Counsel appearing before Courts may be forgiven for assuming them to be the law. They are not. It takes a discerning Court to put the law back to track. If I may say with admiration, such was the appellate bench in *Boru Onduu* [1982-1992] 2 KAR 288." (Emphasis supplied)

189. Also, in Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adellah [2015] eKLR, R.E. Ougo, J, held as follows: "32. On the multiplier considering the vagaries of life the Plaintiff proposed a multiplier of 35 years while the Defendant proposed 15 years. I find that the deceased died at 28 years assuming he was in employment he would have retired at 65 years. Putting into account the vicissitudes of life I give the deceased 60 years. I will adopt the multiplier proposed by the Plaintiff of 35 years…"

190. Again, in Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) [2018] eKLR, the deceased died at the age of 38 years old. He was a watchman. JA. Makau, J held as follows: "13. On loss of Dependency the Trial Court applied a multiplier of 20 years and multiplicand of KShs. 5,000/=. The Appellant urged that both multiplicand and the multiplier are excessive. The deceased was a watchman aged 38 years. In Kenya there is no prescribed retirement age of a watchman. Indeed, in Kenya most of the watchmen are passed retirement age and can even work upto 75 years. The Trial Court held the deceased would have worked as a watchman upto around the age of 55. I find that reasonable though at 55 years most of the watchmen would consider themselves strong enough to continue working for the next 10 to 15 years. I shall therefore adopt the multiplier of 20 years as found by the Trial Court and find that it is fair and reasonable on the deceased's earnings, PW1 alleged the deceased was a watchman with dependants as per Chief's letter exhibit 6. He produced grant of letters of administration intestate and police abstract as exhibits. He urged the deceased earnings were KShs. 10,000/= per month but did not produce payslip or employer's letter to prove the deceased 's earnings." {Emphasis supplied}

191. Which formula should a Court apply in assessing the loss of expectancy? The Multiplier-multiplicand or the global figure formula? What should a Court do in circumstances where the multiplier-multiplicand approach is inappropriate? Where the multiplier-multiplicand formula is inexpedient on account of failure or inability to establish earnings, then it will be prudent that a global figure formula is adopted. Where a person is employed but the salary is not determined, reference should be made to the government wage guidelines issued from time to time. And where the stated profession does not appear in the government wage guidelines, then a Court can adopt a global figure. In Oyugi Judith & Another v Fredrick Odhiambo Ongong & 3 Others [2014] eKLR the Court held that "Where a person is employed and the salary is not determined, his or her income may be determined by reference

to the government wage guidelines issued from time to time. The absence of documentary or other evidence led the Magistrate to rely on "municipal rates." The meaning of municipal rates was not explained in the judgment nor was the amount referenced to some official document or standard. In my view, this constitutes an error of principle. As the income could not be ascertained with precision, the Court ought to have awarded a global sum. In this respect I would adopt the reasoning by Ringera J, in Mwanzia v Ngalali Mutua and Kenya Bus Services (Msa) Ltd & Another quoted by Koome J, in Albert Odawa v Gichimu Gichenji NKU HCCA No. 15 of 2003[2007] eKLR where he expressed the following view; 'The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependancy, and the expected length of the dependancy are known or are knowable without undue speculation where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do.' The same principle was adopted in *Mary Khayesi Awalo & Another v Mwilu Malungu & Another* ELD HCCC No. 19 of 1997 [1999] eKLR where Nambuye J, stated that: "As regards the income of the deceased there are no bank statements showing his earnings. Both Counsels have made an estimate of the same using no figures. In the Courts opinion that will be mere conjuncture. It is better to opt for the principle of a lumpsum award instead of estimating his income in the absence of proper accounting books. In sum I find and hold that the multiplier approach was wholly inappropriate in light of the paucity of evidence. Taking the aforesaid principles into account, I award the dependants of Eric Okoth Obambla and Collins Ochieng Obambla the sum of Kshs. 700,000.00 each." {Emphasis supplied}

192. The application of the multiplier-multiplicand formula should not be treated like one shoe fits all. It is not expedient for all cases. It is suitable for cases where the regular income is established. Otherwise, a global figure should be adopted. In *Cuossens v Attorney General* [1999] 1 EA 40 it was held that "The general rule regarding measure of damages applicable both to contract and tort is that sum which will put the party who has been injured, or who has suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation…In cases of pecuniary loss, such as claimed in the present, it is easy enough to apply this rule in the case of earnings which have actually been lost, or expenses which have actually been lost, or expenses which have actually been incurred up to the date of trial. The exact or approximate amount can be proved and, if proved, will be awarded as special damages and in this category falls income or earnings lost between the time of injury and the time of trial…But in the case of future financial loss whether it is future loss of earnings or expenses to be incurred in the future, assessment is not easy. This prospective loss cannot be claimed as special damages because it has not been sustained at the date of trial. It is therefore awarded as part of the general damages…An estimate of prospective loss must be based in the first instance, on a foundation of solid facts; otherwise it is not an estimate, but a guess. It is therefore, important that evidence should be given to the Court of as many solid facts as possible. One of the solid facts that must be proved to enable the Court assess prospective loss of earnings is the actual income which the Plaintiff was earning at the time of the injury…The method of assessment of loss of income or earnings applies equally to claims based on personal injury as well as to those for loss of dependency arising from fatal accidents…Sometimes it is impossible, though the justice of the case requires some award to be made or arithmetic has failed to provide the answer which common sense demands…A Plaintiff's loss of earning capacity occurs where as a result of his injury his chances in the future of any work in the labour market or work as well paid as before the accident are lessened by his injury…It is a different head of damages from an actual loss of future earnings, which can readily be proved at the time of the trial. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence while compensation for diminution of earning capacity is awarded as part of the general damages…The question is what is the present value of the risk that at future date or time the Plaintiff

will suffer financial disadvantage in the labour market because of his injuries? It can be a claim on its own (where the Plaintiff had not worked before the accident) or in addition to another (where the Plaintiff was in employment then and or at the date of trial). The factors to be taken into account will vary with the circumstances of each case. Examples include the age and qualifications of the Plaintiff; his remaining length of working life; his disabilities; previous service, if any, and so on. Mathematical calculation may not be possible but a Court can try to assess what earnings a Plaintiff may lose after the trial and for how long. There is no formula and the Judges must do the best they can…The assessment of damages is more like an exercise of discretion by the trial Judge and the appellate Court should be slow to reverse the trial Judge unless he has either acted on wrong principles or awarded so excessive or so little damages that no reasonable Court would or he has taken into consideration matters he ought not to have considered or not taken into account those matters he ought to have considered and in the result arrived at the wrong decision…Loss of earning capacity is a claim on its own and the figure need not be plucked from the air because the Plaintiff would be expected to furnish the material on which a reasonable figure could be based. The figure should be based on mathematical calculation using such relevant factors as the respondent's age and qualifications and the nature of the injuries sustained."

193. In *Albert Odawa v Gichumu Githenji* (2007) KLR, Ringera, J (as he then was) had this to say about the multiplier approach to assessment of damages: "The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned, where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency and the expected length of the dependency are known or are knowable without undue speculation; where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of Justice should never do."

194. In *Alpharama Limited v Joseph Kariuki Cebron* [2017] eKLR, the Court stated that "… On the same vein the multiplier approach is just but one aid the Court applies in assessment of damages. It is not the only one. The Court would be properly entitled to make a global award because there is a general agreement in decisions rendered by Courts that there is no formula for assessing damages for lost or diminished earning capacity provided the Judge takes into account relevant factors. In this matter, the fact that the Plaintiff has been rendered legless for life, her age at the time of accident and therefore the period she has been consigned to live with reduced mobility, her qualification at the time and that she might not effectively fit back into the job of a port clerk, are relevant factors to be taken into account."

195. Similarly, in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR, the Court of Appeal observed that "There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the Plaintiff has suffered as a result of disability…In the instant case, the loss of earning capacity was claimed as part of general damages. The respondent was not working at the date of the trial his apprenticeship having expired by effluxion of time about 3½ years before the commencement of the trial. He was training for general mechanical fitting and mechanical engineering. The only incapacity that he suffered is loss of the fifth finger of the right hand and inability to fully extend the right fourth finger for which permanent in capacity was assessed at 15% by Dr. Juma and at 10% by Dr. Raburu. Thus, the right hand lost a maximum of 15% of its function. Plaintiff was a farmer at the time of the trial. All what he said at the trial was that he had not been able to get a similar job as he was doing before the accident. There was no evidence however that because of disability he could not do the job for which he was being trained – mechanical fitting. Having regard to the degree of incapacity that the respondent suffered the risk of the respondent not being able to find employment in the labour market was not substantial. It was minimal. The trial Judge in assessing the multiplicand of Shs. 7,000/= per month took into account that the appellant was earning Shs.

8,300/= p.m. during apprenticeship and applied a multiplier of 24. Having regard to the degree of incapacity that the respondent suffered, it was inappropriate to assess the loss of earning capacity on the multiplicand/ multiplier basis." {Emphasis supplied}

196. In John Kipkemboi & another v Morris Kedolo [2019] eKLR, W. Musyoka, J while addressing his mind to a bodaboda operator found the application of a multiplier-multiplicand formula in his loss of earning capacity did not warrant the use of the multiplier formula as the earnings of the respondent could not be established and instead applied a global figure of Kshs. 1,500,000.

197. What are the determinative factors in fixing a dependency ratio? First, it should be borne in mind that a dependency ratio is a question of fact and common sense. In Mwita Nyamohanga & Another v Mary Kobi Moheria (suing on behalf of the estate of Joseph Tagare Mwita (deceased) & Another [2015] eKLR, Majanja, J reasoned that "... It is correct that the dependency ratio is a question of fact. The evidence is clear that the deceased was a family man with young children hence he must have used a significant amount of his income to support his family. I therefore do not find any error in the dependency ration of 2/3 applied." And so, upon conducting a review of decisional law on this issue, Mativo, J came to a conclusion in A*cceler Global v Gladys Nasambu Waswa & Another* [2020] eKLR that "...in fact, a review of decided cases show that the 1/3 ratio is applied where the deceased was unmarried, but where the deceased had a family, it is reasonable and a matter of common sense that the dependency is higher. I find no basis to fault the Learned Magistrate for applying a dependency ratio of 2/3 for the deceased who left behind a family..."

198. Second, the dependency ratio to be applied is at the discretion of the Court. And so, dependency ratio to be applied is not fixed by law. It is left to the discretion of the Court dictated by the varied circumstances. It is adjusted by polycentric factors including the age of the dependants; whether the dependants are working and whether the deceased was the head of the family. There is no principle of law that two thirds of the income of a person should be made available for his family expenses. It is all a question of fact and circumstances. It all depends on circumstances the ratio will therefore vary from case to case dictated by polycentric factors like the age of the dependants. The younger or older the age, the more the dependency ratio since the deceased would have been required to pay school fees, medical care and general basic needs. Whether the deceased was the head of the family in which case the dependency ratio is higher than not. If the dependants are all adults or the deceased was not married or the dependants are working, the dependency ratio will be deemed to be less. In Beatrice Wangui Thairu v Ezekiel Barngetuny & another Nairobi HCC No. 1638 (unreported), which was cited in *James Mutuma Kirimi v P.C.E.A Kikuyu Hospital & another* [2017] eKLR, it was held that "The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear...I am constrained to observe that there is no rule of law that two thirds of the income of a person is taken as available for his family expenses. The extent of dependency is a question of fact to be determined in each case. Where a trial Court adopts two thirds of the income to value of dependency, this is no more than a finding of fact that such is reasonable in the particular case ... Unfortunately, those findings of fact have for long masqueraded as holdings on points of law and Counsel appearing before Courts may be forgiven for assuming them to be the law. They are not. It takes a discerning Court to put the law back to track. If I may say with admiration, such was the appellate bench in Boru Onduu [1982-1992] 2 KAR 288." {Emphasis supplied}

199. In *Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased* [2020] eKLR, in finding that the dependants were adults and substituting the dependency ratio of two thirds with one third, R. Mwongo, J held that "17. On this head, the appellants further submitted that the deceased perished at age 53 and would have retired at 60. They thus argue that the multiplier should have been 7 years

and not 8 years as adopted by the trial Court; That the dependency ratio ought to have been 1/3rd and not 2/3rd as applied by the trial Magistrate since the deceased's dependants were adults and were relying on themselves. 18. I have perused the evidence of PW1. He said they were over 18 years old when the deceased died. He was an active player at Mathare FC. PW1 said in cross examination that: "My son who was in business earning an income" 19. Based on the above, I think that the correct dependency ratio ought to have been 1/3rd not 2/3rd as applied by the trial Court. I would calculate dependency as follows: 13,201.55 x 12 months x 8 years x 1/3 = 422,449.60..."

200. Where the deceased is not married at the time of death and was only looking after his parents, the appropriate dependency ratio should be one third since a huge component like school fees for children is absent. In *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adellah* [2015] eKLR, R.E. Ougo, J, held as follows: "31. It is not in dispute that the deceased died at the age of 28 years and was not married. On this the Plaintiff proposed 2/3 as the deceased was supporting his old parents and was paying school fees for his siblings whilst the Defendant proposed 1/3 dependence ratio. The Plaintiff being unmarried must have assisted the parents. In my view a ratio of a third dependence is appropriate considering that he had a sibling he was in partnership with. The Plaintiff's evidence was that he was earning Kshs. 1,500/- however the Defendant argued that the receipts adduced were not in the names of the deceased and no documents were presented to show that the alleged figures were in fact profit or income nor was there any documents that there was a joint venture with the deceased. In this regard the Defendants proposed that the deceased be treated as an unskilled laborer and proposed an award of Kshs. 5,000/- per month. Guided by the Court of Appeal's holding in the case of Jacob Ayiga & Another –vs Simon Obayo (supra) I find that though the amount earned by the deceased has not been proved am guided by the evidence of the brother whom they were in partnership with and find that the sum of Kshs. 10,000/- is reasonable to be considered as the sum he earned per month."

201. And what happens where the quantity of dependency is not clear? The Court of Appeal noted in *Theta Tea Company Ltd & Another v Florence Njau Njambi* [2002] eKLR stated that "[W]here it is proved that a claimant was dependent on a deceased party but the amount of dependency is not quantifiable, that does not necessarily mean that the claim must fail. If that be so, a lot of Kenyans would be denied substantial justice, taking into account out level of literacy and such like factors." This reasoning was followed by Majanja, J in *Mombasa Maize Millers Limited v W.I.M. suing as the representative of J.A.M. (Deceased)* [2016] eKLR.

Determination

202. The first business of this Court under this head of damages is to elect the formula to apply in assessing the general damages for loss of expectancy. The options on the table for election are two: either the multiplier-multiplicand formula or the global figure formula. In this regard, I find and so conclude that on a balance of preponderance, that the deceased was a Secretary working for the Kenya National Union of Teachers (KNUT) with a net salary of Kshs. 48,189 (as evidenced in the Plaitnfiffs' Exhibit 7). On this premise, the availability of this variable facilitates application of the multiplier-multiplicand formula in assessing damages for loss of dependency, since the other variables namely age of the deceased, the approximate dependency ratio and the expected length of the dependency are ascertainable. The multiplicand will thus be Kshs. 48,189 x 12 = 578,268.

203. The second task of this Court is to determine the multiplier. The deceased died at the age of 44 years old. In Kenya, as opposed to the public sector where a general labourer should retire at 60 years unless retained on contract, there is no law that fixes the retirement age of a caretaker. A caretaker is thus at liberty to work past the 60-years public sector cap. See Paul Ouma v Rosemary Atieno Onyango

& another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased) [2018] eKLR, where the deceased watchman died at the age of 38 years old and JA. Makau, J held as follows: "... The deceased was a watchman aged 38 years. In Kenya there is no prescribed retirement age of a watchman. Indeed, in Kenya most of the watchmen are passed retirement age and can even work up to 75 years..." In this regard, Counsel for the Plaintiffs proposed a multiplier of 16 years, placing reliance in *Benedeta Wanjiku Kimani v Changwon Chemboi & another* [2013] eKLR; and *James Mutunga Mbinda v Stephen Mwalula Mulwa & another (Suing as the Legal Representatives of the Estate of Winfred Mbatha Mwalula (Deceased))* [2021] eKLR, where a multiplier of 16 years was adopted for deceased who died aged 44 years. In this regard, the assertion that the deceased was of good health is not controverted. Taking into account the variability and vicissitudes of life like premature death from diseases in the context of the good health aforesaid, I find the multiplier assessed in *Benedeta Wanjiku Kimani v Changwon Chemboi & another* [2013] eKLR; and *James Mutunga Mbinda v Stephen Mwalula Mulwa & another (Suing as the Legal Representatives of the Estate of Winfred Mbatha Mwalula (Deceased))* [2021] eKLR, suitable and I thus adopt a multiplier of 16 years.

204. My third task now is to assess a reasonable dependency ratio. In the eyes of the *Fatal Accidents Act* (section 4(1) thereof), the beneficiaries of an action thereunder are a spouse, parent and/or child of the deceased. These are automatic dependents for which evidence is not required. In this case, all the two dependents disclosed (namely the husband and daughter of the deceased) fall under the *Fatal Accidents Act* and are thus automatic beneficiaries under the *Fatal Accidents Act*. Evidence is thus not needed to prove that they are dependents. I have considered the fact that the deceased was the wife of the 1st Plaintiff herein and that the 2nd Plaintiff was said by the 1st Plaintiff to be an adult now. Both of them can thus fend for themselves. I infer from these circumstances that the dependency ratio, especially tipped by the fact that both dependants are adults, is low. In this context, the appropriate dependency ratio is two thirds (1/3) which I hereby set.

205. The loss of dependency will thus work out as follows: 578,268 (p.a.) x 16 years x 1/3 = 3,084,096.

206. Where the beneficiaries are more than one, the Court may in its discretion divide the amount of damages amongst the beneficiaries in such shares as it may deem fit. Section 4(1) of the *Fatal Accidents Act* reads thus: "(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 the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the Court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the Defendant, shall be divided amongst those persons in such shares as the Court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person." This is especially pertinent in circumstances where part of the beneficiaries lack capacity to defend themselves like children and persons with unsound mind. Applying this reasoning in *Mombasa Maize Millers Limited v WIM suing as the representative of JAM (Deceased)* [2016] eKLR, Majanja, J rendered himself as follows: "13. Before I conclude this judgment, I turn to an issue that has caused me grave anxiety in so far as the issue were not raised in the Court below and on this appeal. The proceedings in the subordinate Court were brought on behalf of the deceased's brothers. The deceased was not married but PW 1 disclosed that he had one son by the name C. The dependants contemplated under the *Fatal Accidents Act* are expressly defined under section 4(1) as follows; 'Every action brought by nature 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.....be

brought by and in the name of the execution or administrator of the person deceased]……'….The brothers of the deceased are not dependants for purposes of the *Fatal Accidents Act* and are therefore not entitled to the proceeds of the judgment and any award to them would definitely prejudice the deceased's child's entitlement. 14. Since a child the primary beneficiary of the judgment is a child of the deceased, the guiding principle in this case is to be found at Article 53(2) of the Constitution and it is that, "A child's best interests are of paramount importance in every matter concerning the child." This principle is reinforced by the *Children Act* (No. 8 of 2001) and in particular section 4 thereof, which provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, Courts of law or any other institutions, the paramount consideration shall be the best interest of the child. What amounts to the best interest of the child has not been defined by the law as best interest of a child will depend on the particular circumstances of each child. 15. Although, the law is clear, that the Court should not consider a matter not raised by either parties either in the pleadings before the subordinate Court or on this appeal, I am nevertheless compelled by the Constitution and the law I have cited to take into account the best interests of the child. A child has no capacity, in law or in fact, to agitate his father's claim hence relies on third parties to take steps to protect his interest. In this case, the respondent clearly did not have the best interests of the child at heart hence this Court must intervene to protect those interests. My decision is further fortified by the fact that liability was admitted in subordinate Court and the fact that the appellant conceded that the deceased's dependants were entitled to some form of damages, whose nature and extent was left for the Court's determination. 16. As a child is a beneficiary, the Court must ascertain this issue and also approve a scheme of investment. I therefore direct that the respondent to file the necessary application for consideration before this Court in due course before the decretal sum is released to the respondent or his Advocate." Now that both Plaintiffs are adults, I find it unnecessary to exercise my discretion in the direction of distributing the award amongst the two beneficiaries equally.

207. Wherefore I assess Kshs. 3,084,096, in general damages for loss of dependency, subject to the 50:50 apportionment of liability.

(x) Whether or not to award general damages under both the Law Reform Act and Fatal Accidents Act

208. Can a Court award general damages under both the *Law Reform Act* and the *Fatal Accidents Act*? Under what circumstances can the Court not award general damages under both the *Law Reform Act* and the *Fatal Accidents Act*?

209. The *Fatal Accidents Act* houses the law governing compensation of the families of persons killed in accidents. The Act allows a dependant to maintain an action and claim all such damages which would have been claimed by the deceased if he was alive on condition that the death was caused by a wrongful act, neglect or default if the deceased would have been entitled to maintain such a suit. Section 3 thereof provides that "Whenever the death of a person is caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, then in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death was caused under such circumstances as amount in law to felony."

210. The *Fatal Accidents Act* prescribes the beneficiaries under the *Fatal Accidents Act* namely a wife, husband, parent or child. Section 4 of the *Fatal Accidents Act* provides for actions to be maintained for the benefit of family of deceased. It states 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 the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the Court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the Defendant, shall be divided amongst those persons in such shares as the Court, by its judgment, shall find and direct: Provided that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within three years after the death of the deceased person. (2) In assessing damages, under the provisions of subsection (1), the Court shall not take into account— (a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act; (b) any widow's or orphan's pension or allowance payable or any sum payable under any contributory pension or other scheme declared by the Minister, by notice published in the Gazette, to be a scheme for the purpose of this paragraph." {Emphasis supplied}

211. There have been conflicting positions taken by the superior Courts on the interface between the *Law Reform Act* and the *Fatal Accidents Act*. The dominant position of the High Court is that where the beneficiaries under the *Law Reform Act* and the *Fatal Accidents Act* are the same, the deceased's estate should not benefit twice from the same accident by awarding both damages under the *Law Reform Act* as well as the *Fatal Accidents Act*. This dominant position traces its root to the reasoning of Kneller, JA (as he then was) in *Kemfro v A.M. Lubia and Olive Lubia* (1982-1988) KAR 727, where his Lordship stated that "...The net benefit will be inherited by the same Dependents under the *Law Reform Act* and that must be taken into account in the damages awarded under the *Fatal Accidents Act* because the loss suffered under the latter Act must be offset by the gain from the estate under the former Act."

212. In the seminal works of P.S Atiya, in his book *Accident Compensation and the Law*, 2nd Edition, at page 88 the same principle is stated as follows: "The law will not allow double recovery. In practice, this means that the amount inherited by a person as a beneficiary of the deceased's estate may be deducted from award under Fatal Accident Act on the legal justification or pretext that the inheritance is a gain resulting from the death which must be set off against the loss."

213. In some decisions of the High Court, it has been held that where a claim is made under both the *Fatal Accidents Act* and the *Law Reform Act*, and the claimant succeeds under both Acts, then the award made under the *Law Reform Act* must be deducted in full from the award made under the *Fatal Accidents Act* as the deceased's estate cannot benefit twice. One such decision is the decision in *Paul Ouma v Rosemary Atieno Onyango & another (Suing as the Legal Representative in the Estate of Joseph Onyango Amollo (Deceased)* [2018] eKLR, where the trial Magistrate awarded damages both under the *Law Reform Act* and Fatal accidents as follows: Pain and suffering-20,000; Loss of expectation of life-KShs. 100,000; General Damages for loss of Dependency-KShs. 800,000; Special Damages-KShs. 22,100, totalling to Kshs. 942,100. The Defendant appealed. While discussing the principle against duplication of compensation, JA. Makau, J had this to say: "18. As regards the correct principle regarding awards under *Fatal Accidents Act* and the *Law Reform Act* and in dealing with principle of duplication of awards, this principle in kemp & kemp on Damages is clearly stated to be that where a claim is made under both the *Fatal Accidents Act* and the *Law Reform Act*, and where claimant succeeds in both, the award made under the *Law Reform Act* must be deducted in full from the award made under the *Fatal Accidents Act* as the deceased's estate cannot benefit twice. In the instant case, both sides have not appreciated the law and have in their respective Submissions not appreciated the principle and did not cite the law in support in urging their Submissions nor did they urge the Court to do so in this matter. I cannot nevertheless shut my eyes on the law but have to apply the same to the letter." In this case, JA. Makau, J proceeded to deduct from the total award of general and special damages the

general awards which had been awarded under the *Law Reform Act* (for pain and suffering; and loss of expectation of life).

214. However, the view taken by JA. Makau, J seems not to find favour in the Court of Appeal which in any event supersedes the decisions of the High Court. According to the Court of Appeal, a Court is not enjoined to deduct whatever has been awarded under the *Law Reform Act* from what the total award under both Acts. It instead reasons that all the Court has to do in awarding general damages under the *Fatal Accidents Act* is to clearly explain that it has taken into account the award made under the *law Reform Act* namely the general damages for pain and suffering and also the general damages for loss of expectation of life. The beacons were erected by the Court of Appeal in the same *Kemfro v A.M. Lubia and Olive Lubia* (1982-1988) KAR 727 which has been misconstrued for a long time. A wholesome reading of this decision indicates that the ratio decindendi which was established unanimously by the three-Judge Bench was that "6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered. 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death. 8. The words "to be taken into account" and "to be deducted" are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are "taken into account". The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower Court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial Judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

215. The Court of Appeal was at it again in *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR. This was a second appeal from the decision of the High Court which had determined the matter under its appellate jurisdiction. The remit of this appeal was therefore to settle the law on the interface between the *Law Reform Act* and *Fatal Accidents Act*. The deceased was a teacher. The trial Magistrate had made an award under the *Law Reform Act* in the sum of Sh. 10,000 for pain and suffering and Sh. 100,000 for loss of expectation of life. The Magistrate also made an award under the *Fatal Accidents Act*, for loss of dependency, since the deceased was survived by Hellen and several children and grandchildren. It found as a fact that the deceased was a teacher employed by the Teachers Service Commission earning a gross salary of Sh. 39,683 as at the time of death. He was aged 54 years when he died and therefore, under the existing law, he would have retired at age 55. The trial Court then used a multiplier of 1 ½ and the conventional dependency of 2/3 on the multiplicand of the gross salary and awarded a figure of Sh. 476,196 in general damages. The High Court reassessed the damages and from the total award, deducted the awards of general damages which had been awarded under the *Law Reform Act*. Waki & Nambuye, JJA (as they then were) and Kiage, JA., took the following view: "19. Finally on the third issue, learned Counsel for KSSL, Mr. C. K. Kiplagat was of the view that Hellen could not claim damages under both the LRA and FAA because there would be double compensation since the dependants are the same. He therefore supported the two Courts below who deducted the entire sum awarded under the LRA from the amount awarded under the FAA. With respect, that approach was erroneous in law. 20. This Court has explained the concept of double compensation in several decisions and it is surprising that some Courts continue to get it wrong. The principle is logical enough; duplication occurs when the beneficiaries of the deceased's estate under the *Law Reform Act* and dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same

persons. It does not mean that a claimant under the *Fatal Accidents Act* should be denied damages for pain and suffering and loss of expectation of life as these are only awarded under the *Law Reform Act*, hence the issue of duplication does not arise... 22. The deduction of the entire amounts made under the LRA in this case was erroneous and once again, we have to interfere with the final award of damages. We observe that the High Court reduced even further the figure of Sh. 100,000 awarded for Loss of life expectation to Sh. 70,000 despite confirmation in its judgment that there was no dispute on the award. Mr. Kiplagat attempted to justify the reduction by the argument that it would be beneficial to Hellen because less amount would be deducted from the FAA award. With respect, that argument is misguided since there is no compulsion in law to make the deduction." In this case therefore, the Court of Appeal did not deduct the general damages awarded under the *Law Reform Act* reasoning as follows: "23...In our view, the low amounts awarded under the LRA sufficiently take into account the further award under the FAA. We also note from the list of dependants that some of them would not directly benefit from the estate."

216. Following the Hellen Waruguru holding, in *West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the administrator and personal representative of the estate of James Julaya Sumba* [2019] eKLR, J Njagi, J reiterated that "22. In view of the above there is no legal requirement for the Court to deduct the amount awarded under the *Law Reform Act* from the award made under the *Fatal Accidents Act*. The argument by the Advocates for the appellant on the issue does not stand. The upshot is that the appeal is unmerited and is accordingly dismissed with costs to the respondent."

217. Similarly, in *Sukaru Insutries Limited v Lensa Awuor Nyagumba & another* [2019] eKLR, AC Mrima, J followed the holding in *Hellen Waruguru Waweru (Suing as the Legal Representative of Peter Waweru Mwenja (Deceased) v Kiarie Shoe Stores Limited* [2015] eKLR and held as follows: "10. As to whether awards under the *Law Reform Act* ought to be discounted from those under the *Fatal Accidents Act*, I must take caution that although the Appellant raised the issue in its Memorandum of Appeal it did not argue it in this appeal. However, since the Respondent submitted on it and for the purposes of laying the correct legal position on the issue this Court and for the completeness of the appeal, this Court is under a legal obligation to, at least, say something on it. Suffice to say that the Court of Appeal settled the issue in Hellen Waruguru Waweru case (supra) where the Court put the legal position into perspective... 11. It is therefore settled that there is no legal requirement for a Court to engage in a mathematical deduction when dealing with the assessment of damages under the *Law Reform Act* and the *Fatal Accidents Act* as long that Court bears in mind or considers the award made under the *Law Reform Act* for the non-pecuniary loss. The only instance where a Court may deduct the sums under the *Law Reform Act* from those awarded under the *Fatal Accidents Act* is when the beneficiaries of the deceased's estate under the *Law Reform Act* and the dependants under the *Fatal Accidents Act* are the same, and consequently the claim for lost years and dependency will go to the same persons. In this case, that fact has not been proved hence the Appellant's position on the deduction cannot stand."

218. Also, R. Mwongo, J followed the holding in the Hellen Waruguru case in Omar Sharif & 2 others v Edwin Matias Nyonga & Maxwell Musungu (Suing as legal representatives and administrators of the Estate of Enos Nyonga Deceased [2020] eKLR and held that "16. The position is clear, and I need add nothing to the above, except to state that there is no requirement to deduct one award from the other. I thus decline the appellant's argument." So did J Kamau, J in *Pleasant View School Limited v Rose Mutheu Kithoi & another* [2017] eKLR. And while deciding *Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the administrators and personal representatives of the estate of Josephine Weyanga Tsuma – Deceased)* [2019] eKLR, W. Musyoka, J associated himself with the reasoning of J Kamau, J in *Pleasant View School Limited v Rose Mutheu Kithoi & another* [2017] eKLR.

219. The Court should always take into account whether the beneficiaries under the *Law Reform Act* are the same under the *Fatal Accidents Act*. If so, then the Court may consider deducting the awards under the *Law Reform Act* from the total award. In *Francis Wainaina Kirungu (suing as personal representative of the estate of John Karanja Wainaina) v Elijah Oketch Adellah* [2015] eKLR, R.E. Ougo, J, held as follows: "33. It is an accepted principle of law that a deceased's estate should not benefit twice from the same accident by awarding both damages under the *Law Reform Act* as well as the *Fatal Accidents Act* where the benefits will be inherited by the same dependants... Therefore I deduct the Kshs. 100,000/- under the *Law Reform Act* from the award of Kshs. 1,528,655/-. I therefore enter judgment for the Plaintiff against the Defendant in the sum of Kshs. 1,478,655/- with interest at Court rates from the date of judgment until payment in full. Costs to the Plaintiff."

Determination

220. The beneficiaries under the *Fatal Accidents Act* are the wife, husband, parent or child. In precis, this principle against double compensation does not and cannot be applied in an omnibus fashion on the mere basis that general damages have been sought under both the *Law Reform Act* and *Fatal Accidents Act*. It is deployable, at the discretion of the Court, in circumstances where the beneficiaries under the *Law Reform Act* are the same beneficiaries under the *Fatal Accidents Act*. Needless to underscore, even in circumstances where the beneficiaries under both Acts are the same, this rule is not obligatory upon a Court that the general damages awarded under the *Law Reform Act* shall be deducted. All a Court is beholden to do in assessing the damages for loss of dependency, in my discernment, is to take into account the benefits granted under the *Law Reform Act* and especially where the beneficiaries under both Acts are the same. However, it is not mandatory that the award under the *Law Reform Act* be deducted from the total award of damages under both Acts. In sum, the decision whether to grant general damages for loss of expectation of life, pain and suffering and also for loss of dependency, is a discretionary power of the Court.

221. I have examined the list of dependants set out in the said Plaint. I must note that all the beneficiaries under the *Fatal Accidents Act* are the same beneficiaries under the *Law Reform Act*. Having addressed my judicial mind to the modest award for loss of dependency, I exercise my discretion in the direction of awarding general damages under both the *Law Reform Act* and *Fatal Accidents Act*, which I hereby do.

(xi) Evaluation of evidence adduced in support of special damages and the quantum thereof

222. It bears repeating that special damages are the damages which are ascertainable and quantifiable as at the date of the legal action. The parallels between general and special damages have been set out herein above as discussed in detail in the Court of Appeal decision in *Jogo Kinaki Bus Services Ltd v Electroform International Ltd* (1992) KLR 177, and further, in the High Court decision in *Joseph Kipkorir Rono v Kenya Breweries Limited & Another*, Kericho HCCA No. 45 of 2003. I do not desire to repeat the parallels here. But suffice it to say that it is now trite that special damages must not only be pleaded and but also be strictly proved. This law has been enunciated in multiple cases including *Ratcliffe v Evans* (1832) 2 QB 524 which was also cited in approval in the cases of *Kampala City Council v Nakaye* (1972) EA 446 and *Hahn v Singh* (1987) KLR 716.

223. In the case of *Rosemary Wanjiru Kungu v Elijah Macharia Githinji & Another* (2014) eKLR, the Court allowed only special damages for which proof had been adduced in form of receipts and concluded as follows: - "On special damages, the Plaintiff pleaded Kshs. 1,048,597. However, the total sum as per the receipts produced before this Court comes to Kshs. 972,157.32."

224. In *James Thiongo Githiri v Nduati Njuguna Ngugi* (2012) eKLR, Emukule, J (as he then was) had this to say about special damages: "Special damages must not only be specifically claimed (pleaded) but also

strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

225. In the case of *Coast Bus Services Ltd v Sisto Murunga Danji & 3 others*, Civil Appeal No. 192 of 1992 (Unreported), the Court restated the principle guiding special damages as follows: "We should restate the position. Special damages must be pleaded with as much particularity as circumstances permit and in this connection, it is not enough to simply aver in the Plaint as has. It is only where the particulars of the special damages are pleaded in the Plaint that a claimant will be allowed to proceed to strict proof of those particulars."

226. Special damages are proven by way of receipts. Pro Forma invoices cannot pass the test. In *Christine Mwigina Akonya v Samuel Kairu Chege* (2017) eKLR, J Ngugi, J held that "26. Consequently, our case law seems quite clear that a party must produce actual receipts in order to meet the test of specifically proving special damages and that a pro forma invoice will not suffice. In this case, the Plaintiff presented the following documents in her claim for specific damages: ... 27. I have carefully perused these documents. As is readily obvious, many of them are pro forma invoices not receipts as our case law requires. I am therefore unable to award the amounts represented by those invoices as special damages. The receipts presented only amount to Kshs. 67,627.00. This is the only amount proved by evidence and it is the only amount I will award."

227. This Court is satisfied that a sum of Kshs. 194,050 in special damages was pleaded. I now proceed to assess the Plaintiff's bundle of receipts (the Plaintiffs' Exhibit 8) as follows:

i. A receipt dated 31st January 2012 acknowledging receipt of Kshs. 3,500 for motor vehicle registration number KAR **** search, prima facie, issued the Kenya Revenue Authority;

ii. A receipt dated 3rd February 2010 acknowledging receipt of Kshs. 3,400, prima facie, issued by Maridadi Tailors;

iii. A receipt dated 3rd February 2010 acknowledging receipt of Kshs. 6,000, prima facie, issued by Light Transport Machakos for chairs and tents;

iv. A receipt dated 3rd February 2010 acknowledging receipt of Kshs. 19,000, prima facie, Nzioka Mutisya for videography;

v. A receipt dated 28th January 2010 acknowledging receipt of Kshs. 8,000, prima facie, issued by Ethany Funeral Services;

vi. A receipt dated 2nd February 2010 acknowledging receipt of Kshs. 103,000, prima facie, issued by Deman Events for tents, chairs, tables, and transport;

vii. A receipt dated 1st February 2010 acknowledging receipt of Kshs. 30,000, prima facie, issued by Memorial Funeral Services;

viii. A receipt dated 1st February 2010 acknowledging receipt of Kshs. 30,000, prima facie, issued by Memorial Funeral Services for the burial equipment; and

ix. A receipt dated 3rd February 2010 acknowledging receipt of Kshs. 8,900, prima facie, issued by Machakos Funeral Home Limited.

228. This Court has considered the subject receipts guided by the principles laid in the Rosemary and Coast Bus cases (afore-discussed) and the total amount for which receipts have been presented is Kshs. 211,800.

229. In such cases, superior Courts have held that in such expenses, the Court is given the discretion to award a reasonable sum on special damages. See the Court of Appeal holding in *Jacob Ayiga Maruja & Another v Simeon Obayo* (2005) eKLR, per Omolo, Tunoi and Githinji, JJA (as they then were); *Douglas Ooga Nyansimora v Sammy Mutunga Makau & another* (2016) eKLR, per Sergon, J; and *Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others* (2013) eKLR, per Anyara Emukule, J (as he then was).

230. I thus desire to exercise my discretion in favour of the Plaintiffs and proceed to assess the special damages at Kshs. 211,800, which I hereby ward, subject to the 50:50 apportionment of liability.

(xii) Who should shoulder the costs of this suit?

231. This Court is reposed with discretionary power to determine not only whether costs shall be payable in a particular matter but also the person who shall shoulder the costs, the property which may be levied and the extent of the costs. Section 27 of the *Civil Procedure Act* provides that "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the Court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the Court or judge shall for good reason otherwise order. (2) The Court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

232. Whenever a Decree is for payment of money, a Court is reposed with discretionary power to award interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. However, where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum. Section 26 of the *Civil Procedure Act* provides that "(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit. (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum."

233. The law on costs and interest as I discern it is that first, an award of costs and interest is discretionary. Second, save where costs and interest are compromised, the Court retains the discretion thereon. See *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J Third, even where a suit has been compromised without including costs and interest in the compromise, the discretion of the Court aforesaid remains unscathed. See *Rose Kaume & Another v Stephen Gitonga Mbaabu & Another* [2016] eKLR, per C. Kariuki, J

234. How then is this discretion exercised? Discretion is not the same thing as carte blanche. Beacons demarcating how discretion is exercised are as follows.

235. The first beacon is that discretion ought to be exercised with circumspection and judiciously. See *Christopher Kiprotich v Daniel Gathua & 5 others* [1976] eKLR; *Mbogo and Another v Shah* [1968] EA 93 and *Mohindra v Mohindra* (1953) 20 EACA 56. Speaking of discretion, Lord Halsbury L. C., in the case of *Sharp v Wakefield* [1891] 64 L.T Rep. 180 Ap. Ca.173 held that: "When it is said that something is to be done within the discretion of the authorities, that thing is to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour. It is not to be arbitrary, vague and fanciful but legal and regular. It must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself." In Rooke's case, 5 Rep. 99b (1598), adverted to in approval by Mativo, J in *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR, the Court attempted a definition of discretion as follows: "Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the Constitution entrusted with."

236. The second beacon is that costs follow the event unless the Court finds a good cause to negate this trajectory. See *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another* [2016] eKLR). In this context, the meaning ascribed to the words "costs shall follow the event" is that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the Defendant or Respondent will bear the costs. See the seminal works of Kuloba, J (as he then was), *Judicial Hints on Civil Procedure* 2nd edition at page 99; *Dipchem East Africa Limited v Karutturi Limited (In Receivership)* [2015] eKLR, per Gikonyo, J; *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR, per Mativo, J; and *Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ

237. The third beacon which is closely intertwined with the second is that costs should not be used to penalize the losing party but rather to compensate the successful party for the trouble invested in the proceeding or defending the suit. See *Joseph Oduor Anode v Kenya Red Cross Society* [2012] eKLR, per Odunga, J

238. The fourth beacon which is closely connected with the second and third is that the purpose served by an award of costs is guided by the principle restitution in integrum i.e to reimburse the successful party the money expended in the case. See the SCOK decision in *Jasbir Singh Rai & 3 others v Tarcholan Singh Rai & 4 others* (2014) eKLR, per Mutunga, CJ & P (as he then was) Tunoi, Ojwang and Rawal, SCJJ (as they then were) Ibrahim and Wanjala, SCJJ

239. The fifth beacon which connected to the second, third and fourth beacons is that a successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs or the successful issue was not attracting costs. See *Orix Oil (Kenya) Ltd v Paul Kabeu & 2 Others* (2014) eKLR; and *Morgan Air Cargo Ltd v Everest Enterprises Ltd* (2014) eKLR, Gikonyo, J

240. Regarding costs, upon considering the cause of action and circumstances unique to this case, this Court directs that the Plaintiffs shall be entitled to 50% of the costs.

241. Regarding interest, the Defendants having failed to promptly settle the claim at the date of the claim or soon thereafter, it translates that the Plaintiffs would have had a capital sum to invest with gains thereon. On this premise, again, I exercise my discretion in favour of the Plaintiffs.

Part VII: Disposition

242. Wherefore this Court finds the Defendants, jointly and severally, 50% liable. Accordingly, Judgement is entered in favour of the Plaintiffs in the following terms:

   i. The Plaintiffs are awarded general damages for pain and suffering in the sum of Kshs. 50,000, less 50% making the total award Kshs. 25,000.

   ii. The Plaintiffs are awarded general damages for loss of expectation of life in the sum of Kshs. 100,000, less 50% making the total award Kshs. 50,000.

   iii. The Plaintiffs are awarded general damages for loss of dependency in the sum of Kshs. 3,084,096, less 50% making the total award Kshs. 1,542,048.

   iv. The Plaintiffs are awarded special damages in the sum of Kshs. 211, 800, less 50% making the total award Kshs. 105,900.

   v. The Plaintiffs are awarded 50% of the costs of this suit.

   vi. The Plaintiffs are awarded interest on (i), (ii), (iii) and (v) supra, at Court rates, from the date of this Judgment until payment in full.

   vii. The Plaintiff is awarded interest on (iv) supra, at Court rates, from the date of filing this suit until payment in full.

243. Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 30TH DAY OF MARCH 2023

....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiffs:........................

Advocate for the 1st Defendant:.................

2nd Defendant:..................................

Court Assistant:..................................