

h. The plaintiff shall as far as possible rely on the doctrine of “Res Ipsa Loquitor” to establish negligence.

3. It is also averred that the Plaintiff suffered loss and damage and the particulars given as regards special damages are:

- i. Police Abstract Kshs. 200/=
- ii. Death Certificate Kshs. 130/=
- iii. Funeral Expenses Kshs. 75,000/=
- iv. Post Mortem Kshs. 2,500/=
- v. Filing fees for letters of

administration Kshs. 1,025/=

TOTAL Kshs. 78,905/=

4. The claim is also premised on both the Fatal Accidents Act Cap 32 and the Law Reform Act, Cap 26 and in that regard general damages are sought on both limbs. Costs and interest thereon are similarly sought.

5. The Plaintiff in his evidence stated that Caroline was a Computer Specialist with Bible Translation and Literacy Society in its Summer Institute of Linguistic International (SILI). Her salary according to P. Exh. 13 was Kshs.20,121.00/= net and Kshs.33,282/= gross. In his view she had high prospects in life and he produced her diploma and certificates – P Exh.5 – P. Exh.10 to indicate how grounded she was in the field of Information Technology and she was in fact a member of the Institute of Management of Information Systems and he produced her Certificate of Membership as P. Exh.11.

6. As regards how the accident occurred, the Plaintiff relied on the principle of res ipsa loquitor and stated that although he was not present when the accident occurred the fact of the accident occurring was sufficient proof of negligence on the part of the Defendant’s agent.

7. The Plaintiff was unable to produce any evidence that he incurred any expense when he went to collect Caroline’s body at Machakos General Hospital Mortuary and before and during her burial. This apparently was because his erstwhile advocates, M/s Wanjiku Mwaura & Co. Advocates closed shop and disappeared without trace and yet they had all his supporting documents.

8. In a Statement of Defence dated 31/10/2005 and filed on 2/11/2005, the Defendant denied all the averments in the Plaintiff and sought its dismissal. It called no evidence at all and an evaluation and analysis of the case is as follows:-

Since there is no evidence to the contrary, I will hold and find that Caroline died on her way to Mombasa while among a group of Christian Youth traveling in M/V Reg. KAR 780 B on the night of 13/7/2005. There is no evidence to suggest anything other than that the said motor vehicle belongs or belonged to the Defendant and that being a public service vehicle it was being driven by the Defendant’s agent or servant lawfully authorized to do so. The question is, can the doctrine of res ipsa loquitor be applicable to this case?

9. As I understand it, the said principle is applicable where a party claims that the fact of the accident happening speaks for itself. The defence on the other hand can only then rebut that assertion and “**avoid liability by showing either that there was no negligence on their part that the accident was due to circumstances beyond their control**” – see Kago vs Njenga, C.A. 1/1979 @ e KLR and Msuri Muhhdin vs Nazzer bin Seif el Kasabu & Ano. (1960) E.A. 201.

10. In **Kago** (supra), the court found that since the accident was caused by a tyre burst, there could not be negligence properly to be attributed to the Appellant. In **Embu Public Road Service vs Riimi (1968) E.A 22** however, there was found to be negligence on the part of the bus driver who had failed to take corrective action as a competent driver should have and so the fact of the bus overturning after a tyre burst was found to have been due to his negligence.

11. In the present case, sadly, no defence whatsoever has been raised. The accident has been denied, the particulars of negligence and damages have been denied and yet no evidence has been led to rebut the Plaintiff's evidence pleaded and later proved in oral evidence. This court can only but agree with the Plaintiff that where there is no attempt at rebutting the application of the principle of res ipsa loquitur then once pleaded the same applies – see also **Muchoki vs A-G (2004) 2 KLR 518**.

12. In written submissions and based on the Plaintiff, the advocate for the Plaintiff sought damages under the Law Reform Act and the Fatal Accidents Act. As was stated in **Sheikh Mushtaq Hassan vs Nathan Mwangi Transporters & Others (1982 – 1988) 1 KAR 946**, under the Fatal Accidents Act, damages are awarded for loss of dependence and special damages too. In the **Sheikh** Case, the deceased had been admitted to study architecture at University and the Court of Appeal held that in Kenya parents are entitled to rely on their children to support them in old age. I take the same view irrespective of the status of the parents as parents are expected to receive some income from their children. In this case the deceased was 26 years old and was earning Kshs.20,121/= net. The Plaintiff said that she would on occasion give her parents Kshs.10,000/= and that to me is a reasonable figure to be used as a multiplicand. Assuming she would work upto 55 years, a multiplier of 29 is also reasonable. Under loss of dependency therefore I would calculate the damages awardable as follows:-

10,000 x 29 x 12 x ½ = Kshs.1,740,000/=.

13. I have also been asked to award damages for pain and suffering. The evidence before me cannot justify such an award because such an award can only be made **“if the Plaintiff dies from his injuries shortly after the accident and an award in respect of pain and suffering may be appropriate if the evidence justified it.”** – see **Kemp and Kemp – Quantum of Damages, Sweet and Maxwell, 1997**. In this case, the Plaintiff only found his deceased daughter in the mortuary the morning after the accident. She had been taken there from the scene and it is unclear whether prior to death, she was aware of pain and whether she had any capacity for suffering. I will decline to grant any sum under this heading.

14. Regarding the claim for damages under the Law Reform Act, no doubt Caroline was the source of joy and happiness to her parents. She was apparently a disciplined and committed Christian and her loss must be immense. I will award Kshs.100,000/= which is conventional, fair and reasonable sum.

15. Lastly, on special damages, the Plaintiff pleaded that he spent Kshs.78,905.00 for funeral and related expenses. In evidence he said that he spent close to kshs.200,000/=. He failed to produce any evidence whatsoever to support his claim because apparently all the supporting documents disappeared with his former advocates. I know that in Kenya, funerals are expensive and it cannot be in doubt that a father would spend money to bury his daughter and the Plaintiff herein is one such father. But what does the law say?

16. The law is that special damages must be strictly proved. That is what Apaloo J. called the orthodox Statement of the Law in **Wambua vs Paterl & Ano. (1986) KLR 336**. The judge in that case however, alive to the special circumstances of the case nonetheless stated that “it was unrealistic to expect” the Plaintiff to produce receipts for certain purchases and granted an award in special damages. I am in the same position. Here is a Plaintiff who obviously had some receipts for funeral expenses but his advocate disappears with them. That is not uncommon but should he be told to go away by a court properly applying its mind to the facts before it? I do not think so. The Plaintiff pleaded special damages of Kshs.78,905/=. Looking at the tabulation of items, the figure is wholly proved taking into account the explanation given. I will without further ado award that sum as it is a drop in the ocean compared to what the Plaintiff said that he actually spent i.e. Kshs.200,000/=.

17. In the end, judgment is entered for the Plaintiff as follows:-

- a. Loss of Dependency - Kshs.1,740,000.00
- b. Loss of Expectation of Life - Kshs. 100,000.00
- c. Special Damages - Kshs. 79,905.00

TOTAL Kshs. 1,919,905.00

18. Costs shall also be paid to the Plaintiff.

19. Orders accordingly.

Dated and delivered at Machakos this **29th** day of **September** 2008.

ISAAC LENAOLA

JUDGE

In presence of: **Mrs Mwangangi holding brief for Mr Amendi for Plaintiff**

N/A for Defendant

ISAAC LENAOLA

JUDGE