



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HIGH COURT CIVIL DIVISION**

**CIVIL APPEAL NO. 362 OF 2017 & CIVIL APPEAL NO. 710 (CONSOLIDATED)**

**CITI HOPPA BUS LIMITED.....1ST APPELLANT**

**MESHACK MUSEMBI.....2ND APPELLANT**

**- VERSUS -**

**MARIA CLARA ROTA (Suing as the Administratrix of the Estate of**

**ABREHET AREGAY KAYSAY-DECEASED.....RESPONDENT**

**(An Appeal from the Judgement and Decree of the Honourable Senior Principal Magistrate**

**G. Mmasi (Mrs.) delivered on the 27/06/2017 in Milimani CMCC No. 593 of 2012)**

**JUDGMENT**

This is an appeal by Citi Hoppa Bus Services and Meshack Musembi against the judgement and decree of the Honourable G. Mmasi (Mrs.), Senior Principal Magistrate in Milimani Cmcc No. 593 of 2012 delivered on 27<sup>th</sup> June 2017. The Appellants were the Defendants while the Respondent was the Plaintiff before the trial court. The firm of Kairu & McCourt Advocates represents the Appellants whilst the firm of Wandabwa Advocates represents the Respondent.

By a plaint dated 9th February 2012, filed before the Chief Magistrate's court, the Respondent acting as the legal representative of the estate of the deceased sued the appellants herein for damages arising from the death of the deceased. The Respondent pleaded that the 1st Appellant was the registered owner of Motor Vehicle Registration No. KAX 078S and the 2nd Appellant was its authorized driver or agent. The facts are that on or about 7th September, 2020 the deceased was lawfully crossing Ngong Road near Ngong Lane when the 2nd Appellant negligently and or recklessly drove the suit motor vehicle thereby causing it to hit the deceased.

The trial court held he appellant 100% liable and made the following award on damages:-

Liability - 100% as against the Appellants	
Pain and Suffering	- Kshs. 100,000/-
Loss of expectation of life	- Kshs. 5, 170,560/-
Special damages	- <u>Kshs. 905,177/-</u>
Net Award	- Kshs. 6,175,737/-

Costs and interest at courts' rates awarded to the plaintiff.

Being dissatisfied with the judgement and decree of the subordinate court the Appellants have preferred this appeal by way of a Memorandum of Appeal dated 18th July 2017 filed in court on 19th July, 2017. The 8 grounds of appeal are: -

1. The learned Trial Magistrate erred in law and misdirected herself when she failed to consider the Appellants' submissions on both points of law and facts.

2. The learned Trial Magistrate's judgment was unjust, against the weight of evidence and was based on misguided points of facts and wrong principles of law and has occasioned a miscarriage of justice.

3. The learned Trial Magistrate erred in law and fact in finding the Appellants 100% in view of the evidence produced before the trial Court and in particular the following:-

a. That this being a fatal claim, the Respondent failed to summon an eye witness in support of their case.

b. That the Respondent only proved that an accident had occurred but failed to establish negligence as against the Appellants.

c. That the Trial Magistrate disregarded the evidence of DW1 being PC. Zakayo attached to Kilimani Police Station who produced OB extract No. 17 of 7/09/10.

d. That Police Abstract Report dated 1/10/10 produced by PW1 indicated that the case was still Pending Under Investigations hence the driver of the subject motor vehicle at the time of the accident had not been charged nor found culpable for the alledged accident.

4. The Learned Trial Magistrate erred in assessing an award on quantum, as hereunder, which was inordinately high and wholly erroneous estimate of the loss and damages suffered by the estate of The Deceased.

i. Loss of Expectation of Life      Kshs. 5,170,560

ii. Pain and suffering              Kshs. 100,000

iii. Special Damages                Kshs. 905,177

Net Award                              Kshs. 6,175,737

5. That the Learned Trial Magistrate misdirected herself and applied the wrong principles of law when she awarded under Loss of Expectation of Life without consideration of the submissions made by the Appellants' counsel on quantum and evidence adduced before the trial court and in particular the following:-

a. That the Respondent testified that the deceased, a nun aged 33 years was of Ethiopian origin who had come to Kenya as a student.

b. That the Respondnet failed to prove that the deceased was a qualified and/or trained teacher.

c. That no proof of earnings was established by the Respondent to establish the deceased's earning during her stay in Kenya.

d. That the Honourable Trial Court erroneously used Kshs. 21,554/- as a multiplicand, which was purported to have been the deceased's pay slip from Ethiopia when in actual event the Respondent testified that the deceased was a student in Kenya hence not earning a salary at the time of the accident.

6. That the Learned Trial Magistrate misdirected herself and applied the wrong principles of law when she awarded Kshs. 905,177/- as special damages when in actual event the Respondnet failed to prove the same.

7. The Learned Trial Magistrate erred in law and fact in failing to consider the authorities cited by the Respondent in his submissions.

8. That the Learned Trial Magistrate erred in awarding costs of the suit and interest to the Respondent.

Parties consented to have High Court Civil Appeal No. 362 of 2017 and High Court Civil Appeal No. 710 of 2017 consolidated and the latter be the lead file. On 21st January, 2021 Hon. Mboghohi Msagha J. directed that the appeal be canvassed by way of written submissions. The Appellants have on record submissions dated 30<sup>th</sup> July, 2019 while the Respondent's submissions are dated 12<sup>th</sup> March 2021.

#### Appellant's submissions

The issues for determination as outlined by the Appellants are mainly on liability and quantum. On the issue of liability, the Appellants combined grounds 1, 2 and 3 of the memorandum of appeal and submitted that it was upon the Respondent to prove that the Appellants' negligently and or recklessly drove the suit motor vehicle thereby causing it to hit the deceased as a result of which she sustained fatal injuries. The Appellants submits that the Respondent failed to discharge this burden of proof as none of the witnesses were present at the accident scene and therefore they could not purport to testify on the issue of occurrence, circumstances and/or liability for the accident.

Further that the trial magistrate erred in purporting to shift the burden of proof to the Appellants before considering whether the Respondent had discharged this burden first on a balance of probabilities. Further that under Sections 107, 108 and 109 of the Evidence Act Cap 80 Laws of Kenya, the burden of proof is on he who alleges.

The Appellants relied on the case of **East Produce (K) Limited vs Christopher Astiada Osiro, Civil Appeal No. 43 of 2001** where Gacheche J. (As she then was) held:-

**“It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged the position was well laid down in the case of Kiema Mutuku v. Kenya Cargo Hauling Services Ltd. (1991) 2KAR 258, where it was held that “there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence.”**”

Reference was also made to the case of **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro [2015] eKLR** where Majanja J. held: -

**“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107(1) of the Evidence Act (Chapter 80 of the Laws of Kenya), which provides:**

**107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”**

It is submitted that PW1 (Maria Clara Rota) and PW3 (Abrehet Rufael) did not witness the accident as they only visited the deceased in hospital after the accident therefore they could not testify on how the accident occurred or who was at fault. The evidence by PW3 that she was informed by the conductor that the deceased sustained some injuries after falling down while alighting from the subject motor vehicle which was still in motion is heresy and thus inadmissible in law. Additionally, PW2 was equally not present at the scene of the accident and only offered his expert opinion as a pathologist on the cause of death. Thus, the trial court finding on liability was unfounded and, without basis and therefore erroneous in law and should be set aside. Reliance was placed on the case of **Mary Wambui Kabugu vs Kenya Bus Services Limited, Civil Appeal No. 195 of 1995** where Bosire, JA (as he then was) expressed himself as hereunder;

**“The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply that she looked for her husband who had not been seen for three days and found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone I would dismiss the appeal.”**

Further, the Appellant has made reference to the case of **V.O.W vs Private Safari (E.A) Limited [2010] eKLR** where Okwengu J. (as she then was) held that;

**“14. I have no reason to fault the trial magistrate in that regard. I find that there was no evidence upon which a finding of negligence against the appellant's driver could be arrived at. It was not for the respondent to prove that he was not negligent but for the appellant to discharge that burden. Indeed, an accident can be caused by many factors. For the above reasons, I find no merit in this appeal and do therefore dismiss it. I make no order as to costs.”**

Counsel for the appellant also relies on the case of **Isaac Michael Okenye vs Lacheke Lubricants Limited & Another [2017] eKLR** where Mulwa J. cited the case of **Timsales Limited vs Harun Wafula Wamalwa, Nakuru HCCA No. 95 of 1995** where Musinga J. (as he was then) held that;

**“in an adversarial system of litigation as is the case in Kenya, cases are tried on the basis of pleadings, issues of facts and law as framed and the burden of proof lies with the plaintiff and the degree of proof is on a balance of probabilities.”**

Reliance is also made to the case of **Jamal Ramadhan Yusuf & Another vs Ruth Achieng Onditi & Another [2010]eKLR** where Asike-Makhandia J.(as he then was) held that:-

**“It is trite law that the mere fact that an accident occurs does not follow that a particular person has driven negligently and or negligence *ipso facto* must be inferred. So that it is always absolutely necessary and vital that a party who sues for damages on the basis of negligence must prove such negligence with cogent and credible evidence as he who asserts must prove.”**

On the question of proof and the burden thereof, Ibrahim J. (as he then was) in **Treadsetters Tyres Limited vs John Wekesa Wepukhulu[2010]eKLR** cited **CHARLESWORTH & PERCY ON NEGLIGENCE, 9<sup>th</sup> edition at P.387:-**

**“In an action for negligence, as in every other action, the burden of proof falls upon the plaintiff alleging it to establish each**

element of the tort. Hence it is for the plaintiff to adduce evidence of the facts on which he bases his claim for damages. The evidence called on his behalf must consist of such, either proved or admitted and after it is concluded, two questions arise, (1) whether on that evidence, negligence may be reasonably inferred and (2) whether, assuming it may be reasonably inferred, negligence is in fact inferred.”

On what amounts to balance of probabilities, the Appellants have relied on the Court of Appeal case in **Ignatius Makau Mutisya vs Reuben Musyoki Muli [2015] eKLR** where the Court cited the decision of **Denning J. in Miller –vs- Minister Of Pensions [1947]2 All ER 372** where he stated:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

On the issue of quantum under the Law Reform Act, the Appellants submitted that from the testimony of PW1 and PW3, the deceased succumbed to her injuries four (4) days after the accident therefore an award of Kshs. 50, 000 as opposed to Kshs. 100,000 awarded by the trial court is fair for pain and suffering. Reliance was placed on the case of **Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another [2017]eKLR** where Nyamweya J. (as she then was) opined that nominal damages under this head if death followed immediately after the accident. Further, that the conventional award for loss of expectation of life is Kshs. 100,000 while for pain and suffering the awards range from Kshs. 10,000 to Kshs. 100,000 with higher damages being awarded if the pain and suffering was prolonged before death.

The Appellants submit that the bone of contention is on the award of Kshs. 5,170,560.00 on account of loss of expectation of life which was erroneously and incorrectly applied by the trial court. That the multiplier formulae adopted by the trial court is used in determination of loss of dependency where the income can be ascertained. The trial court in working out the loss of expectation adopted a multiplier of 20 years using a multiplicand of Kshs. 21,554.00 being the alleged basic salary of the deceased at St. Angela’s Elementary School;

“Kshs. 21,554.00 x 12x20= Kshs. 5,170,560.00”

The Appellants submit that the award of Kshs. 5,170,560.00 on account of loss of expectation of life was erroneous, ought to be set aside and substituted with an award of between Kshs. 100,000.00 to Kshs. 200,000.00. To buttress this, the Appellants have relied on the case of **Hyder Nthenya Musili & Another vs China Wu Yi Limited & Another(Supra)** where the court awarded Kshs. 10,000 for pain and suffering and Kshs. 100,000 for loss of Expectation of Life where the deceased, a 32-year-old married with two children, died on the spot. While in **Pleasant View School Limited vs Rose Mutheu Kithoi & Another [2017] eKLR** the court upheld the trial court award of Kshs. 20,000 and Kshs. 100,000 for pain and suffering and loss of expectation of life respectively for a 36-year-old deceased. Further in **Mombasa Maize Millers Limited vs W I M suing as the representative of J AM (Deceased) [2016] eKLR Majanja J.** upheld the award of Kshs. 20,000 for pain and suffering and Kshs. 100,000 for loss of expectation of life for a 34-year-old deceased with one child. Additionally, Mwongo J. upheld an award of Kshs. 20,000.00 and Kshs. 100,000 for pain and suffering and loss of expectation of life respectively in **Kizito Nzesya Mutisia & 2 Others vs CAO & Another (suing as the legal administrators of the estate of BOO [2019] eKLR.**

Under the Fatal Accident Act, the Appellants submit that in their opinion the award of Kshs. 5,170,560.00 as calculated herein amounted to an award for loss of dependency. However, the same would be unjustifiable and unmerited for the reason that dependency was not pleaded leave alone proved. It is the Appellants submission that PW1 testified that the deceased was a nun from Ethiopia and after her passing on, her body was transported to Ethiopia and handed over to her parents for burial. Further that, her parents were not listed as dependants of the deceased in the plaint and neither did they testify and even so the Respondent herein and the community does not qualify as beneficiaries under Section 4(1) of the Fatal Accidents Act. It was the testimony of PW1 and PW3 that the deceased was a student and was therefore not working and that since she was a nun she worked for the community and whatever she owned was communally owned.

Relying on the case of **Independent Electoral and Boundaries Commission & Ano. Vs Stephen Mutinda Mule & 3 others [2014] eKLR** the Appellants submit that parties are bound by their pleadings and cannot be allowed to raise different or fresh case without amendment and therefore the award for loss of dependency cannot be considered or made as the same was not pleaded in the plaint. Further reliance was placed on the case of **Kenya Wildlife Services vs Geoffrey Gichuru Mwaura [2018] eKLR** where the court relied on the case of **Wangai Thairu v H. Ezekiel Barngetuny and Another HCCC 1638 of 1988 and stated:-:**

“The principles applicable to an assessment of damages under the Fatal Accidents Act are 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 purchase. 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 dependants and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration 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”

Further reliance has been placed on the case of **Kenya Power Limited vs James Matata & Others (suing as the Legal representatives of the Estate of the late Nyange Masaga [2016]eKLR** where Kamau J. set aside the trial court award to the deceased brothers and sister as they could not be regarded as dependants under the Fatal Accidents Act. In **Aphia Plus Western Kenya & Another vs Mary Anyango Kadenge & Another [2015]eKLR Majanja J.** held that a mother who was not particularized in accordance with section 8 of the Fatal Accidents Act and siblings do not qualify as dependants/beneficiaries under Section 4 (2) of the Fatal Accident Act. The learned judge further cited the case of **Mary Nabwile Omalla v David Wachira & 2 others Nbi HCCC No. 605 of 2009[2011]eKLR** where Rawal J. stated that brothers and sisters are not considered as dependants under Section 4 (1) of the Act.

The Appellants submit that since the respondent failed to plead and prove dependency, she was only entitled to damages for pain and suffering, loss of expectation of life and special damages. To support this, reliance has been placed on the case of **Multiple Hauliers Co. Limited vs David Lusa [2021]eKLR** where Asike Makhandia J. (as he then was) held that dependency must be proved and it is not upon the court to infer dependency but upon parties to prove the same.

### **Respondent's Submissions:**

In opposition to the appeal, the Respondent submit that the Appellants failed to prove that the accident was due to the deceased's negligence as they failed to call any witness to give an account of the accident and thus sway the court to apportion liability otherwise. The Respondent has relied on Halsbury Laws of England, 4th Edition where the burden of proof has been discussed under page 662 at paragraph 476;

**“The burden of proof in an action for damages for negligence rests primary on the plaintiff, who, to maintain the action must show that he was injured by a negligent act or omission for which the defendant is in law responsible. This invites the proof of some duty owed by the defendant to the plaintiff, some breach of that duty, and an injury to the plaintiff between which and the breach of duty a causal connection must be established.”**

Counsel for the respondent referred to **Winfield & Jolowicz on Tort (11th Edition, S7M 1979)** at page 99 where it is stated as follows:-

**“In order to discharge the burden of proof placed upon him, it is usually necessary for the plaintiff to prove specific acts or omission on the part of the defendant which qualify as negligent conduct. Sometimes however the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do.”**

Further in **Kago vs Njenga Civil Appeal No. 1 of 1979** the Court fo Appeal held that;

**“For the defence to rebut the presumption of negligence arising from “res ipsa Loquitur”, it was for the defendants to avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part, or that the accident was due to circumstances not within their control.”**

Reference is made to the case of **Nzuri Muhludin v Nazzar Bin Seif [1960] EA 201 at 207** where it was held:-

**“In the light of the dicta set out above I accept counsel for the respondents propositions that the respondents can avoid liability if they can show either that there was no negligence on their part which contributed to the accident or that there was no probable cause of the accident which does not connote negligence on their part or that the accident was due to circumstances not within their control.”**

On the cosequences of a party failing to call evidence, the Respondent relies on the case of **Linus Nganga Kiongo & 3 others vs Town Council of Kikuyu [2012] eKLR** where Odunga J. cited the case of **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001** where it was held that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.

On the application of Res ipsa Loquitur, the Respondent have relied on the case of **Mary Ayo Wanyama & 2 others vs Nairobi City Council Civil Appeal No. 252 of 1998** where the Court of Appeal held that Res Ipsa Loquitur means that a plaintiff prima facie establishes negligence where on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible which act or omission constitutes a failure to take proper care for the plaintiff's safety.

The Respondent has further submitted that a claim under the Fatal Accident Act may be brought by the personal representative of the deceased or by the dependant in her personal capacity as was held by the Court of Appeal in the case of **Roman Karl Hintz v Mwang'ombe Mwakima [1984] eKLR**.

On quantum, the Respondent submits that the court should not disturb the award by the trial court on pain and suffering for the reason that the deceased died four days after the accident at the Mp Shah hospital. The evidence of the prosecution witnesses revealed that the deceased was in pain as she suffered head injuries and therefore the award of Kshs. 100,000 is justifiable.

On loss of expectation, the Respondent maintains that the same should not be disturbed as the deceased was 33 years old and a teacher by profession teaching at St. Angela Elementary School earning a salary equivalent to Kshs. 21,554. That the multiplier of 20 years adopted by court is thus justifiable. On dependency, the Respondent confirms that the deceased was a nun and had dedicated her life to the church and worked with the Orsoline Sisters and as such whatever she earned was for the congregation. The Respondent urges the court to consider the peculiarity of the case, the sanctity of life and the right to compensation thereof where a life is lost. With regards to cost, the Respondent has argued that costs follow the event and since the Appellants herein have failed to produce any evidence during trial which would have exonerated themselves from liability, the appeal should be dismissed and costs granted to the Respondent.

### **Analysis and determination**

This being a first appeal, the court is required to evaluate the evidence on record before drawing its own conclusion. Three witnesses

testified for the plaintiff's case. **PW1 SISTER MARIA CLARA ROTA** is the plaintiff. She was living with the deceased. The deceased was a sister from Ethiopia. PW1 is taking care of an orphanage as well as Single Mothers in Kibera. On 7<sup>th</sup> September 2010 she was called at 3.15p.m. and informed that the deceased was at Nairobi Women Hospital having been knocked by a vehicle. She found the deceased bleeding from the mouth, head and ears. The deceased died after four (4) days. She transported the body to Ethiopia and handed it to her parents. The deceased used to earn a salary while in Ethiopia but was not earning a salary in Kenya.

**PW2 DR ANDREW KANYI GACHIE** performed a post mortem on the deceased on 12<sup>th</sup> September 2010. The deceased was 33 years old. The deceased had fracture of the skull among other injuries. He opined that the cause of death was head injury due to blunt force trauma due to road traffic accident.

**PW3 ABREHET RUFANEL** is a nun and Nurse. Like PW1, she was living with the deceased. On 7<sup>th</sup> September 2010 the deceased left for school at Karen. They were later called and informed that she was hospitalized. They went to the hospital and found the vehicle driver and conductor. The driver told them that the deceased alighted from a moving vehicle. The deceased died after four (4) days.

**DW1 PC ZAKAYO BUNDOTICH** was attached to the Kilimani Police Station on traffic duties. Part of his evidence is reproduced in the judgment.

The appeal raises the twin issues of liability and quantum. The appellant has strongly denied liability and contend that no one witnessed the accident. The three witnesses who testified for the plaintiff's case were not at the scene of the accident. It is submitted that under the Evidence Act the respondent was under duty to discharge the burden of proof. According to the appellant, the plaintiff's evidence falls short of proving negligence against them. DW1 testified that the deceased fell from a moving vehicle. It is further contended that the plaintiff proved that an accident did occur but did not prove negligence.

It is true that none of the witnesses were at the scene of the accident. The plaintiff relied on the doctrine of *Res Ipsa Loquitur*. The plaintiff did prove that an accident did occur on the material day. The circumstances of the case establish that the deceased was a passenger in the accident vehicle. Part of DW1's evidence is as follows:-

**“Male Adult Christian sworn and states in English Language attached to Kilimani Police Station performing traffic duties. We received summons to produce OB in respect to accident which occurred on 7/09/2010 at 2.50pm. It involved a passenger and motor vehicle registration number KAX 078S UD Bus belonging to Citti Hoppa Company and the deceased. The vehicle was being driven along Ngong Road. On reaching Ngong lane the passenger fell from the vehicle sustained injuries on the head. She was rushed to Nairobi Women Hospital. She was rushed there by the driver of Citi Hoppa, the driver came to report to station. The vehicle was detained at the station awaiting inspection.**

**I wish to produce OB Extract as exhibit. D. Exhibit 1. I wish to produce police abstract as exhibit - D. Exhibit 2. The driver reported accident to police. The deceased alighted from the vehicle as it was moving. I was not the Investigating Officer. The Investigating Officer has been since transferred. The victim passed on later, hence accident turned fatal. The injuries sustained by the passenger were fatal. It is against the law to alight when the vehicle is in motion.**

**I was not the Investigating Officer in this case. I was not at the scene of accident. Report was made to Kilimani Police Station by the driver of the Citi Hoppa, after he had taken her to hospital. I rely on the OB extract. I am not in a position to say whether the deceased had alighted from the vehicle. The OB reads, case pending under investigation. I did not establish whether investigations are complete. I can't verify the information in the OB.”**

The trial court made the following observations as cited by the appellants:-

**"...the defendants contended that the evidence of PW1 and PW3 amounts to hearsay as she was not at the scene at the of the accident...If that is the reasoning of the defendants, then the Question that begs answers is why was the driver who was at the scene not called by the defendants to shed light to what exactly transpired. The defendants called... DW1 who was equally not at the scene of the accident and who stated that the deceased jumped off the moving bus...The defendants contend that the deceased was alighting from a vehicle which was in motion. The same is neither here nor there, even if that was the position, the blame still lays on the defendants as there was a conductor on that bus and he could not allow passengers to alight when the vehicle was in motion. The defendants owed a duty of care and all passengers aboard that bus. The driver was negligent in the manner he was driving and was not cautious to ensure that the passenger had safely alighted before taking off. It is my considered view that the defendants are wholly to blame..."**

The driver of the vehicle is the 2<sup>nd</sup> appellant. The evidence shows that he took the deceased to hospital. According to PW3, Abrehet Rufael, she found the conductor and driver at the hospital. The driver told her that the deceased fell from a moving vehicle. PW1 testified that the accident occurred about 20 metres from where they were staying with the deceased. PW1 also testified that the driver told them that the deceased alighted while the bus was on motion.

In my view, the plaintiff having relied on the doctrine of *res ipso loquitur* and having proved that a fatal accident did occur involving a vehicle owned by the first appellant and driven by the 2<sup>nd</sup> appellant, the burden of proof shifted to the appellants to disprove the alleged negligence on their part. The court cannot expect each accident to be witnessed by someone who will testify on how the accident occurred. The circumstances of the case can enable the court draw its own conclusion on who is to blame for the accident. In the current case the evidence does prove that the deceased was a passenger in the accident vehicle. There is no evidence that she jumped out of the vehicle. The driver told the police, PW1 and PW3 that the deceased alighted from a moving vehicle. The logical expectation is that a passenger carrying vehicle would be having its door(s) closed and only opened by the conductor or driver depending on the operation of the vehicle. It is further expected that while the vehicle is moving, the door would be closed and no passenger is allowed to stand near the door. The evidence proves that the accident vehicle had a conductor. How did the deceased open the door, pass the conductor and alight while the vehicle was moving

has not been explained. It was the duty of the appellants to take care of all the passengers at the moment they boarded the vehicle, during the journey and at the time of disembarking from the vehicle. The three witnesses were not at the scene and the court cannot expect them to adduce evidence on how the accident occurred. It is true that there cannot be liability without fault. However, the circumstance of the case can attribute blame to a party, and in this case, the appellants. If the conductor had closed the door and ensured that it was not opened until the vehicle had come to a complete stop, then the accident could not have occurred. That is if we go by the appellant's version of the incident that the deceased alighted from a moving vehicle.

Given the circumstances of the case, I am in agreement with the findings of the trial court that the appellants are entirely to blame for the occurrence of the accident. There is no explanation from the appellants as to how the deceased could have opened the door and alighted while the vehicle was moving yet there was a conductor inside the vehicle. On the issue of liability, I am satisfied that on a balance of probabilities, the appellants are 100% liable. This is not tantamount to shifting the burden of proof. The evidence proved that the deceased was a passenger in the accident vehicle and that she did not jump out of the vehicle.

The next issue relate to the assessment of damages. It is an established principle that an appellate court should not interfere with the assessment of damages by a trial court unless it can be shown that such an assessment is contrary to the well established guidelines. In the case of **BUTT –V- KHAN (1981-88) KLR 349** the court held as follows:-

**“The appellate court cannot interfere with the decision of the trial court unless it is shown that the Judge proceeded on the wrong principle of law and arrived at misconceived estimates.”**

The trial court awarded Kshs.100,000 for pain and suffering. The deceased suffered head injuries. She stayed in hospital for four days before succumbing to those injuries. She definitely suffered great pain as a result of the injuries. I do find that the award of Kshs.100,000 for pain and suffering is reasonable.

The trial court awarded Kshs.5,170,560 for loss of expectation of life. Part of the judgment reads as follows:-

**“For loss of expectation of life**

**The deceased died aged 33 years old that she was a teacher at St. Angela's Elementary School earning basic salary of Kshs.21,554/= the salary slip was produced in Court as exhibit, retirement age being 60 years, she would have worked for 27 years. The Plaintiff proposed an award of  $Kshs.21,554 \times 12 \times 27 = Kshs.6,980,256/=$  for damages under the Fatal Accident's Act. They proposed an award of Kshs.1.5million arguing that the community which she was serving suffered as a result of her loss.**

**In regard to special damages the Plaintiff availed receipts totaling to Kshs 905,777/-. In regard to the special damages, the defendants proposed that the Plaintiff's should not be awarded any amount as the receipts produced did not have a revenue stamp. The defendants during the trial never objected to the production of the said receipts.**

**I have considered the evidence adduced, the submissions tendered**

**and the authorities cited to support the proposals tendered by both counsels and find it viable to enter judgement for the Plaintiff as against both defendants jointly and severally for:**

**Liability 100%**

**Pain & Suffering Kshs. 100,000/**

**For loss of expectation of life I will use a multiplier of 20 years, the same translates in**

**Kshs.21,554 X 12 X 20 Kshs.5,170,560/**

**I decline to award under the Fatal Accident's Act having awarded**

**Kshs.5,170,560/= as loss of expectation of life”(emphasis added)**

Counsel for the appellant has faulted the trial court for awarding Kshs.5,170,560 for loss of expectation of life. I am in agreement with the appellant's contention that the trial court ought not to have used a multiplier method to award damages under loss of expectation of life. The multiplier system is normally used to assess damages for loss of dependency. The dependency ratio is also applied to the assessed damages depending on the extent of dependency on the deceased by those who were depending on him/her. Damages for loss of expectation of life are awarded as lump sum.

Before the trial court, counsel for the appellant referred to the case of **ELIZABETH GACOKI W/O KIHARA –V- PAUL EKULAN & ANOTHER (1987) eKLR** where the court held:-

**“The Fatal Accidents Act, Cap 32 Laws of Kenya, does require that the full particulars of the deceased's dependants be set out in the claim, presumably to give some indication as to the extent of their dependency and the duration of the dependency. The plaintiffs were under a duty not only to supply those particulars but also to prove by evidence on a balance of probabilities the extent of their dependency on the deceased and, also, the duration of that dependency.”**

Damages for loss of expectation of life are awarded under the Law Reform. Counsel for the appellant maintain that such damages are awarded as a global sum and suggests an award of between Kshs.100,000 to Kshs.200,000.

Loss of expectation of life refers to the deceased's expectation to live. Anyone expects to live his full life until he dies due to old age or other natural causes where one's life is cut short due to the negligence of a third party; the deceased is entitled to damages for loss of expectation of life under the Law Reforms Act (Cap 26 Laws of Kenya). In the case of **BENEDETA WANJIKU KIMANI (Suing as the administrator of the estate of SAMWEL NJENGA NGUNJIRI (deceased) –V- CHANGWON CHEBOI & ANWARALI BROTHERS LIMIED (2013)eKLR** Justice Anyara Emukule (as he then was) observed that the award for loss of expiation of life has been increasing due to increase of life expectancy from 45 years to 60 years.

In the case of **HELLEN WARUGURU WAWERU (Suing as the legal representative of PETER WAWERU MWENJA (deceased –V- KIARIE SHOW STORES LIMITED (2015) eKLR**, the Court of Appeal stated as follows:-

**“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.”**

In the Hellen Waruguru Waweru case (supra) Kshs.100,000 was awarded for loss of expectation of life. Similarly, in the case of Benedeta Wanjiku Kimani (supra), Kshs.100,000 was awarded for loss of expectation of life.

The demand letter from counsel for the respondent sought Kshs.100,000 as damages for loss of expectation of life. It is clear to me that the award of Kshs.5,170,560 by the trial court for loss of expectation of life is erroneous. The award for loss of expectation of life is not determined by the level of happiness the deceased was expecting to enjoy during her life. It is also not based on how poor the deceased was. This is a nominal award which takes into consideration the fact that a life has been cut short. The computation is not based on one's salary or monthly income and that is why the multiplier and multiplicand route is not applied when awarding damages for loss of expectation of life.

Counsel for the appellant in his submissions urged the court to substitute the award of Kshs. 5,170,560 with a conventional award between Kshs.100,000 to Kshs.200,000. In view of the deceased's age and considering that the deceased had dedicated her life to serve the Lord, I do find that the upper proposal of Kshs.200,000 for loss of expectation of life is quite ideal and I do proceed to award that amount.

### **Loss of dependency**

It is submitted for appellant that the award of Kshs.5,170,560 can be taken to be made for loss of dependency and not loss of expectation of life. It is further submitted that the plaintiff did not plead for loss of dependency.

Awards for loss of dependency are made under the Fatal Accidents Act (Cap 32) Laws of Kenya. The Act is intended to compensate families of persons killed in accident. Section 4(1) of the Act states:-

Similarly, Sections 7 and 8 of the Act states:-

**7.“If at any time, in any case intended and provided for by this Act, there is no executor or administrator of the person deceased, or if no action is brought by the executor or administrator within six months after the death of the deceased person, then and in every such case an action may be brought by and in the name or names of all or any of the persons for whose benefit the action would have been brought, if it had been brought by and in the name of the executor or administrator, and every action so brought shall be for the benefit of the same person or persons as if it were brought by and in the name of the executor or administrator.**

**8. Plaintiff to deliver full particulars of the persons for whom damages claimed In every action brought by virtue of the provisions of this Act, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his advocate, full particulars of the person or persons for whom, and on whose behalf, the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.”**

Paragraph 8 of the plaint partly states as follows:-

**“the said estate has suffered loss and damages and will be seeking for compensation in terms of general damages under the Law Reform Act and the Fatal Accidents Act and Special damages.”**

The prayers being sought include general damages under the Fatal Accidents Act.

The demand letter from Ms. Wandabwa Advocate dated 16<sup>th</sup> June 2021 addressed to both Citi Hopa Bus Limited and Mr. Meshak Musembi makes a demand for Kshs.1,015,777 made up as follows:-

- a. Pain, suffering and loss of amenities      Kshs. 50,000
- b. Loss of expectation of life                      Kshs.100,000

Special damages

**a. Hospital Bills**

**Hospital Expenses at M.P Shah.... Kshs. 594,573.00**

**Hospital Expenses at M.P Shah.....Kshs. 80,000.00**

**Hospital Expenses at Nairobi Women Hospital.....Kshs. 29,237.00**

**Nairobi Hospital CT scan.....Kshs.16,340.00**

**Post mortem charges.....Kshs.30,000.00**

**b. Funeral Expenses**

**Transportation expenses within the country.....Kshs.55,000.00**

**Transportation of the deceased's remains by airlift**

**(Ethiopian Birrs, 1,537.00 exchange rate of Kshs 5.21)....Kshs.8,007.00**

**Payment to Freight Time Limited for transportation of deceased remains dollars 649.00 At exchange rates of Kshs 80 to 1\$).....Kshs.51,920.00**

**c. Motor Vehicle Search Certificate.....Kshs.500.00**

**d. Death Certificate.....Kshs.200.00**

**Total.....Kshs.1,015,777.00**

It is evident from both the plaint and the demand letter that there is no claim for loss of dependency under the Fatal Accidents Act. Equally, the trial court's judgement does not make any reference to loss of dependency. The Fatal Accidents Act under Section 8 requires that the particulars of the dependants be stated, presumably, in the plaint. Parties are bound by their pleadings. The trial court in its judgment stated as follows:

**“I decline to award under the Fatal Accidents Act having awarded Kshs.5,170,560 for loss of expectation of life”**

Counsel for the respondent submit that due to the deceased's profession, the estate which is the Orsoline Sisters L.V.M. lost one of its most dependable people. It is also contended for the respondent that if one chooses to live a celibacy life, he/she dedicates his life to the community he is serving. All these contentions are found in the submissions before the trial court and on appeal. There is no pleading in the plaint that the church is the deceased's beneficiary/dependant or that the community has lost the services of the deceased. Counsel for the respondent in her submissions before the trial court urged the court to award Kshs.1.5million for loss of dependency. This claim is not supported by any evidence or pleadings. The deceased had no child. Her parents were not included in the pleadings yet her body was handed over to them. I am satisfied that the circumstances of this case do not qualify for an award under the Fatal Accidents Act. Any such claim is therefore declined.

Although ground 6 of the grounds of appeal relate to the award of Kshs.905,177 as special damages, submissions by counsel for the appellant do not deal with that issue. The amount claimed as special damages was specifically pleaded. The special damages being claimed mainly involve the process of burying the deceased. I do find that the plaintiff proved the claim for Kshs.905,177 as special damages.

In the end, I do find that the appeal partly succeeds. The award of Kshs.5,170,560 for loss of expectation of life awarded to the respondent is hereby set aside. The respondent is awarded Kshs.100,000 for pain and suffering, Kshs.200,000 for loss of expectation of life and Kshs.905,177 as special damages. This makes a total award of Kshs.1,205,177. The respondent shall have costs and interest awarded by the trial court. Parties shall meet their own costs of this appeal.

**DATED AND SIGNED AT NAIROBI THIS 13<sup>TH</sup> DAY OF JULY, 2021**

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**S. CHITEMBWE**

**JUDGE**