



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 140 OF 1999**

**PAUL KIOKO** (Suing as the legal Representative of the estate of Mary Mwikali Kioko  
(Deceased) .....**PLAINTIFF**

**VERSUS**

**SAMUEL G. KARINGA**.....**DEFENDANT**

**As consolidated with HCCC NO. 46 of 2001**

**PAUL KING'OO KIOKO** (Suing on his Behalf and As the legal representative of the  
Estate of **MARY KIOKI** (deceased).....**PLAINTIFF**

**VERSUS**

**JUMA HAMISI**.....**1<sup>ST</sup> DEFENDANT**

**AFRO TRAIN (TZ) LIMITED**.....**2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

This Judgment is in respect of two suits which were consolidated by the order of court on 6/7/2001. The first to be presented to court was Nairobi HCCC NO. 140 of 1999 in which the plaintiff is indicated as one Paul King'oo Kioko (Suing on his own behalf and as the legal representative of the Estate of Mary Mwikali Kioko (Deceased). The plaintiff had initially cited Afro Train (TZ) Limited as the first defendant and Samuel G. Karinga as the second defendant. However the suit in HCCC 140/1999 was discontinued as against the first defendant Afro Train (TZ) Limited vide a notice of discontinuance under order XXIV rule 1 CPR dated the 9<sup>th</sup> day of March, 2001 and filed on the 12<sup>th</sup> day of March, 2001.

Upon the said withdrawal of the suit as against the first defendant in HCCC NO. 140 of 1999, the plaintiff moved and filed another suit in HCCC Number 46 of 2001 in which the plaintiff is suing in the same capacity as in HCCC NO. 140/1999 and has cited one Juma Hamisi as the first defendant and Afro Train (TZ) Limited as the second defendant. The original plaint in HCCC NO. 140 of 1999 had been dated on the 23<sup>rd</sup> day of March, 1999 and filed on the 14<sup>th</sup> April, 1999. It was subsequently amended with the leave of court and the amended plaint is dated the 14<sup>th</sup> day of July, 2000 and filed on the 17<sup>th</sup> day of August, 1999. Where as the plaint in HCCC No. 46 of 2001 is dated 20<sup>th</sup> day of March, 2001 and filed

the 23<sup>rd</sup> day of March, 2001. The contents of both complaints are similar in all material particulars and will be assessed as one. The salient features of the same are that:-

(i) At all material times the plaintiff was the owner of Motor vehicle Registration Number N145GV- New York Mitsubishi Pajero which was at the material time being driven by the deceased Mary Mwikali Kioko whereas the second defendant in HCCC Number 46/2001 Afro Train (TZ) Limited was the owner of Motor vehicle registration Number TZF 4991 Scania lorry driven by the first defendant in HCCC NO. 46/2001 Juma Hamisi as the employee, servant and or agent of the 2<sup>nd</sup> defendant Afro Train (TZ) limited. While Samuel G. Karinga who is the second defendant in HCCC NO. 140/1999 was the owner of motor vehicle registration number KWD 559 Isuzu lorry driven either by himself, his employee, servant and or agent.

(ii) The cause of the grievance as against the defendants in HCCC 46/2001 is that on the 6<sup>th</sup> day of May, 1998 the deceased Mary Mwikali was driving Motor vehicle registration number N1459V-New York along Mombasa road when the first defendant Juma Hamisi negligently drove, managed and or controlled motor vehicle registration number TZF 4991 that he caused it to collide into motor vehicle KWD 559, hurling it against motor vehicle registration number N145GV-New York and thereby fatally injuring Mary Mwikali Kioko and extensively damaging motor vehicle registration number N145GV- New York. Whereas the source of the grievance as against one Samuel G. Karinga is that in the alternative and without prejudice to the foregoing the accident was substantially caused and or contributed to as a result of the negligence of the 2<sup>nd</sup> defendant or his driver, servant or agent by negligently driving motor vehicle registration number KWD 559 thereby causing it to ram into or be rammed into by motor vehicle registration number TZF 4991 and thereafter colliding into motor vehicle registration number N145GV- New York thereby causing the accident and extensively damaging it.

(iii) The particulars of negligence attributed to the first defendant in HCCC Number 46/2001 Juma Hamisi are that of driving motor vehicle registration number TZF 4991 at a speed that was too high in the circumstances, driving the said motor vehicle without due care and attention to other road users, failing to see motor vehicle registration number KWD 559, failing to maintain a proper look out or in any other way manage and or control the said motor vehicle so as to avoid the accident, failing to take care not to collide into motor vehicle registration number KWD559 and thereby causing an accident whereby motor vehicle registration number N145GV-New York was knocked, failing to swerve, apply brakes or act in any other way to control motor vehicle registration number TZF 4991 so as to avoid the accident and lastly turning into Namanga road at an illegal turning and thereby failing to observe the High way code and the Road Traffic Act. Whereas the negligence attributed to the second defendant in HCCC NO.140/1999 Samuel G. Karinga, his servant, agent and or employee are given as driving motor vehicle registration number KWD 599 at a speed that was too high in the circumstances, driving the said motor vehicle without due care and attention to other road users, failing to see motor vehicle registration number TZF 4991, failing to maintain a proper look out or in any other way manage and/or control the said motor vehicle so as to avoid the accident, failing to take care not to collide into motor vehicle registration number TZF 4991 and thereby causing an accident whereby motor vehicle registration number N145GV- New York was knocked, failing to swerve, apply brakes or act in any way to control motor vehicle registration number KWD 559 so as to avoid the accident.

(iv) By reason of matters complained of Mary Mwikali Kioko suffered bodily injuries from which she died and her estate has suffered loss and damage and the plaintiff also suffered loss and damage.

(v) The action in HCCC No. 46/2001 has been brought pursuant to the law reforms Act cap 26 and the fatal accidents Act cap 32 of the laws of Kenya.

(vi) The action is brought on behalf of the estate of the deceased Mary Mwikali Kioko and also on behalf of the Dependants and beneficiaries of her estate.

(vii) At the time of her death the deceased was aged 44 years and was in good health. She had prospects of living a long happy life which was drastically reduced by the accident.

(viii) The deceased was working as a clinical nurse at Deaton University of Mary Land Medicine, United States of America, earning a salary of US Dollars 21.08 per hour, 48 hours a week from which she spent two thirds of it on her immediate family.

(ix) The names of the persons for whose benefit the action is brought are listed as:-

(1) Paul King'oo Kioko husband aged 49 years.

(2) Angela Wanza King'oo daughter aged 17 years.

(3) TRixie Ndanu King'oo daughter aged 15 years.

(4) Susan Mwikali King'oo daughter aged 14 years.

(x) By reason of matters complained of in both cases namely HCCC No.140/1999 and HCCC 46/2001 the plaintiff contends that by reason of the deceaseds' death the deceaseds family lost the deceased means of support and have thus suffered loss and damage.

(xi) Further by reason of matters complained of in both cases namely HCCC NO. 140/1999 and 46/2001 as a result of the accident motor vehicle registration number N145GV- New York received extensive damage and the plaintiff has incurred loss, damage, loss of consortium and servitium.

In consequence thereof the plaintiff prays for Judgment against the defendants jointly and severally for:-

**(a) Damages pursuant to the Law Reform Act cap 26 and Fatal Accidents Act cap 32 of the laws of Kenya.**

**(b) Loss of consortium and servitium.**

**(c) Special damages of Kshs.564, 753.00 comprising.**

**(i) Funeral expenses of Kshs.30,000.00**

**(ii) Costs of police abstract Kshs.100.00.**

**(iii) Cost of death certificate Kshs.50.00**

**(iv) assessment report kshs.3,500.00**

**(v) Repair charges of Kshs.531,103.00**

**(d) Costs of the suit.**

**(e) Interests on (a) and (b) at court rates.**

**(f) Any other relief that this Honourable Court may deem fit to grant.**

The defendants in HCCC No.46/2001 filed a defence dated 29<sup>th</sup> March, 2001 and filed on the 4<sup>th</sup> day of April, 2001. The salient features of the same are as follows:-

(i) Would seek stay of the proceedings in HCCC Number 46/2001 until HCCC number 140 of 1999 is heard and determined as to them HCCC Number 46/2001 has been brought with malafides considering the existence and undetermination of HCCC No.140/1999.

(ii) Without prejudice to the above and notwithstanding, the plaintiff Paul King'oo Kioko has no authority and or capacity to bring the alleged suit on behalf of the Estate of the deceased Mary Mwikali Kioko and for this reason the suit is incompetent and the defendant would move the court at an appropriate time to have it struck out.

(iii) Admitted paragraphs 2, 3,5 and 12 of the plaint.

(iv) They have no knowledge of the content of paragraphs 4 and 8 of the plaint and puts the plaintiffs to strict proof thereof.

(v) Denied that the accident occurred as described by the plaintiff in paragraph 7 of the plaint and specifically denied the particulars of negligence attributed to the defendants and shall put the plaintiff to strict proof.

(vi) Notwithstanding the above and in the alternative averred that the said accident was wholly caused or substantially contributed to by the negligence of the servant or agent of Samuel G. Karinga the owner of motor vehicle Reg.No. KWD559 as pleaded in that paragraph and by the negligence of the deceased Mary Mwikali Kioko. The particulars of negligence attributed to Samuel G. Karinga his agent and or employee are given as driving motor vehicle registration number KWD 559 at a speed that was too high in the circumstances, driving the said motor vehicle without due care and attention to other road users, failing to see motor vehicle registration number TZF4991, failing to maintain a proper look out or in any other way manage and/or control the said motor vehicle so as to avoid the accident, failing to take care not to collide into motor vehicle registration number TZF4991 and thereby causing an accident whereby motor vehicle registration number N145GV- New York was knocked and lastly failing apply brakes or act in any way to control motor vehicle registration number KWD559 so as to avoid the accident. Whereas the particulars of negligence of the deceased Mary Mwikali Kioko are given as driving at an excessive speed in the circumstances, failing to have any or any proper regard for other motor vehicles driving along the said road especially the one owned by the second defendant, failing to observe the high way code, failing to stop, slow down, swerve or act in any other way to manage, control or avoid the accident, driving without due attention and diligence on the said road and driving without due care and attention.

In consequence thereof the defendants in HCCC No.46/2001 prayed for the dismissal of the plaintiff's suit against them.

The 2<sup>nd</sup> defendant in HCCC No.140/1999 namely Mr. Samuel G. Karinga filed a defence which the court has noticed as at the time of the drafting of this Judgment that the same is undated and un signed but was filed on the 20<sup>th</sup> day of March,2000 and since the 2<sup>nd</sup> defendant participated fully in the proceedings and since no objection was raised to court about this defect before the conclusion of the

trial , the court will bear in mind the provision of Article 22 (3) (d) and 159 (2) (d) of the constitution and proceed to assess the same. The salient features of the same are that:-

(i) Denied the description and capacity of the plaintiff to institute the suit under the law Reform Act cap 26 laws of Kenya and under the Fatal accidents Act cap 23 laws of Kenya.

(ii) Denied the contents of paragraph 2 of the plaint and puts the plaintiff to strict proof.

(iii) Admitted the descriptive part of paragraph 3 of the plaint and denied the rest of the content of that paragraph; denied the rest of denied the contents of paragraph 4 of the plaint and puts the plaintiff to strict proof, denied paragraph 5 and 6 of the plaint and puts the plaintiff to strict proof thereof.

(iv) That the suit is bad in law and incompetent and the 2<sup>nd</sup> defendant will apply to have it dismissed as against the 2<sup>nd</sup> defendant.

(v) Save that there was an accident on the 6<sup>th</sup> day of May,1998, the 2<sup>nd</sup> defendant, his agents and servants and or employees neither contributed and or caused or was in any way to blame for the said accident and puts the plaintiff to strict proof thereof.

(vi) Denied all and singular particulars of negligence enumerated in paragraph 8 of the plaint and put the plaintiff to strict proof thereof.

(vii) Further or in the alternative such loss or damage as the plaintiff may prove were occasioned wholly or in part or contributed to by the negligence of the plaintiff particularized as Driving motor vehicle N145GV- New York at an excessive speed in the circumstances, driving the said motor vehicle without due care and attention on the road, failing to observe the high way code whilst driving on the said road, driving dangerously and recklessly without taking any precaution or care for the safety of other road users more especially the motor vehicle KWD559, ramming into motor vehicle KWD559 from behind, failing to stop, slow down, swerve or act in any other manners so as to avoid the said accident.

(viii) The 2<sup>nd</sup> defendant denied the contents of paragraph 9 of the plaint and put the plaintiff to strict proof thereof.

(ix) In the alternative and without prejudice to the afore going paragraph the 2<sup>nd</sup> defendant averred that the said accident was entirely caused and or substantially contributed to by the negligence of the driver of TZF 4991 particularized as driving at an excessive speed in the circumstance, driving into a no-entry zone, driving without due care and attention for other road users more specifically motor vehicle registration number KWD 559, failing to see motor vehicle registration number KWD559 in time or at all, failing to maintain a proper look out or in any other way manage and or control the said motor vehicle so as to avoid the accident failing to swerve, apply brakes or act in any other manner to control motor vehicle TZF4991 so as to avoid the accident,

(x) The 2<sup>nd</sup> defendant will at the appropriate time issue a notice of claim against the first defendant under order 1 rule 21 of the CPR.

(xi) Denied services of a demand notice on them.

In consequence thereof prayed for the plaintiffs' suit against them to be dismissed with costs to them.

The court has not traced on the record replies to both defences.

Parties were heard. Seven witnesses testified for the plaintiff. PW2 Martha Kiptuigat Kipturgo produced documents held by the nursing council of Kenya confirming that the deceased Mary Mwikali Kioko was a graduate of their school of the year 1977. Her name appears in the register of grandaunts of that year against entry number 1242. Both the copy of the register where the deceased's name appears and the copy of the Diploma certificate were produced as exhibit 5(a) (b).

When cross –examined PW2 maintained that their school of nursing is a department within the Kenya medical Training College; that she had records to confirm that indeed the deceased was one of their students who graduated from their school in the year 1977 and that the documents presented to court reflect the correct position of the entries made in their records.

PW3 Timothy Chari Chimbeja a motor vehicle assessor employed by East Africa Limited recalled receiving instructions from the plaintiff Paul Mumo Kioko to carry out an assessment on the plaintiffs motor vehicle registration Number N145GV- New York Mitsubishi Pajero with a foreign registration and subsequently given a local registration as KAL 791E. The assessment was in connection with damage arising from a motor vehicle accident. The vehicle was lying at Simba Colt workshop along Mombasa road. PW3 carried out the assessment, furnished the report and was duly paid for services rendered.

When cross-examined PW3 stated that he had 21 years experience on the job; he conceded there appears to be a discrepancy in the engine number given in the log book and the assessers report but he did not check the engine number. He conceded that the colour of the motor vehicle in the log book and that in the report did not quite tally but to him the colour of the motor vehicle could be changed at any time by the owner if he so wished. He confirmed that he did not record the engine number in his report.

PW4 Francis Nelson Dieg an employee of Simba Colt gave evidence to the effect that he had been an employee of Simba Colt for 27 years to the date of trial. He recalled the plaintiff brought his motor vehicle registration number N145 GV-New York to the yard using a breakdown. The vehicle had visible accident damage. A job card was prepared estimates given and paid for by the plaintiff through a banker's cheque. Concedes that shield of Kenyan insurance had been entered as an owner but later changed to read the name of Paul Mumo Kioko. Confirmed that it is Paul Mumo Kioko who made the payments for the work done. Confirmed the genuineness and the correctness of the entries in their records showing existence of a job card which contained details of the work to be done , the job card number namely 15107980, amount payable for services to be rendered namely KSHS.531,103.00 the break down on the pricing for each work to be done, check list of the components of the vehicle or loose items on the vehicle when the vehicle came into the workshop, the owners signature, address and phone number, mode of payment which was by bankers cheque in case of the plaintiff herein, paid on 15/10/98 and stamped by the cashier whose signature PW4 was familiar with, evidence of material issues from the workshop towards the repairs which were being done. The witness identified his own signature and that of the foreman confirming that the said works were carried out. The witnesses also confirmed that their office through the hand of the general manager operations a Mr. Cris Fryer confirmed payment for the work done as per the content of exhibit 23 and 24.

When cross-examined, PW4 responded that the name of the owner was changed from the insurance company giving the cover to the owner of the vehicle who is the plaintiff. PW4 confirmed that it is them who carried out the first assessment of the repairs to be carried out. Concedes they had access to the assessors report and there is possibility of amending the assessors report but he is sure they did

not change the colour of the vehicle or carry out repairs on the engine. They called for the plaintiff and made him to sign because they had no instructions from the insurance company to repair the said vehicle.

PW5 was a police officer number 41701sgt Kinyua Ringera. At the material time when the accident subject of these proceedings occurred he was based at Athi River police station. It is his testimony that at around 7.30 p.m. on 6/5/98 while at the police station and on duty he received information from members of the public that an accident had occurred at Athi River at the junction to Namanga. He was accompanied to the scene by P.C. Kinyanjui and P.C. Lumire .Upon arrival at the scene, he found that the accident had involved three vehicles namely TZF 4991 SC 24904 Scania, Lorry trailer, lorry KWD 559 Isuzu lorry and a foreign registered Mitsubishi Pajero N 145 GV New York. He drew a sketch plan before giving instructions for the removal of the accident vehicles.

Observation of the scene by PW5 revealed that the Scania lorry was facing towards Namanga direction. The accident took place at the Namanga junction on the Nairobi Mombasa road at the turn off. The TZF lorry was facing Namanga direction on the lane of no entry. The lorry KWD559 was facing towards Nairobi having come from the Mombasa direction. It had turned towards the left side. PW5 placed blame on to the Scania lorry for the causation of the accident by using a no entry lane and for failing to stop to give way for on coming vehicle to pass. PW5 added that both KWD 559 and the foreign registered vehicle were in their rightful lane. After drawing the sketch plan, PW5 recorded statements from the turn boy in the Scania vehicle, driver and turn boy of KWD 559 and a passenger in the foreign registered vehicle.

When cross-examined PW5 responded that he received the accident report at around 7.30 p.m. they visited the scene immediately and upon going back to the station is when they booked the report in the OB at 8.25 p.m.. He denied the suggestion that the accident occurred at 8.25 p.m. and that is why it was booked at that time.

PW5 further reiterated that upon arrival at the scene he still found the vehicles at the scene with the Isuzu lorry and the vehicle with the foreign registration facing Nairobi. Whole TZF 4991 Isuzu with trailer 4904 was facing Mombasa but slightly towards Namanga. In his opinion, the driver of the Scania lorry was in the wrong when he failed to give way to on coming vehicles and then used no entry to join the Namanga road. He was firm that according to his observations had it not been for the Scania lorry there would have been no accident and that is why he recommended the driver of the Scania lorry Juma Hamisi to be charged with the offence of causing death by dangerous driving but he was not charged because he disappeared after the accident. That there were no skid marks to show that KWD 559 reversed and hit the Pajero but PW5 could not rule out that after the impact there was a possibility of the lorry reversing to hit the Pajero. There were no skid marks to show that the Pajero rammed into the lorry that there is a possibility that after the impact between the lorry but the Scania the Pajero could have moved into the lorry from behind.

PW5 went on to state that he has knowledge that the vehicle being a foreign registered vehicle it had to have a permit in order to be driven on Kenyan roads. PW5 recalls there was such a permit which had expired on 23/4/1998 before the occurrence of the accident which occurred on the 6/5/1998. He has personal knowledge of the requirement of the high way code that safe distance behind another vehicle should be 40 meters. The same distance is supposed to be kept by a vehicle approaching a junction. When referred to the issue of existence of two police abstracts, relating to the same accidents, PW5 PWW5 conceded that indeed there are two abstracts issued in relation to the accident subject of these proceedings. No.A 338429 was issued in respect of KWD 559 Isuzu and that is why it does not have the name of Margaret Nduku Mutuku and A324434 contains the name of Margaret

Nduku Mututku because it was issued in respect of the foreign registered motor vehicle PW5 denied the suggestion that there was an illegality committed by them including the name of Margaret Nduku in the abstract issued in respect of the foreign registered vehicle. All the witness knows is that the information gathered shows that this vehicle had only two occupants the deceased and Margaret Nduku. On further cross-examination, PW5 conceded there is some information missing from the police file because it had not been included in the compilation, some are signed while others were not signed; some entries were made by PW5 while others were made by other officers. PW5 did not agree with the content of the statement of one Joseph Kinyanjui to the effect that the scania lorry was stationery and that the Pajero attempted to overtake the lorry KWD 559. But says as a correct version that the scania lorry turned into the Namanga road junction suddenly using the wrong directions. Lastly that if the Pajero had been overtaking it could not have banged the lorry from behind but on the side and to him the deceased was surprised and bears no responsibility for the causation of the accident.

PW6 Janet Nyanga Mwamuge an officer from the nursing council of Kenya produced records relating to the deceased to the effect that according to records held by them the deceased entered medical training college upto the time she qualified as a Kenya registered nurse and was registered vide entry No.5998. She recalled the deceased sent them a letter requesting for verification of her academic testimonials and PW6 has no doubt they were so verified.

PW7 Margaret Nduku Mutungi was the passenger in the deceased vehicle. It was a left hand drive. The deceased was the driver. They had driven from Masii in Machakos District and were headed to Nairobi. They were going at a moderate speed. She was seated on the right hand side of the vehicle. The view a head was clear. She first noticed the lorry KWD 559 first after the Nairobi Mombasa Machakos turn off. It was a head of them. They drove behind it upto Namanga junction. They were going at 40 KM per hour. At Namamnga Junction, it had rained and it was wet. Since the view was clear she saw a lorry come from the Nairobi direction. It just turned and banged into KWD 559 which moved backwards because of the impact. The deceased tried to avoid that motion and swerved to the right and that is why KWD 559 hit it on its left side. The deceased said "**O my God**" and everything went silent. The vehicles stuck on impact. People came and separated the impacted stuck vehicles. The deceased was rushed to mater hospital but was pronounced dead on arrival. To PW7, the lorry from Nairobi was to blame for the accident as it did not indicate that it was going to turn into the Namanga junction.

When cross-examined PW7 responded that they arrived at the junction at 7.00 p.m., it was getting dark, people were now using their side lights. It is PW7s evidence that the deceased did not see the lorry from Nairobi but she saw KWD559 coming backwards and that is when she swerved to the right to avoid it. She denied the suggestion that the accident was spontanous. They were in the correct lane. The accident happened because the driver of KWD 559 did not know that the lorry from the nairobi direction was going to turn into the Namanga junction. She made observations when she came out of the vehicle. It is her testimony that the accident between the scania lorry and KWD559 was not a head on collision but the impact was on the side of the driver, the right hand side. While that on the scania lorry was on the passengers side. She was firm that it is KWD 559 which moved backwards. To PW7, they had kept a good distance between them and KWD 559. It is her testimony that she reported to police in September, 1998 and not immediately after the accident happened because she married two days after the accident and then left for her honey moon until September 1998. She denied the suggestion that she saw statements of other witnesses before making her own statement. She was firm that her statement contains what she witnessed of the accident. She maintained that after following behind KWD 559 for a while she asked the deceased if they could overtake but the deceased told her she was comfortable going at 40km per hour and they did not over take. She confirmed that the deceased took an evasive action of swerving to the right to avoid the accident. She agreed that indeed the deceased swerved into the lane for on coming vehicle from Nairobi direction but there was no on

coming vehicle at that time. When she came out of the vehicle, the two accident vehicles were in the Namanga junction. She does not recall the deceased braking.

PW1 Paul King'oo Mumo Kioko was the main witness. The salient features of his evidence is that he is the plaintiff with locus standi to present these proceedings on his own behalf and that of other dependants of the deceased. The deceased was his legally and lawfully wedded wife. They had three children between them enumerated in the plaint. The proceedings arise from the death of the deceased who died on 6/5/98 aged 44 years of age. The deceased had trained and been registered as a nurse by the relevant authority in Kenya. At the time of her death, she had left Baltimore Mary Land USA where she had been residing with her family and working to come to Kenya to attend the deceased's nieces wedding. She died two days upon her arrival in Kenya. Upon graduation the deceased worked in Kenya at Kenya Airport Authority, Tetra Park and Aga Khan hospital.

Upon arrival in the United states of America the deceased was employed immediately and worked at various places among them state University of New York, Befalan, Niagara nursing home for the aged. They came back to Kenya in 1982 and then went back to the USA in 1993 where upon the deceased obtained a licence to secure employment in the USA with the first licence expiring on 31/8/1995 which was duly renewed upto 31/8/98. While in New York she worked at ST. Peters Hospital. When they moved to Baltimore Mary Land in July 1997, She obtained a licence as required and then was employed at the university of Mary Land medicine staff clinic. Where she worked till her death. She earned 21.80 Dollars per hour which comes to 5,000.00 U.S Dollars a month. PW1 confirmed that both him and the deceased filed tax returns. The deceased would have worked till the age of 65 years. To improve on her expertise, the deceased attended various courses at various institutions and was awarded certificates which in turn went to earn her promotion.

While the deceased was in regular employment she was bringing in regular income of US Dollars 5,000.00 per month while the plaintiff brought in US Dollars 1,200.00 per month. The two incomes went to sustain the family. When the deceased died the plaintiff was unable to sustain the family in the USA and had to relocate back to Kenya, took their children to a school following the American Educational system in order to prepare them for their university Education in the United States.

Turning to the expenses incurred herein, the plaintiff spent Kshs.30, 000.00 for the funeral, Kshs.100.00 on the abstract but did not have receipts. The vehicle the deceased was driving belonged to the plaintiff. He carried out repairs on the vehicle. It was registered in his name on 11/11/99 after the accident. The damages were assessed before repairs were carried out on the said vehicle. Repair charges were paid for by the plaintiff. In further support of the plaintiffs case, the plaintiff produced a licence to show that his foreign registered vehicle had been licenced to drive on Kenyan roads. Upon going back to the USA he was the sole supporter of the family despite loosing the 75% financial support from the deceased supplemented by loans from various institutions. On the basis of the evidence adduced the plaintiff sought the reliefs sought in the plaint.

When cross-examined, the plaintiff responded that him and the deceased married in the year 1975. The plaintiff was an accountant by profession while the deceased was a nurse. Upon finishing their professional qualifications the plaintiff worked as an accountant while the deceased worked as a nurse. The plaintiff left for USA for academic studies. He came back to Kenya, worked for his employer and when he completed the contract of service bond for sponsorship, he ventured into private business. He left for the USA with the deceased in 1978 and then came back in 1982. They worked shortly him plaintiff in private financing business. While the deceased worked for Aga Khan Hospital. The family went back to the USA in 1993. Upon arrival in the USA he was a dependant of the deceased because the deceased by virtue of her academic qualification she secured employment a head of him because of the

job demands of her profession. To enable the deceased to be so engaged, she had to be duly licenced. Concedes that ability to work depended on being licenced. That computation of time worked was per hour. Conceded in Kenya the deceased changed jobs thrice i.e Kenya Airports Authority, Tetra Park and Aga Khan Hospital. That in the USA, she changed jobs twice firstly at St. Peters Albany New York and Deaton speciality hospital in Mary Land. The plaintiff goes further to state that while the deceased worked continuously he was engaged in the import and export business which was not doing very well because he didn't have reliable people in Kenya. When the deceased passed on, the plaintiff and the children relocated to Kenya. While in Kenya the plaintiff enrolled them at Rift Valley Academy in Kijabe, an institution catering for an American system type of Education which is a high cost school. This was to prepare them for college Education back in the USA. Finances to meet the cost of Education for his daughters came from joint savings with the deceased both in the states and local banks as well as proceeds of the sale of their a home in Runda. He maintained contact with the United States wherein he visited once a year to stay for a month and after enrolling the daughters back in USA colleges he used to go and then stay for 3 months and come back. The visits were self financed.

With regard to the accident vehicle, they purchased it in the USA through a loan which they fully serviced and there after it was brought to Kenya and had it cleared in march/April 1998. He had intended to use it in Kenya whenever he come around. He confirmed that upon the vehicle being involved in an accident him plaintiff is the one who took it to Simba Colt motor Limited for repair and fully paid for the repairs by a bankers cheque. Conceded the car had a 3<sup>rd</sup> party cover for the vehicle but he had not insured it comprehensively. With regard to the permit to have the vehicle drive on Kenyan roads, the plaintiff has knowledge that the permit on the wind screen had indeed expired on 23/4/98 but its renewal was at home and hence as at the time the accident occurred the vehicle was validly driving on Kenyan roads and denied the suggestion of obtaining it after the accident. On further cross-examination, PW1 conceded that the licence or permit did not identify the registration number of the vehicle but maintained exhibit 28 was for his vehicle. He had fully paid for it although he did not have a receipt. As for exhibit 29 on the income of both him and his deceased wife, the plaintiff stated that he had intended the maker to come and produce it but could not do so due to inability of the maker to attend court and testify.

After the plaintiff closed his case the matter was adjourned for the defence but the defence were unable to trace their witnesses and closed their defences without tendering any evidence.

Parties filed written submissions. Those of the plaintiff are dated the 30<sup>th</sup> day of July, 2009 and filed the same date. The salient features of the same are that:-

(i) The proceedings herein relate to HCCC NO. 461/2001 and HCCC 140 of 1999 both of which were consolidated on 6/7/2001. Both suits relate to a claim of both special and general damages arising from the fatal injury sustained by one Mary Mwikali Kloko in a road traffic accident which occurred on 6/5/98 at Athi River as well as material damage to the accident vehicle the deceased was driving at the material time. The claim is against the defendants as joint tort feasers.

(ii) The plaintiff adduced evidence through seven witnesses while the defence tendered none.

(iii) Parties filed agreed issues which the court is invited to use in the assessment of the evidence tendered herein.

(iv) It is the stand of the plaintiff that they have established their claim because of the following reasons:-

(a) Capacity to sue has been established by production of a grant of representation to the estate of

the deceased Mary Mwikali.

(b) Locus standi of the first defendant Afro Train (TZ) limited has been established by their admission in their defence in HCCC No. 46/2001 that they are a registered company and that they owned motor vehicle TZF 4991. While that of the 2<sup>nd</sup> defendant is confirmed in their un signed but filed defence in HCCC No. 140/1999 whereby admission of ownership of motor vehicle Reg. No. KWD 559 is made.

(v) Police abstracts tendered in evidence have all gone to demonstrate that the defendants motor vehicles were all involved in the accident leading to the death of the deceased and material damage to the plaintiffs motor vehicles.

(vi) The plaintiff tendered evidence to prove ownership of the vehicle the deceased was driving as at the time she sustained the fatal injuries.

(vii) On liability the court has been invited to believe the testimony of PW5 and PW 7 who absolved the deceased of any blame and fixed liability on the defendants.

(viii) In the absence of any evidence being tendered by the defence, the court to find both defendants equally to blame for the causation of the accident.

(ix) On the facts presented by the plaintiff as well as the exhibits produced in evidence, the plaintiff has made out his case for a claim of damages against both defendants jointly and severally in that it is the wrongful actions of the defendants which had led to the deceased sustaining fatal injuries and the material damages to the plaintiffs motor vehicle.

(x) On quantum the court was invited to give an award of Kshs.200, 000.00 under the head of loss of expectation of life, Kshs.100, 000.00 for pain and suffering before death, specials of Kshs.564, 753.00. As for loss of dependency the court was invited to apply the rate of US dollars 21.08x48 hours per week and then multiply by 4 weeks in a month to get hours per month and then multiply by 23 years and then apply the dependency ratio of 2/3rds.

The first defendants' submissions are dated the 9<sup>th</sup> day of February, 2010 and filed on the 10<sup>th</sup> day of February, 2010. The salient features of the same are as follows:-

(i) The plaint dated the 22<sup>nd</sup> day of March,1999 and filed on 14<sup>th</sup> day of April, 1999 is incompetent and is a proper candidate for striking out because:-

(a) The summons to enter appearance purportedly issued on the 30<sup>th</sup> day of June, 1999 and served on the defendant are invalid because the same were served after their expiry.

(b) The defendant had knowledge of this and that is why they entered appearance in HCCC No. 140/1999 under protest.

(c) The plaintiff confirmed that the defendants contention was the correct position and that is why they filed a chamber summons under order VI rule 1 and 32 of the civil procedure rules as they were then filed on 10<sup>th</sup> November, 2000 purporting to seek validation of the summons giving rise to a resulting ruling dated the 16<sup>th</sup> day of January, 2001 purporting to be validating the extention which the defendants content that the said ruling was in valid as there was nothing to be extended and the court is invited to be guided by the case law cited.

(ii) Contends that the plaintiffs' motor vehicle Reg. No. NN145 GV- New York Mitsubishi Pajero was not legally and lawfully driving on the Kenyan roads because:-

(a) When the plaintiff filed the list of documents on the 18<sup>th</sup> February, 2002, and the 17<sup>th</sup> day of April, 2002, none showed that the plaintiff had a licence for a foreign registered vehicle as required under the Traffic Act as the licence retrieved at the time of the accident by the investigating officer had expired on the 24<sup>th</sup> day of April, 1998 whereas the accident occurred on 6<sup>th</sup> May, 1998. In the premises, the court is invited to reject the licence tendered in evidence vide a further list of documents dated 28<sup>th</sup> day of November, whereby the plaintiff purported to produce a licence number 199399 purporting to be a renewal of the one which had expired on 23/4/98.

(b) The first defendant concedes that the court in its ruling of 22<sup>nd</sup> February, 2008, allowed this document for purposes of discovery, they contend no such licence was in existence as at the time of the accident firstly because it had not been displayed on the wind screen of the Mitsubishi Pajero and the plaintiff only moved to produce it after the defendants had put their case across that the said vehicle was not properly licenced to be on the Kenyan roads.

(c) There is nothing to demonstrate that the said new licence had even been surrendered to the police.

(iii) There was no proof that the vehicle had been insured under 3<sup>rd</sup> party risk and for this reason non compliance constitute commission of offences.

(iv) On liability, the 1<sup>st</sup> defendant has urged the court to find that the deceased having been driving a left hand car, her manner of driving too close to the lorry a head of her must have impaired her vision leading to her ramming into the lorry in front of her and since there was no contact between the plaintiffs vehicle and that of the first defendant the first defendant is not liable to the plaintiff for any loss and or damage caused as a result of that accident. Secondly if the deceased had kept a safe distance from the lorry she would have seen the 1<sup>st</sup> defendant's vehicle well in advance and avoided to ram into the 2<sup>nd</sup> defendants vehicle.

(v) The court is invited to dismiss the entire claim on quantum as these were not proved.

The second defendants' submissions on the other hand are dated the 26<sup>th</sup> day of February, 2010 and filed on the 1<sup>st</sup> day of March, 2010. The salient features of the same are that:-

(i) The onus is on the plaintiff to prove liability in his favour as against both defendants.

(ii) Contends that the plaintiffs claim against the 2<sup>nd</sup> defendant has not been proved because the evidence of PW5 relied upon by the plaintiff places blame on the 1<sup>st</sup> defendants motor vehicle which turned into Namanga road without giving KWD 559 owned by the 2<sup>nd</sup> defendant which was in its rightful lane, the right of way. 2ndly by using the no entry to join Namanga road the first defendant blocked the path of DWD 559.

(iii) The court is invited to believe the evidence of PW5 when he said that had it not been for the action of the scania lorry TZF 4991 there would have been no accident.

(iv) The police officer attached no blame worthiness on to the driver of KWD 559 and this court is urged to make a similar finding.

(v) There is clear demonstration, the police intended to charge and prosecute the driver of the first defendant and not the 2<sup>nd</sup> defendant.

(vi) As for the liability between the 2<sup>nd</sup> defendant and the deceased driver of the Pajero vehicle, statements in the police sub file all go to demonstrate that the driver of the pajero attempted to overtake the lorry when she noticed the approaching (lorry) and on returning back to her lane is when she rammed into the lorry KWD 559 owned by the 2<sup>nd</sup> defendant.

(vii) The court is invited to note that the accident occurred at a junction where there are yellow lines meaning that overtaking was not allowed, meaning that the deceased was wrong in making an attempt to overtake. This is evidenced by the fact that PW7 who testified that after following the lorry KWD559 for long she suggested to her aunt that they overtake and although she denied the suggestion that her aunt did infact overtake, the circumstances of the case and as supported by statements in the police file all go to demonstrate that the deceased infact did overtake.

(viii) By reason of what has been stated above the court is invited to believe that the evidence of PW7 does confirm that it is the lorry that was owned by the 1<sup>st</sup> defendant that banged onto the 2<sup>nd</sup> defendants lorry while the 2<sup>nd</sup> defendants lorry was travelling at a slow speed in its lane. Secondly that PW7 stated that the truck from Nairobi did not indicate that it was going to turn.

(ix) That since liability had not been established the issue of assessment of quantum does not arise.

In response the plaintiff filed a response dated the 3<sup>rd</sup> day of March, 2001 and filed on the 3<sup>rd</sup> March, 2010 stressing the following:-

(i) Concede that HCCC NO.140/99 was withdrawn against the 1<sup>st</sup> defendant on 12/3/2001 leaving this suit valid as against the 2<sup>nd</sup> defendant.

(ii) A fresh suit was filed against the 1<sup>st</sup> defendant on 23/3/2001 to which the 1<sup>st</sup> defendant filed a defence on 4/4/2001.

(iii) On 4/5/2001 the plaintiff presented an application to consolidate the two suits which was allowed and the two suits were consolidated on 6/7/2001 and for this reason the issue of stale summons to enter appearance does not arise.

(iv) With regard to the licence permitting the plaintiffs vehicle to be on the Kenyan roads, the court is invited to believe the uncontroverted evidence of PW1 that the licence had been acquired on 4/4/98 long before the one found on the vehicle expired. In the absence evidence ousting exhibit 28 the court is invited to go by it.

(v) As for the insurance cover, the court is invited to accept PW1s' evidence that he only insured the vehicle for 3<sup>rd</sup> party and that is why he had to meet the costs of the repairs as the vehicle had no comprehensive cover.

(vi) With regard to the evidence adduced on liability, no blame was placed on to the deceased with regard to the causation of the accident. Instead they reiterate their earlier submissions that liability has been established and that the plaintiff is entitled to damages claimed as against both defendants jointly and severally.

Parties also cited case law to court for guidance. The plaintiff cited the case of **ANASTASIA NYANJUI GIKONYO (SUING AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN NJUGUNA GIKONYO VERSUS SALIM MOHAMED COAST BUS SERVICES LIMITED NAKURU HCCC NO. 421 OF 1996** decided by Rimita J as he then was on the 20<sup>th</sup> day of March, 1998 wherein the court awarded Kshs.100,000.00 for loss of expectation of life, the case of **LOICE WAIRIMU MWANGI AND ANOTHER (JOINTLY SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF JAMES NDUNGU (DECEASED) VERSUS JOSEPH WAMBUA KAMBA NAKURU HCCC NO. 229 OF 2004** decided by Musinga J on the 12<sup>th</sup> day of October, 2006 wherein the learned judge awarded Kshs.100,000.00 for loss of expectation of life, the case of **MURIUKI KARANJA & ANOTHER VERSUS JIRDAH MWANGI KAMAU MWARU NAIROBI CIVIL CASE NO. 4016 OF 1995** decided by Angawa J on the 25<sup>th</sup> day of April, 2002 wherein the learned judge awarded Kshs.100,000.00 for pain and suffering before death to a deceased who died a day after the accident. The case of **MARIA KOKONYA & ANOTHER VERSUS BOB-MIL INDUSTRIES LIMITED AND ANOTHER NAIORBI HCCC NO.609 OF 1997** decided by G.P. Mbiti J as he then was wherein the court allowed a multiplier of 10 years where the deceased died at the age of 49 years, leaving a wife of almost the same age. The case of **MRS. P.F. HEYES AND OTHERS VERSUS C.J. PARTEL AND ANOTHER (1961) 129** which laid down principles of assessment of damages as follows:-

(i) The assessment of damages for the death of small children should start with ascertainment of the age and expectation of working, the ages and expectation of life of his dependants, the net earning power of the deceased (i.e his income tax) and the proportion thereof which he would have made available for his dependants.

(ii) In this way the annual value of the dependency should be arrived at ; and this must then be capitalized by multiplying the annual value by so many years purchase.

(iii) The multiplier will bear a relation to the expectation of working life of the deceased and the expectation of life and dependency of the widow and children.

(iv) The capital sum so reached is to be discounted to allow for the prospect of the widows' remarriage and in certain cases of acceleration of the receipt by the dependants of what the deceased left to them respectfully. The resulting sum which will depend on a number of estimates and imponderables will be the lump sum to be apportioned among the dependants

The case of **WERE & 6 OTHERS VERSUS ATTORNEY GENERAL (1986) KLR 227** wherein Aluoch J as she then was held inter alia that “two-thirds of the net income of a family man is now widely accepted as a basis for dependency”

The case of **BELUF ESTABLISHMENT VERSUS THE ATTORNEY GENERAL NAIROBI CA NO. 134 OF 1986** decided by AKiwumi JA as he then was on the 23<sup>rd</sup> day of September, 1993 wherein the said law lord as he then was ruled that ...

“It is now clear that Kenyan courts in applying the common law can in proper case express judgment in foreign currency convertible at the rates prevailing on the date of payment or enforcement of the judgment.”

The case of **CAROLE COPE LAND VERSUS DIANI CAR HIRE AND SAFARIS NAIROBI HCCC NO.5562 OF 1991** decided on the 19<sup>th</sup> day of June, 1995 wherein A.G. Ringera J as he then was drawing inspiration from the decision of **BELIF ESTABLISHMENT VERSUS ATTORNEY GENERAL (SUPRA)** expressed his judgment in sterling pounds.

The first defendant on the other hand referred the court to the ruling in the case of **CHURCH COMMISSIONER FOR KENYA VERSUS JULIA AYING'O AND 3 OTHERS NAIORBI HCCC NUMBER 935 OF 2002** decided on the 2<sup>nd</sup> day of August, 2007 in which Rawal J as she then was now JA drew inspiration from the decision in **MC FOY LIMITED VERSUS AFRICA CO LIMITED (1961) 3A11ER 1169** at Pg.1172 where there is observation that:-

**“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it a side....You cannot put something on nothing and expect it to be there”** on that reasoning went a head to fault service of a defective summons anchored on defectives summons. In the same decision the learned judge as she then was now JA drew inspiration from the case of **MOBILE KITALE SERVICE STATION VERSUS MOBIL OIL KENYA LIMITED AND ANOTHER (2004) 1KLR1** where it had been held inter alia that:- **“We ought to respect the rules of engagement as they are promulgated to achieve justice to rival parties summons is a judicial document calling a party to submit to the jurisdiction of the court”**. The case of **PUFFS VERSUS HUNT AND ANOTHER (1991)2Q.B 24** wherein the plaintiffs claim for damages arising from negligence was declined because he was contributory to the negligence which resulted in the causation of the accident. The case of **SAUNDERS AND ANOTHER VERSUS EDWARD AND ANOTHER (1987) 1WKR.1116** where the plaintiffs performance of the contract is tainted with illegality, the court has to determine whether the quality of illegality was such that the plaintiffs should not be permitted to succeeded in their action that the court in determining whether the defence of exturpicausa non oritur action should succeed would consider the parties conduct and moral culpability.

No case law was referred to court by the 2<sup>nd</sup> defendant. This court has taken into consideration the rival pleadings filed by the respective parties, sole evidence of the plaintiff, documentary exhibits tendered in evidence, rival submissions on record and principles of case law cited by the plaintiff and the first defendant and the court proceeds to make the following findings:-

(1) There are two suits relating to the subject matter namely HCCC No. 140/1999 and HCCC Number 46/2001.

(ii) Although HCCC No.140/1999 had initially been directed against both defendants, it has transpired from the content of the submission of the first defendants and the plaintiffs reply thereto that the summons served on the first defendant in HCCC No.140/1999 had been served out of time. That indeed the plaintiff had made an attempt to validate the said summons by seeking an extension of time and was duly granted court orders to validate the summons which orders are still on record and have not been upset to date. It however transpired that the first defendant upon being served entered appearance and filed defence under protest. It has been contended by the first defendant that on this account the plaintiff's suit is incompetent.

(2) The second defendant appears to have been served in time and no technical issues have been raised by the second defendant with regard to the legality of the claim raised against the second defendant by the plaintiff. In the premises the court makes a finding that the plaintiffs claim as laid against the second defendant in HCCC no. 140/1999 is proper and sound and the same will be determined on its merits as against the second defendant presented before moving to make a determination of the issues raised by the parties for the courts determination. The general observations identified by the court are as follows:-

(3) There are two suits relating to the subject matter namely HCCC NO. 140/1999 and HCCC number 46/2001.

(ii) Although HCCC 140/99 had initially been directed against both defendants, it had transpired from the content of the submissions of the 1<sup>st</sup> defendants and the plaintiffs reply there to that the summons served on the first defendants in HCCC 140/1999 had been served out of time. That indeed the plaintiff had made an attempt to validate the said summons by seeking an extension of time and was duly granted court orders to validate the summons which orders are still on record and have not been upset to date. It however transpired that the first defendants upon being served enter appearance and filed defence under protest. It has been contended by the first defendant that on this account the plaintiff suit is incompetent.

(4) The second defendant appears to have been served in time and no technical issues have been raised by the second defendant with regard to the legality of the claim raised against by the plaintiff. In the premises the court makes a finding that the plaintiffs claim as laid against the second defendant in HCCC NO. 140/1999 is proper and sound and the same will be determined on its merits against the second defendant.

(5) The plaintiff's response as against the first defendant's technicality to the competence of the claim against them appears to be one of conceding, that that was the correct position then. But has gone further to state that that defect was cured by the plaintiff moving to file HCCC No. 46/2001 to which the first defendant who is the sole defendant moved and entered appearance not under protest. The defence for the first defendant was also filed but not under protest. The plaintiff in HCCC 46/01 is the same as that one in HCCC Number 140/1999. The cause of action is the same. There has been traced on record in HCCC No. 140/1999 a notice of discontinuance of suit against Afro Train (TZ) Limited presented under order XXIV rule 1 CPR dated 9<sup>th</sup> day of March, 2001 and filed the 12<sup>th</sup> day of March, 2001. It is after the discontinuance of the suit against the first defendant in HCCC No. 140/1999 that the plain in HCCC No. 46/2001 was presented on first defendant and his driver only. It is therefore the courts' finding that the plaintiff has correctly submitted that the technical fault which would have operated in HCCC NO. 140/1999 to invalidate the plaintiffs' claim against the first defendant therein has been cured by the filing of the fresh case against the same first defendant in HCCC NO. 46/2001. It therefore follows that even if the orders to validate the summons in HCCC 140/1999 still stand in an invalidity condition they do not give the first defendant a clean bill of health to wriggle out of the plaintiffs claim on technical ground. All that the court needs to do is to expunge and or treat as supplusage the 1<sup>st</sup> defendant's entry of appearance and filing of defence under protest in HCCC 140/1999 and it is so ordered.

(6) The question that arises is whether by reason of what has been stated in number 3 above the plaintiff stands non suited as against the first defendant with regard to the material claim laid in HCCC no. 140/1999. The courts' response to this own framed question is that since the two suits HCCC No. 140/1999 and HCCC No. 46/2001 arise from the same cause of action and since the two suits have been consolidated the plaintiffs claim against the first defendant in HCCC NO. 140/1999 does not stand prejudiced even if the 1<sup>st</sup> defendants defence in HCCC no. 140/1999 stands faulted as the claims have been fused into one. The issues stand to be considered together.

(7) There is in place a grant of representation produced in evidence as exhibit P1. Issued by the high court of Kenya in Nairobi HC Succession Cause NO. 1065 of 1998 issued on the 12<sup>th</sup> day of March, 1999. In the premises the plaintiff is properly vested and he has locus standi to present the claim under the law reform Act cap 26 laws of Kenya and the Fatal accidents Act cap 32 laws of Kenya on behalf of both the estate of the deceased Mary Mwikali Kioko and on behalf of the dependants of the said deceased who are himself plaintiff as the husband and the three children of the marriage.

(8) It is undisputed that the only contenders as dependants of the estate of the deceased are the plaintiff and his three daughters as enumerated in the plaint and as confirmed by exhibit 2, 3, 4 (a) (b) and

(c ) being the marriage certificate between the plaintiff and the deceased, death certificate of the deceased and the birth certificates of the three children.

(9) It is undisputed that the deceased had a basic training as a clinical nurse, fully qualified as a nurse even practiced as such both locally in Kenya and the USA as shown by the documents on training produced as exhibit 5(a) (b) (c ) and 5(d). further fortification of this evidence is from further exhibit 26 and 27 indicating that the deceaseds' registration number is KRN 5998 and exhibit 29, a document under the hand of one Cindy Nicholas of Deaton speciality Hospital confirming that the deceased had been working at their end effective from 7/14/97 to 5/8/98 at an hourly rate of US Dollars of 21.09.

(10) Exhibit 19 a police abstract No.A324434 dated 6/1/99 indicates clearly that three vehicles were involved in the accident subject of these proceedings, namely N145GV- New York make Pajero and TZF4991 SU2490H scania Trailer Art and KWD559 Isuzu lorry.

(11) It is undisputed that the Pajero motor vehicle was a foreign registered motor vehicle. The court has been informed and the plaintiff is in agreement that it needed a special licence or permit in order for it to be driven on Kenyan roads. The court has also been informed that the vehicle had such a licence pasted on its windscreen explicitly indicating that it had expired on 23/4/98. According to the defence this was and this is still the licence that this court should take into account when assessing facts in the determination of the issues in controversy herein and this being the case, the court has been invited to hold that in view of the fact that the said pajero was being illegally driven on Kenyan roads as at the time of the accident subject of these proceedings, the court to find the plaintiff non suited in so far as his claim relating to damages occasioned to this vehicle are concerned.

(12) The plaintiffs stand on the other hand is that indeed the licence displayed on the wind screen had expired on 23/4/98. But care had been taken to renew the said licence with another licence produced as exhibit 28 issued on 24/4/1998 expiring on 23/7/1998. The only error made by the deceased is that she did not stick it onto the vehicles' windscreen and that if the maker were to be called he would confirm the correctness of the entries made there on. The court has perused the same and confirmed that indeed entries on it show that it had been issued on 24/4/1998 and was due to expire on 23/7/1995 meaning that the plaintiffs motor vehicle was properly licenced to be driven on Kenyan roads.

(13) In response to the plaintiff's contention in number 10 above, the first defendant maintains that if exhibit 28 had been in existence as at the time of the accident, then PW5 the investigating officer would have been handed the same. The plaintiff's response to this is that he was not asked to produce the same and had the police inquired about it, PW1 would have produced it them. Further that if the maker is called to testify he will confirm that the entries are correct.

(14) It is also undisputed that the plaintiff ultimately caused the vehicle to be registered locally as KAL 791E as shown on exhibit 20.

(15) Further evidence on the record is that the plaintiff's vehicle was subsequently taken to Simba Colt motors limited following involvement in the accident subject of these proceedings. An assessment of damages occasioned to the said motor vehicle was made vide exhibit 2, photographs were taken of the damages which clearly show that the damage on the vehicle was concentrated on the driver's side on the left as the court was informed that the vehicle was left hand drive.

(16) The court was informed that a job card was opened, repairs carried out and since the vehicle was not comprehensively insured the plaintiff personally paid for the repairs as shown by the documentation comprising exhibit 22, 23 and 24.

(17) The investigating officer PW5 produced the police investigation file as exhibit 25. In it is contained among others statements of witnesses who gave statements to police. Out of this number PW5 and PW7 attended court, gave evidence and were cross-examined. The rest did not attend court to give evidence.

(18) The non attendance of witnesses who gave statements to police to attend court and give evidence in court notwithstanding the defence has asked the court to take the said evidence into consideration and discount liability in favour of the plaintiff as against them.

Against the afore set out background information and general findings parties filed sixteen (16) issues for determination by the court. These are:-

- (1) Does the plaintiff have capacity to institute the suit"**
- (2) Is the 3<sup>rd</sup> defendant a duly registered limited liability company"**
- (3) Are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants properly sued"**
- (4) In this suit was the plaintiff owner of motor vehicle registration number N1145GV- New York Mitsubishi Pajero"**
- (5) Was the 3<sup>rd</sup> defendant owner of motor vehicle registration number TZF 4991 Scania lorry"**
- (6) Was the 2<sup>nd</sup> defendant owner of motor vehicle registration number KWD 559 Izusu lorry"**
- (7) How did the accident occur"**
- (8) Was the accident entirely caused and or substantially contributed to by the negligence of the driver of motor vehicle registration number TZF4991"**
- (9) Was the accident wholly caused or substantially contributed to by the negligence of the driver of motor vehicle registration number KWD 559"**
- (10)What if any is the degree of contribution attributable to the driver of motor vehicle registration number TZF4991"**
- (11)What if any is the degree of contribution attributable to the driver of motor vehicle registration number KWD 559"**
- (12) Was the accident entirely caused and or substantially contributed to by the negligence of the deceased"**
- (13) Is the plaintiff entitled to any damages as a result of the said accident"**
- (14) Is the 1<sup>st</sup> defendant entitled to claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants"**
- (15) Is the 3<sup>rd</sup> defendant entitled to claim against the 1<sup>st</sup> defendant"**
- (16) Was any demand and or notice of intention to sue served upon the defendants by and or/on behalf of the plaintiff"**

This court has given due consideration to the afore set out agreed issues in the light of the evidence afore assessed as well as the general findings set out above and taking a global view of all the issues since they are inter related, the court proceeds to make the following findings on the same.

1. On capacity to sue the court is satisfied and as earlier found that the plaintiff who holds a grant of representation to the estate of his deceased wife has locus standi to sue as sued in both suits namely HCCC NO. 140/1999 and HCCC 46/2001. Both complaints are in order and as consolidated they deserve a merit determination.

2. Locus standi of the defendants to be sued has been established by their own admissions in their defences that they are the owners of the accident vehicles namely TZF 4991 and KWD 559, that TZF 4991 was at the material time being driven by the first defendant in HCCC NO. 46/2001 Juma Hamisi as a servant, agent and or employee of the 3<sup>rd</sup> defendant. Whereas KWD 559 was being driven either by the 2<sup>nd</sup> defendant or his agent servant and or employee.

3. The only issue raised by the first defendant with regard to the legality of the service of the expired summons on them in HCCC NO. 140/1999 which invalidity could not be cured by extension of time within which to serve the expired summons which extension was in effect null and void, was cured by the plaintiff moving to discontinue their suit against the first defendant in HCCC No.140/1999 and then proceedings to initiate fresh proceedings against the first defendant in HCCC 140/1999 as the 1<sup>st</sup> and 2<sup>nd</sup> defendant in HCCC NO.46/2001. The consolidation of these two files which is not denied by the defence fuses the issues involved into one since they all arise from the same set of circumstances and will be considered as one.

4. With regard to the ownership of motor vehicle Registrations Number N145GV- New York subsequently converted to local registration and given the number KAL 791E, the copy of the log book exhibit 20 as fortified by the un challenged evidence of PW1 all go show the plaintiff as the owner and the court to finds that the plaintiff is the owner.

5. Issue was raised by the defendant with regard to the legality of the said motor vehicle being driven on Kenyan roads. It is common ground as found earlier on that indeed as a vehicle with foreign registration it required a licence in order for it to be authorized to be driven on Kenyan roads. As found earlier on the windscreen had a licence which had expired on 23/4/98. Whereas PW1 the plaintiff produced exhibit 28 whose entries show that it had been issued on the 24/4/98 meaning that it was operational as at the time of the accident. The defence took issue with exhibit 28 because it was not clear whether it had been handed over to the police or not. Secondly it was produced after the defence had raised the issue of the illegality of the vehicle being on the road without a licence as at the material time of the accident. It is on record that the 1<sup>st</sup> defendants cross-examined the plaintiff at length on exhibit 28. PW1 was firm that the same was available in the house save that the deceased had not a fixed it on the windscreen. PW1 was firm that even if the maker of the document were to be availed he would confirm the correctness of the said entries. No application was made by the defence to have the maker of exhibit 28 called as a witness. In the premises there is nothing which can entitle this court to form a basis for holding that exhibit 28 is a forgery. Indeed it may not have been included in the investigation file exhibit 25. But as explained by PW1 it was not asked for by the police and that had it been asked for, then PW1 could have handed it over to police. PW5 was clear in his testimony that he did not inquire beyond the expired licence which was on the windscreen. It is therefore the finding of this court that there is nothing to oust PW1s evidence that exhibit 28 is authentic and was in existence in a valid condition as at the time the accident subject of these proceedings occurred.

6. Going side by side with what has been stated in number 5 above as to whether if indeed it were

to be true that if the plaintiffs vehicle had been on the road without a licence then that disentitles him to a civil claim in the manner sought. The first defendant has asserted so that the plaintiff stands non suited by reason of the said Pajero having been on the road illegally. Reliance was placed on the persuasive decision of **P1TTS VERSUS HUNT (SUPRA) AND SAUNDERS AND ANOTHER VERSUS EDWARDS (SUPRA)** decided by English courts wherein relief to a civil claim was withheld because the plaintiffs in the PITTS case had contributed to the commission of the wrong. Whereas in the Saunders case the relief was granted because withholding would have made the defendants to benefit from its fraud. This court has construed the said two decisions and the court is satisfied that the facts of the two cases are distinguishable from the facts herein because in the cited cases the plaintiffs instigated and were party to the initiation of the illegality they sought to benefit from. Herein there is nothing to show that the plaintiff instigated the commission of an illegality of not renewing the road permit or licence in time in order to benefit from any road traffic accident that may arise there from.

7. In furtherance of the finding in number 6 above failure to renew the licence is a traffic offence which gives rise to a prosecution. None was undertaken by PW5 against the plaintiff. Nowhere in the said relevant rules has it been stated that it is a disqualification for one to pursue a civil claim arising from a wrong committed against the defaulting party. In the absence of proof of such a legal requirement in the rules, it is the courts finding that PW1s' civil claim arising from wrongs committed to the vehicle while being driving without a valid road licence if any exists distinctly and independently from the criminal prosecution one risked under going for non compliance with the said rules if indeed no operational licence had been in place as at the time of the accident.

8. The issue of ownership of motor vehicle TZF 4991 and KWD 559 is tied up with the issue of locus standi to be sued and as ruled, on the issue of locus standi to be sued, the court adopts the said earlier reasoning and makes a finding that the defence pleadings have confirmed that the 2<sup>nd</sup> defendant in HCCC NO. 140/1999 owned motor vehicle REG. NO.KWD 559 and it was at the material time being driven by the 2<sup>nd</sup> defendant's driver, servant agent and or employee. It was also on the said road with the owner's permission. Likewise the second defendants in HCCC no. 46/2001 was the owners of motor vehicle TZF 4991 and was at the material time on the road with the owner consent under the command of the 2<sup>nd</sup> defendants servant, agent and driver the first defendant Juma Hamisi.

9. On the blame worthiness for the causation of the accident, it is common ground that the named three vehicles namely TZF 4991, KWD 559 and the Mitsubishi Pajero later registered as KAL 791E were at the scene of the accident and were variously involved in the accident. The court has two sets of evidence with regard to the collision. We have the evidence of witnesses who gave statements to police but did not attend court to testify. These statements are contained in the police file exhibit 25. The one of Joseph Kinyanjui recorded on 11/5/98 is to the effect that he was driving KWD 559 Isuzu lorry from Machakos towards Nairobi and on reaching at Namanga turn off he saw a lorry coming from Nairobi Direction and after reaching at the said turn off it stopped and when he was about to pass it, he saw another motor vehicle which was behind them trying to overtake them but when the driver of the vehicle behind them saw the lorry ahead, it returned and all of a sudden he saw the lorry which was coming from the other side entering and he knocked it on the right side. On coming out he saw that the motor vehicle which was behind them had also knocked them. From there he was taken to hospital treated and discharged.

(b) One Charles Mututku John made his statement on the 13<sup>th</sup> day of May, 1998 (13/5/98). The salient features of the same are that they were on their way from Machakos where they had gone to fetch sand; it was at around 3.3.p.m.; that on reaching Namanga turn off a long Mombasa Nairobi road a lorry with a Tanzanian registration number which was coming from Nairobi direction turned to enter Namanga road using the wrong side and all of a sudden it was hit by their lorry. They were injured

together with the driver and were rushed to hospital. That the whether was wet.

(c) Whereas the statement of Leonard Mudoye was recorded on the 8/5/98. The salient features of the same are that they left Tanzania on 28/4/98 in the company of the driver of their company who was driving a motor vehicle Reg. No.TZF 4991 Scania articulated trailer No.ZU 24209; they proceeded to Ruaraka where they were to collect crates filled with beer for their employer. Back in Tanzania; they arrived in Nairobi on 1/5/98 and proceeded straight to Ruaraka where their employers' vehicle was filled with crates of beer; they left Ruaraka at 6.00 p.m. heading to Tanzania. The vehicle was still under the command of the same driver Juma Hamisi of Tanga, they drove along Nairobi Mombasa road from the Nairobi direction. On reaching the Namanga junction, he saw a vehicle coming at a high speed; it was raining and the whether was wet; their driver tried to void a head on collision and that it was at this time that his driver swung to his right side and tried to join into a no entry junction; but before he could finish turning the vehicle which they had seen coming at a high speed and from the opposite direction hit them with its front part on their left front tyre and resulted in an accident. Their driver stopped on the spot. They went out to observe the scene and confirmed that there were two other vehicles which had been involved in the accident; a lorry which had hit their lorry and a Pajero both of which were being driven in the opposite direction to theirs. The lorry was in front followed by the Pajero. Their driver instructed him to wait at the scene while the driver went to get help from two other of their lorries belonging to the same company of their employer which had already reached Kitengela but he never came back.

10.This court has given due consideration to the afore set out content of the afore assessed statements in number 9 above and the court proceeds to make the following findings on the same:-

(a) The afore assessed witnesses did not attend court to give evidence and for this reason the veracity of their statements was not tested on cross-examination hence these carry less weight with regard to their evidential value.

(b) There is confirmation that the whether was wet.

(c) There is suggestion from the statement of Leonard Mudoye that the action of the driver of TZF 4991 Scania lorry of turning into Namanga Road using a no entry was involuntary as it was meant to avoid a head on collision between this lorry and KWD 559.

(d) The statement of the driver and turn boy of KWD 559 do not mention anything about any evasive action that the driver of KWD559 did in an effort to avoid the collision. There is no mention that he ever stopped, checked traffic from Namanga intending to turn into Nairobi road and those from Nairobi road intending to turn into the Namanga road and ensured that all was well before proceeding on.

(e) The turn boy of TZF 4991 Scania lorry alleges that the lorry KWD 559 was speeding.

(f) The turn boy of TZF4991 does not mention seeing a vehicle attempting to overtake the lorry KWD 559 in fact he states that he saw this other vehicle behind the speeding lorry when they come out of their lorry after the accident.

(g) The driver of KWD 599 did not mention that he applied brakes or was driving in such a manner so as to be able to bring the vehicle to a safe stop in the event of any emergency or give reasons as to why he did not do so. He did not also mention that he flashed at this other vehicle to warn it of his approach and it failed to heed its warning.

11.Against the statements evidence assessed in number 9 and 10 above, there is the testimony of

the witnesses who recorded statements as well as giving evidence in court, and were duly cross-examined. Their evidence therefore carry's more weight than that of the witnesses who merely gave statements to police. The sum total of the evidence of PW7 Margaret Nduku is that she was the sole passenger who was travelling with the deceased who was going to be the matron of honour in her wedding scheduled two days a head. They had travelled from Masii before Machakos town on their way to Nairobi for about an hour. They were going at 40km/ph which the deceased said she was comfortable with. It is PW7s testimony that she noticed the lorry KWD 559 shortly after the turn off to the Machakos Nairobi road and drove behind it up to the accident sport. It is PW7s testimony that at some point she suggested to the deceased to overtake the lorry but the deceased declined when asked as to why she took three months to record her statement with the police she stated that she married 2 days after the accident, left for her honey moon and on coming back is when she was told that police were looking for her. She went to find out and why police were looking for her and that is when she recorded her statement when put to her, she denied the suggestion that the deceased pulled out to overtake and when she saw the on coming vehicle is when she pulled back into her lane and that is when she rammed into the rear of KWD559. To PW7 the correct position is that the deceased remained behind KWD 599 even as at the time of the accident. That she kept a safe distance and when the lorry a head of her KWD 559 suddenly started moving backwards is when the deceased took an evasive action to swerve to the right but it was too late and then the lorry KWD 559 hit their vehicle on the left. The evidence of PW5 on the other hand is based on the observations made at the scene upon arrival after receiving the report of the occurrence of the accident. The sketch plan contained in exhibit 25 has been revisited and the court has made the following observations on the same:-

(a) TZF 4991 was pulling a trailer half of the trailer length wise is on the yellow marking while half is on the road for on going vehicles headed to Nairobi.

(b) Indeed the head of TZF 4991 is tilted into the no entry junction of the Namanga road.

(c) KWD559 had indeed passed the correct entry into the Namanga road and had gone half way the no entry junction to the Namanga junction.

(d) It is noted that KWD 559 is whole in its correct lane as you face Nairobi from Mombasa.

(e) The Pajero is behind KWD 559. Three quarters  $\frac{3}{4}$  of it is in its correct lane. While a quarter  $\frac{1}{4}$  of it is in the yellow markings.

(f) There are no skid marks noted on the sketch plan but PW5 stated that TZF 4991 had made some skid marks where as the other 2 vehicles had no skid marks.

(g) PW7 confirmed that the whether was wet and the ground was slippery.

12.This court has given due consideration to the findings made with regard to the contents of the statements of the witnesses who did not come to testify as in number 9 and 10 above and the evidence of the witnesses who testified in court, the observations made on the sketch plan contained in exhibit 25 and the court proceeds to make the following findings on blame worthiness for the causation of the accident.

(a) The action taken by the deceased who was driving motor vehicle Reg. N 145GV-New York subsequently registered locally KAL 791E does not pin any blame for the causation of the accident on the said deceased for the following reasons:-

(i) The court believes the unchallenged evidence of PW7 that the deceased had declined a request made to her earlier on by PW7 to overtake the lorry KWD 559 which the deceased had been trailing shortly after the turn off on the Machakos Nairobi road. There is therefore no reason as to why the deceased who could have found it prudent to overtake at an opportune time and did not could decide to overtake in a dangerous situation as they approached the junction to Namanga.

(ii) From the evidence of PW7 with regard to the deceaseds manner of driving the picture painted of the deceaseds' manner of driving is one of a prudent and careful driver.

(iii) The position of the deceaseds vehicle after the impact is in line with PW7s evidence that the deceased took an evasive action by swerving to the right to avoid being hit by KWD 559 which had been pushed backwards by the impact caused by the collision between KWD 559 and TZF 4991.

(iv) The damage on the deceaseds vehicle as confirmed by the observations on the photographs is clearly shown to have been on the left at an angle which is also in line with the evidence of PW7 that the deceased took an evasive action.

(v) The deceased was rightly and lawfully driving in her right lane.

(vi) PW7 had no reason to tell lies about KWD 559 being pushed backwards upon impact.

(b) The lorry driver of TZF 4991 takes the greatest blame for the causation of the accident because:-

(i) since he was headed away from Nairobi towards Mombasa before turning off into the junction to Namanga, he is supposed to have kept to his extreme left and only turned into the junction entrance when sure that it was clear and safe for him to do so.

(ii) The sketch plan indicates that indeed the vehicle TZF4991 was driving in the lane shaded yellow and the lane for traffic headed to Nairobi the opposite direction. He was therefore driving in the wrong lane.

(iii) It is possible as per the evidence of the turn boy of the lorry TZF 4991 that the driver of TZF4991 swerved or turned into a no entry lane at the junction to Namanga to avoid a head on collision with the on coming lorry of KWD 559. In this courts opinion this was an incompetent best on the part of the said driver of TZF 4991.

(iv) Considering that there was no mention that there was a vehicle which was following immediately behind TZF 4991 or that such a vehicle was overtaking TZF4991 on its left, and considering that it was evident that TZF 4991 was driving in the wrong lane then the best prudent action to take in the circumstances would have been for TZF4991 to swerve to its left and continue on till it reached the correct position for it to turn into Namanga Road.

(v) Considering the availability of space on the road as shown by the content of the sketch plan if the said driver of TZF4991 had applied brakes and stopped immediately KWD 559 would have slightly leaned to its left and proceeded on safely.

(vi) The conduct of the driver of TZF4491 of running away after the accident is evidence of guilty conscience and clear evidence of admission of a wrong doing by conduct.

(c) With regard to the blame worthiness of the driver of KWD 559 the court finds that this driver too

bears some blame for the causation of the accident but to a lesser degree than that of TZF 4991 for the following reasons:-

(i) There is no indication that the said driver was new on the road or that the Namanga road junction was the first junction for him to approach. He must therefore have anticipated presence of drivers who would engage in reckless acts such as the one engaged in by TZF 4991 and must have been expected to be on the look out for such drivers so as to take an evasive action in the event of such drivers making a reckless move to his disadvantage.

(ii) Considering that he had not yet passed the Namanga turn off entry and considering that there is no mention that another vehicle a head of TZF 4991 had just cut in ahead of him, considering that he saw TZF4991 approach and apparently driving on the lane of KWD 559, the most prudent action this driver could have taken should have been to swerve to his left since it was clear. Had he done so a collision would not have occurred.

(iii) There is no mention that he took any evasive action to avoid the collision not even applying brakes. It matters not that he was in his correct lane. He is enjoined to be attentive to any eventuality and then be able to take evasive action in the event of an emergency. On the facts displayed herein the said driver had been in attentive and therefore contributed to the causation of the accident.

(i) Although the said driver alleges that he was a stranger to the vehicle moving backwards to hit the deceaseds' vehicle, the statement of the said driver contained in the police file exhibit 25 does not operate to oust the evidence of PW7 who was an eye witness and which was tested on cross-examination. It confirms that KWD 559 was pushed back upon impact with TZF 4991 and that is when their vehicle was hit.

(ii) Indeed there is evidence that the whether was wet. The driver of KWD 559 did not say that he had problems driving in wet whether. There is therefore no reason as to why he never took an evasive action such as applying brakes. The court is of the opinion that had he done so the evasive action taken by the deceased of swerving to the right could have borne fruits.

13.By reason of what has been stated in number 12 above the court makes a finding that the deceased bears no blame for the causation of the accident. She takes zero blame. The blame for the causation of the accident is to be apportioned between the defendants. The apportionment is an exercise of judicial discretion by reason of which the law enjoins the court to exercise it judiciously and with a reason and in this courts opinion a ratio of 70% to the first defendant and 30% to the 2<sup>nd</sup> defendant is fair and just and it is so apportioned.

14.Since there is admission that the said motor vehicles were on the road with the permission and or consent of the owners and that they were being driven on the said road by the drivers, servants, agents and employees of the said owners, the liability established herein attaches vicariously to the said owners both jointly and severally as apportioned.

#### **15.QUONTUM- SPECIAL DAMAGES.**

Having established liability the court proceeds to make an assessment of damages. The first head is the head falling under special damages. The applicable law is now clear. SSee the case of **OUMA VERSUS CITY COUNCIL OF NAIORBI (1976) KLR 297** as crystallized by the court of appeal in the case of **HANN VERSUS SIGNH (1985) KLR 716** wherein it is specifically stated that:-

**“Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”**

16. The court adopts its findings on the general evidence and uses the same in the assessment of proof of the special damages. The first to be considered is the claim for the assessment report and material damage to the plaintiff's motor vehicle. As found earlier on exhibit 20 proves ownership in favour of the plaintiff. Exhibit 1 establishes the locus to claim exhibit 21, 22, 23 and 24 establish the quantum as supported by the evidence of PW3 and 4. The explanation given by the plaintiff that the vehicle had not been insured comprehensively is reasonable and holds the amount paid for the repairs is found to have been has been proved. The court allows the claim of Kshs.534, 703.00.

(b) The second set of special damages are those related to the death of the deceased namely funeral expenses, cost of the police abstract and cost of death certificate. No receipts were availed to court but the fact of death is not disputed. Also the fact of funeral expenses having been incurred is not ruled out. The police abstract and death certificate are public documents. The court has judicial notice of the that these are not usually given out free of charge. They are usually paid for. For this reason the court will allow Kshs.100.00 for the police abstract and Kshs.50.00 for the death certificate.

As for the funeral expenses as mentioned , death is not disputed. The court also takes judicial notice of the fact that a funeral does come with attendant costs. The court is inclined to exercise its discretion to allow this same save that the amount will suffer a minor deduction to cover for the margin of error occasioned by the non availability of the receipts. The court will therefore allow Kshs.25,000.00 under this head.

### **GENERAL DAMAGES**

The court wishes to adopt the guiding principles on the case law assessed on the assessment of this type of damages. In addition the court wishes to take note of the following guiding principles as well.

(a) Assessment of damages at large is a matter of discretion for the particular Judge which discretion like all other judicial discretions has to be exercised judiciously and with a reason.

(b) Such assessments should not be inordinately too low or too high.

(c) They are not meant to enrich a victim but to compensate the victim for the injury suffered and try as much as possible to restore him/her to the position in which he/she was before suffering the injury.

(d) Past awards are mere guides and each case should be considered on its own merits and peculiar circumstances.

(e) Where past awards are taken into consideration their age and the rate of inflation and the strength of the Kenyan shilling when the said awards were made and the time when the intended award is to be made are of paramount consideration.

The court has applied the afore stated principles to the rival arguments herein on the assessment of damages and the court proceeds to make the following assessment:-

(i) On loss of expectation of life under the law reform Act cap 26 laws of Kenya, the court has judicial notice that courts of this jurisdiction usually allow a conventional figure. The court has taken note of the

awards in the case law cited, taken note of their age and doing the best it can the court awards Kshs.200,000.00 (Two hundred thousands shillings only under this head.

(ii) Under the fatal accidents Act cap 32 laws of Kenya there is a claim for pain and suffering, loss of consortium and for loss of dependency.

(a) For pain and suffering it is on record that the deceased was pronounced dead on arrival at the hospital. She suffered pain. Bearing in mind the awards in the case law cited and their age the court awards Kshs.50, 000.00 under this head.

(b) As for loss of consortium it is not disputed the deceased was wife of the plaintiff and upon her death he lost consortium. The court assesses Kshs.100, 000.00 under this head.

(c) As for loss of dependency the court has taken into consideration the fact that the documentation exhibited go to show that the deceased had trained as a nurse. Documentation showing proof of employment were not produced in evidence due to logistical problems. These were marked for identification as MF16, 7, 8(a) 8(b) 9(a) 9(b) 10,11,12,13,14,16,17 and 18. For this reason they cannot be assessed. Reliance has been placed on exhibit 25 which gives the deceaseds' income to be at the rate of US Dollars 21.09.per hour. There is no back up pay slip, bank statements or income tax returns. It is therefore not prudent to use the said figure as a medium for assessment of loss of dependency. The courts inability to assess loss of dependency based on actual income of the deceased which has been lost is not fatal to the plaintiffs claim under this head. There is room for the court to fall back on to the principle in the court of appeal decision of **SHEIKH MUSHTAQ HASSAN VERSUS KAMAU TRANSPORTERS AND FIVE OTHERS (1982-1988) 1KAR 946** and assess a global figure and then apply a percentage deduction to cover the percentage the deceased would naturally have spent on herself leaving the balance to be apportioned by the court to the surviving dependants.

In the circumstances displayed herein this is an appropriate case where a global award can be resorted to. It is on record that the deceased was a professional nurse. The court believes the testimony of the plaintiff that indeed she worked both locally and in the USA. As such she brought in income which according to the plaintiff was the major income which sustained the family. The only hand cap that has been encountered by the court and the plaintiff is proof of this income in terms of figures.

It has also to be borne in mind that the plaintiff as a husband and head of the family was expected to be the flag bearer in terms of income earning. But according to him he survived on odd jobs in the USA. He also tried export and import business which did not do well. But it is undisputed that since the deceased died leaving very small children under his care one of whom was only 3 years old he has soldered on and brought them up and even given them a good education. When questioned on how he managed to achieve that he stated that he emptied their bank accounts with the deceased in the USA, sold a property in Runda and then applied that income to the Education and upkeep of the children both here in Kenya and the USA up to the level they had reached. Details of how much was in their bank accounts with the deceased or how much was realized from the sale of family property in Runda were not given, but one thing that the court is sure of is that the plaintiff has since the death of the deceased continued to keep the family going financial despite lack of contribution from the deceased. Although it can not be said that the plaintiff being a professional was expected to shoulder a greater part of the family's expenses. There being a need for the deceaseds' substantial contribution towards the general maintenance, upkeep and Educational needs of the children of the marriage cannot be ruled out considering that as at that time the children were still very small.

Taking all the relevant matters into consideration and doing the best it can the court makes a global

assessment of Kshs.5,000,000.00 five million as loss of dependency from the deceased herein. This will suffer a 20% (twenty percent) reduction to cover the amount the deceased would have spent on herself which works out as  $Kshs.5,000,000.00 \times 20/100$  which comes to Kshs.1,000,000.00 when reduced from the global sum awarded it leaves a balance of Kshs.4,000,000.00 as the sum to be awarded for loss of dependency.

For the reasons given in the assessment, the court proceeds to make the following final orders in the disposal of this matter:-

#### **Competence of the Suit.**

(1) The plaintiff herein Paul King'oo Mumo Kioko has locus standi to present the suits herein namely HCCC No.140/1999 and HCCC 46/2001 because he obtained a grant of letters of administration to the Estate of the deceased Mary Mwikali Kioko before the filing of both suits.

(2) The two suits namely HCCC No.140/1999 and HCCC No.46/2001 have been consolidated by a court order on 6/7/2001. The issues in both became fused into one.

(3) The incompetence of the plaintiffs suit as against the then first defendant Afro Train (TZ) Limited in HCCC No.140/1999 was cured by the plaintiffs discontinuance of the plaintiffs suit as against the said 1<sup>st</sup> defendant vide a notice of discontinuance issued under order XXIV rule 1 CPR ( as it was then) dated 9<sup>th</sup> day of March,2001 and filed on the 12<sup>th</sup> day of March,2001 followed by the presentation of the suit on 23<sup>rd</sup> day of MARCH,2001 in HCCC No.46/2001 naming Juma Hamisi and Afro Train (TZ) Limited as the first and second defendants herein.

#### **(4) LIABILITY.**

For the reasons given in the assessment liability for the causation of the accident has been apportioned as follows:-

(a) The deceased Mary Mwikali Kioko as driver of Motor Vehicle Reg. No.N145GV- New York subsequently registered as KAL 791E to bear Zero-percent blame.

(b) Samuel G. Karinga as the owner, driver , servant, agent and or employee of KWD 559 to bear 30% blame- thirty percent.

(c) Juma Hamisi and Afro Train (TZ) Limited as the owner, driver, agent, servant and or employee of motor vehicle registration number TZF4991 to bear 70%- seventy percent blame for the causation of the accident.

#### **DAMAGES**

(5) **Special damages:** For the reasons given in the assessment the court makes the following assessment under this head:-

(a) Funeral expenses Kshs.25,000.00

(b) Cost of abstract Kshs.100.00

(c) Costs of death certificate Kshs.50.00.

(d) Cost of assessment report and material damage to motor vehicle Reg. No.N145GV- New York and subsequently registered as KAL 791E Kshs.534,703.00

**Total under this head Kshs.559,853.00.**

(6) Interest on the sum awarded under item 5 is ordered to be at court rates and is to run from the date of filing till payment in full.

(7) B. **GENERAL DAMAGES.**

For the reasons given in the assessment the court proceeds to make the following awards under this head:-

(a) Loss of expectation of life Kshs.200,000.00

(b) Loss of consortium and servitium Kshs.100,000.00

(c) Pain and suffering before death Kshs.50,000.00

(d) Loss of Dependency Kshs.4, 000,000.00.

**Total under this head Kshs.4, 350,000.00.**

(8) The amount awarded under item 7 will carry interest at court rates from the date of Judgment till payment in full.

(9) The plaintiff will have costs of the suit.

(10) The delay in the drafting and delivery of this Judgment which is highly regretted was occasioned by systemic work constraints.

**SIGNED AT NAIROBI BY HON. LADY JUSTICE R.N. NAMBUYE.-JA**

**DATED, READ AND DELIVERED AT NAIROBI BY HON. MR. JUSTICE MAJANJA ON THIS 12<sup>TH</sup> DAY OF OCTOBER, 2012.**

**JUDGE**



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