REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAJIADO

CIVIL APPEAL NO. 22 OF 2019

ALLAN OWITI AWUOR...1ST APPELLANT

DONALD ENOCK WAMARI OWUOR..2ND APPELLANT

VERSUS

TABITHA MICERE MATHU (suing as personal representative of the estate of

PETER MATH NG'ANG'A)...RESPONDENT

(Appeal from the judgment and decree by Hon. B. Cheloti, (SRM)

delivered on 25th June, 2019 in CMCC NO. 313 OF 2015

at the Chief Magistrate's Court, Kajiado)

JUDGMENT

1. The respondent filed a suit before the Chief Magistrates Court at Kajiado against the appellants for damages arising from a road traffic accident that occurred on 31st January, 2014, along Magadi road, involving Peter Mathu Ng'ang'a (Deceased) and motor vehicle registration Number KBS 854L. The vehicle was owned by the 1st appellant and was at the material time driven by the 2nd appellant. The appellants denied the respondent's claim, negligence attributed to them and liability for damages.

2. In a judgment delivered on 25th June, 2019, the trial court found the appellants 90% liable for negligence. The court then awarded general damages of Kshs. 2,380,000 and special damages of Kshs. 195,156, making a total of Kshs. 2,575,156.00. It also awarded costs and interest to the respondent. The award was subject to 10% contribution.

3. The appellants were aggrieved with the trial court's finding on both liability and quantum and filed a memorandum of appeal dated 11th July, 2019, raising the following grounds of appeal, THAT:

> ***1. The learned magistrate erred in law and fact and condemned the defendants unheard as she failed to consider the pleadings and submissions of the defendants on record hence arriving at an unfair determination.***
>
> ***2. The learned magistrate erred in law and in principle in making finding on liability and ignoring a consent recorded by the parties hence condemning the defendants.***
>
> ***3. The learned magistrate erred in law and in principle in awarding damages for loss of dependency which was not claimed by the plaintiff in their submissions hence filling the gaps in the plaintiff's submissions and arriving at an unfair determination.***
>
> ***4. The learned magistrate erred in law and in fact in finding that the plaintiff succeeded in proving that the deceased was earning a profit to a tune of the alleged Kshs. 20,000 per month.***
>
> ***5. The learned magistrate erred in law and in fact in finding that the deceased died at a young age of 57 years and failed to consider the vicissitudes of life hence applying an extremely high multiplier.***
>
> ***6. The learned magistrate erred in law and in fact in finding that the plaintiff had successfully proved dependency of the listed***

adult beneficiaries hence applying a very high dependency ratio of 2/3.

7. The learned magistrate erred in law and applied the wrong principles hence arriving at an excessive award for loss of dependency at kshs.2,080,000 regard being had to the pleadings filed by the parties, evidently material on record and submissions of the parties.

8. The learned magistrate erred in law and in failing to give her reasons for finding that the sum of Kshs. 2,080,000 for loss of dependency was reasonable and/or adequate compensation.

9. The learned magistrate erred in law and in principle in awarding an extremely high amount of damages for pain and suffering at Kshs. 200,000.

10. The learned magistrate erred in law, fact and principle in awarding an extremely high and unjustified amount of special damages at Kshs. 195,156.

11. ***The learned magistrate erred in awarding such an inordinately high award of damages and that the said award can only be adjudged to be an entirely erroneous estimate of the correct damages awardable to the respondent***.

4. Parties filed written submissions and agreed to dispose of this appeal through those submissions.

5. The appellants submitted that the trial court was in error when it failed to take into account the consent of parties on liability. They argued that although liability had been agreed at 85%:15% in favour of the appellants, a fact that was captured in their submissions before the trial court as well as the record, the trial court applied a rate of 90%:10% liability which was an error.

6. They relied on Article 159(2) of the Constitution on alternative dispute resolution, and ***Kenya Breweries Ltd v Bia Tosha Ltd & 5 Others*** [2020] eKLR citing ***UAP Provincial Insurance Co. Ltd v Michael John Beckett*** on the importance of promoting alternative dispute resolution.

7. Regarding quantum, the appellants submitted that courts award damages for pain and suffering depending on the period the deceased suffered before death. They argued that in the present appeal, the deceased died a day after the accident on 1st February 2014. They submitted that they had relied on ***Beatrice Mukulu Kuria Kang'uta & Another v Silverstone Quarry Ltd & Another*** [2016] eKLR where Kshs. 200,000 was awarded for pain and suffering as the deceased in that case had suffered for five hours after the accident. In the appellants' view, the trial court disregarded their submissions for Kshs. 50,000 supported by the decision in ***FMM & Another v Joseph Njuguna Kuria & Another*** [2016] eKLR in which the deceased died after two days following an accident. The appellants pointed out that the case the trial court relied on in awarding Kshs. 200,000 for pain and suffering had since been appealed against and the award of Kshs. 200,000 reduced to Kshs, 50,000. They also cited ***Silverstone Quarry Ltd & Another vs Beatrice Mukulu Kang'uta (suing as administrator of the estate of Philip Musyoka Muthoka)*** [2020] eKLR for holding that the amount of Kshs, 200,000 for pain and suffering was excessive and reduced to Kshs.50,000.

8. On loss of dependency, the appellants submitted that the trial court disregarded their written submissions thus violated their right to a fair hearing guaranteed under Article 50(1) of the Constitution. On this right to be heard, they relied on ***Republic vs Sussex Justices, Exparte McCarthy*** [1924] IKB 256, [1923] All ER 233, that not only must justice be done; it must also be seen to be done.

9. They submitted that the respondent mixed up the claim for lost years and loss of dependency. They argued that whereas the respondent made an attempt to ask for lost years, she portrayed it as loss of dependency and arrived at Kshs. 2,080,000 which the trial court wrongly awarded without considering their submissions and authorities cited before it. The appellants also faulted the trial court for applying a multiplier of 13, on the basis that the deceased died at a young age of 57 years.

10. The appellants also faulted the trial court for applying 2/3 dependency ratio on the argument that the deceased had a wife and 3 dependant children. According to the appellants, the trial court ignored the fact that from the plaint, the youngest of the deceased's children was 24 years at the time of his death and there was no evidence that any of the children was in school or college and therefore in need of the deceased's support.

11. They maintained that the respondent testified that the deceased earned Kshs. 20,000 per month but no evidence was produced to support this claim. They therefore faulted the trial court for ignoring their submissions that the issue of earnings had not been proved, and went ahead to accept Kshs. 20,000 as the deceased's monthly earnings. They blamed the court for placing reliance on ***Jacob Ayingi Maruja v Simeon Obayo*** CA No. 67 of 2002,that Kenyans, even those illiterate, keep no records and yet they earn a livelihood in various ways. The appellants took issue with the trial court for applying the above decision to the case yet the two cases were distinguishable. They further blamed the trial court for failing to apply the general wage rate of Kshs. 13,572 under the First Schedule to General Wages (Amendment) Order 2015, LN No. 2 of 2019.

12. The appellants again submitted that the trial court awarded double compensation for lost years and loss of dependency even though the benefits went to the same persons. They relied on ***Hellen Waruguru (suing as the legal representative of Peter Waweru Mwenja - Deceased) v Kiarie Shoe Stores Ltd.*** [2015] eKLR for the argument that duplication occurs when the beneficiaries of the deceased's estate under the Law Reform Act and dependants under the Fatal Accidents Act are the same. In the present appeal, the awards for lost years and dependency will go for the same persons.

13. According to the appellants, the trial court made double awards given that beneficiaries under the Fatal Accidents Act and the Law Reform Act are the same. They maintained that the respondent's pleadings, evidence and submissions did not make a case for loss of dependency and for that reason the trial court could only make an award for lost years.

14. As to what entails lost years, the appellants relied on ***Roger Dainty v Mwinyi Omari Haji & Another*** CA 59 of 2004 (Msa) to argue that the loss to the estate known as lost years is what the deceased would have been likely to have available to save, spend or distribute after meeting the cost of his living at a standard which his job and career prospects at the time of the death was reasonably likely to achieve.

15. The appellants submitted that the deceased was 57 years at the time of his death and therefore a multiplier of 8 years would be appropriate but not the 13 years used by the trial court. They relied on ***Joseph Kahiga Gathii & Another v World Vision Kenya & 2 Others*** [2014] eKLR where the court used a multiplier of 8 years on a deceased aged 57 years as at the time of death.

16. On income, the appellants submitted that the witness testified that she was not sure of the deceased's monthly earnings but the deceased had said he was earning Kshs, 20,000. They submitted that there being no evidence on earnings the trial court should have used the minimum wage guidelines. They relied on ***Juma Kigambwi v Koise Kahenya*** [2017] eKLR for the proposition that in the absence of evidence on earnings, the court should use the minimum wage guidelines. In their view, under First Schedule to Regulation of Wages General (Amendment) Order NO. 12 of 2018, Legal Notice No. 2 of 2019, wage of Kshs, 13,512 should have been used.

17. The appellants submitted that using Kshs 13,512 as the monthly earnings, and relying on the decision in ***Roger Dainty v Mwinyi Omanri Haji*** (Supra), the deceased's expenses and tax liability would be Kshs, 8,000/- leaving a balance of Kshs. 5,572/- for the estate. Thus the award for lost years would be 8 X 12 X 5,572 which is Kshs. 534,912/-

18. In the alternative, they submitted, loss of dependency would work out to 13,572 x 9 x 12 x 1/3 = 434,304, since there was only the widow to support, the rest of the children being adults and there being no evidence that any of them was in school or college.

19. With regard to special damages, the appellants argued that whereas the respondents claimed Kshs 195,155, they only produced receipts for Kshs, 52,996/-. They relied on ***Delta Haulage Services Ltd v Complast Industries Ltd & Another*** [2015] eKLR to argue that special damages must not only be pleaded but must also be specifically proved. They urged that only special damages proved be allowed.

20. The appellants urged this court to allow the appeal, set aside the trial court's judgment and replace it with an award of Kshs. 50,000 for pain and suffering; Kshs. 534,912 for lost years or Kshs. 434,304 for dependency and Kshs.52,996 special damages. The liability ratio should also be 85:15 having been agreed between the parties.

21. The respondent's also relied on their written submissions dated 13th November, 2020 and filed on 4th December, 2020.

22. On liability the respondent submitted that a finding on liability is a matter of fact and a court sitting on appeal, should only interfere with on clear basis. She cited ***Ephantus Mwangi & Another v Duncan Mwangi Wambugu*** [1982 -88] KAR 278**.** She however admitted that liability was agreed between the parties at 85%:15% for the appellant and respondent respectively, which should have applied.

23. Regarding quantum, the respondent argued that the trial court awarded damages under the heads of pain and suffering, loss of expectation of life and lost years. On pain and suffering, she contended that the deceased sustained multiple injuries and died one day after the accident, and a such he experienced a lot of pain and suffering before his death. She supported the trial court's award of Kshs. 200,000 and relied on **Beatrice Mukulu Kang'uta v Silverstone Quarry Limited & Another [2016].**

24. On loss of expectation of life, the court awarded Kshs. 100,000 which she supported, and relied on ***Bernadette Wanjiku Kimani(suing as the administrator of the estate of Samwel Njenga Ngunjiri (Deceased) v Changwan Cheboi and Another*** [2013] eKLR. On lost years, she submitted that the deceased who was 57 years, a farmer and a businessman who traded in packed tea leaves and was earning Kshs. 20,000 per month with a 2/3 dependency ratio.

25. The respondent relied on ***Jacob Maruja & Another v Simeon Obayo*** to argue that it is not always the case that a person has to produce evidence of earning, and ***Daniel Kuria Ng'ang'a v Nairobi City Council*** [2013] eKLR, that age of the deceased is material in an award for loss of dependency. With regard to special damages the respondent submitted that special damages Kshs. 195,158 were pleaded and proved.

26. The respondent admitted that liability be apportioned at 85%:15% as had agreed, but the appeal on quantum be dismissed with costs.

27. I have considered this appeal, submissions and the decisions relied on. I have also considered the trial court's record and the impugned judgment. This being a first appeal, it the duty of this court as the first appellate court to reconsider, reevaluate and reassess the evidence afresh and come to its own conclusion on it. The court should however bear in mind that it did not see the witnesses testify and give due allowance for that.

28. In ***Gitobu Imanyara & 2 others v Attorney General*** [2016] e KLR, the Court of Appeal held that;

> ***"[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect"***

29. In ***Peters v Sunday Post Ltd*** [1958] EA 424, the Court held that;

> ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the***

appellate court will not hesitate so to decide"

29. Similarly, in ***Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates*** [2013] eKLR, the court stated with regard to the duty of the first appellate court;

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way"***

30. The respondent testified that on the evening of 31st January, 2014,at about 10.30 pm, her son called her and informed her that the deceased had been involved in a road traffic accident along Magadi Road. He had been rushed to Mariakani Hospital but transferred to Nairobi West Hospital. The MRI Machine was not working which necessitated that he be moved him to Kenyatta National Hospital. He passed away on Saturday at 5.30 p.m. the following day. She produced a bundle of documents including receipts for medical treatment. She told the court that the deceased was 57 years old and left behind 3 children and parents who depended on him. She also told the court that the deceased used to receive monthly pension of Kshs,65,317.50. In cross-examination, she stated that the deceased who retired in 2010, used to sell tea and made Kshs, 20,000 per month.

31. PW2 Peter Mathu Macharia, a boda boda operator within Ongata Rongai, testified relying on his witness statement dated 1st August, 2016, that on 31st January, 2014, he was riding his motor cycle along Magadi road. On approaching the 5th avenue, he saw the deceased crossing the road from left to the right hand side. After he had finished crossing the road, motor vehicle KBS 854L veered of the road and knocked him down. The driver quickly made a u turn and escaped. He gave chase and caught up with the driver at Catholic University bus terminus and took the registration number of the vehicle. He returned to the scene where he was informed that the deceased had been rushed to Mariakani Hospital. He shared details of the vehicle with the deceased's son at the hospital and left. He was later informed that the deceased had passed on. He recorded a statement with the police and later testified in a traffic case against the driver of the vehicle.

32. The appellants did not call any evidence before the trial court.

33. The trial court delivered its judgment in favour of the respondent prompting this appeal. The appellant has faulted the trial for not applying contribution ratio agreed between the parties; awarding inordinately high damages; making double awards and allowing special damages more than what was proved. The appellants also blamed the trial court for failing to apply minimum wage given that the deceased's earnings had not been proved.

34. The respondent admitted that parties agreed on the liability ratio of 85%:15% and that the trial court should therefore have applied it. Other than that, the respondent supported the trial court's finding on quantum and urged this court to dismiss the appeal.

35. I have considered the respective parties arguments on this appeal. There is agreement that the issue of liability was agreed at 85%; 15% which the trial court should have adopted. That being the case, appeal on liability succeeds.

Whether awards were inordinately high

36. It is a principle of law that an appellate court will not ordinarily interfere with exercise of a trial court's exercise of discretion unless the discretion has not been properly exercised. Assessment of damages is exercise of discretion and this court will not interfere with assessment of damages unless it is shown that the trial court took into account irrelevant factors or failed to take into account relevant factors or applied a wrong principle or the award is inordinately high or inordinately as to represent an erroneous estimate.

I. Pain and suffering

37. The firs award under challenge is on pain and suffering. The trial court awarded Kshs. 200,000 which the appellants argued was on the higher side. In their view, an award of Kshs. 50,000 would be appropriate given that the deceased died one day after the accident. An award for pain and suffering is made due to the pain the deceased experienced before death.

38. In the present appeal, the accident occurred on the evening of 31st January 2014 and the deceased died in hospital the following day 1st February 2014, one day later. According to the death certificate, he died due to severe head injury due to blunt trauma force. There is no doubt, therefore, that the deceased experienced severe pain during this period he was under treatment. The trial court awarded Kshs 200,000 for pain and suffering based on the decision of ***Beatrice Mukulu Kang'uta v Silverstone Quarry Limited &Another*** (supra). As correctly argued by the appellant, the award of Kshs 200,000/= made in the above case has since been reduced on appeal to Kshs. 50,000/= in ***Silverstone Quarry Ltd & Another vs Beatrice Mukulu Kang'uta (suing as administrator of the estate of Philip Musyoka Muthoka*** (supra).

39. I must also point out that whereas the deceased in the above case died after five hours, the deceased in the present appeal died after one day. In the premises, I am of the considered view that an award of Kshs. 200,000/= was inordinately high. The appellants submitted for Kshs. 50,000, but considering that the deceased was in pain for one day, an award of **Kshs. 100,000/=** would be appropriate in the circumstances.

40. The trial court awarded Kshs. 100,000/= for loss of expectation of life. This is a one off award and I do not see reason to interfere with it.

II. Loss of dependency

41. The appellants also blamed the trial court for awarding loss of dependency of Kshs.2,080,000/=. According to the appellants, the three children were 24 years old and above and there was no evidence that any of them was in school or college and therefore depended on the deceased. The respondent on her part submitted for lost years contending that the deceased led a normal life and was a businessman who made Kshs. 20,000/ monthly from the business with a dependency ratio of 2/3.

42. I have perused the trial court's decision under appeal. The trial court made an award for dependency and not lost years stating:

> ***"The deceased is survived a widow(sic) and 3 children who are said to have been dependants to the deceased prior to his death. I agree with the plaintiff's counsel that a dependency ratio of 2/3 would be in order. I also adopt a multiplicand of Kshs. 20,000/= which was what the deceased earned as his monthly profit as pointed out by the plaintiff's counsel."***

43. The appellants have faulted the trial court arguing that there was no proof of dependency and earnings. On dependency, there can be no argument that the deceased left behind a widow, the respondent. The widow was not employed and obviously depended on him. With regard to children, from the plaint, the youngest was a son aged 25 years while the rest were 29 years son and daughter.

44. I agree with the appellants that there was no evidence of dependency in so far as the children were concerned. This is so because dependency is a fact to be proved by evidence. In the absence of evidence of dependency, the trial court fell into error in assuming that all the children were dependants of the deceased. For my part, I am prepared to hold that the youngest child who was 25 years was a dependant given that even if it could be assumed that he had completed college, he was still dependent on the deceased on certain respects.

45. That brings us to the issue of dependency ratio, the multiplier and earnings. On dependency ratio, the applicants argued that the 2/3 ratio was on the higher side. They argued that a ratio of 1/3 would be appropriate. I agree.. It must be clear that dependency is a question of fact to be proved unless the court could take judicial notice depending on the circumstances of each case. There were only two dependants and therefore there was no way the deceased would have spent two thirds of earnings on them. The respondent did not state how much the deceased gave them for support to enable the court determine whether that was 2/3 of his earning. The trial court applied a wrong principle to warrant interference by this court.

46. On the multiplier, the trial court used a multiplier of 13 years. In the view of the trial court, the deceased would have continued with his business until he was 70 years. The appellants thought this was on the higher side. They suggested 8 years. The trial court did not take into account the fact that the deceased was already a pensioner having retired in 2010. There was no guarantee that he would have lived and continued with his business up to 70 years, taking into account the unpredictable nature of life. I once again agree with the appellants that a multiplier of 8 years would be appropriate.(see ***Joseph Kahiga Gathii & another v World Vision Kenya & 2 others*** [2014] eKLR).

47. Finally, the appellants contested the issue of earning. According to them, the respondent did not prove that the deceased was making Kshs. 20,000/=. The respondent argued that the deceased was a businessman selling parked tea leaves and was making Kshs. 20,000/= monthly. The trial court accepted the respondent's evidence regarding the amount the deceased made in that business.

48. There was no evidence before the trial court that the deceased earned Kshs. 20,000 monthly from business. The respondent did not even say that she took part in the business and was sure that the deceased could make that kind of money. In fact she stated that it was the deceased who told her that he made Kshs. 20,000/ a month. That was not cogent evidence that deceased earned Kshs. 20,000/= per month. It was not clear whether the deceased had a shop where he conducted the business, whether he did it from the house, or whether he sold the merchandise in the open air market. In the circumstances, the trial court could not accept the figure of Kshs. 20,000 thrown from the blue simply because the respondent had been told by the deceased that he made that amount.

49. It is true that it is not in every case that documentary evidence will be available to support earnings. It is also true, as decisions from courts show, that one can earn a living without necessarily having documents to prove that. However, it is strite law that in the absence of proof of income, the court should fall back to the regulations on wages and apply the minimum wage. In ***Juma Kigambwi v Loise Kahenya*** [2017] eKLR, the court held that where there is no proof of income, the court should apply minimum wage.

50. The appellant suggested minimum wage of Kshs. 13,572/= as allowed by the First Schedule to the Regulation of Wages General (Amendment) Order 2018, No. 12 of 2018, (LN 2 of 2019). The respondent did not make any proposal. She simply urged the court to rely on ***Jacob Ayiga Maruja & another v Simeon Obayo*** (supra), that production of documents is not the only way of proving earnings.

51. As already stated it is not a must that one must have documentary evidence to prove earnings. There should however be credible evidence to that end. In the absence, minimum wage guidelines apply. In this appeal, there was no credible evidence of earning and for that reason the trial court should have applied the minimum wage.

52. The appellants urged the court to apply Kshs. 13,572 subject to taxation. The deceased was not employed and was there was no evidence that the amount was subjected to taxation. Taking this into account I am of the view that the multiplicand should be the Kshs 13,572/= and not Kshs. 20,000 applied by the trial court.

53. Having come to that conclusion on the multiplicand and the multiplier of 8 years, the award under the head loss of dependency would work out thus **8x12 x13,572x1/3=Kshs. 434,304/=.**

54. The quantum of damages therefore works out as follows; **Pain and suffering Kshs. 100,000/=**, **loss of expectation of life Kshs. 100,000/=** and **loss of dependency Kshs. 434,304/=** making a total of **Kshs. 634,304/=.**

55. It must however be clear that the court should not make awards under both the law reform Act and the Fatal Accidents Act where the awards go to the same beneficiaries. **Section 2(5) of the Law Reform Act provides**:

"The right conferred by this part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conformed on dependants by the Fatal Accident's Act or the carriage by Air Act 1932 of the United Kingdom"

56. Similarly, in ***Maina Kaniaru & another v Josephat M. Wangondu*** [1995] eKLR, the Court of Appeal stated:

"The rights conferred by section 2(5) of the Law Reform Act (cap 26 Laws of Kenya) for the benefit of the estates of deceased persons are stated to be "in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the Fatal Accidents Act." This does not mean that damages can be recovered twice over but that if damages recovered under Law Reform Act devolve on the dependants the same must be taken into account in reduction of the damages recoverable under the Fatal Accidents Act. The House of Lords held in the case of Davies and another v Powell Duffryn Associated Collieries Ltd (1942) All ELR p 657 that in assessing damages under the Fatal Accidents Act, 1846, damages under the Law Reform (Miscellaneous Provisions) Act, 1934, must be taken into account in the case of dependants who will benefit under the latter Act."

57. In the present appeal, the suit was filed for the benefit of the same people under both the Law Reform Act and the Fatal accidents Act. In that case, the trial court did not deduct the award under the Law Reform Act from that under the Fatal Accident Act which was an error. consequently, the award on loss of expectation of life of Kshs. 100,000/= is deductible from the total award leaving general damages of **Kshs. 534,304/=**

III. Special damages

58. The appellants also argued that the trial court allowed more special damages that were proved. The respondent maintained that special damages pleaded were proved. The law is clear that special damages must not only be pleaded but must be specifically proved.(***Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited*** [2016] eKLR). Similarly, it is not enough for a parties to note down particulars of special damages and throw them at the court saying "this is what I have lost" and expect the court to allow the damages. They have to prove it.***(David Bagine v Martin Bundi*** CA No. 283 of 1996),

59. According to the plaint, the respondent pleaded special damages of Kshs. 195,156. She attached documents to support this claim. The appellants submitted that only Kshs. 52 996 was proved. According to them, only special damages for copy of records, funeral home fee, Hearse service fee, Hospital medical expenses, fee for death announcements to Royal Media services and Nation Media Group all amounting to Kshs. 52,996 should have been allowed.

60. The amount that the appellants argued were not proved included Kshs. 80,000 for cost of coffin, Kshs. 19,000 for mortuary and Service fee, Kshs. 2,000, admission charges, Kshs. 1,160 court fees for letters of administration and Kshs. 10,000 for legal fees to obtain letters of administration, totaling to Kshs. 112,160/=.

61. I have considered the arguments on this issue. The respondent contended that she proved special damaged pleaded. The trial court in its judgment stated that the respondent (plaintiff) incurred expenses amounting to Kshs. 195,156/= which it allowed. The court did not state that all pleaded special damages were proved through production of receipts.

62. Section 6 of the Fatal Accidents Act recognizes funeral expenses. It provides:

"In an action brought by virtue of the provisions of this Act the court may award, in addition to any damages awarded under the provisions of subsection (1) of section 4, damages in respect of the funeral expenses of the deceased person, if those expenses have been incurred by the parties for whom and for whose benefit the action is brought."

63. The expenses the appellants oppose include the cost of coffin. There was no denial that there was death and that burial took place. Ordinarily the body is buried in a coffin and there was no suggestion that the body was disposed of in any other way. I therefore do not agree with the appellants that the cost of the coffin should have been excluded given that it is a funeral expense, unless there was proof that it was duplication. What I note, however, is that the cost of Kshs. 80,000/- is exaggerated. An ordinary coffin should not cost more than thirty thousand. In the present appeal a cost of Kshs. 25,000 would be appropriate.

64. The other major item is Kshs 19,000/= for mortuary and Service fee. I note that there is also an item on funeral home fee. The respondent attached a receipt dated 6th February 2014 from Kenyatta University for Kshs. 19,000/=for embalming, washing and dressing of the body. This item was proved and the trial court properly allowed it. I do not see reason to exclude the other items.

65. The special damages of Kshs. 195,156 awarded by the trial court is reduced by Kshs 55,000/= leaving a balance of **Kshs. 140,156/=** which I hereby award.

66. In the end, this appeal is partly allowed and the judgment of the trial court on both quantum and special damages set aside. In place therefor, the respondent is awarded damages of **Kshs. 534,304/=** and special damages of Kshs. **140,156/=** making a total of **Kshs. 674,460/=.** This amount shall be subject to the agreed liability ratio of 85% against the appellants and 15% against the respondent.

67. The respondent shall have costs before the trial court plus interest as ordered by that court. However, since the appellants have substantially succeeded in this appeal, each party shall bear their own costs of the appeal.

Dated, signed and delivered at Kajiado this 12th February, 2021.

E.C. MWITA

JUDGE