



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 30 OF 2014

LUO JIYAO & WANG YIQING (Suing as the

personal representatives of the Estate of the late

LUO YI- Deceased and on their own behalf as dependants.....PLAINTIFFS

VERSUS

SUN AFRICA HOTELS LIMITED

t/a LAKE NAIVASHA COUNTRY CLUB.....DEFENDANT

KENYA WILDLIFE SERVICES.....THIRDPARTY

JUDGMENT

INTRODUCTION

1. In their Plaintiff dated 31st October 2013 and filed on 17th February 2014, the Plaintiffs sought the following reliefs from the Defendant:-

- a) **General damages for pain and suffering;**
- b) **Damages for loss of life expectation;**
- c) **Damages for loss of dependency;**
- d) **Special damages Kshs 3,851,916.45;**
- e) **A refund of Kshs 179,520 being the unutilized tour package for hotel bookings paid by the deceased;**
- f) **Interests on (a), (b) & (c) from the date of judgment to the date of payment in full;**
- g) **Interests on (d) & (e) above at court rates from the date of demand, being 24th June 2013 to the date of payment in full; and**
- h) **Costs of this suit.**

2. The Defendant's Statement of Defence was dated 16th April 2014 and filed on 23rd April 2014. Its List of Witnesses was dated 4th November 2014 and filed on 10th November 2014. Its Witness Statement signed by Avin George was dated 23rd July 2014 and also filed on 10th November 2014. The Witness Statement for Kamal Kant was dated 2nd June 2017 and filed on 5th June 2017 while that of Jacob Juma Ogechi was dated 28th April 2017 and also filed on 5th June 2017.

3. Leave was granted to the Defendant on 19th April 2016 to enjoin Kenya Wildlife Services (KWS) as a Third Party to the suit herein. The Third Party's Statement of Defence, List of Witnesses and Witness Statement of Stanley Rotich Kiplangat were also all dated 18th April

2016 and filed on 19th April 2016. The Witness Statement of Rauni Munene was dated 7th May 2018 and filed on 8th May 2018.

4. The Plaintiffs' Written Submissions were dated and filed on 2nd August 2018. Their Written Submissions in response to the Defendants' Written Submissions that were dated 28th August 2017 and filed on 29th August 2018 that were dated and filed on 31st October 2018. The Third Party's Witness Statement and List of Authorities were both dated 17th September 2018 and filed on 2nd October 2018.

5. Riechi J heard the Plaintiff's case. On 8th May 2018, the matter proceeded from where it had reached.

6. When the matter came before the court on 1st November 2018, both parties requested the court to render its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

THE PLAINTIFFS' CASE

7. The Plaintiffs' case was that on 21st April 2013, Luo Yi (deceased) and her five (5) colleagues from China booked into the Defendant's hotel facility. As they were retreating to their rooms after having dinner at the 1st Defendant's Restaurant, the deceased was attacked by a hippopotamus at about 10.00 pm as a result of which she sustained fatal injuries and her estate suffered loss.

8. The Plaintiffs sued the Defendant for breach and/or negligence on its part, its servants and/or agents, the particulars thereof which were particularised in their Plaintiff.

9. In addition to the claim for damages, they had also claimed a sum of Kshs 3,851,916.45 for special damages. It was their contention that they had also suffered loss in their individual capacities because the deceased was their only child due to the Chinese Government Policy of one (1) child per family.

10. They therefore urged this court to grant them the reliefs they had sought in their Plaintiff.

THE DEFENDANT'S CASE

11. The Defendant denied the particulars of breach and negligence that were attributed to it on the ground that it had put in place exhaustive protective measures, security and protection as humanely possible to avert incidents of human - wildlife conflict in its facility.

12. It averred that the deceased acted recklessly and exposed herself to danger and ignored the warning signs that had been posted in various points at the hotel and the warning briefing that was given to her and her colleagues at the time of checking in at the hotel.

13. It thus asked this court to dismiss the Plaintiffs case.

THE THIRD PARTY'S CASE

14. The Third party attributed negligence and/or contributory negligence to the deceased for exposing herself to the risk of attack by a hippo. It termed her actions as reckless and careless.

15. It also stated that the Defendant was negligent for having failed to heed to its warnings to erect an electric fence or other device to prevent wild animals, especially hippos, from accessing its premises.

16. It was therefore emphatic that it was not liable to indemnify and/or contribute to the Defendant's negligence with regard to the Plaintiffs' claim.

LEGAL ANALYSIS

17. The Defendant and Third Party did not file any Statement of Agreed Issues. The Plaintiffs Statement of Agreed Issues were dated and filed on 18th August 2014. The court directed that they would be the ones to be used during trial. The said issues were as follows:-

1. Whether the Plaintiffs had the legal capacity to sue on behalf of the estate of the Deceased;

2. Whether the Deceased's presence in the Defendant's premises was justifiable;

3. Whether the Defendant owed the Deceased a statutory duty of care pursuant to the Occupiers Liability Act;

4. Whether the Defendant had in place adequate safety measures within its premises as required by the Occupiers Liability Act;

5. Whether the Defendant was negligent and in breach of its contractual and statutory duty of care to the Deceased leading to her attack by the hippopotamus and her consequential death;

6. Whether the Deceased was negligent by failing to observe safety precautions contributing wholly or in part to her death?

7. Whether the accident that led to the demise of the Deceased was inevitable; and

8. Whether the Plaintiffs are entitled to the prayers sought in the Plaint? If so, how much is payable under each head of damages?

18. Having considered the evidence that was adduced, this court found that the issues that had been placed before it for determination were in respect of apportionment of liability between the parties and the quantum that was payable to the deceased's estate.

19. The court therefore dealt with the said issues under the separate and distinct headings shown herein below.

I. LIABILITY

20. Huang Yue (hereinafter referred to as "PW 1") testified that on the material date, she and the deceased stayed in the same room at the Defendant's hotel facility where they were indoors that afternoon. They checked in at the facility on the material date at 12 noon. After they finished dinner at about 9.00 pm, a couple who they had arrived with at the hotel left and went to their cottage. She was left with the deceased.

21. After checking out a shop within the facility, they followed the couple along the pathways towards their rooms. As they walked, they noticed shadows but they were not sure if they were animals as the area was poorly lit. One of the shadows moved towards them. She escaped. Unfortunately, the deceased was not able to escape and she was attacked by a hippo. Despite shouting, help only came after about five (5) to ten (10) minutes.

22. She denied having seen any warning signs or watchmen on that night. She was categorical that they were not given any escort to their rooms and that the deceased was not attacked while taking photos of the hippo.

23. Shujie Jiang (hereinafter referred to as "PW 2") confirmed that she was ahead of PW 1 and the deceased by about five (5) to ten (10) metres when she heard a sound. She turned back and found that a hippo had knocked down the deceased.

24. She testified that she checked in at the same time with PW 1 and they were all not given any safety instructions. She stated that she did not also see any warning signs in her hotel room. She corroborated PW 1's evidence that help only came five (5) to ten (10) minutes later, that it was dark and that they did not have any escort as they went to their rooms. It was her further evidence that there was no barrier between the lake and the hotel and that they were not supplied with torches.

25. Omboto Oyongo (hereinafter referred to as "PW 3") told the Trial Court that he was instructed to prepare a Report. When he conducted his investigations, he found that the fence was broken, that there were no trenches to prohibit animals to cross and that the hotel did not provide guards to escort guests to their rooms. He, however, admitted that there were warning signs within the premises giving warnings of animals within the premises.

26. No 69182 Corporal Esther Kinaitore (hereinafter referred to as "DW 1") told this court that the incident was reported at Naivasha Police Station by Shujri Yang, a Chinese National. She stated that he was in a room together with the deceased when the deceased went out for a walk but she was attacked by a hippo. Her evidence was that at the time the deceased was attacked, she was taking photos of a hippo and that her camera which was on standby was recovered at the scene.

27. She pointed out that the Inquest File that had been opened in respect of the incident herein was closed as the magistrate who heard the evidence concluded that the same was an accident.

28. She stated that she went to the premises the following day and saw a trench although it had been submerged in water. She did not see any electric fence. She could not confirm if the hippos were in the riparian area but she was clear that from the place where the hippos were to the lake, it was about two hundred (200) metres.

29. Jacob Juma Ongeti (hereinafter referred to as "DW 2") worked as a Security personnel in the Defendant's facility until 2015 when he left its employ. He was in charge of Security on the material night. His testimony was that guests were normally briefed upon checking in at the hotel and that at night they would be escorted by security personnel to their rooms. His evidence was that on that night, there were eleven (11) security personnel.

30. He, however, did not know if the deceased and her colleagues were briefed when they checked in at the hotel. He also said that he did not see the deceased at the hotel but only saw her after she was attacked by the hippo. It was, however, his evidence that he saw a security personnel by the name of Abednego escorting the deceased and her colleagues to their rooms after they had their dinner.

31. His further evidence was that the deceased's body was found two (2) metres from the pavement. He admitted that the hippos came close to the pavement. It was his averment that hippos would at times break the electric fence and that on the material night, the hippos passed through the one and a half (1 ½) metre trench that had been filled with water. He said that the trenches were at times covered with soil. He admitted that the responsibility to remove the soil from the trenches lay with the hotel.

32. He agreed that the photos that were adduced by the Plaintiff showed that the fence was broken and that a hippo could pass in the trench. He was, however, adamant that there were warning signs all over the hotel and that guests were always briefed at the time of checking in about the presence of animals within the premises.

33. He stated that his personnel informed him before the deceased was attacked that they had chased hippos from the hotel. He said that when he went to the scene, he found the deceased having been attacked by the hippo and her camera on standby mode which was proof that she was taking photos.

34. Kamal Kant (hereinafter referred to as "DW 3") was the Foods & Beverages Manager of the hotel at the material time. He said that he could not see the cottages from his office. He also stated that he did not know whether the deceased and her colleagues were briefed upon checking in at the hotel or if they had been escorted to their rooms as was the procedure at the hotel or who was on duty as security on that night.

35. His testimony was that the hotel had equipped the security personnel with highly beamed spotlights to scare away the wild animals. He added that on that night, the fence was submerged in water and the water had flooded the gardens at the hotel. He admitted that it was the responsibility of the hotel to maintain the trenches.

36. KWS No 6581 Raumi Munene (hereinafter referred to as "TP 1") was at the material time, in charge of a station dealing with Problem Animal Control. He testified that the hippo that attacked the deceased came from Lake Naivasha and that Kenya Wildlife Services (hereinafter referred to as "KWS") used to brief communities living around the lake how to deal with wild animals. They also trained Naturalists who would in turn brief guests who visited hotels around the lake on how to deal with wild animals. His evidence was that the Naturalist from the Defendant's facility by the name of Lugala was aware of how to deal with problem wildlife.

37. He added that the Defendant's facility was nearest to its Base and that they used to patrol the lake often. He pointed out that they would not go to hotels unless an issue had arisen.

38. He told the court that it was the responsibility of the Defendant to have had a moat or trench to prevent the animals from getting into its premises. He also stated that if the deceased and her colleagues had been escorted by guides, the incident would not have occurred.

39. PW 1 and PW 2 were emphatic that on the material date and time they were walking along the pavement when they heard a distress call from the deceased who had just been attacked by a hippo. They were adamant that they had not been given any escort to their rooms and that help came after about five (5) to ten (10) minutes. They were emphatic that the deceased's body was found about two (2) metres from the pavement. This was corroborated by DW 1 who stated that the deceased was attacked outside her room.

40. Notably, none of the witnesses who were called by the Defendant were present when the deceased was attacked by the hippo. If indeed, security personnel at the premises had escorted the deceased and her colleagues to their rooms as had been contended by DW 2 and DW 3, then they should have been called to testify and explain how exactly the attack happened. Abednego, who DW 2, had said was the one who escorted the deceased and her colleagues on the material night was not called as a witness. The Defendant did not also call the person who briefed the deceased and her colleagues when they checked into the hotel on the material night to corroborate DW 2's and DW 3's evidence that all guests were briefed of wild animals in the hotel precincts upon checking in into the hotel. They were crucial witnesses who would have shed light as to what transpired on that material night.

41. In the absence of any evidence to the contrary, this court found and held that the deceased and her colleagues were not being escorted on the material time when the deceased was attacked by the hippo and that the hippo had encroached the Defendant's premises and was very close to PW 1's and deceased's path.

42. Going further, this court found and held that the evidence by DW 1, DW 2 and DW 3 that the deceased was taking photographs of a hippo was hearsay as none of them saw the deceased taking the photographs. The fact that the deceased's phone camera was on standby, if at all, was not proof that she was taking the photograph of the hippo as there was a possibility that she could have taken unrelated photographs earlier and left her phone camera on standby mode. The court perused the Inquest File that was submitted in evidence by DW 1 and noted that DW 2 never mentioned the deceased's phone camera having been on standby mode as he had told this court.

43. Only DW 3 had alluded, in the said Inquest File, to the deceased having been excited and attempted to take photographs of the hippo. Even so, this court noted that his evidence that the deceased and her colleagues rushed out of their rooms to take photographs of the hippo was not only mere hearsay as he was not at the scene of the incident where it occurred and he could not see the cottages from his office but his evidence was also telling on two (2) fronts.

44. The above notwithstanding, his evidence that the deceased and her colleagues saw a hippo and excitedly came out of their rooms to take photographs implied that the hippo was near their rooms for them to have seen it. This court came to the said conclusion because that the lighting conditions were poor as was evidenced in the photographs that were adduced in evidence. Notably, visibility would only have been possible if objects were nearer the dim source of light. The rest of the garden was pitch black and no object could be seen.

45. If the hippos were near the cottage the deceased and her colleagues' were staying, this suggested that the Defendant had been negligent in allowing wild animals to come near the paths guests used to get to their rooms.

46. Appreciably, DW 1 had testified that from where the hippos were and the lake, it was about two hundred (200) metres. It was clear to this court that the hippos had encroached onto the hotel premises and were a major threat to guests staying at the hotel. The fact that DW 2 had stated that the security personnel had informed him of the presence of the hippos which they had chased away only pointed to a need for enhanced security for guests more so on that material night.

47. The placing of signage warning guests to beware of wild animals could not exonerate the Defendant. It ought to have ensured that the electric fence was functional and that the same was not broken. The photographs showed a broken fence. The mere fact that hippos were in the precincts of the hotel on that night, was evidence of the Defendant's negligence of not having ensured the safety of the deceased.

48. The Third Party's submission that it was the Defendant who was to ensure that its hotel was properly secured to prevent wild animals encroaching into its compound thus found favour with this court. The hippos were two hundred (200) metres from the lake where KWS had a duty to oversee.

49. Whereas as the Defendant argued that the Third Party had an obligation to keep the wild animals in check, the Third Party could not have come on private property to ensure that there was no human-wildlife conflict unless it had been called to intervene. Indeed, TP 1 testified that there was no report made to KWS regarding human-wildlife conflict on that particular night before the incident occurred for it to have intervened.

50. It was an undisputed fact that the deceased was lawfully in the Defendant's premises as a paying guest in its facilities. She was therefore owed a duty of care by the Defendant, as an occupier, as has been contemplated in Section 3 (2) of the Occupiers Liability Act. She was under no restriction while in the hotel and the Defendant had not modified or excluded its duty to her while she was a guest in its facility.

51. Section 3 (1) of the Occupiers Liability Act Cap 34 provides as follows:-

“An occupier of premises owes the same duty, the common duty of care, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.”

52. Section 3 (2) of the Occupiers Liability Act further stipulates as follows:-

“For the purposes of this Act, “the common duty of care” is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.”

53. The occupiers duty is to ensure that any person who is lawfully in his premises does not suffer any injury by ensuring that the premises are reasonably free from any dangers.

54. This duty by an occupier was addressed in the case of Ali vs Gitau [1992] eKLR where it was held as follows:-

“This duty is governed by the Occupiers Liability Act Cap 34 Laws of Kenya. Section 3 (2) provides for a common duty of care whereby the occupier of any premises owes a common duty of care to his visitors which is a duty to take such care as in all the circumstances of the case that is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he was invited or permitted by the occupier to be there.”

55. Any private individual who purports to construct a facility that interact with nature and in particular where wild animals are not inhibited, he has a duty to ensure that visitors who have license to be on its premises are well protected.

56. There has been a tendency for hotels constructed near lakes inhabited with wild animals or nature reserves to allow wild animals to freely roam within the hotel precincts. This is dangerous because a wild animal is a wild animal.

57. The hotels may have that attraction for adventure purposes but it is reckless if no proper safety mechanisms are put in place. A person who wishes to have such animals in his facility that is frequented by paying guests, exposes himself to a higher degree of responsibility. If there was a Naturalist as TP 1 testified, then nothing would have been easier than for the Defendant to have called him to deal with the encroachment of the hippos on the material night.

58. Accordingly, having considered the evidence and the Written Submissions by the respective parties and the case law they each relied upon, this court came to the conclusion that the Defendant owed the deceased a duty of care under common law and under the Occupier Liabilities Act and having failed to ensure the deceased's safety, it was liable for the injuries that the deceased sustained.

59. Having said so, this court noted that the deceased and her colleagues checked in at the hotel at about 12 noon. In view of the good lighting conditions at the time, they ought to have seen and read the warning signs.

60. It was not clear from the evidence that was adduced whether they understood English to enable them read the signage warning them of the wild animals. Whereas the evidence adduced by PW 1, PW 2, DW 1, DW 2 and DW 3 of the spot where the deceased was found was suggestive of the fact that no prudent person would have expected to encounter a wild animal near the designated walking paths, this court nonetheless took the view that the deceased and her colleagues ought to have been more cautious due to the warnings of animals in the hotel. If they could not read the signs, the animals in the hotel as shown in the photographs they adduced in evidence would have led them to enquire about presence of animals and safety of walking to their room. This was more so because they were going to their rooms when it was dark with poor lighting along the pathways.

61. Taking the circumstances of the case herein, this court found that apportionment at 80%-20% in favour of the deceased was fair. It did not find the Third Party to have been liable in any way as it was the responsibility of the Defendant to have maintained the trenches to prevent the hippos coming into the hotel as was admitted by DW 2 and DW 3, to ensure that the electric fence was in proper working condition, to ensure that guests were escorted to their rooms by guards and that there was adequate lighting within the precincts of the hotel to give anyone an opportunity to see danger immediately and take evasive action.

II. QUANTAM

I. FATAL ACCIDENTS ACT

62. In view of the aforesaid conclusion, this court was not persuaded by the Defendant's submissions that the claim was payable by the Third Party under the Wildlife Conservation and Management Act, 2013.

63. The Plaintiffs submitted that since the deceased was aged twenty eight (28) years, then a multiplier of twenty six (26) years ought to be applied. The Defendant argued that since the official retirement age for female officials in China was fifty five (55) years and taking into account the vagaries of life, then a multiplier of eighteen (18) years was adequate.

64. After carefully considering the Plaintiffs' and the Defendant's submissions, this court found that a multiplier of twenty four (24) years was reasonable herein. In arriving at this conclusion, this court had due regard to the following authorities:-

1. In Alice O Alukwe vs Akamba Public Road Services Ltd & 3 Others [2013] eKLR, Emukule J (as he then was) adopted a multiplier of thirty (30) years where the deceased was twenty four (24) years.

2. In William Kinyanjui & Another vs Benard M Wanjala & Another [2015] eKLR, Githua J adopted a multiplier of twenty (20) where the deceased was twenty six (26) years of age at the time of her demise.

65. On the issue of the ratio of dependency, the Plaintiffs proposed a ratio of dependency of 2/3 on the ground that the Plaintiffs were retired and the deceased who was an only child under the "one child policy" was their sole bread winner. The Defendant suggested a ratio of dependency of 1/3 on the ground that the deceased's parents were retirees.

66. In respect of the ratio of dependency, this court took the view that 1/3 was reasonable as the deceased was unmarried. There was no evidence that was adduced to demonstrate that the Plaintiffs solely relied on her for their upkeep.

67. In arriving at the said conclusion, this court had due regard to the case of **Chania Shuttle vs Mary Mumbi [2017] eKLR** where this very court had found that a ratio of dependency of 1/3 was fair because all the deceased's children therein were adults and did not depend on the deceased therein.

68. In respect of income, the Plaintiffs proposed a sum of CNY 350,000 but the Defendant submitted that because there were no payslips to prove the deceased's income, it would be difficult for the court to determine the income since the amount was a gross and not the sum.

69. Notably, the Defendant did not adduce any evidence to controvert the Plaintiffs evidence that the deceased earned an annual gross salary of CNY 350,000. This translated to CNY 29,167 per month. As the same remained un rebutted, this court accepted this to have been the deceased's annual gross income.

70. The Plaintiffs had submitted that the deceased's annual income was Kshs 4,491,993.98. It was not clear what exchange rate was used. However, it appeared to this court that the same had not been subjected to any taxation. Notably, if the deceased's income had been taxed, then the letter dated 7th March 2013 to the deceased was silent on the same. This court therefore took the income indicated therein as a gross income.

71. As was rightly pointed out by the Defendant, the gross income had to be subjected to taxation. This court therefore fully associated itself with the cases of **Leonard O Ekisa & Another vs Major K Birgen [2005] eKLR** and **Stella Kimani Jackson & Another vs KPLC Ltd [2012] eKLR** that were relied upon by the Defendant in this regard.

72. As this court did not know the taxation percentage in China and none of the parties submitted on it, it adopted that of Kenya, being thirty (30%) per cent. After applying a tax of thirty (30%) per cent, the deceased's monthly income came to CNY 20,417 or Kshs 305,875.01 computed as follows:-

Annual salary CNY 350,000 or Kshs 5,243,571.20

Monthly salary CNY 29,167 or Kshs 436,964.27

Less 30% tax CNY 8,750 or Kshs 131,089.28

CNY20,417 or Kshs 305,875.01

The said computation was arrived at having adopted an average exchange rate of Kshs 15/= to 1 CNY.

73. Under this head, the computation of the claim was thus Kshs 29,364,000/= made up as follows:-

$1/3 \times 305,875 \times 12 \times 24 = \text{Kshs } 29,364,000/=$

II. LAW REFORM ACT

74. The Plaintiffs urged this court to award a sum of Kshs 400,000/= under this head. They relied on the case of **Benedeta Wanjiku Kimani (suing as the administrator of the Estate of Samuel Njenga Ngunjiri vs Anwarali Brothers & Another [2013] eKLR** where the court

therein awarded a sum of Kshs 200,000/= for pain and suffering and Kshs 100,000/= for loss of expectation of life. They submitted that the deceased endured a lot of pain as she did not die immediately after being attacked by the hippo.

75. On its part, the Defendant urged this court not to award damages for pain and suffering but to award the deceased's estate Kshs 100,000/= for loss of expectation of life.

76. This court found it neater to separate the two (2) claims under the Law Reform Act. This court therefore dealt with the same under the following heads.

A. LOSS OF EXPECTATION OF LIFE

77. Taking the inflammatory trends into consideration, it was the considered view of this court that a sum of Kshs 150,000/= would be adequate compensation under this head. In arriving at the said conclusion, it placed reliance of the following cases:-

1. In **William Kinyanjui & Another vs Benard M Wanjala & Another (Supra)**, Githua J awarded a sum of Kshs 100,000/= for loss of expectation of life in 2015.

2. In **Alice O Alukwe vs Akamba Public Road Services Ltd & 3 Others (Supra)**, Emukule J (as he then was) also awarded a sum of Kshs 100,000/= for loss of expectation of life in 2013.

3. In 2016, this very court awarded a sum of Kshs 100,000/=for loss of expectation of life in the case of **Kenya Power and Lighting Company vs James Matata & 2 Others [2016] eKLR.**

B. PAIN AND SUFFERING

78. It was clear from PW 1's and PW 2's evidence that they waited for five (5) to ten (10) minutes before they could get assistance to take the deceased to hospital. This meant that she did not die immediately. She must have therefore undergone a lot of pain from the injuries that were inflicted by the hippo. It was indeed a painful death.

79. Whereas in the case of **Premier Dairy Limited vs Amarjit Singh Sagoo & Another [2013] eKLR** the court therein awarded a sum of Kshs 75,000/= for pain and suffering where the deceased died instantly, it was the view of this court that a sum of Kshs 30,000/= for pain and suffering would be adequate. Indeed, courts must be careful not to award manifestly and/or inordinately high awards that would be clearly unsustainable to those obligated or found liable to pay the same.

III. SPECIAL DAMAGES

80. The Plaintiffs claimed a sum of Kshs 3,851,916.45 made up as follows:-

ITEM	PARTICULARS	KSHS
1.	Air tickets for Luo Jiyao and Wang Yiqing (parents)and Jianzhong Wang (aunt)- Shanghai to Nairobi -to and from	1,864,425.95
2.	Vaccination for the parents and Jianzhong Wang (aunt)	1,000
3.	Accommodation for the family of the deceased (Hotel Intercontinental) from 26 th April 2013 to 5 th May 2013	169,379.32
4.	Local transport and taxi for the family	23,500.00
5.	Commissioning the private investigator	640,000.00
6.	Funeral cloth fabric	1,740.00
7.	Telephone expenses for the family	2,960.00
8.	Accommodation for the family (Solaxe Club) from 5 th May 2013 to 23 rd May 2013	294,234.00
9.	Mortuary charges, cremation fees, coffin, transport to the cemetery and incidental services paid on 8 th May 2013	294,000.00
10.	Legal fees towards petitioning for the limited Grant of the Letters of Administration.....	105,000.00
	Filing fees for the <i>Ad litem</i> Petition.....	1,095.00

	Sub total	106,095.00
11.	Certificate of death	100.00
12.	Air ticket for Jing Wang (Uncle) and Jiahua Wang (aunt) for the purpose of attending the funeral-return ticket Australia-Kenya	358,403.86
13.	Post Mortem fee	50,000.00
14.	Food and tea	13,042.00
15.	Sundries and Supermarket purchases for the family and mourners	12,141.32
16.	Immigration visa fees for the parents and Jianzong Wang (aunt)	17,400.00
17.	Photographs and flowers	8,495.00
	TOTAL	Kshs 3,851,916.45

81. The Defendant objected to monies claimed on the ground that the same were not justified as it was necessary for the deceased's relatives to have come to Kenya or to have stayed at Intercontinental Hotel, which is one of the most expensive hotels in Kenya. It also submitted that the legal charges for obtaining the Letters of Administration *Ad litem* were manifestly excessive and not supported by the Advocates Remuneration Order 2006. It also rejected the claim for a sum of Kshs 170,520/= being alleged payments made to the Tour Operator because the deceased and her colleagues had already checked in the Defendant's hotel.

82. Having considered the claim herein this court disallowed the items Nos (2), (4), (5), (8), (12), (15) and (16) as they were not justified leaving following items Nos (1), (3), (6), (7), (9), (10), (11), (13), (14) and (17).

83. This court therefore allowed the following amounts for the aforesaid allowed items:-

Air tickets for parents Kshs 1,864,428.95

Accommodation for parents Kshs 169,379.35

Funeral fabric Kshs 1,740.00

Telephone expenses Kshs 2,960.00

Funeral expenses Kshs 294,000.00

Court filing fees for

Obtaining letters of

Administration *Ad litem* Kshs 1,095.00

Certificate of Death Kshs 100.00

Local transport Kshs 8,132.00

Food and tea Kshs 13,042.00

Photographs & flowers Kshs 8,495.00

Kshs2,363,372.30

84. This court, however, omitted the claim for Post Mortem fees in the sum of Kshs 50,000/= as the same was not supported by any documentation. It was a special damage that had to be specifically proven.

85. Bearing in mind that expenses must be incurred during the funeral, this court

allowed a sum of Kshs 1,864,425.95 for transport to and from Shanghai, Kshs 8,132/= for local transport and accommodation for parents at

Kshs 169,379.32 and Kshs 13,042/= as the same was not unreasonable. The other receipts were disallowed as the same were in respect of the deceased's uncles' and aunts' transport and accommodation expenses.

86. Notably, there was a receipt for clothes for Kshs 4,000/= but because the Plaintiff had pleaded for Kshs 1,740/=. That is what the court allowed as parties are bound by their pleadings. As the claim for refund of Kshs 179,520/= being the unutilised tour package for hotel bookings paid by the deceased and her colleagues was not supported by any document to prove the same, this court did not award the same. There was also no evidence that was led to demonstrate if the said amount was in respect of the deceased only or it was in respect of her and her colleagues as they had travelled together.

87. The Defendant was not liable for the Plaintiff's advocate fees to obtain the letters of Administration *Ad litem* as costs were not awarded in the Probate Cause. In any event, the procedure for assessment of costs for advocates' legal services is well spelt out in the Advocates Remuneration Order as was correctly submitted by the Defendant herein.

DISPOSITION

88. For the foregoing reasons, the upshot of this court's decision was the Plaintiffs' suit was merited and judgment be and is hereby entered in their favour against the Defendant for the sum of Kshs 25,525,897.84 made up as follows:-

Loss of dependency

1/3 x 305,875 x 12 x 24 **Kshs 29,364,000.00**

Loss of expectation of life Kshs 150,000.00

Pain and suffering Kshs 30,000.00

Special damages Kshs 2,363,372.30

Kshs 31,907,372.30

Less 20% contributory negligence Kshs 6,381,474.46

Kshs 25,525,897.84

Plus costs and interest at court rates from the date of judgment until payment. The Defendant shall also bear the Third Party's costs of this suit.

89. It is so ordered.

DATED and DELIVERED at NAIROBI this 31st day of JANUARY, 2019

J. KAMAU

JUDGE