REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL NO. 13 OF 2019

SAVANNAH HARDWARE.....APPELLANT

VERSUS

EOO (SUING AS representative of

SO (DECEASED).....RESPONDENT

(Being an appeal from the Judgment and Decree of Siaya PMCC 2 of 2017 dated 3.5.2018 before Hon. J.O. Ongondo – Principal Magistrate)

JUDGMENT

1. The appeal herein was filed on 31.5.2018 by the appellant **Savannah Hardware** against the Respondent **EOO** (**Suing as Representative of SO (Deceased)**. The appeal challenges the judgment and decree of **Hon. J. O. Ongondo Principal Magistrate** made on 3.5.2018 in Siaya PMCC No. 2 of 2017 wherein the appellant herein was the Defendant whereas the Respondent herein EOO was the Plaintiff.

2. The Plaintiff's claim against the defendant was for general damages and special damages allegedly suffered by the Plaintiff following a road traffic accident which occurred on 9.8.2016 involving the deceased **SO** (Pedestrian) and Motor vehicle Registration No. KBG 193K along Siaya-Luanda Road at Karemo area, as a result of which the deceased was allegedly knocked by the said motor vehicle, and died from the injuries sustained in the said accident.

3. The Plaintiff's claim was contained in the Plaint dated 20th January, 2017 wherein he claimed that the defendant was the beneficial owner and/or driver of the subject motor vehicle and that while the deceased was lawfully walking along the said road, the defendant's driver negligently drove the motor vehicle in question that he knocked her upon which she sustained serious injuries and succumbed.

4. The Plaintiff gave particulars of negligence on the part of the defendant as per paragraph 5 of the plaint and particulars of special damages were stated in paragraph 7 of the plaint.

5. In paragraph 10 of the plaint, it was alleged that the deceased was aged 10 years, brilliant and supportive of her family hence her timely death robbed her family of a great source of hope and health. The plaintiff claimed for damages both under the Law Reform Act and under the Fatal Accident's Act, he also claimed for special damages in the sum of KShs.492, 700 costs of the suit and interest.

6. The 2 defendants filed a defence dated 31.1.2017 denying all the allegations levelled against them by the plaintiff and putting the plaintiff to strict proof thereof.

7. The Defendants also invoked the doctrine of *volente non-fit injuria* and pleaded contributory negligence on the part of the deceased and the plaintiff for allowing a minor to wander alone on the road without guidance among other particulars of negligence attributed to the deceased and the Plaintiff guardian.

8. The Plaintiff filed a reply to defence dated 28.8.2017 reiterating the pleadings in the plaint and denying all particulars of negligence attributed to the plaintiff and the deceased in the defence.

9. In his judgment dated 31.5.2018 the trial magistrate found for the plaintiff against the defendant as follows:

Liability 100%

General Damages: Pain and Suffering KShs 10,000

Loss of dependency- KShs 700,000

Special damages -KShs 492,700

Costs of the suit.

10. Aggrieved by the above judgment and decree of the trial court, the 2nd defendant herein Savannah Hardware filed this appeal contending and setting out 8 grounds of appeal, challenging the judgment both on liability and quantum of damages awarded.

11. The grounds of appeal are:

1. That the learned magistrate erred in law in making a finding of damages against the defendant.

2. That the learned magistrate erred in law and fact in holding that the defendant was 100% liable for the excessive damages so awarded or at all in the absence of any concrete evidence to demonstrate the same.

3. That the learned magistrate erred in law and fact in awarding unreasonable loss of Dependency of KShs.700.000/= without taking into consideration the vagaries of life.

a. The learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to damages of KShs.700,000/= without any tangible proof of the same.

b. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendant to special damages of KShs.492,700/= allegedly spent in what the plaintiff turned to be a merry celebration without concrete documentary evidence.

4. That the learned magistrate erred in law and fact in failing to appreciate the impeccable defence of the defendant and thereby arriving at a wrong and erroneous conclusion condemning the defendants to excess general and special damages without concrete documentary evidence.

5. The learned magistrate erred in law and fact in failing to appreciate the long established principle of stare decisis, precedent law thus bringing law into confusion and thereby deriving an erroneous finding/conclusion, in particular relating to damages.

6. The learned magistrate erred in law and fact in failing to appreciate as follows:-

(i) That the plaintiff's pleadings and the evidence tendered in support thereof was incapable of sustaining the award of damages.

7. That the learned magistrate erred in law and fact in entering judgment in favour of the plaintiffs against the defendant inspite of the plaintiff's miserable failure to establish her case more especially on quantum.

8. The learned magistrate erred in law and fact in failing to appreciate the legal position that there could be no liability

12. The appellants' counsel urged this court to allow the appeal with costs, reassess the award of special, general damages, loss of earning and that the judgment of the subordinate court and consequential orders therefrom be set aside with costs to the appellant both in the lower court and on Appeal.

13. This being a first appeal, this court is obliged to abide by the provisions of **Section 78 of the Civil Procedure Act** which empowers the court to:

a) Determine a case finally;

b) Remand a case;

c) Frame issues and refer them for trial;

d) Take additional evidence or require the evidence to be taken; or

e) Order a new trial

14. **Section 78 of the Civil Procedure Act** provides that the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Act on courts or original jurisdiction in respect of suits instituted therein. The above provisions were the subject of interpretation by the **Court of Appeal in Sielle Vs. Associated Motor Boat Company Ltd.[1968] EA 123** where it was held, *inter alia*:

"This court must consider the evidence, evaluate itself and draw its own conclusion though in doing so it should always bear in

mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or of the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.

15. Revisiting the evidence before the trial court, PW1 EOO testified on oath that he was a teacher employed by Teachers Service Commission, and that the deceased was his daughter. He adopted his written statement as his evidence in chief. In the said statement, the plaintiff recalled that on 9.8.2016 the deceased had gone to school and at about 1.40 p.m. when she was returning home for lunch, the plaintiff was called by his mother and informed that the child had been knocked by a hit and run vehicle. The plaintiff rushed to the scene of accident and found that a good Samaritan had rushed the child to hospital at Siaya County Referral Hospital for Emergency treatment so he followed them but when he reached the hospital, he was met with sad news that she had succumbed on her way to hospital.

16. At the said hospital, he met eyewitnesses to who told him that they knew particulars of the accident motor vehicle and that it belonged to Savannah Hardware because it was a common vehicle and that its driver was well known.

17. He proceeded to Siaya Police Station to report and on arrival, he met the driver of the accident motor vehicle and the vehicle was also at the Police Station as the driver had presented himself to the Police after the accident and the Police impounded the Motor Vehicle. He made arrangements for burial and incurred special damages.

18. He stated that the deceased was 10 years at the time of her death, and in class four. That she was very active in school and at home. She helped with domestic chores and performed well in class hence they had high hopes in her future.

19. He blamed the driver of the accident motor vehicle for speeding at a bus stop and failing to notice the minor who was innocently walking home in broad daylight and that he sped off instead of stopping to assist her to hospital. The plaintiff prayed for compensation.

20. The Plaintiff produced as exhibits several documents being:

1) Demand Notices to the Defendant.

2) Copy of Records for Motor vehicle registration number KBG 193K.

3) Police Abstract form.

4) Letters of Administration.

5) Chief's letter.

6) Funeral Expense receipts and invoices.

7) Copy of record from registrar of motors.

21. PW2 PC **LA** testified and produced a police abstract involving motor vehicle KBQ 193 Toyota Corolla and a Pedestrian on 9.8.2016 along Siaya-Luanda Road at Karemo at 13.00 hours. She stated that the driver confirmed being involved in the accident and that the motor vehicle was impounded. She stated that the accident occurred at a place where there were many people at a shopping center although the stage is unmarked. That the driver drove at a high speed. He also produced OB extract and stated that investigations were ongoing.

22. PW3 JOO testified and produced receipts which had been marked undated for KShs.81, 000 and 43,000/= respectively for catering of food for mourners during the burial of the deceased. The Plaintiff then closed his case.

23. The Defendant/Appellant herein called one witness **Alfred Juma Omondi** who testified as DW1 that he was a driver for 9 years and in possession of a driving licence.DW1 testified that on 9.8.2016 he was driving Saloon KBQ 193K from Luanda to Siaya at around 1.00 pm and at Karemo, Police stopped him and let him go. Upon reaching Karemo shopping centre, he saw a Nissan Matatu going to Lunda as the defendant witness was going the direction of Siaya. That another Matatu emerged from behind and dropped school children. The children then crossed from right to left, on his lane. He swerved to avoid hitting the three but 2 children stopped and one ran to cross. She was hit by the vehicle on the right headlamp.

24. That DW1 stopped some meters ahead but motor cyclists gathered around him so he feared and drove off to Siaya Police Station and reported. He saw County Government vehicle behind which took the injured child to hospital. He blamed the parent of the child for leaving children to cross the road alone. He also blamed the child for failing to be careful.

25. On being cross-examined by counsel for the plaintiff, DW1 stated that there is no bump at the scene. He denied that it was a bus stop but conceded that vehicles stop there to drop passengers. He stated that he saw a matatu stop and another one stopped behind it.

26. On being referred to his own statement, he read and stated that it was his statement and that he wrote that he saw children alight from the matatu which stopped behind the last one. He also conceded that he said it was at a shopping center and he could drive at 50 kilometers per hour and that he reduced speed to 50 kilometers per hour. He conceded that the child was knocked and died from the impact.

27. Parties filed written submission.

28. In his judgment which is impugned, the trial Magistrate found for the plaintiff on liability at 100% and awarded general and special damages, and costs of the suit as started herein above.

29. Only the appellant filed submissions to canvass this appeal despite the Court accommodating both parties on several occasions.

30. In their written submissions dated 27.3.2019, the Appellant's Counsel Mose Mose and Milimo Advocates submitted on liability and quantum. On liability Counsel submitted relying on **Section 107, 108, 109 and 112 of the Evidence Act** on the burden of proof and the plaintiff did not prove liability against the Defendant to the standard required.

31. He also relied on several decisions **Stack Park v James Mbithi NRB Civil Appeal No. 152 of 2003; Muthuku Kiema V. Kenya Cargo Handling Services Ltd (1991) (??) and Japheth Nkubitu & another v Regina Third.**

32. Counsel urged this court to dismiss the Respondent's suit in the lower court because:

> ***(1) the Plaintiff did not avail an eyewitness to give an account of what transpired;***
>
> ***(2) the Police abstract relied on does not apportion blame on the defendant and neither was the driver charged for any offence;***
>
> ***(3) The deceased was unaccompanied and unaided was attempting to cross a busy road without regard to her own safety. He relied or Cleophas Shimanyula v Mohamed Salat [2018] eKLR where the court dismissed the Plaintiff's suit for failure to prove on a balance of probabilities.***

33. On quantum, counsel for the appellant submitted that the trial court made an award that was inordinately high and against the principles established in **Stanley Moore V Geoffrey Mwenda (Nyeri C.A. 147/2002)** i.e. that comparable injuries should as far as possible be compensated by comparable award, keeping in mind the correct level of awards in similar cases.

34. It was submitted that as the deceased was only 10 years at the time of her demise, it was very uncertain as to when she would have completed school and later join the long road to tarmac in search of a job which is a hurdle hence the court should not have chosen a multiplicand as that is speculative.

35. He urged this court to consider the lump sum approach and award a lump sum figure since the minor's future was uncertain. Reliance was placed on **Ogutu V. Makaro 3Bs Trading Co** (No. citation given) where the above principle was plied and a lump sum figure of KShs.70,000/= awarded.

36. Further reliance was placed on **Oyugi Judith & Another v Fredrick Odhiambo Ongonga & 3 Others [2014] eKLR** where the court awarded a lump sum of KShs.120,000/= damages. The deceased was a Form 2 student.

37. The appellant's Counsel also relied on **Sheikh Mushtag v Nathan Mwangi Kamau Transported and Others (1985 – 1988) 1 KAR 217, KBL Ltd v Sawo [1991] KLR 408; H Young & Co. Ltd and Another v James Gichana Orangi Kisii HCCA 207/2019 and Charles Ouma Otieno and Another v Bernard Odhiambo Ogecha [2014] eKLR, and KPLC Ltd v Irene Chemutai [2015] eKLR** where the Court applied lump sum principles.

38. The appellant's Counsel urged this court to award KShs.400, 000/- less contribution where the deceased is largely to blame for the accident.

39. As the Respondent did not file any submissions, I now proceed to determine this appeal as canvassed by the appellant's Counsel and the evidence adduced on record.

40. Having considered the evidence adduced before the trial Court for the plaintiff/Respondent herein and the Defendant/Appellant herein, the grounds of appeal and submissions together with a plethora of authorities cited by the appellants' counsel, in my humble view, the following are the main issues for determination:

> ***(i) Whether the Plaintiff/Respondent proved liability against the defendants/appellants at 100% on a balance of probabilities or whether the trial court should have apportioned liability between the appellant and the deceased.***

41. The burden of proof always lie with he who alleges and therefore in this case, the burden of proof lay with the plaintiff to proof any of the acts of negligence attributed to the appellant/defendants. One can only prove that another is liable by adducing evidence to that effect or unless the defendant admits liability or acts of negligence. The fact of an accident having occurred is not in itself is not proof of liability.

42. In Civil cases, proof is that on a balance of probabilities or preponderance. In this case, the evidence on record which is undisputed as stated by DW1 is that the deceased was a child aged 10 years, was crossing the road at a shopping center where there were other public service vehicles. That she alighted from the vehicle ahead of him with other children and they ran across the road to go to the other side. That DW1 was driving towards Siaya. He had slowed down to 50 Kilometers per hour but hit the child.

43. This is the only evidence of an eye witness to the accident and who is the driver of the accident motor vehicle that led to the death of the minor child daughter to the plaintiff, since the plaintiff was not at the scene of accident.

44. The question is whether the appellant's driver, DW1 acted in a manner expected of a reasonable and prudent driver in his position and

circumstances.

45. **Lord Reid** in **Stephany V Gypsum Mines Ltd (2) (1953) AC 663 P.681** stated as follows, concerning determination of what caused an accident:

> ***‘ …….One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally.’***

46. The Plaintiff blamed the defendant for driving too fast on the road and without due care and attention, and failing to see the deceased and failing to swerve to avoid hitting her. The Defendant’s witness on the other hand blamed the child for crossing the road without due care and attention and blamed her guardian for letting the minor child wander along the road unaccompanied.

47. Whereas the Plaintiff was under a duty to ensure that the child was accompanied on a public road, the Appellant’s driver DW1testified that prior to the accident, he had seen the children, among them, the deceased, alight from a Matatu ahead of him and that another Matatu went and stopped behind that other Matatu then he saw the Children ran across the road while others stood then he swerved to avoid hitting the 3 but 2 stopped and one ran across the road from right to left and that she was hit by the vehicle’s right head lamp. The driver, DW1 then stopped some metres ahead.

48. Undoubtedly and admittedly, the defendant’s driver saw a motor vehicle ahead of him stop, drop school children who started running across the road. The children were within his view therefore he should have slowed down or even stopped to ensure that all the children had crossed the road before proceeding on. He did not. He knew that the place was a shopping centre and Matatus dropped and picked passengers from there hence, the possibility of a passenger crossing over was very high. Thus, the driver of a motor vehicle being driven on a public road has a higher duty of care to other road users. Had the appellant’s driver kept adequate look out and having noticed the presence of young children, he should not have driven on as if the road was clear of children. A person driving as motor vehicle is under as duty to care for other road users since a vehicle is a lethal weapon and due care is expected of him.

49. In this case, the appellant submitted that the trial court erred in finding the appellant 100% liable yet the Police had not concluded investigations into the accident and that neither had the appellant’s driver been charged with any traffic offence.

50. However, it is important to note that liability in negligence in civil cases cannot be equated to liability in traffic offences. Traffic offences are criminal offences and therefore the standard of proof required is higher-beyond reasonable doubt, unlike in Civil Cases where the standard of proof required is on a balance of probabilities.

51. Therefore, even where one is charged with a traffic offence, is tried and acquitted of the charges for insufficiency of evidence, they may still be culpable in negligence which is a tort.

52. Accordingly, I find that it is not a conviction or charging of a driver with a traffic offence that would determine the liability or culpability of such person in Civil Claims. This discussion then leads me to determine the next question which is (***ii) Whether the trial court should have apportioned liability between the defendants and the deceased minor***

53. Therefore on the liability or contributory negligence of the minor child or her guardian, as stated above, the evidence on record show that the child was aged 10 years and the appellant saw the children alight from a Matatu ahead of him and they started crossing the road. Other children stood while others ran across the road. It was at a shopping center where many people could be found and the 2 Matatus ahead of the defendant’s driver were busy dropping passengers. In my view, the appellant’s driver owed a greater duty of care not only to the children but also to all other road users at the material time and place. He claimed that he drove at 50 kilometers per hour at a busy area. In my humble view, assuming that was the speed that he drove at, he should have s topped or slowed down to give way to the children to cross the road before driving on as he admittedly saw the children ran across the road.

54. In **Andrews V. Freeborough (1966) 2 ALL E.R. 721** where a child aged 8 years stepped onto a kerb into the path of an oncoming car, **Wilmer, LJ** stated, and I concur:

> ***“I should have a good deal of persuasion before imputing contributing negligence to the child having regard to her tender age.”***
>
> **Davies LJ** in the same case stated:
>
> ***“Even if she did step off into the car it would not be right to count as negligence on her part such a momentary act of inattention or carelessness.”***

55. In **Gough Vs. Thorne (1966) 1 WLR 1389**, the Appellate court of England refused to apportion liability or negligence to a girl aged 13 ½ years old who was knocked down while crossing the road. **Lord Denning** stated:

> ***“A very young Child cannot be guilty of contributory negligence. An Order Child may be. But it depends on the circumstances. A Judge should only find a Child guilty of contributory negligence, if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. He or she is not to be found guilty unless he or she is blameworthy”***

56. According to **Lord Denning,** the test is whether the child is of such an age as to be expected to take precautions for his or her own safety and a finding of contributory negligence should only be made if blame could be attached to the child. For instance in **Attorney General v Vinwood [197] E.A.** an 8 ½ year boy was found to have minimally contributed to the accident owing to his age and degree of intelligence at that time because he crossed the road in between two parked cars and was hit by a vehicle which was being driven at 15 miles per hour. The Court of Appeal agreed with the trial judge for apportioning liability at 10% to 90% against the Defendant as the child was said to have clearly misjudged and miscalculated when he thought he could safely cross the road at the material time that he did. Thus, each case depends on its own circumstances. In **Stephany v Gypsum Mines Ltd (2) [supra] Lord Reid** stated that:

> ***"The court is concerned with the causative potency matters giving rise to the result of the accident, not just to the accident itself. The question as to what caused an accident must be determined as a properly instructed and reasonable jury would decide it, by applying common sense to the facts of each particular case."***

57. Turning to this appeal, and considering that the accident took place at a shopping center with public service vehicles popularly known as ***Matatus*** dropping passengers in broad daylight meaning there was human traffic in the area, a driver driving in such an environment would be expected to be more cautions and conscious of such human traffic being as closer to the road and therefore anticipate that at such a place and time, pedestrians are bound to crisscross the road. It was at 1p.m. and by his own testimony, the appellant's driver saw a vehicle dropping school children ahead of him.

58. In my humble view, a motorist who finds himself in such an environment bears the greater responsibility of driving, managing or controlling his vehicle in such a manner as to avoid any sort of collusion with any member of the public and in particular, a child of tender years. He must therefore not only drive at a manageable speed but he must also keep a proper lookout for any eventuality.

59. For the above reasons, I find and hold that the defendant/appellant's driver was wholly liable for the accident involving the minor child and therefore the trial magistrate did not err in so finding that the defendants were jointly and severally liable for the minor's fatal injuries at 100%. I uphold that finding and dismiss the ground of appeal seeking for apportionment of liability between the deceased minor and the Defendant's driver.

60. ***On the third question of (iii) whether the quantum of damages awarded to the plaintiff was erroneous or manifestly excessive:***

61. The Appellant also challenged the quantum of damages awarded to the Respondent's estate both under the law Reform Act and the Fatal Accidents Act. It was contended in submission that the award of KShs.700,000 for loss of dependency was unreasonable and a suggestion made that the trial court should have awarded a global figure since the deceased was a minor hence the guardian could not have depended on such a deceased child as there was no guarantee that the minor would become such a person as would be relied upon by the guardian, taking into account the vagaries of life.

62. It was submitted that there was no tangible proof that the Respondent deserved such an award. The impugned award was as follows: **Loss of dependency-700,000**

63. The appellant has no issue with awards made under the Loss of expectation of life being Kshs. 100,000 and for pain and suffering of Kshs 10,000.

64. It is not unusual that there is controversy over whether a court should award damages for loss of dependency where the fatal injuries were caused on a minor.

65. There are two schools of thought on this issue, with one school advocating for an award under the heading calculating loss of dependency in terms of the number of years and anticipated income for the deceased, whereas the other school advocates for a global award.

66. In **Beatrice Wangui Thaini v Hon Ezekiel Bargetuny and Another NRB HCC 1638 of 1998(UR) Ringera J** (as he then was) stated:

> ***"The principles applicable to an assessment of damages under the Fatal Accidents Act are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same, the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure, usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependents and the chances of life of the deceased and dependents. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in a lump sum and would if wisely invested yield returns of an income nature."***

67. In awarding loss of dependency, the trial magistrate stated:

> ***"The plaintiff has proposed Kshs 1,000,000/- while the defendant has proposed KShs.400,000. Since this was a child, I will award a global figure of KShs.700,000/"***

68. An award for loss of dependency is an award under the Fatal Accidents Act.

69. In **Ephantus Mwangi and Another V. Duncan Mwangi Wambugu [1982] 1 KAR 278, Hancox J.A**. (as he was then stated:

> ***"A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principle in reaching the findings***

he did."

70. In this case the trial Court awarded a global figure of KShs700, 000/= for loss of dependency, on account that the deceased was a child. In my view, that global award was not erroneous and neither was it excessive. I am fortified by the decision in **Emmanuel Wasike Wabukesa suing for BWW a Minor Deceased v Munena Ndiwa Durman C.A. Eldoret C.A. No. 10 of 2017 [2019] e KLR** where the High court set aside an award of loss of dependency which had been made by the trial court using a multiplier where the deceased was an infant and where an award of KShs.1, 260,000 was substituted with an a global award of KShs.200,000. The Court of Appeal cited several of the past decisions where it made awards on loss of dependency using global sums i.e. **Kenya Breweries Ltd v Saro [1991] e KLR** where the Court of Appeal awarded KShs.100,000 for loss of dependency to a parent of a child and stated that: ***"damages are clearly payable to a parent of a deceased child irrespective of the age of a child and irrespective of whether there is no evidence of pecuniary contribution."***

71. In **Kwamboka Grace v Mary Mose [2017] e KLR** the Court awarded a global sum of KShs.300, 000 for loss of dependency under the Fatal Accidents Act in respect of the death of a child aged 4 years.

72. The plaintiff pleaded that the deceased was aged 10 years, brilliant and supportive of her family. Her untimely death robbed the family of a great source of hope and health and the plaintiff claims both under the law Reform Act and Fatal Accidents Act.

73. In **Daniel Mwangi Kememi & 2 Others V JGM & Another [2016] e KLR the court (Gikonyo J awarded KShs.1,000,000/=** for loss of dependency where the deceased child was aged Nine (9) years, a bright student who was always in position one to three in their class and expressed her desire to be a doctor upon completion of her education but all her dreams were shattered by the untimely deaths.

74. In my humble view, therefore, an award of Kshs 700,000 was reasonable in the circumstances, I find no reason to upset it. I uphold it.

75. iv) **On whether the plaintiff was entitled to an award of special damages of KShs.492,700,** the law is clear that special damages must not only be specifically pleaded but that they must be strictly proved.

76. The Plaintiff pleaded for special damages as follows:

(a) Funeral expenses KShs. 461,050.00

(b) Processing grant KShs. 30,000.00

(c) Police Abstract KShs. 200.00

(d) Motor vehicle search KShs. 550.00

84 He also produced receipts at pages 31 – 42 of the record of Appeal showing the funeral expenses which included

i. KShs.**81,000 + 43,000** for catering;

ii. tents and claims, Public address system, lighting and general, coffin lowering gear, water tank, transport, all totaling **KShs.124,000;**

iii. Purchase of one cow for beef KShs. 46,000;

iv. Another Cow KShs. 38,000;

v. Another cow KShs. 40,000

Total 124,000;

vi. Other items including cooking oil,

Ngano, Milk, Sugar 56, 3000

Charcoal, firewood

Beef + Chicken = 150,000

Mineral Water KShs. 234,500

Ambulance Bama Nursing Home 4000

Coffin 42,000

Dressing the Corpse & her Parents

50,000

Post mortem KShs.4750

Funeral Announcement ***2,700 by Royal Media***

77. The above expenses alone total KShs.641,750 exclusive of processing a limited grant, police abstract and motor vehicle search fee.

78. In his testimony in the trial court, the plaintiff produced receipts dated 16.8.2016 for funeral expense all totaling **KShs.368,700.**

79. PW3 JAO a caterer testified and produced two receipts for **Kshs 81,000** and for **KShs43,000** totaling **KShs.124,000.**

80. The Plaintiff was therefore able to prove special damages in the sum of KShs. **492,700** again exclusive of expenses of grant, Police Abstract and search fee.

81. I have however carefully observed the receipts produced and I note that there is no way the Plaintiff could have spent KShs.150,000 on Beef and chicken, having bought three cows for beef worth Kshs 46,000, 38,000 and 40,000 each.

82. I therefore deduct KShs.100,000/= from the item on beef and chicken leaving KShs.50,000/=.

83. In total, I award the Plaintiff:

Special Damages of KShs.492, 700

Less for beef Kshs. 100,000

Less for grant as no receipt was produced Kshs. 30,000

Less for police abstract as no receipt was produced Kshs. 200

Less for M/V search as no receipt was produced Kshs. 550

Balance special damages awarded <u>is Kshs. 361,950</u>

Add general damages for loss of dependency Kshs 700,000

Add damages for loss of expectation of life Kshs 100,000

Add damages for pain, suffering and loss of amenities Kshs 10,000

Total damages awarded to the plaintiff/Respondent Kshs 1,171,950.

84. Interest to accrue on special damages from date of filing suit until payment in full. Interest on general damages to accrue from date of judgment in the lower court until payment in full.

85. On the whole, this appeal against liability is dismissed.

86. The appeal against an award of **Kshs 700,000 f**or loss of dependency is dismissed.

87. The appeal against quantum is allowed to the extent that the special damages in the sum of **KShs.492, 700/-** is set aside and substituted with an award of **KShs.361, 950.**

88. All the other awards that were not challenged in this appeal remain the same.

89. On costs of this appeal, I order that each party do bear their own costs of this appeal as the respondent did not make any submissions challenging the appeal.

Dated, Signed and Delivered in open court at Siaya this 25th day of November 2019

R.E. ABURILI

JUDGE

In the presence of:

N/A for the appellant

N/A for the Respondent

CA: Brenda and Modestar