Omar v Ngowa & another (Both suing as Administrators of the Estate of the Late Hamisi Ndoro Chaka) (Civil Appeal E225 of 2023) [2024] KEHC 8750 (KLR) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8750 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E225 OF 2023

DKN MAGARE, J

JULY 15, 2024

BETWEEN

REHEMA OMAR .... APPELLANT

AND

ALIMA MOSE NGOWA .... 1ST RESPONDENT

SAMUEL CHAKA NDORO .... 2ND RESPONDENT

BOTH SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE HAMISI NDORO CHAKA

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. J.M. Omido, Senior Principal Magistrate in Kwale Civil Suit No. 543 of 2016 delivered on 20/7/2023.

2. The Appeal is on the quantum of damages only. The Memorandum of Appeal dated 23/8/2023 raised grounds that the trial court erred in law and fact in the award on quantum of damages that were inordinately high and amounted to erroneous estimate of damages.

Pleadings

3. In the Plaint dated 1/11/2016, it was pleaded that on 3/3/2015, the deceased was riding motorcycle Registration No. KMDD 745Q along Mombasa Lungalunga highway at Kona Mpya when the defendant drove Motor vehicle Registration No. KAK 367E so negligently that it knocked down the deceased causing him fatal injuries.

4. The plaintiff prayed for judgement for Kshs. 40,801/= being special damages and also prayed for general damages.

5. The Appellant as Defendant in the lower court suit entered appearance. They filed defence denying the averments in the plaint.

6. PW1 relied on her witness statement and documents filed in court and testified that she was the widow of the deceased. It was her case that she had two children aged 2 and 4 years. The latter, Zawadi Ndoro was in school. In cross-examination, it was her case that she had produced the birth certificates for the children.

7. PW2 was the police officer, PC Edward Nzau who testified on labiality. Liability is not subject to this appeal and will not belabor the testimony of this witness. PW3 testified that the deceased was his cousin. He stated that he was the eye witness who witnessed the accident.

8. On the part of the Appellant, they did not call any witness. The learned magistrate also considered the case and rendered the Judgement on quantum as follows:

   Kshs. 80,000/- for pain and suffering

   Kshs. 100,000/- for loss of expectation of life

   Kshs. 2,347,428/- for loss of dependency.

   Special damages Kshs. 20,250/-

   Less 50% liability = net award Kshs. 1,173,714.

9. Aggrieved, the Appellant who was the defendant lodged this Appeal.

Submissions

10. The Appellants filed submissions dated 3rd April 2024. It was submitted that the lower court awarded general damages that were inordinately excessive and high. It was submitted that Kshs. 100,000/- for loss of expectation was excessive. It was submitted for Kshs. 30,000/-. They relied *inter alia* on *Rose Munyasa v Daphton Kirombo and Another* [2014] eKLR.

10. The Appellant did not submit on the manner in which the damages for pain and suffering as awarded was excessive. It was also submitted that the damages for loss of dependency were inordinately high and should be set aside.

10. The Respondent also filed submissions dated 15th February 2024. It was submitted that the learned magistrate correctly applied the principles applicable for the award of general damages and arrived at a correct decision in the impugned judgement.

10. They relied on *Anne Wanza & Another v Lucy Wambui Kiarie* (2021) eKLR and *Kenya Power & Lighting Co. Ltd v Livingstone Wechuli Mukhwana* (2019) eKLR to submit that the awards on pain and suffering and loss of expectation of life were not inordinately high and reflected a commensurate estimate of damages.

10. It was also submitted that the award of loss of dependency took into consideration the principles of the law and was not excessive. It was submitted that a multiplier of 40 years could be appropriate. In the absence of a cross appeal, I find no basis to analyze the projections in the submission by the Respondent. They relied on *Jacob Ayiga Maruja & Another v Simeone Obayo* [2005] eKLR to submit that a profession could not necessary be proved by certificates and documents were not the only requirement to prove income.

Analysis

10. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. The issue is whether the lower court erred in the award of general damages, damages for future medical expenses and special damages.

10. The Court is to bear in in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

10. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses…But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion…"

10. In *Nyambati Nyaswabu Erick v Toyota Kenya Ltd & 2 Others* [2019] eKLR, Justice D.S. Majanja held as doth:

> " General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same."

10. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

10. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No. 43 of 1983 [1984] KLR where the Court of Appealed held as follows:-

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of uniformity is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies…should be taken into consideration."

10. Being exercise of discretion the exercise should be done judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

10. The court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd vs Meru Express Servcie vs. A.M Lubia & Another* 1957 KLR 27 as follows: -

> " The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in

assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

10. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, that is *Nance vs British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga vs Manyoka* 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

10. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

10. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.

    c. The award is simply not justified from evidence.

10. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

10. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic [*1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

10. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

10. Therefore, the trial court and this court will construct documents in a similar manner as there are no witnesses required to know the content of a document. Therefore, where the findings of the trial Court are consistent with the evidence generally, this Court should not interfere with the same.

10. The court apportioned liability at 50:50. This was surprising as the Appellant did not testify in support of contributory negligence. Circumstances of the case are crucial in determining the natural cause of events. In the case of *Berkley Steward v Waiyaki* Vol 1 KAR 1118 [1986 – 1989] it was held:

> "Under Section 119 of the *Evidence Act*, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in relation to the facts of the particular case."

10. In the case of *Caparo Industries PLC v Dickman* {1990} 1 ALL ER 568 and *Chun Pui v Lee Chuen Tal* [1988] RTR 298 the determinants of negligence were stated as follows:

> "The requirements of the tort of negligence are, as Mr. Batts submitted, fourfold, that is, the existence of a duty of care, a breach of the duty, a causal connection between the breach and the damage and foreseeability of the particular type of damage caused ...
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> What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other. As regards the question of proof of a breach of the duty of care, there is equally no question that the onus of proof on a balance of probabilities, that the defendant has been careless falls upon the claimant throughout the case."

10. The burden of proving contributory negligence on the part of the plaintiff is on the defendant. in *Embu Road Services v Riimi* [1968] EA22 and 25 Mzuri Muhhidin V Nazzar Bin Seif [1961] EA 201, Menezes Stylianicers Ltd CA No.46 of 1962 the court stated as hereunder: -

> "Where the circumstances of the accident gave rise to the inference of negligence, the defendant, in order to escape liability, has to show that there was a probable cause of the accident, which does not create negligence or that the explanation for the accident was consistent only with absence of negligence. The essential point in this case, therefore is a question of fact, that is whether the explanation given by the Respondent shows that the probable cause of the accident was not due to his negligence or that it was consistent only with absence of negligence".

10. A finding on contributory negligence must be based on facts. The court will be slow to interfere with such finding unless it is based on no evidence or the court below was simply wrong. In Jones v Livox Quarries Ltd [1952] 2 QB608 the Court of Appeal stated that; -

> "An appellate court will generally only interfere with a finding of contributory negligence in the event of a substantial misjudgment of the factual basis of the apportionment by the trial court. In such circumstances the appellant Court may reassess the apportionment if it is satisfied that the assessment made by the Judge was plainly incorrect"

10. In the case of MacDrugall App v Central Railroad Co. Rbr 63 Cal 431 the court held that; -

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence"

10. In Grace v Australian Knitting Mills Ltd [1938] AC 85 the court stated:-

> " It is clear that the decision in Donoghurt case treats negligence, where there is a duty to take care, as a specific tort in itself and not simply as, an element in some more complex relationship or some specialized breach of duty, and still less as having any dependence on contract. All that is necessary as a step to establish the tort of action able negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however essential in English Law that the duty should be established: The mere fact that a man is injured by another's act gives in itself no cause of action. If the act is deliberate, the party injured will have to claim in Law even though the injury is interment, so long as the other party is merely exercising a legal right if the act involves lack of due care, again no case of actionable negligence, will arise witness the duty to careful exists.

10. In the case of Alfred Chivatsi Chai & another v Mercy Zawadi Nyambu [2019] eKLR, Nyakundi R J, stated as follows: -

> " By reason of the said duty of care, the same standard of care underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well that of others. When it comes to contributory negligence and res ipsa loquitor the test can be followed.
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> In the case of Benner v Chemical Construction Ltd [1971] 3 ALL ER 822 where the Court of Appeal said in a Judgment by David C. J –
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> "In my view it is not necessary for the doctrine to be pleaded, if the accident is proved to have happened in such a way that prima facie it could not have happened without negligence on the part of the defendants, that it is for the defendants to explain and show how the accident could have happened without negligence."
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> Further in Lodigelly Iron Coal Co. Ltd v Mcmillan [1934] A.C.
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> "The court held it in strict legal analyses negligence means more than heedless or careless conduct whether in omission or commission. It properly connotes the aspect concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."

10. In the case of *Obala v Okello & 2 others (Civil Appeal E022 of 2022*) [2022] KEHC 15762 (KLR) (22 November 2022) (Judgment), Justice Aburrili stated as follows: -

> " It is also worth noting that it was the appellant who introduced the aspect of a third party in the proceedings and therefore, under those circumstances, it was incumbent upon the appellant, if her case was that a third party was to blame for the accident, to enjoin the said third party as she had already alluded to in her own pleadings."
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> I find that the appellant was under an obligation, if she felt that someone else was responsible for or contributed to her predicament in the case, to enjoin that someone else as a third party,

following the procedure laid out in the law, so that she can claim from him any loss or award that she may suffer, should the case be determined in favour of the respondent. A court of law can only determine the case or issues between the parties who are before it and not those parties who should have been or are yet to appear or be made parties to proceedings before it.

10. In the case of Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR, it was held that: -

> " In law, a third party is enjoined in a suit at the instance of the defendant and through the set procedure under order 1 rule 15-22 of the Civil Procedure Rules. And, liability between the defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the defendant and has given directions under order 1 rule 22 of the Civil Procedure Rules. The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant and cannot be a bona fide issue triable between the defendant and the plaintiff. On the basis of those legal reasons, even if the third party had been joined, which he has not, it is not a triable issue at all for purposes of liability between the plaintiff and the defendant. Looking at the defence and the generalized denials, it is a mere sham. It is a perfect candidate for striking out."

10. The case of Stella Nasimiyu Wangila &another v Raphael Oduro Wanyama[2016] eKLR where the court held that: -

> " The owner and driver of the said pick-up registration No KAY 651A are not parties in this case. The defendant had an option and opportunity to enjoin that party to the suit – See order 1 rules 15 of the Civil Procedure Rules. He did not do so. A court cannot adjudicate on issues touching a party or pass judgment against a party who is not a party in a suit. Failure to join the party that the defendant blames for the accident as a third party or a necessary party and or seek indemnity from that party has a legal consequence."

10. The learned magistrate had no basis for holding the deceased liable. What the police had was a one sided story from the driver. Further the driver did not testify. However, I cannot disturb the award in absence of a cross appeal.

10. I proceed to determine whether the court erred in the award on quantum. The principles guiding this Court as the first Appellate Court have crystalized. This is in recognition that the award of damages is discretionary.

10. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v Shepherd [1964] AC.326 (supra) where it was stated that:

    ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.

    In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

10. With the above guide, if the award is inordinately high, then I will have to set it aside. If however, it is just high but not inordinately high, I will not do so. For the appellate court to interfere with the award,

it is not enough to show that the award is high or had I handled the case in the subordinate court I would have awarded a different figure.

10. The lower court in this case awarded Kshs. 80,000/- in General Damages for pain and suffering. The Appellant did not submit on the manner in which this award was excessive. Justice Majanja in Sukari Industries Limited v Clyde Machimbo Juma; Homa Bay HCCA No. 68 of 2015 [2016] eKLR stated that:

> “ I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased’s estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Kshs 10,000 to Kshs 100,000 over the last 20 years.”

10. The deceased died instantly. The trial court awarded a modest figure of Ksh.80,000/-. There is no basis to interfere with the discretion of the trial court for pain and suffering. In Retco East Africa Limited v Josephine Kwamboka Nyachaki & another [2021] eKLR, the court awarded 100,000/- for a deceased who died 30 minutes later. It stated as doth: -

> “ The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -
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> “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

10. In the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR where Court opined that in assessing damages for personal injuries, the general method of approach is that comparable injuries should as far as possible be compensated by comparable awards, keeping in mind the correct level of awards in similar cases. See also (Arrow Car Limited v Elijah Shamalla Bimomo & 2 Others [2004] eKLR).

10. On damages for loss of expectation of life, the court awarded Kshs. 100,000/-. The Appellant submitted that Kshs. 30,000/- would be adequate compensation. The deceased was only 24 years. He had a whole life ahead of him. An award given was low but not inordinately low. It was definitely not high.

10. In the case of Patrick Kariuki Muiruri & 3 others v Attorney General [2019] eKLR the Court of Appeal upheld an award of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/=) for loss of expectation of life for the deceased who was aged twenty-nine (29) years at the time of death. In this case, the Deceased was aged 24 years and there was no evidence that he was of ill health. The award of Kshs. 100,000/- for loss of expectation of life is not inordinately high as to amount to erroneous estimate of damages. I am unable to interfere with the discretion of learned magistrate on the award under this head.

10. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute with its own simply because if it had been the trial court it would have exercised the discretion differently.

10. On damages for loss of dependency, the Appellants submitted that the lower court failed to exercise its discretion fairly by taking into account irrelevant factors and awarding quantum of Kshs. 2,347,428 for loss of dependency.

10. The deceased was 24 years. He would have lived for another 40-50 years being useful to the widow. The youngest child was 4 months old. The court was correct in applying a multiplier of 30 years. The widow will be only 54 years in 30 years. She could still be a dependent on the deceased. The youngest child had 25 years or more to be dependent on the father. All have lost these. A multiplier of 30 years is appropriate in this case.

10. Regarding the dependency ratio of 2/3 is proper for a married man. It is proper and allowable. Conventionally courts have taken married persons more so with children to spend more on their families than themselves and apportioned a dependency ratio of 2/3. On the other had they have taken unmarried people to spend more on themselves more than their dependents more so parents hence have apportioned a dependency ratio of 1/3 which has over time been enhanced to 1/2. In this case it was submitted that as the deceased was married with 3 children he spent more on his family than self hence a dependency ratio of 2/3 would suffice.

10. The deceased was said to have been a boda boda rider earning a living through boda boda services. This was uncontroverted. The court applied a minimum wage of Ksh.9,780/=. There was evidence of higher income. However the Respondent did not dispute. The amount of Ksh.9,780/= is for an unskilled worker. This was a boda boda rider, a machine. The third row in the minimum wage is far more appropriate.

11. Lastly, on special damages, the Appellant did not plead or submit the manner in which the court erred in the award of special damages. On the other hand, I have perused the proceedings and evidence and note that the learned magistrate awarded Ksh. 20,250/ which the Respondent proved even though the Respondent had prayed for Kshs.10, 150/=. I have also noted that though pleaded, the court did not award funeral expenses. The court cannot treat funeral expenses as special damages. Further, the court erroneously subjected special damages to contribution. The funeral expenses and special damages are not subject to contribution.

10. In the circumstances, I set aside the award of 20,250/= and substitute the same with a sum of 10,150/ = being fess for Ad litem and for the death certificate.

10. Given that the court did not award funeral expenses, the appellate court is entitled to correct the anomaly to avoid this being a precedent for reversing the agreed position on funeral expenses. In Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR, the Court of Appeal stated as follows: -

> " We do not think that it is a breach of the general rule that special damages must be pleaded and proved, to hold that families who expend money to bury or otherwise inter their dead relatives should be compensated. In fact, we do take judicial notice that it would be wrong and unfair to expect bereaved families to be concerned with issues of record keeping when the primary concern to a bereaved family is that a close relative has died and the body needs

to be interred according to the custom of the particular community involved. The learned judge took what was a practical and pragmatic approach. Although a sum of Kshs. 400,000/ = was pleaded in the plaint and witnesses who were the relatives of the deceased – testified that they spent much more that this in preparing for and conducting a cremation the learned Judge awarded a sum of Kshs. 150,000= which sum he saw as a reasonable and prudent amount to compensate the family for funeral expenses. We are of the respectful opinion that the judge was entitled to award that sum without in any way breaching the general rule we have referred to on the issue of special damages."

10. The court did not award funeral expenses and awarded more special damages than had been pleaded. The award of special damages has been corrected to 10,150/=. This is on the basis of the law on special damages as posited in the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, where Justice Luka Kimaru, as then he was, stated as doth; -

> "In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn v Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

10. In the case of David Bagine vs Martin Bundi [1997] eKLR, the court of Appeal stated as follows: -

> "It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v City Council of Nairobi 1982-88] IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter v Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

10. Regarding funeral expenses, a sum of 30,650/= was pleaded. The same are reasonable. To demand receipts for funeral expenses is to live in utopia. The court needs only to estimate a proper award. In this case 30,650/= is reasonable. I correct the judgment by awarding the sum for which the court did not decide upon.

10. Therefore, except for the award of funeral expenses and setting aside on part of special damages, the appeal lacks merit and is accordingly dismissed.

10. The court is entitled to make an order for costs and indicate the costs. This is on the basis of Section 27 of the *Civil Procedure Act*, which, provides as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion

of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

10. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

Determination

10. In the circumstances, the court makes the following orders:

   a. Except on funeral and special damages the Appeal lacks merit and is accordingly dismissed with costs of 125,000/=

   b. The award of Kshs. 20,550/= as special damages is set aside and in lieu thereof substituted with a sum of Kshs. 10,150/=

   c. The court awards a sum of Kshs. 30,650/= as funeral expenses.

   d. Special damages and funeral expenses shall attract interest from the date of filing suit in the lower court, that is 2/11/2016 and are not subject to contribution.

   e. The rest shall attract interest from the date of judgment in the lower court, that is 20/7/2023.

   f. This works out as follows: -

      i. pain and suffering Kshs. 80,000 /=

      ii. loss of expectation of life Kshs. 100,000/=

      iii. loss of dependency Kshs. 2,347,428/=

Kshs. 2,527,428/=

iv. Less 50% liability= (Kshs. 1,263714)

Subtotal Kshs. 1,263,714/=

v. add Special damages Kshs. 10,150/-

vi. Funeral expenses Kshs. 30,650/-

Total Kshs. 1,304,514/=

g. The respondent shall have costs in the court below.

h. 30 days stay of execution.

i. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 15TH DAY OF JULY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Njiru for the Appellant

Otuya for the Respondent

Court Assistant – Jedidah