Jang Xi Youse Construction Group Company Limited & another v Ahmed & another (Suing in their own behalf and their Capacity as Administrators of the Estate of the Late Omar Kulala Swaleh) (Civil Appeal 234 of 2021) [2023] KEHC 1813 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1813 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 234 OF 2021

F WANGARI, J

MARCH 10, 2023

BETWEEN

JANG XI YOUSE CONSTRUCTION GROUP COMPANY LIMITED .... 1ST APPELLANT

ISMAEL KIPONDA .... 2ND APPELLANT

AND

SWALEHE KULALA AHMED .... 1ST RESPONDENT

KULALA SWALEHE NGOVI .... 2ND RESPONDENT

SUING IN THEIR OWN BEHALF AND THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE OF THE LATE OMAR KULALA SWALEH

(Being an appeal from the Judgement of the Principal Magistrate Hon. P. Wambugu in Kwale Civil Suit No. 191 of 2019 delivered at Kwale on 27th October, 2021)

JUDGMENT

1. This is an appeal against the judgement delivered by Honourable P. Wambugu, Principal Magistrate on 27th October, 2021. The Appellants being dissatisfied with the said judgement preferred this appeal.

2. The Appellant preferred fourteen (14) grounds of appeal in urging this court to set aside the judgement delivered on 27th October, 2021 among them that: -

   i. That the Learned Principal Magistrate erred in law and in fact in holding that the Defendants/Appellants were 100% to blame for the accident on 7th January, 2019 contrary to the evidence before him.

ii. That the Learned Principal Magistrate erred in failing to give any or any adequate reason or reasons to hold the Defendants/Appellants wholly to blame for the accident.

iii. That the Learned Principal Magistrate erred in awarding a sum of Kshs. 1,500,000/= to the Plaintiffs/Respondents as damages for lost years yet dependency was never proved by the evidence tendered before him.

iv. That the Learned Principal Magistrate erred in adopting a global sum of Kshs. 1,500,000/= in favour of the Plaintiffs/Respondents as damages for lost years which sum was inordinately high in order to amount to an erroneous estimate of the damages payable to the Plaintiffs/ Respondents in respect thereof.

3. Directions were taken and the appeal was disposed of by way of written submissions where all parties duly complied and relied on various decisions in support of their rival positions.

4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of Selle & Ano. vs. Associated Motor Boat Co. Ltd (1968) EA 123). This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348).

5. I have carefully perused and understood the contents of the pleadings, proceedings, judgement, decree, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the judgement ought to stand or otherwise, I will carefully revisit the record.

6. The Respondents vide a plaint dated 10th April, 2019 and filed on 17th April, 2019, being the administrators and personal representatives of the deceased estate brought the suit on their own behalf and on behalf of the estate under the *Fatal Accidents Act*, Chapter 22, Laws of Kenya and *Law Reform Act*, Chapter 26 Laws of Kenya. They sought for general and special damages from the Appellants for an accident that allegedly occurred on 7th January, 2019 along Kinango – Samburu Road at Vigurungani Area, occasioning the deceased fatal injuries causing the estate to suffer substantial loss and damage. The suit was defended and the same was fully heard.

7. Through a judgement delivered on 27th October, 2021, the Lower Court found in favour of the Respondents. The Appellants were found to be 100% liable for the accident. The Respondents were awarded damages under various heads as follows: -

a. Lost years - Kshs. 1,500,000

b. Pain and suffering - Kshs. 100,000/=

c. Loss of expectation of life - Kshs. 150,000/=

d. Special damages - Kshs. 249,200/=

8. The Respondents were equally awarded costs of the suit. The Appellants being aggrieved by the said judgement have preferred this appeal. The appeal is both on liability and quantum. The Appellants contend that the Trial Magistrate erred in law and fact in holding that the Appellants were 100% to blame for the accident.

9. In dealing with the issue of liability, I am guided by the principle that as this is a first appeal, it is my duty to reconsider the evidence, evaluate it and reach my conclusion bearing in mind that it is the trial court

that saw and heard the witnesses testify and was able to assess their demeanor (see Selle v Associated Motor Boat Co. (supra).

10. The evidence of the parties was straight forward. Corporal Obare (PW1) stated that he was from Vigurungani Police Station and he had received summons to produce a file. He stated that the file involved an accident that occurred on 7th January, 2019 at Makuluni area, Vigurungani, Samburu area. It involved a motor cyclist called Omar Swalehe and a lorry registration number KCK 482Y belonging to a road construction company called Jang Xu. The driver was called Ishmael Kiponda and the deceased was Omar Swaleh. He produced the police abstract and the post mortem report.

11. On cross examination, he stated that he never visited the scene. The investigation officer was Sergeant Julius Odera. He confirmed that the accident happened at around 7:15 in the evening and he was not sure whether there were any road signs on the said road.

12. Moses Malema (PW2) adopted his witness statement. He stated that he was at Vigurungani driving motor cycle KMEQ 057B. He saw a lorry KCK 482Y following him. A motor cycle KMEE 926U was coming towards them. After passing the motor cycle, he heard an impact and found out that the lorry had knocked the deceased. The lorry had dim lighting and the motor cycle could not see him. He stated that the accident occurred on the right lane. Since the lorry was following him, he saw the accident with his side mirror.

13. He stated that the lorry driver veered off the road, lost direction and control of the vehicle and fled. He followed the truck to the yard. The deceased was on his lane. On cross examination, he stated that the accident happened at 7:30 p.m. He was about 10 meters away. He heard the impact and turned. He did not see the accident. He only heard and saw using his side mirror.

14. Swalehe Kulala Ahmed (PW3) adopted his witness statement. He stated that the deceased was 27 years during his death which resulted from a road accident. A search was conducted for the lorry and it belonged to the 1st Appellant. The deceased was unmarried. He was with his parents, four brothers and two sisters. They incurred a cost of Kshs. 279,000/=. He stated that the deceased was a mason and a bodaboda rider earning Kshs. 800/= per day. He sought for compensation. On cross examination, he confirmed having not witnessed the accident. Equally, he had no proof of deceased's income. On re-examination, the witness confirmed that in bodaboda business, books are not kept. For the value of Kshs. 105,000/= claimed, the witness stated that it was for the value of the motor cycle.

15. I note that there was a further amendment of the plaint at paragraph 13F of the amended plaint which was allowed under section 100 of the *Civil Procedure Act*. That marked the close of the Respondent's case. By consent of the parties, the witness statement of Douglas Odero was adopted as defence evidence in chief together with the defence exhibits. That marked the close of defence case.

16. The Trial Court considered the evidence and concluded that the Appellants were 100% to blame. I have reviewed the evidence on my own and it is not in dispute that an accident occurred on 7th January, 2019 involving motor vehicle registration number KCK 482Y and motor cycle registration number KMEE 926U, and as a result of this accident, the deceased who was riding motor cycle registration number KMEE 926U sustained fatal injuries. It is equally not in dispute that the accident happened in the evening at around 7:30 p.m.

17. The point of departure was who was to blame for the accident. The Respondents contended that the Appellants were to blame. The Trial Court concluded that the police and the eye witness testified and they blamed the 2nd Appellant who was the 1st Appellant's driver. Thus since there was no contrary evidence adduced by the Appellants, the Trial Court concluded that the Appellants were to blame.

18. As correctly pointed out by the Appellants, the evidence as to who was to blame was led by PW2 who was presented as an eye witness. I say so because both PW1 and PW3 confirmed that they never witnessed the accident. As for PW1, his testimony was limited to production of police abstract and the post mortem form. As for PW3, his testimony was limited to that of an administrator and a dependant of the deceased's estate. Therefore, to unravel who was to blame for the accident, a bird's eye view of PW2's testimony has to be considered.

19. Did PW2 witness the accident? It is not in doubt that motor vehicle registration number KCK 428Y was driving in the same direction as PW2. Similarly, PW2 was ahead of motor vehicle registration number KCK 428Y. The deceased was riding his motor cycle in the opposite direction. PW2's evidence in chief was that he saw the accident with his side mirror.

20. On cross examination, he stated that he did not see the accident only to change that version on re-examination. As per his testimony, motor vehicle registration number KCK 428Y had dimmed its lights and the accident happened at 7:30 p.m. With all these inhibiting factors, it was imperative for the Respondents to lead more evidence than merely that of PW2. This is because according to me, PW2 cannot be conclusively classified as an eye witness for reasons that all he heard was an impact. He confirmed on cross examination that he did not see the accident.

21. PW1 on his part confirmed that the police file was pending under investigation. He equally stated that he never visited the scene of the accident since the investigating officer was one Sergeant Odera Julius. Police abstract showed that the accident was by collusion of two motor vehicles. No sketch map was produced to show for instance, the point of impact and the final resting place of the vehicle(s). The failure of the police to determine from the scene of the accident which motor vehicle was to be blamed greatly compromised a conclusive finding of who was to blame for the accident.

22. I note that the investigating officer was never called to testify in this case. The only reason offered was that he was on transfer. I note that the police abstract was produced by consent of the parties. However, were the requirements of section 35 of the *Evidence Act* complied with? Section 35 (1) of the *Evidence Act* sets out the conditions to be satisfied and I note that the said section is conjunctive and not disjunctive. Therefore, both conditions set out under section 35 (1) have to be complied with. It is not in doubt that the maker of the police abstract was never called and this really diminished a conclusive finding as to who was to blame.

23. I note from the police abstract that the investigating officer had made an opinion to have one Ismael Kiponda charged with the offence of causing death by dangerous driving. However, from PW1's testimony, the said Ismael Kiponda was still at large and thus he was never charged. Even if he had been charged and convicted, I take note of section 47A of the *Evidence Act*. In Robinson v Oluoch [1971] E.A, the Court of Appeal while commenting on section 47A of the *Evidence Act* had this to say: -

> " ...The Respondent to this appeal was convicted by a competent court of careless driving in connection with the accident, the subject of this suit. Careless driving necessarily connotes some degree of negligence, and we think, without deciding the point, that in those circumstances it may not be open to the respondent to deny that his driving, in relation to the accident, was negligent. But that is a very different matter from saying, as Mr. Sharma would have us say, that a conviction for an offence involving negligent driving is conclusive evidence that the convicted person was the only person whose negligence caused the accident, and that he is precluded from alleging contributory negligence on the part of another person in subsequent civil proceedings. That is not what Section 47A states. We are satisfied that it is quite proper for a person who has been convicted of an offence involving

negligence, in relation to a particular accident, to plead in subsequent civil proceedings arising out of the same accident that the plaintiff, or any other person, was also guilty of negligence which caused or contributed to the accident…" (emphasis added)

24. The Respondents in their plaint indicated that they would be relying on the doctrine of res ipsa loquitor. This was in order to shift the burden to the Appellants. To my understanding, res ipsa loquitor would apply where the subject matter is entirely under the control of one party and something happens while under the control of that party, which would not in the ordinary course of things happen without negligence. (See Bikwatirizo v Railway Corporation [1971] E.A 82). To successfully apply this doctrine, there must be prove of facts that are consistent with negligence on the part of the defendant as against any other cause.

25. This is a case of two motor vehicles colliding. What facts were proved by the Respondents to presume negligence on the part of the Appellants as against the other vehicle? Can I safely presume that the mere fact that the two vehicles being KCK 482Y and KMEE 926U collided, negligence was on the part of the Appellants and not the other? The Respondents must prove facts which give rise to what may be called the res ipsa loquitor situation. There cannot simply be an assumption in this case. If the deceased was in a self-involving accident as against a collision, then perhaps, such a presumption can be made against the owner of the car.

26. Though the Appellants did not lead any evidence on liability, that fact of itself does not absolve the Respondents from discharging their burden as required. In Charterhouse Bank Ltd (Under Statutory Management) v Frank N. Kamau [2016] eKLR, the Court of Appeal addressed the issue of failure to call evidence by the defence in the following rendition: -

> " …We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified…"

27. It was the Respondents duty to prove on a balance of probabilities that the Appellants were entirely to blame. I have stated elsewhere that since the accident was a collision of two (2) motor vehicles, and in the absence of a conclusive eye witness, liability could not be presumed at 100% merely because the Appellants led no evidence. I therefore find and hold that the trial magistrate erred in finding the Appellants 100% liability. I accordingly apportion liability at 50% each.

28. I now turn to the quantum of damages. It is settled that in awarding damages, the trial court is exercising discretion. The law is quite clear as to when an appellate court can interfere with the trial court's exercise of discretion in arriving at quantum of damages. The Court of Appeal in Butt V- Khan (1982 - 88) KAR 1 set the parameters as follows: -

> " …An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge

proceeded on wrong principles, or that he misapprehended the evidence in some material respect and arrived at a figure which was either inordinately high or low…”

29. Before the Trial Court, I note that the Respondents abandoned the claim for loss of dependency to avoid the question of double compensation and I have no reason to say more on this aspect. This issue has been settled in various decisions of superior courts among them Kemfro v A.M. Lubia & Another [1982 – 1988] KAR 727. Submitting under the head of lost years, the Respondents had submitted that the deceased was a bodaboda rider and was also doing masonry. His daily income ranged from Kshs. 800/= to Kshs. 1,000/=. Since there was no documentary evidence, the Respondents submitted that the court should consider applying minimum wage in determining the issue of income.

30. The case of Kenya Ports Authority v Beryl Mulowa Were (Suing as the Administrator of the Estate of the Late John Lubalo) among other provisions of the law were cited in support of the proposition. The Respondents referring to Legal Notice No. 2 of 18th December, 2018 proposed that the minimum wage for a general worker in Kwale inclusive of house allowance would be Kshs. 8,327.0925/= per month.

31. On multiplier, it was submitted that the deceased was 27 years at the time of death. Citing several authorities which I have considered, the Respondents submitted that a multiplier of 33 years be adopted. On dependency ratio, the Respondents submitted that the deceased was the eldest in a family of seven (7) children and a father. They urged the court to hold that the deceased could only spend a third of the income on himself and the remaining two thirds on the administrator and beneficiaries of the estate.

32. Thus, they submitted that under the head of lost years, they prayed for Kshs. 2,198,352.42/=. In the alternative, they sought for a global sum of Kshs. 2,500,000/= For special damages and funeral expenses, the Respondents stated that they had pleaded with particularity special damages of Kshs. 249,200/= and proved it strictly thus urged the court to award this amount.

33. On the head of loss of expectation of life, the Respondents cited several authorities which I have equally considered and placing reliance on passage of time and inflation, they sought for Kshs. 200,000/=.

34. On pain and suffering, the Respondents cited three (3) authorities where the awards ranged between Kshs. 100,000/= and Kshs. 150,000/=. Taking into account inflation and passage of time, they sought for Kshs. 200,000/=. They concluded by praying for costs and interests.

35. As for the Appellants, under the head of lost years, they submitted that lost years do not necessarily have to be calculated on the basis of a multiplier and multiplicand basis but that the global figure is also applicable. On that note, they submitted that a global figure of Kshs. 400,000/= would be sufficient. In the alternative, the Appellants submitted that were the Trial Court to adopt the multiplier approach, they proposed a figure of Kshs. 7,240.95/= as the minimum wage. A multiplier of 15 years considering his nature of work as a bodaboda rider and mason. Since there was no proof that any of his siblings or father were dependent on him, a dependency ratio of 1/3 was proposed. Applying the above, a sum of Kshs. 434,357= was proposed under the head of lost years.

36. On loss of expectation of life, the Appellants proposed a sum of Kshs. 50,000/= citing the case of Benedeta Wanjiku Kimani v Changwon Cheboi & Another [2013] eKLR.

37. Under the head of pain and suffering, the Appellants submitted that Kshs. 50,000/= would be sufficient as the deceased died on the spot. Reliance was placed in the case of Alice O. Alukwe v Akamba Public Road Services Ltd & 3 Others [2013] eKLR.

38. On special damages, the Appellants proposed a sum of Kshs. 135,200/= being the legal fees for letters of administration, transport, hearse, mortuary expenses and funeral expenses since the requisite receipts

were produced. However, the sum of Kshs. 114,500/= being the loss of motor cycle and insurance to the said motor cycle was vehemently disputed. According to the Appellants, this amount could not be awarded in the present suit as it was a material damage claim which ought to be filed separately.

39. Earlier in this judgement, I set out what the Trial Court awarded under each of the heads. On appeal, both parties filed their submissions as directed by the court. I have considered the said submissions and the parties appear to have adopted their respective rival positions before the lower court.

40. I shall thus endeavour to consider whether the awards made by the Trial Court ought to stand or otherwise. Notably, assessment of damages are matters that are within the discretion of the trial court and the appellate court ought to respect that discretion if properly exercised.

Pain and Suffering

41. The Trial Court made an award of Kshs. 100,000/= under this head. In West Kenya Sugar Co. Limited v Philip Sumba Julaya (Suing as the Administrator and personal representative of the estate of James Julaya Sumba) [2019] eKLR it was observed that-

> “ The principle is that damages for pain and suffering are recoverable if the deceased suffered pain and suffering as a result of his injuries in the period before his death.

42. It has been held that very nominal damages will be awarded on this head if death followed immediately after the accident. In the earlier decided case of Alice O. Alukwe v Akamba Public Road Services Ltd & 3 others [2013] eKLR, it was held that damages under this head are awarded on the basis of the time the deceased suffered pain before death. In the present case, I note that parties are agreed that the deceased died on the spot. In Alice O. Alukwe (supra), an award of Kshs. 50,000/= was made for a deceased who died on the spot. In view of the above decisions and bearing in mind that this Court has been invited to exercise its discretion when considering the award made by the Trial Court, I find that the award made in the sum of Kshs. 100,000/= for pain and suffering was not excessive. I therefore uphold the said award.

Loss of Expectation of Life

43. The Trial Court awarded a sum of Kshs. 150,000/= under this head. Looking at awards made under this realm, the court in the case of Rose v Ford [1937] AC 826 held that damages for loss of expectation of life can be recovered on behalf of a deceased’s estate. In Benham v Gambling [1941] AC 157 it was held that-

> “ In assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life on earth would bring him happiness, the test is not subjective and the right sum to award depends on an objective assessment of what kind of future on earth the victim might have enjoyed, whether he had justly estimated that future or not. Of course no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects.” (emphasis added).

44. In the present case, the deceased is said to have been 27 years. In Hyder Nthenya Musili & Another v China Wu Yi Limited & Another [2017] eKLR, the court noted as follows: -

> “ ...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 Kshs. 100,000/= while for pain and

suffering, the awards range from Kshs. 10,000/= to Kshs. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death…" (emphasis added)

45. The Trial Court having made an award of Kshs. 100,000/= under the head of pain and suffering, I see no reason for making an award of Kshs. 150,000/= under the head of pain and suffering. I find that the sum of Kshs. 150,000/= awarded by the trial court was inordinately high. I am of the view that an award of Kshs. 100,000/= is reasonable for loss of expectation of life.

Lost Years/Loss of Dependency

46. Loss of dependency is a question of fact. The criteria to be used in determining an award for loss of dependency for a deceased who left behind dependants is the number of dependants, the age of the dependants and the level of dependency. In my view the award ought to be higher where the dependants are young. The age at which the deceased died is also a relevant factor. In Abdalla Rubeya Hemed v Kayuma Mvurya & Another [2017] eKLR the Court held as follows: -

> " Dependency is always a matter of fact to be proved by evidence. It is not that the deceased earned a sum and therefore must have devoted a portion or part of it to his dependence. Rather the claimant must give some evidence to show that he was dependent upon the deceased and to what extent."

47. PW3 testified that, "He was not yet married. He had his parents, four brothers and two sisters…I used to work at Voi" (page 253 of the Record of Appeal). I also note that from the chief's letter dated 28th January, 2019, all the listed dependants other than one are adults who are listed as siblings. Based on decided cases, it is incumbent that a party gives evidence to show that one was dependent upon the deceased and to what extent. In the present case, I find that PW3 did not show to what extent he or the other named siblings were dependent on the deceased.

48. Be that as it may, there are two settled methods in arriving at this head. The first one is the multiplier approach while the other is a global sum approach. Where there is proof of income of the deceased's earnings, the multiplier approach is normally resorted to but where there is no proof of income just as in the present case, a global sum approach would be more useful. In Mwanzia v Ngalali Mutua & Kenya Bus Service (Msa) Ltd & Another, Ringera, J (as he then was) while discussing the two approaches noted as follows: -

> " The multiplier approach is just a method of assessing damages. It is not a principle of law or a dogma. It can, and must be abandoned where the facts do not facilitate its application. It is plain that it is a useful and practical method where factors such as the age of the deceased, the amount of annual or monthly dependency, and the expected length of the dependency are known or are knowable without undue speculation. Where that is not possible, to insist on the multiplier approach would be to sacrifice justice on the altar of methodology, something a Court of justice should never do."

49. I note that both parties before the Trial Court had all proposed either method based on minimum wage or the global sum. However, the Appellant appears to have jumped ship and instead opted for the multiplier approach. Considering that there was no proof of the deceased's income, I cannot fault the Trial Magistrate for opting for global sum approach. The only question would be, was the sum of Kshs. 1,500,000/= inordinately high to represent an erroneous estimate of the damage?

50. To answer this question, a consideration of a few decided would suffice. In Ainu Shamsi Hauliers Limited v Moses Sakwa & another (suing as the Administrators of the Estate of the Ben Siguda

Okach (Deceased) [2021] eKLR, a 40-year-old TukTuk deceased driver married with two children was awarded a global sum of Kshs. 2,000,000/=. In China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR, a 79 – year – old deceased's estate was awarded a global sum of Kshs. 700,000/= on the head of loss of dependency. It is trite that no two cases are the same and that each case must be decided on its own merits. I therefore find that the Trial Court's award of Kshs. 1,500,000/= for lost years/loss of dependency was not inordinately high hence I have no reason to disturb the award.

Special Damages

51. The Court of Appeal in Hahn v Singh [1985] eKLR held as follows in relation to special damages:

> " ...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..."

52. The Respondents had claimed a sum of Kshs. 249,200/= and the same was awarded by the Trial Court. I note that the Appellants had no objection with an award of Kshs. 135,200/=. Their only objection was on the sum of Kshs. 114,000/= being the value of the motor cycle and the insurance. The Appellants contention was that the said sum was not specifically pleaded and proved. I have considered the record and I note that there was an amended plaint dated 4th March, 2020 and filed on 29th July, 2020. At paragraph 13 (f) and (g) of the said amended plaint, I note that special damages of 114,500/ = for loss of use for motor cycle and insurance were pleaded. I equally note that on 20th January, 2021, leave to amend paragraph 13 (f) of the amended plaint was allowed. To this end, I am satisfied that the Trial Court did not err in awarding the special damages of Kshs. 249,200/= and I thus uphold the same. In the result, the appeal partially succeeds and in my view, on the questions of Law and fact which were brought to the attention of the court, at the conclusion of it all, these shall be orders of the court:

1. The appeal on liability as per the Judgment of the trial court of 100% in favor of the Respondents is hereby set aside and in its place, liability is entered at the ratio of 50:50.
2. Damages under the *Law Reform Act*
    i. Pain and suffering Kshs. 100,000/=
    ii. Loss of expectation of life Kshs. 100,000/=
    iii. Special damages Kshs. 249,200/=
3. Damages under the Fatal Accident Act
    i. Loss of dependency Kshs. 1,500,000/=
4. Sub-total Kshs. 1,949,200
5. Less 50% liability Kshs. 974,200/=

    Net Kshs. 974,200/=
6. Each party to bear their costs of this appeal.
7. Interest at court rates on quantum on general damages from the date of the Judgment by the trial court and on special damages from the date of filing suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MARCH, 2023.

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F. WANGARI

JUDGE

In the presence of;

Adede Advocate for the Appellant

Jengo Advocate for the Respondent

Guyo, Court Assistant