



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT VOI

CIVIL APPEAL NO 7 OF 2019

COAST BUS (MSA) LTD.....APPELLANT

VERSUS

FATIMABHAI OSMAN SULEIMAN

TAZMIN JAFFERALI JUMA (suing at the Legal Representatives

of the estate of ASLAM JEFERALI JUMA.....RESPONDENTS

J U D G M E N T

1. The Court has before it an Appeal from the Judgment by the Learned Senior Principal Magistrate Hon E. G. Nderitu in **Civil Suit No. 117 of 2014** delivered on 28th January 2019 in the Senior Principal Magistrates Court in Voi.
2. This Appeal relates only to the issue of quantum. During the course of the trial the Parties filed a consent on the question of liability where the Defendant agreed that it was liable and would bear liability to a ratio of 30:70% with the Defendant being liable for 70%.
3. The Appellant (formerly Defendant) filed its Memorandum of Appeal dated 5th February 2019 on the next day. The Record of Appeal was filed on 9th April 2019. The Appellant sets out its grounds thus:

“MEMORANDUM OF APPEAL

The Appellant above named humbly appeal to the High Court at Voi from the judgment of the learned Senior Principal Magistrate Hon. Nderitu in Voi Civil Suit No 117 of 2014 against his assessment of quantum of damages and sets forth the following grounds of objection to the Decree appealed from namely:-

1. *That the Learned Senior Principal Magistrate erred in law in awarding to the Plaintiff the sum of Shs.4,435,600.00 for loss of dependency under the Fatal Accident Act when there was plausible and/or credible evidence tendered before him that the only dependant of the deceased who was a bachelor was his elderly and sick mother the first plaintiff Fatimabai Osman Suleiman.*
2. *That the Learned Senior Principal Magistrate having held that only dependant of the deceased was his mother namely Fatimabai Osman Suleiman who was elderly and sick at the time when she gave evidence erred in adopting a multiplier of 25 years whilst assessing damages for loss of dependency damages payable for loss of dependency under the Fatal Accident Act.*
3. *That the Learned Senior Principal Magistrate failed to take into account whilst assessing damages payable under the Fatal Accidents Act the age of Fatimabai Osman Suleiman the only dependant of the deceased.*
4. *That the Learned Senior Principal Magistrate erred in failing to appreciate that by reason of the advanced age of the deceased's mother she would have been dependant of the deceased for a limited time only and consequently in all the circumstances the multiplier of 25 he adopted in assessing damages under the Fatal Accidents Act was erroneous.*
5. *That the Learned Senior Principal Magistrate erred in adopting a ratio of 2/3 whilst assessing damages under the Fatal Accidents Act when he had found that Fatimabai Osman Suleiman was the only dependant of the deceased and that she was elderly and sick.*

6. That the Learned Senior Principal Magistrate erred in not adopting a ratio of 1/3 whilst assessing damages under the Fatal Accident Act considering all the circumstances and the totality of the evidence led before him.

7. That the Learned Senior Principal Magistrate erred in holding that the only dependant of the deceased was receiving two thirds (2/3) of the deceased income yet there was no documentary evidence to show what fraction of his income or how much money he used to give to his mother.

8. That the Learned Senior Principal Magistrate erred in failing to hold that in the absence of the deceased his sister and Fatimabai Osman Suleiman's daughter who survived the deceased, would in keeping with the Indian culture look after their mother in the absence of the deceased and further failing to hold that by reason of this, their mother dependency on the deceased would be reduced.

9. That the Learned Senior Principal Magistrate erred in not deducting the amount awarded by him for loss of expectation of life from the amount awarded for loss of dependency under the Fatal Accident Act.

10. That the Learned Senior Principal Magistrate in awarding to the plaintiff a sum of Shs.50,000.00 for pain and suffering when there was clear evidence before him that the deceased died immediately after the accident.

11. That the Learned Senior Principal Magistrate erred in making awards under the various heads by failing to take into account that the general damages awarded to the Plaintiffs would be invested to earn interest. If the Learned Senior Principal Magistrate had borne that factor in mind it is reasonably possible that he would have awarded a lesser amount to the plaintiffs under each head.

12. That the Learned Senior Principal Magistrate erred in law in failing: -

- a. To appreciate the significance of the various facts that emerged from the evidence of the plaintiff's witnesses.
- b. To consider or properly consider all the evidence before him and/or
- c. To make any or any proper findings on the aspect of quantum of damages on the evidence before him.

13. That the Learned Senior Principal Magistrate erred in failing to consider or properly consider the written submissions filed by counsel for the Defendant/Appellant.

4. The Appellant is seeking orders that "this appeal be allowed with costs and that the Learned Senior Principal Magistrate's judgment dated 28th January 2019 be set aside or varied as to this Honourable Court appears proper and an appropriate order for costs be made in respect of this appeal and in respect of the proceedings in the court below".

5. The background to this Appeal concerns a road traffic accident leading to the death of at least one passenger and one driver of a bus travelling from Nairobi to Mombasa on Christmas Day 2011. There was an accident involving 3 vehicles, Two buses owned by the Appellant (Coast Bus Limited) who were travelling to Mombasa and one belonging to Maslah travelling the opposite direction. The bus travelling towards Nairobi is said to have collided with both the buses travelling towards Mombasa at (or near) a place called Kenani, the second of which left the road, overturned causing the fatalities. However, it was the driver of the Appellant's first bus who was charged with dangerous driving. The Plaintiffs were the Guardians ad Litem of the Estate of one of those deceased persons namely, Aslam Jaffererali Juma. They sued for special and general damages more specifically under the **Law Reform Act** and the **Fatal Accident Act**. The Learned Trial Magistrate made the following award:

"a. Pain and suffering.....Kshs.	50,000.00
b. Loss of expectation of life.....Kshs.	150,000.00
c. Loss of dependency.....Kshs.	4,435,600.00
d. Special damages.....Kshs.	<u>50,000.00</u>
	Kshs. 4,686,079.00
Less 30% Liability	<u>Kshs. 3,280,255.30</u>

6. The Appellant appeals against that award. Before the Lower Court, the Plaintiffs had sued 3 Defendants namely, Coast Bus (Mombasa) Ltd, Maslah Bus Service and a Mursal Guleid. The Appellant at first denied liability including denying that the Deceased was a passenger in the bus (KAX 008X). Subsequently, the Plaintiffs discontinued the suit against the Second and Third Defendants and entered into a consent with the First Defendant, the Appellant here. The terms of the consent were an apportionment of liability 30:70 with the Defendant bearing 70% of liability. In the circumstances, the Defendant admitted liability at trial and it was only to quantum that the Learned Trial Magistrate needed to address her mind. The record does not show whether or not the Learned Trial Magistrate was informed of the outcome of the criminal proceedings.

7. Before the Trial Court the Plaintiffs Plaint prayed for the following:

- a. "Special Damages KShs.50,479.00
- b. General damages under the Law Reform Act and Fatal Accident Act
- c. Costs
- d. Interest."

8. In their Written Submissions the Plaintiffs argued for:

a. Loss of dependency	Kshs.7,000,000.00
b. Loss of expectation of life	Kshs. 150,000.00
c. Pain and Suffering	Kshs. 50,000.00
d. Special Damages	Kshs. 50,479.00
Total	Kshs. 7,250,479.00
Less 30%	
Total Claim	<u>KShs. 5,075,335.30</u>

9. The Appellant's Submissions at the trial were for the following amounts:

- a. Loss of dependency KShs.443,560.00
- b. Loss of expectation of life KShs.100,000.00
- c. Pain and Suffering KShs. 10,000.00
- d. Special Damages: Only that which is proved by documentary evidence.

It is clear the Learned Trial Magistrate was faced with a great discrepancy of opinion. Her award is set out above. The Appellant is not satisfied with that decision.

10. The Appellant's complaint is that the Learned Senior Resident Magistrate (in fact she was a Senior Principal Magistrate) erred in failing to consider or properly consider the Written Submissions on behalf of the Appellant. The Grounds of Appeal can be condensed into four main Grounds namely that:

- a. The Learned Trial Magistrate erred in failing to appreciate and/or consider the evidence that the only surviving dependants of the Deceased was his Mother;
- b. That the Learned Trial Magistrate failed to deduct damages awarded for loss of life expectation from the award under the Fatal Accidents Act
- c. The Learned Trial Magistrate made an award that was too high because she failed to consider the facts or to make any proper findings on the evidence before her.
- d. The Learned Trial Magistrate failed to consider that the sums awarded would be invested and earn high interest,

11. At the first directions hearing the Court gave directions for the filing of written submissions. The Written Submissions on behalf of the Appellant were filed on 9th March 2020. The Appellant sets out clearly that it is only quantum and not liability that is being challenged. The Appellant also reminds the Court of the principle that should guide this Court namely that the Appellant court should only interfere with the award of the Lower Court only when it is satisfied that the Lower Court, in assessing the damages, applied a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account some relevant one:' or short of this, that the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage (**Nance v British Columbia Electric Railway Co Ltd [1951] AC 601, 613**). The Appellant has not stated specifically which of those it is seeking to demonstrate to this Court.

12. Also on the issue of quantum the Appellant asks the Court to bear in mind the Court of Appeal decision in ***Tayab vs Kinanu (1982-88) 1KAR 90*** which was followed in ***Civil Appeal 251 of 1996 (Cecilia Mwangi and Anor vs Ruth Mwangi)***. Where the Court stated that: "I state this so as to remove any misapprehension so often repeated that the Plaintiff is entitled to be fully compensated for all the loss and detriment she had suffered. That is not the law she is only entitled to what in the circumstances are compensation fair to both her and to the

Defendants. The Defendants are not wrong doers. They are simply the people who foot the bill". That was the view expressed about 24 years ago and the statement is adopted from the Court of Appeal decision of the English case of **Lim Poo Choh v Camden and Islington Area Health Authority (1979)**

13. The Appellant's Written Submissions were filed on 9th March 2020. The Respondents filed their Written Submissions on 19th March 2020.

14. The Submissions on behalf of the Respondent argue that there is no arguable appeal raised and invites the Court to dismiss the Appeal. The Submissions remind the Court that the award of damages is discretionary and based on the facts and matters (evidence) presented before the Court. They rely on the authority of **Kiruga v Kiruga** and another which itself cites further authority for the proposition that an Appellate Court, notwithstanding its jurisdiction to review the evidence, should not substitute its own factual findings unless there is very good reason for doing so.

15. In relation to the heads of damage challenged by the Appellant, the Respondents argue that the Court should not interfere with the award for pain and suffering because it was accepted that death was instant. They ask the Court to uphold the award of KShs.50,000.00 as being in keeping with a 2014 authority where the Court ordered 30,000/= in similar circumstances. However, that was not a true "finding" because the award was conceded by the Defendant in that case.

16. As this is a first appeal this Court is charged with the responsibility to re-consider the facts. Further, this suit requires the trial court to apply its discretion. The application of the Court's discretion is based on the particular facts and circumstances of the case before it. However, the Defendant (Appellant) admitted liability and therefore the facts as pleaded in the Defence were not tested by the trial process. The facts and matters alleged in the Plaintiff were admitted. In the celebrated case of **Peters v. Sunday Post [1958] E.A. 424 and p. 429** E Sir **Kenneth O'Connor P.** said:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution: it is not enough that the appellate court might itself have come to a different conclusion."

17. Therefore, the appropriate starting point is the factual evidence before the Court. The Plaintiff are the Mother and sister of the Deceased. They are suing in their capacity as guardians ad litem of the Estate pursuant to a Limited Grant of Letters of **Ad Coligenda Bona**, in other words limited to filing a civil suit. The Deceased was an Aslam Jafferli Juma. The Court heard that the Deceased was a 30 year old accountant resident in Mombasa. He happened to be in Nairobi and wished to travel to Mombasa for a family wedding over the Christmas period in 2011. Although it was difficult, he managed to get a ticket on one of the Defendant's vehicles KAX 008S thereby becoming a fee-paying passenger on that vehicle. The only eye witness to the accident who gave evidence (his statement was on the file) was the driver of one of the other buses that was involved in the accident, Caleb Odhiambo Odhiambo. His evidence was that the accident occurred on the night of 25th December 2011 at about 2.30 am. A second bus owned by his employer was behind him/following him and it was driven by Mr Amani who also perished in the accident. He said the oncoming bus crashed into both buses. He said he had his headlights on signifying that it was dark. The vehicle the Deceased was travelling in was pushed off the road and came to rest on its side. The said driver was charged with causing death by dangerous driving. The outcome of that trial was not before the Court, but the Defendant conceded liability of 70% thereby abandoning the incredible defence whereby it was alleged that the passenger caused his own death by driving negligently.

18. According to the Police abstract dated 27th December 2011 the accident occurred on the Nairobi Mombasa Road near Kenani at 0515 am. It also listed 3 people who passed away, Aslam Jafferli Juma, Njoroge Joseph Maina and Abdallah Barufa. The Deceased the subject of the suit was taken to Makindu District Hospital. According to only eye witness the accident occurred at 02.30. The Post-Mortem Report records that the body was found at a place called Kanga. The date and time of death was 0300 hours. The injuries noted were:

- On the Head: Fractured left side of frontal bone, temporal bone and fractured left mandible. Blood and bruises on the face. Expurged brain tissue through above skull fractures. Blood from nose, mouth and ears.
- Upper limbs: Ring right ring finger, bruises over both hands
- Lower Limbs: Bruises over both legs
- Chest: Large bruise on lateral aspect of lower chest.

The cause of death was cardiorespiratory arrest [secondary] to severe head injury following RTA. An internal examination was not conducted because the Deceased was a Muslim and the relatives declined. Therefore, the only evidence before the Court was that which is listed above. At paragraph 5 of the Plaintiff it is alleged that "At all material times the 1st defendant was the owner of Motor Vehicle Registration Number KAX 008S and Motor Vehicle registration Number KBA 062N both make Scania buses. That was denied by the Defendant. At paragraphs 7 and 8 it is alleged:

"7. That on or about 25th December, 2011 at around 5.15 am, Islam Jefferali Juma referred to herein as the deceased was travelling as a fare paying passenger in Motor Vehicle Registration Number KAX 008S along the main Nairobi/Mombasa Road what at a place known as Kenani he same was involved in accident with Motor Vehicle Registration Number KAZ970L driven by an Agent, Driver and or Servant of the 2nd and 3rd Defendants and a Motor Vehicle Registration number KB 062N driven by an Agent, Driver and or Servant of the 1st defendant as a result of which, the deceased sustained fatal injuries.

8. The Plaintiffs avers and shall maintain that the said accident was solely caused or contributed to by the negligence, careless,

reckless and dangerous manner in which the Agents, Drivers, and or Servants of the three Vehicles drove and or controlled the said Motor Vehicles who were driving the Vehicles within the cause of their agency authorities with the Defendants. The Plaintiffs therefore holds the Defendants vicariously liable for damages for the acts of their Agents, Drivers and or Servants.”

19. In the circumstances, the evidence before the Trial Court and the vague terminology used did not present a convincing scenario where death was instantaneous. If that had been the case, the Appellant’s argument that the Court should award negligible damages might hold water. The evidence contradicts that.

20. The Plaintiffs sought general damages under two heads, pain and suffering and loss of expectation of life. The Plaintiffs sought general damages under two heads, pain and suffering and loss of expectation of life and statutory damages under the Fatal Accidents Act as well as special damages.

Pain and Suffering

21. On the issue of pain and suffering the Respondents submit that the Court should uphold the award as it is in line with a recent 2014 authority ***Rose Munyasa & Anor v Daphton Kirombo & Anor [2014] eKLR***

22. When making an award for general damages, the Trial Court applies generally accepted principles and attempts to maintain consistency between its own and decisions already made where there is similarity in the facts and situation of the case. The award of pain and suffering contains two variables, the element of pain, relating to the injury and the element of suffering which is generally interpreted to be an assessment of the duration of suffering. Where death ensues, the assessment is made by reference to time of death. Where there is permanent disability a higher award is assessed. It is argued that where death is immediate the damages should be nominal. To do that would be to ignore the severity of the injury suffered.

23. Further, in ***Kiruga v. Kiruga & Another*** [1988] KLR 348 the Court held that:

“2. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong.

3. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.

4. Where it happens that a decision may seem equally open either way, the appellate approach is that the decision of the trial judge who has enjoyed the advantage not available to the appellate court becomes of paramount importance and ought not to be disturbed.”

Loss of Expectation of Life

24. Loss of Life Expectation is a common law claim for a loss suffered by the Deceased. As the Deceased is no longer able to do so, the claim or suit is brought on his behalf by his Guardians ad Litem (***ad colligenda di bono***) as was the case here. It is a claim brought by the Deceased (the owner of the life), through his representatives. Therefore, the assessment must be based on the characteristics of the Deceased and not any potential beneficiaries to the Estate. The evidence before the Court was that he was a young man (30 years), he was of good health. He was a professional and he was in gainful employment. He had a good family life with his Parents (both of whom were alive) and his sister. The Court was therefore required to assess how much longer the Deceased would have lived but for the accident. The Defendant/Appellant was arguing for a life expectancy of 60 years based on the 2013 decision of Hon Mr Justice Emakule. In the case of **BENEDETA WANJIKU KIMANI Vs. CHANGWON CHEBOI & ANOTHER [2013] EKLR** Judge Anyara Emukule observed as follows:

In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the Fatal Accidents Act for pain and suffering determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Kshs. 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate.

The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death.

25. That decision is more than 5 years old. The Learned Trial Magistrate was entitled to either agree whether in the current time that assessment was correct or not. Clearly, she felt that the Deceased would reasonably have had an expectation of more than 60 years of life. That seems a perfectly reasonable assessment in this day and age, given the sedentary occupation and standard of living of the Deceased. The Appellant has not demonstrated that such assessment was wrong in principle. On loss of expectation of life the Respondents reiterate the facts namely that the Deceased was only 30 years old and of good health with no pre-existing health conditions. The Court is invited to find the award is adequate and consistent with the precedent followed by ***JWK and Anor v George Omondi & 2 Others [2016] eKLR*** and set by ***Stela Awinja and Anor Vs Attorney General HCCC 915 of 1998***

26. The Appellant puts forward two arguments (1) that all damage cannot be compensated for and (2) that the Defendant/Appellant should not be held fully liable because it is not personally liable. It is not the wrongdoer. The latter argument is adopted from a speech made by Lord Denning in ***Lim Poh Choo vs Camden Islington Area Health Authority*** and deals with the questions of vicarious liability and the position of an area health authority within a public health system. That statement (in so far as it was not set aside by the House of Lords)

cannot have universal application and cannot be taken to abrogate responsibility for everyone who causes injury or loss through a negligent act. In that case the Defendant was an area health authority which is a public body, a component of the national health service of the United Kingdom which is responsible for the management of various hospitals. In the circumstances, that argument cannot be translated to this case, where the Defendant is a commercial enterprise interested mainly in maximizing its profits. The drivers are agents of that enterprise and cannot be likened to a doctor in the exercise of his/her professional duties coupled with a compensation system. The two situations cannot be likened to each other. In this case the fact of the criminal proceedings demonstrates that there was probably wrongdoing by at least one driver, who was the employee of the Appellant (vicarious liability).

27. In addition, the argument that not all loss is recoverable, is the well-known argument on the remoteness of damage. It sets parameters on what is a direct consequence of the negligence and what falls outside the chain of causation. In this case the Defendant admitted liability and therefore there was no room for any discussion nor finding on the chain of causation, nevertheless the Court takes the issue of causation into account in deciding what is reasonable. In this case, it is clear that death was an inevitable consequence of a human being having his skull smashed open. That damage was a natural consequence of the impact that was suffered. The force of the impact has a direct correlation to the speed travelled before the accident. In the circumstances, the Learned Trial Magistrate was entitled to find that the injuries suffered were as a result of the accident and she did so.

Loss of Dependency

27. Loss of Dependency is a claim that arises from the Fatal Accidents Act. **Section 4 of the Fatal Accident Act** provides:

“4. Action to be for benefit of family of deceased (1) Every action brought by virtue of the provisions of this Act shall be for the benefit of the wife, husband, parent and child of the person whose death was so caused, and shall, subject to the provisions of section 7, be brought by and in the name of the executor or administrator of the person deceased; and in every such action the court may award such damages as it may think proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought...”.

28. From the above, it is clear that the claim/cause of action under the Fatal Accidents Act lies with the dependants of the Deceased. That is a completely different claim from Loss of Life Expectancy but the two are brought in the same suit by convention. The particulars of negligence allege that the Plaintiff's driver/servant/agent was driving without due care and attention, too fast and without consideration for other road users. At paragraph 9 it is alleged that “In consequence of the matters aforesaid, Islam Jefferali Juma sustained serious injuries from which he died and lost normal expectation of a happy and successful life. His estate has suffered loss and damage”. Paragraph 10 states: The Plaintiffs who are the legal representatives of the deceased brings this suit on their own behalf and on behalf of the estate of the deceased. At the time of his death, the deceased was 30 years old and not married. He was working, earning a Salary of Kshs.25,000.00 per Month at the early days of a professional career. He used to support his elderly Parents and by reason of his death, the beneficiaries of his estate have suffered loss and damages. He was working, earning a Salary of Kshs.25,000.00 (gross) per month. He used to support his elderly Parents and by reason of his death, the beneficiaries of his estate have suffered loss and damages. The Beneficiary listed pursuant to “Statute” is the Mother. However, the Statute is not specified. The context suggests it is a reference to the Fatal Accidents Act. It is clear from the facts that the Deceased was survived by a Mother AND Father. The Father died subsequently. In fact, it would have been appropriate for the Father's Estate to be named as one of the beneficiaries under **Section 8** of the Act.

29. In that context for the Appellant to argue that the Dependants had other people to support them is firstly, factually untrue and secondly completely misconceived as a statement of the law and therefore can only be perceived to be made in bad faith. **Section 2(5) of the Law Reform Act (Cap 26)** provides:

“(5) The rights conferred by this Part for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependents of deceased persons by the Fatal Accidents Act...”. (**Emphasis added**)

30. On Loss of Dependency the Respondents argue that the Appellant's Appeal and Submissions are misguided because they are based on an incorrect statement of the facts. The true and correct fact is that the Deceased was survived by both Parents at the time of his Death. His Father only passed away later. Therefore, both parents were dependents immediately before his death and immediately after. In the circumstances, it is argued that the multiplicand of 1/3 is erroneous and the 2/3 multiplicand used is the correct one. The Court is reminded that at page 61 of the Record of Appeal where the Learned Trial Magistrate said; “*The deceased was a bachelor, but the appellant being a parent said he depended on his son. This finding was based on disregard of the fact that most parents depend on the support of their children especially at old age. The deceased being was unmarried, but had dependents. I therefore adopt the ratio of 2/3*”.

31. The Appellants also raise a new factual argument that was not raised during the Trial. It is said that parents of the Deceased have a daughter and therefore the daughter could support them. There was no evidence adduced at the trial as to the earning capacity of the Second Plaintiff. She was called as a witness and she was not cross-examined on that issue. Further, the argument is based on “Indian Culture”. The statement as phrased is misconceived, racist and offensive. The cultural context could equally suggest that the Second Plaintiff was a dependent through her parents, a dependent *de facto* (and under the law of succession) if not a dependent *de jure* under the Fatal Accidents Act.

32. The Deceased was a Kenyan Muslim (possibly of the Shia sect) resident in Mombasa. Therefore, the Defendant if it wanted to raise arguments based on cultural practices should have called independent factual and/or expert evidence on the cultural practices of that particular group. It spectacularly failed to do so and relied instead on personal prejudices. In the circumstances, that argument can bear no weight before an appellant court.

33. On the question of special damages, the Appellant conceded such damages as were supported by receipts. In the Judgment the Learned Trial Magistrate has enumerated the damages and the supporting evidence. There was no challenge at trial. No challenge can be now put forward.

"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 so arrived at a figure which was either inordinately high or low." (Butt vs. Khan)

34. For the reasons set out above, the Appellant has failed to satisfy this Court that the Learned Trial Magistrate applied the wrong principles and/or arrived at a figure that was inordinately high. In the circumstances the Appeal is dismissed with costs. Any stay of execution is lifted.

Order accordingly,

FARAH S. M. AMIN

JUDGE

Signed and Dated and Delivered at the High Court in Voi this the 9th day of July 2020

In the Presence of:

Court Assistant: Josephat Mavu

ICT Officer: Ryan Maina

Judgment delivered by MS Teams and disseminated electronically using email at the request of the Parties in accordance with Corvid-19 Directions prevailing at the time.