REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 31 OF 2019

1. ANTHONY KONDE FONDO

2. ENFORCER CAR ALARMS .....APPELLANT/APPLICANTS

VERSUS

RMC (The Representative of

FC (DECEASED).....RESPONDENT

(Being an Appeal from the Judgment of the Senior Principal Magistrate Honourable R. K. Ondieki in SPMC No.595 of 2010 Kilifi delivered on the 25th June 2018)

Coram: Hon. Justice R. Nyakundi

Sachdeva, Nabhan & Swaleh Advocates for the Appellant

Kenga Advocates for the respondent

JUDGMENT

The appeal before me is against the quantum award of damages by the trial court in the sum of Kshs.2, 000, 000/= where the deceased who was 7 years old at the time of death passed away on the 17th of April 2009 after being knocked down by the defendant's vehicle registration number KBD 941D at Gorofani area along the Mombasa-Malindi Highway. The judgment was delivered on 25th June 2018.

Aggrieved by the Judgment, the appellant filed a memorandum of appeal on the 4th of June 2018. His appeal is mainly on the Trial Court's award on quantum. The grounds of appeal are that: -

> ***1) The Learned Magistrate erred in awarding the sum of Kshs. 2,000,000/= by way of general damages under the head loss of dependency to the Respondent.***
>
> ***2) The said award is in the circumstances so inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent.***
>
> ***3) The said award is altogether disproportionate and is not in keeping with other comparable awards made in respect of similar injuries.***
>
> ***4) The Learned Magistrate erred both in law and in fact by giving a very high award in quantum contrary to the evidence given in court.***

The appellants in their grounds of appeal fault the trial Magistrate and do state that the award is excessive, that the trial court failed to consider their submissions and appreciate principles applicable in assessment of damages and thus arrived at an erroneous award. This court has been urged to set aside and/or review the said award. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions.

This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified **(See Selle & Another v Associated Motor Boat Company Ltd & Others {1968} EA 123**. The parties filed Written Submissions and waived their right to highlight the same.

Brief facts of the case

The respondent commenced this suit vide the Plaint dated 3rd November 2010 and filed on the 4th of November 2010 where she sought Judgment against the defendant under the Fatal Accidents Act Cap 32 and the Law Reform Act Cap 26 following a fatal road Traffic Accident of the late **FC** a minor who was 7 years old and a pupil in KG 2 at 9particulars withheld) School. At the time of her demise she succumbed to the injuries on the 17th of April 2009. The claim was for general damages and special damages of Kshs.18,085/=

It was the evidence of **PW1 (plaintiff/respondent), RM,** that her daughter, the deceased, was walking on the left hand side of the road near Gorofani Area along Mombasa-Malindi road and while attempting to cross the road in front of a parked Motor Vehicle. The vehicle was dropping and picking passengers when Motor vehicle Registration Number KBD 941D, make Nissan Urvan heading to Mombasa, veered off the road and knocked down the child causing fatal injuries. It was also her evidence that the deceased was a pupil in KG 2 at [Particulars withheld] Primary School and that she demonstrated competence in English, Mathematics, Science and CRE and had expressed the desire to become a doctor in future. She produced the Death Certificate, Burial permit, Report by traffic Police, grant of letters of administration, Receipt for the grant, Post-Mortem forms, receipt of postmortem fees and a receipt for shopping. However, in cross examination she stated that she was not at the scene of the accident and she did not recall the registration number of the Motor vehicle that caused the accident. She also could not produce a vehicle search to show that the vehicle did in fact belong to the 2nd defendant. She testified that the minor died at the Hospital.

PW2, SNM, an eye witness, who stays at Gorofani and an aunt to the plaintiff/respondent, narrated how the said Motor vehicle Registration Number KBD 941D which was heading to Mombasa from Malindi, knocked down and dragged the deceased along the pavement outside the road, thereby causing serious injuries to the minor from which she succumbed on her way to the hospital. In cross examination she stated to have noticed a vehicle parked on the road.

PW3, PM, a teacher who taught at the KG School, testified that the deceased was good in English, Mathematics, Science and CRE. She also produced a letter from the school dated 30th October 2010 confirming that the deceased was a student at the aforementioned school. She further stated that the accident had occurred during the school holidays.

PW4, Alex Kirui, a Police officer, testified on behalf of the Investigating officer that upon the accident occurring, the 1st defendant/respondent rushed the child to the hospital. He produced the Police Abstract and Receipt of the Police Abstract. In cross examination he told the Court the matter being under investigations with no indictment against the driver of the offending vehicle.

DW1, Anthony Konde Fondo, the 1st defendant and driver, testified that he was driving along the Mombasa-Malindi Road at a speed of 50km/hour, when the deceased child suddenly appeared from the front of a stationery motor vehicle which was parked on the road. He testified that it was raining at the time. He stated that he swerved to avoid hitting the child and applied breaks but considering the proximity of the child impact was inevitable. He told the Court that he stopped the motor vehicle and together with other good samaritans took the deceased to Coast General Hospital where she was pronounced dead. Thereafter, he proceeded to Central police station to report the accident but his statement was recorded at Kijipwa Police Station. In cross examination he testified that he was rushing to drop the tourists at Moi International Airport in Mombasa and that is when he came into contact with the deceased in the middle of the road. He denied any negligent acts or breach of the duty of care.

In her submissions the plaintiff counsel urged the court to find the defendants 100% liable as the child was a minor and the 1st defendant was driving at a recklessly high speed being in a rush to drop passengers at the airport. It was also her submission that the minor being 7 years old and bright in school would have started working at 25 years old with active working life of 35 years. She urged the court to apply a multiplier of 35 and the minimum wage of Kshs.10,000/= due to the unknowns and contingencies in life. As such she submitted that the loss of dependency should be Kshs.2,800,000/=. On pain and suffering counsel submitted that an award of Kshs.150,000.00/= would suffice since the child had succumbed to her injuries soon after accident on her way to the hospital about 30kms away. On loss of expectation of life counsel submitted that the sum of Kshs.350,000.00/= would be reasonable as the life of a joyful and healthy child was prematurely terminated. Counsel cited the cases of **Rose Wanjiru Njeri v Water Recycling Ltd HCCC No. 256 of 2001 (Mombasa).**

On their part, the defendants counsel submitted that no evidence had been adduced to show any nexus between the vehicle and the 2nd defendant and that the plaintiff did not carry out a vehicle search to ascertain the owner of the vehicle. Further, it was submitted that the plaintiff did not explain how the child of tender years was left unsupervised to cross a very busy road. Counsel submitted that the guardian of the child was negligent thus contributing to the occurrence of the accident which could have been avoided had the child been supervised. Counsel also submitted that since there was a matatu parked on the road it would have been only reasonable for the 1st defendant to go past the Matatu to overtake it otherwise there would be no passage until the matatu moved. It was also counsel submission that the defendant did not act negligently but with all due diligence humanly possible evidenced by the fact that no charges had been filed by the police against him.

In addition, counsel also submitted that if one applies breaks at a speed of 50kms/hr the remaining distance is hardly a meter considering the decision to break was at the blink of an eye as the child had been concealed by the Matatu. As such he submitted that it would be grossly unfair to penalize the 1st defendant and he should not be held liable as there was no negligence on his part.

Further the defendant counsel also submitted that the whole suit is fatally defective as the period between the date of the commencement of the suit and the death of the child was way past the 12 months period provide for by section 29 (4) of the limitation of Actions Act Cap 22.

On quantum the defendant counsel submitted that a global award of Kshs.200,000/= for loss of dependency as the child was 7 years old at the time of death ad there was no report card produced to show that the child was doing well in her studies, Kshs.30,000/= for pain and suffering a the child had died almost instantly, and Kshs.100,000/= as there was no certainty of what age the child would have grown up to and the life expectancy in Kenya has reduced. Finally they submitted that a global figure of Kshs.350,000/= to Kshs.400,000/= would suffice.

He placed reliance on the cases of; **Rose Munyasa & Another v Daphton Kirombo & Another 2014 eKLR**, **Kwanzia V Ngalali Mutua & Another**, **Daniel Mwangi Kimemi & 2 Others V Estate of JGM & SMM (The Personal Representatives of the late NK-Deceased) [2016] eKLR, Kenya Breweries Ltd V Saro [1991] Mombasa Civil Appeal No. 441 of 1990 eKLR** and **Jamlick M'Ikianai v M'Masai Nguthani (2007) eKLR.**

Judgment was delivered by the trial court on 25th June 2018 awarding the plaintiff Total Damages of Kshs. 2, 268, 185.00/=, being Kshs. 18,085.00/= on special damages, Kshs.100,000.00/= for pain and suffering, Kshs.150,000.00/= for loss of expectation of life, Kshs. 2, 000,000.00 for loss of dependency under both the Law Reform Act and the Fatal Accidents Act.

The Learned Magistrate assessed general damages as follows:

a) Pain and Suffering	**Kshs. 100,000.00**
b) Loss of expectation of life	**Kshs. 150,000.00**
c) Loss of Dependency	**Kshs.2,000,000.00**
d) Special Damages	**Kshs. 18,085.00**
Total	**Kshs.2, 268,185.00**

The Appellant's Submissions

The appellant's counsel submission is on the basis of the assessment of the quantum of damages. Through their Learned counsel, the appellants submitted that that the Honorable Magistrate erred to awarding loss of Dependency at Kshs.2,000,000.00/= for the deceased child aged 7 years old. Further it was counsel submission that nothing had been adduced as evidence in the trial to prove that the child was doing well in school or otherwise to suggest that the child was if at all in future capable of being admitted to a medical school. Further it was cousel submission that the Learned Magistrate did not give any reason for awarding such an excessive and conditionally high award. Finally, it was counsel request that the appeal be allowed and the quantum awarded reviewed to a reasonable figure under loss of dependency. Counsel submitted that an amount between Kshs.300,000.00/= and Kshs.600, 000.00/= would be sufficient compensation for loss of dependency.

Counsel relied on the following cases to buttress his submissions; **Daniel Mwangi Kimemi & 2 Others V J. G. M & S. M. M (the Personal representatives of the Estate of N. K (Deceased) HCCA NO.18 OF 2014**, **Chen Wembo & 2 Others v I K K & H M M (Suing as the Legal Representatives and Administrators of the Estate of C R K (Deceased) HCCA NO.32 OF 2014**, **Chhabhadiya Entreprise Ltd & Another v Gladys Mutenyo Bitali (Suing as the Legal the Administrator and Personal Representative of the Estate of the late Linet Simiyu) HCCA NO.10 OF 2017** and **P I (Suing as next of kin of C M (Deceased) V Zena Roses Limited & Another Hcca No.126 Of 2009.**

The Respondent's Submissions

The respondent through her Learned Counsel **Kenga,** opposed the appellant's appeal and submitted that the Learned Magistrate did not err in fact or in law in awarding a sum of Kshs.2,000,000/= under loss of dependency. It was counsel submission that assessment of an award payable under Fatal Accidents Act is a discretionary function as properly exercised by the Learned trial Magistrate. Counsel also submitted that in awarding for loss of dependency, time and attendant inflation was of paramount importance. Counsel further submitted that ability in school, and future prospects of the deceased was one such factor which influenced the assessment of damages. Counsel argued and submitted that the deceased minor in this case was duly admitted in KG school where she performed well in which could have enabled her to pursue a degree in medicine.

Finally, counsel submitted that since there was no consent on liability the trial court had held that the Appellants were solely liable for the accident where upon the deceased died. In any event there is no appeal on liability in a nutshell by counsel placed reliance on the cases of; **Daniel Mwangi Kimemi & 2 Others V J. G. M & S. M. M (the Personal representatives of the Estate of N. K (Deceased) HCCA NO.18 OF 2014 (Meru) and Rose Wanjiru Njeri V Water Recycling Limited HCC No. 256 of 2001 (RD) (Mombasa).**

Issues for Determination

The discretionary jurisdiction of the first appellate court being judicial is to be exercised on the basis of evidence and sound legal principles. See the case of **Shah, Paul v E. A. Cargo Handling Services Ltd 1974 EA 75. I also rely on the Eastern Africa Court of Appeal case *Peters –vs- Sunday Post Limited [1958] EA 424*** where **Sir Kenneth O'Connor** stated as follows:-

> ***"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. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt –vs- Thomas (1), [1947] A.C. 484.***
>
> ***"My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For***

convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given." (See also

a) Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000: Tunoi, Bosire and Owuor JJA);

b) Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); Virani T/A Kisumu Beach Resourt v Phoenix of East

c) Africa Assurance Co. Ltd (Kisumu High Court CC No. 88 of 2002)."

With this in mind, I have analyzed the evidence as this court is obliged to do so as to draw my own inferences and conclusions on the matter. I will consequently put my mind to the following two issues for determination by this court in my view:

a) whether the trial court acted on wrong principles of law in making the award of Kshs.2,000,000.00/= for loss of dependency and

b) If (a) above is answered to the affirmative, which sum would be sufficient compensation.

a) Whether the trial court acted on wrong principles of law in making the award of Kshs.2,000,000.00/= for loss of dependency.

In dealing with an appeal on quantum I stand guided by the decision of the Court of Appeal in **Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5** where the court held that;

"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"

In the case of **Savanna Saw Mills Ltd Vs Gorge Mwale Mudomo (2005) eKLR** the court stated as follows: -

"It is the law that the assessment of damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the court simply because it would have awarded a different figure if it had tried the case at the first instance."

Further in the case of **Loice Wanjiku Kagunda vs. Julius Gachau Mwangi CA 142/2003** the Court of Appeal held that: -

'We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (*See Mariga V Musila [1984] KLR 257*).'

Furthermore, in the case of **Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR**, the Court of Appeal held that –

"…it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in* Rook v Rairrie [1941] 1 All ER 297*."

In the case of **Gicheru V Morton and Another (2005) 2 KLR 333** the Court stated:

'In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."

It is the Law in Kenya that general damages must be compensatory. When one looks at the impugned Judgment it must be fair in the sense of what the claimant suffered. In my view whether at the trial Court or on appeal claimants should not aspire to a perfect compensation.

The foregoing sets out the law and the guiding principles which I am bound to apply in the determination of this appeal. The key issue for deliberation in this case is whether or not the trial court's award under the Loss of dependency was inordinately high that it amounts to a wholly erroneous estimate of the damages suffered by the Respondent. The fact that this court may have made a different award if it had tried the matter itself is not a ground for setting aside the award.

The deceased in this case from the evidence adduced in the trial court was a minor in KG2 at [particulars withheld] Primary School who dreamed of becoming a doctor in future when her life was abruptly cut short by the fatal road accident.

This exercise of awarding damages in respect of a minor deceased person always poses a challenge to the courts as it involves a fair account of speculation by the courts (**See Chen Wembo & 2 others v IKK & Another (suing as the legal representatives and administrators of the estate of CRK (Deceased) {2017} eKLR para 15)**. In the case of **Oshivji Kuvenji & Another -Vs- James Mohammed Ongenge [2012] eKLR, Ngenye J** observed in that;

"It is clear that neither the High Court nor the Court of Appeal has adopted a uniform principle on how to tabulate general damages where the deceased is a minor".

However, I stand guided by the principle that there is no golden rule in the assessment of damages in respect of a deceased minor. The heads, global or mixed approaches have been applied in the superior courts. What is beyond doubt is that irrespective of the age of a deceased child, and whether or not there is evidence of his pecuniary contribution, damages are payable to his parents/dependents **(See Kenya Breweries Limited v Saro {1999} KLR 408 and Sheikh Mushtaq Hassan v Nathan Mwangi Kamau Transporter & 5 others {1986} KLR 457 {1986} eKLR).**

For this I rely on the Court's decision in the case of **Kenya Breweries Ltd -vs- Saro (1981) e KLR 408**, where the court held that the age of a child must be considered in assessment of damages.

The Appellant submitted that an amount between Kshs.300, 000.00/= and Kshs.600, 000.00/= would be sufficient compensation under the loss of Dependency head. In the case of **Board of Trustees of the Anglican Church of Kenya Diocese of Marsabit v N I A (minor suing through her next friend I A I S) & 3 others [2018] eKLR** the court stated that;

"…All what the Court has to do is to take into consideration the award made for loss of expectation of life when making awards for loss of dependency."

In calculating the damages for the loss of dependency, the loss to the estate is what the deceased would have been likely able to save, spend or distribute after meeting the cost of his living at a standard of her job and career prospects at time of death **(See Hassan v Nallia Mwangi Kamau Transporters & 4 others {1986} KLR 457)**. It is no doubt as held by the Court of Appeal in the case **Kenya Breweries Limited -Vs- Saro, [1991] KLR 408**:-

"the issue of some damages being payable in both cases is no longer an open question in Kenya. This is because in the Kenyan society, at least as regards African and Asians, the mere presence in a family of a child of whatever age and of whatever ability is itself a valuable asset which the parent are proud of and are entitled to keep intact. It is an accepted fact of life in Kenya that even young children do help in the family, say by looking after cattle or caring for younger followers, and once the children become adults they are expected to and do invariably take care of their aged parents."

There seems to be no uniform method both at the High Court and at the Court of Appeal of assessing damages in the case of a deceased minor's estate. A trial court does not necessarily err simply by choosing one method over another. As such it is my considered opinion that the trial Magistrate did not proceed on wrong principle by choosing to use the parameter of a global sum on assessment of loss of dependency. As signaled in **Livingstone v Rawyards Coal Co. {1880} 5 APP Cas 25, 29 Lord Blackburn** stated:

"where an injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at that sum which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong."

The rational principle should in my view as underscored by **Dickson J. of the Supreme Court of Canada in Andrews v Grand & Toy Alberta Ltd {1977} 83 DLR** which he stated:

"The monetary evaluation is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being ganged by earlier decisions, but the award must also of necessity not be arbitrary or conventional. No money can provide true restitution."

The point was further emphasized in **Lau Chepung v Hoi Kong Ironwares Godown Co. Ltd {1988} 2 HKLR 650** the Court held:

"Apart from automatic adjustment for inflation, a general adjustment of the guidelines may be necessary on account of change in social-economic conditions changes inevitably take place in the everyday life of any growing society and the expectations of the average person and family tend to increase each year goes by."

Such that, it follows therefore the object of an award of damages is to compensate the plaintiff for his loss and not to punish the defendant for his wrong doing. In the ultimate analysis, this case turns on a question of principles fundamental in the assessment of damages. Against this background the argument in favour of the appellant carries the day that in damages award for loss of dependency the parameters applied by the Learned trial Magistrate eventually occasioned an excessive and inordinately high quantum.

Hence, its somewhat necessary to interfere with the award on loss of dependency.

b) Which sum would be sufficient compensation?

The award of damages in respect of a deceased minor is not *ipso facto* evidence that the award is excessive or erroneous. **(See Kenfro Africa Ltd t/a Meru Express Services {1976} & another v Lubia & Another (No. 2) {1987} KLR 30).**

However, having looked at all the evidence before me it is clear that trial court did not make any reference to previously decided cases with similar circumstance before arriving at its assessment of damages. In as much as there are differences on what approach a trial court will take to award damages it is prudent for the courts to have a semblance of consistent decision making with regard to this matter. I find that there are no authorities relied upon by the learned Magistrate whom he expressed himself on the sum of Kshs.2,000,000/= on loss of dependency.

While compensation is the epitome of civil suits and indeed a form of healing balm on the wounds occasioned by the death of a minor, it is prudent for courts to refrain from awarding outrageously high general damages that can only be assumed to be punitive on the part of the Defendants. It is therefore my considered view that the total award of Kshs.2,000,000/= as loss of dependency in the circumstances of this case was excessive.

Now to determine how much the award should be I direct my mind to the most recent decided cases of **S.M.K v Josephat Nkari Makaga Civil Appeal No. 66 of 2011** where an award of Kshs.800,000/= was given on appeal under the head of loss of dependency in 2017 for a child aged 6 years and **Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & 2 others v JGM & SMM** where an ward of Kshs.1,530,000/= given for a 9 year old was revised downwards on appeal to Kshs.1,000,000/= in 2019.

In the instant case the appellants proposed an amount between Kshs.300,000.00/= and Kshs.600,000.00/= would be sufficient compensation under that head but did not lay basis on why they think this figure would be reasonable. I am inclined due to the similarities with the present circumstances in the case of **S.M.K v Josephat Nkari Makaga Civil Appeal No. 66 of 2011 and Civil Appeal No. 18 of 2014 Daniel Mwangi Kimemi & 2 others v JGM & SMM.** I am however inclined to draw a median considering that the minor in the present case was only 7 years old too young for his future to be determined and to avoid further speculation.

I therefore find that compensation of Kshs.900,000.00/= to be fair and reasonable in favour of the respondent.Thus in this appeal, I agree that the appeal should be allowed for the reasons given elsewhere in this Judgment. The decree of the Magistrate Court should be varied by decreasing the award of damages to a net sum of Kshs.900,000/= from the date of Judgement.

In the result, the Learned Magistrate awarded damages on pain and suffering for Kshs.100,000/=, loss of expectation of life of Kshs.150,000/=, special damages of Kshs.18,085/= remains undisturbed by the Court. These are the orders of the Court. It follows in entirety that as the appellant partially succeeded costs of the appeal be equally apportioned with the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF OCTOBER 2020

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R. NYAKUNDI

JUDGE

In the presence of

1. Adoyo holding brief for Noor advocate for the appellants

2. Mr. Atiang holding brief for Kenga Advocate for the respondents