TB v MOO & another (Suing as the legal representatives of the Estate of the Late LM - Deceased) (Civil Appeal 79 of 2021) [2025] KEHC 3520 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 79 OF 2021

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

TB ..... APPELLANT

AND

MOO ..... 1ST RESPONDENT

WKO ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE LM - DECEASED

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. G.N. Barasa (RM) dated 3.3.2020 arising from Ogembo SPMCC No. 232 of 2017. The lower court heard the parties and proceeded to render the impugned judgment in the following terms:

    a. Liability 80:20

    b. Loss of expectation of life Ksh 100,000/=

    c. Loss of dependency Ksh. 1,000,000/=

    d. Special damages Ksh. 45,000/=

    e. Pain and suffering Ksh. 100,000/=

    Total Ksh. 1,245,000/=

2. The Appellant was a defendant in the lower court. The Respondent was an administrator of the estate of a two year old baby who died as a result of an accident on 28.6.2017 at Mangusu market area. The baby died at Akemo Valley Hospital.

3. The Appellant, aggrieved by the lower court's finding, appealed herein vide a mmemorandum of appeal on 13.7.2021. The appeal is against liability and award of general damages. The Appellant posited that the lower court made an inordinately high award. The Appellant sought to set aside the finding on liability.

4. The Memorandum of Appeal is prolixious and unseemly. It is a 10-paragraph monolith raising only two issues; that is liability and quantum. This offends Order 42 Rule 1 of the Civil Procedure Rules, which provides as doth: -

> " 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
>
> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

5. The Court of Appeal had this to say about compliance with Rule 86 now [88] of the Court of Appeal Rules, (which is pari materia with Order 42 Rule 1 of the Civil Procedure Rules) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> " We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
>
> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in anyway enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs." The 18 grounds of appeal presented by the appellant, Robinson Kiplagat Tuwei against the judgment of the Environment and Land Court at Eldoret (Odeny, J.) dated 19th September 2018 raise only two issues..."

6. In the case of Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that : -

> " Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013, this Court stated:

> "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

Pleadings

7. The Respondent, vide a Plaint dated 5.12.2017 claimed damages for an accident that occurred on 28.6.2017 when the deceased infant was a pedestrian off the road at Nyangusu Market when the Appellant, her driver or agent negligently and dangerously drove motor vehicle Registration No. KBA XXXX, lost control and hit the deceased.

8. The Respondents set forth particulars of negligence for motor vehicle Registration No. KBA XXXX. They pleaded special and general damages under the *Law Reform Act* and *Fatal Accidents Act*. The Respondents indicated that the deceased left behind the respondents who were the deceased's father and mother. The Appellant entered appearance and filed defence dated 20.3.2022, denying the particulars of negligence, res ipsa loquitor and injuries pleaded in the plaint. They also set forth particulars of negligence of the deceased baby.

9. Subsequently, the Appellant amended the plaint and introduced special damages of Ksh. 120,000/= being funeral expenses and special damages.

Evidence

10. At the hearing, PW1 was the mother WKO who testified and produced exhibits including receipts for Ksh. 120,000/=. She relied on her witness statement dated 5.12.2017. She testified that the motor vehicle Registration No. KBA XXXX lost control, veered off the road and hit the minor. On cross examination she stated that she saw the accident happen.

11. The Defendant did not testify but called a police officer. The officer stated that the accident did happen and as a result the minor succumbed to injuries. He stated that the child was at the parking lot. The driver removed the child but the child went back. She realized only on screams from members of the public. On cross examination he stated that the driver saw an NTSA vehicle and went back to parking and the accident occurred. I do not know how the court believed such evidence. I shall revert shortly.

Submissions

12. The Respondent filed submissions dated 6.11.2024 by which it was submitted in material that the findings of the lower court on quantum and liability was proper and so the appeal is unmerited.

13. It was submitted in this regard that the deceased minor, 2 years old was at the parking lot and not crossing the road and was accompanied. Based inter alia on Bozman v State 177 md 151 9A 2d 60 (1939), it was submitted that the child of tender years would not be held to the same measure and care as required of a prudent adult. Bashir Ahmed Butt v Uwais Ahmed Khan (1982-88) (1981) KLR 349 was also cited to anchor this position.

14. On quantum it was submitted that the award of pain and suffering of Ksh. 100,000/= was proper as the deceased died several hours after the accident. They, among others, relied on Beatrice Mukulu Knaguta & Another v Siverstone Quarry & Another (2016) eKLR.

15. On loss of expectation it was submitted that the award of Ksh. 100,000/= was adequate as the deceased lost life at a tender age of 2 years. The Respondent cited Daniel Mwangi Kimemia & 2 Others v JGM & Another (2016) eKLR.

16. On loss of dependency, it was submitted for the Respondent that the multiplicand of Ksh. 10,000/= and multiplier of 42 years was proper as adopted by the lower court.

17. The Respondent submitted that the choice of whether to apply the multiplier or global sum approach was at the discretion of the court and such discretion herein was properly exercised. Reliance was placed on the case of Francis Odhiambo Nyunja & 2 Others v Josephine Malala Owinyi (2020) eKLR.

18. I have not had sight of the Appellant's submissions.

Analysis

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

20. This court's the jurisdiction to review the evidence should be exercised with caution. In the cases of Peters vs Sunday Post Limited [1958] EA 424 , the court therein rendered itself as follows:-

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

21. It must be borne in mind that the court does not have the advantage of seeing and hearing the witnesses as did the lower court, yet it must reconsider the evidence, evaluate it itself and draw its own conclusions. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

22. On damages the Appellant submitted that Ksh. 30,000/- would be adequate award under pain and suffering. In Civil Appeal No. 42 of 2018 Joseph Kivati Wambua vs SMM & Another (suing as the Legal Representatives of the Estate of EMM-Deceased) paragraph *21* Hon. Odunga J (as he then was) observed: -

> " The Appellant has taken issue with the award for pain and suffering on the ground that the evidence on record showed that the deceased passed away the same day and therefore the Respondents ought to have been awarded a lesser sum. In my view what determines the award under that head is how long the deceased took before he either passed away or lost consciousness... a distinction ought to be made between a case where the deceased passes away instantly and where the death takes place some times after the accident. In the former, the award ought to be minimal as the legal presumption is that the deceased did not undergo pain before he died. However, where the deceased dies several hours after the accident during

which time he was conscious and was in pain, an award for pain and suffering would not be nominal." (emphasis mine).

23. It must be remembered that damages are at large and are not a mathematical exercise. Where the deviations in the overall award are minimal, the court will not interfere with the award under the various heads, except for special damages that require specificity. In Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (2019) eKLR , Justice D.S Majanja held as doth:

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

24. Award of pain and suffering depends on whether the deceased died on the spot or after some time. That is, 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. Where a deceased died on the spot, courts have taken the approach that minimal damages should be granted, unlike in a case where a deceased dies later on. In this case, the deceased passed away on the same day of the accident, but hours later. He cannot be said to have died on the spot. He died, according to the certificate of death and the evidence on record at Kisii Teaching and Referral Hospital, as a result of chest injury due to blunt force trauma in the chest secondary to a road traffic accident.

25. The question, therefore, is whether the award of Ksh. 100,000/= for pain and suffering was excessive. The damages for pain and suffering were awarded at 100,000/=. The deceased died after some hours of excruciating pain. The court awarded nominal damages of 100,000/=. The Appellant proposed Ksh.10,000/= under this head while the Respondent submitted that the award of Ksh,. 100,000/- was proper. In Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased) [2020] eKLR, the court, Justice W. Musyoka stated as doth; -

> 13. In Sukari Industries Limited vs. Clyde Machimbo Juma Homa Bay HCCA No. 68 of 2015 [2016] eKLR, where the deceased had died immediately after the accident and the trial court awarded Ksh,. 50,000.00 for pain and suffering, the appellate court captured the spirit of the law on the issue when it stated:
>
> > "[5] On the first issue, I hold that it is natural that any person who suffers injury as a result of an accident will suffer some form of pain. The pain may be brief and fleeting but it is nevertheless pain for which the deceased's estate is entitled to compensation. The generally accepted principle is that nominal damages will be awarded on this head for death occurring immediately after the accident. Higher damages will be awarded if the pain and suffering is prolonged before death. According to various decisions of the High Court, the sums have ranged from Ksh, 10,000 to Ksh, 100,000 over the last 20 years hence I cannot say that that the sum of Ksh, 50,000 awarded under this head is unreasonable."

26. The awards under this head are nominal and do not represent the pain the deceased suffered. In granting nominal damages, looking at damages from other perspectives is necessary. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the

insurance industry and the economy. In the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra), it was stated that:

> ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional...

27. I do not find nominal damages for a person who died after three or so hours to be inordinately excessive. I do not find a reason to disturb the discretion of the court. The appeal in respect thereto is therefore dismissed.

28. On loss of expectation of life, the Appellant did not submit how this award was excessive. I find that the award of Ksh. 100,000/- under loss of expectation of life was not excessive and is hereby upheld. The deceased did not die after suffering elongated pain for some hours. In Mercy Muriuki & Another vs. Samuel Mwangi Nduati & Another (Suing as the legal Administrator of the Estate of the late Mwangi) [2019] eKLR it was observed that:

> " The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh,. 100,000/= while for pain and suffering the award range from Ksh,. 10,000/= to Ksh,. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death."

29. Under loss of dependency, the court will address two aspects, that is, the multiplier and the dependency ratio. This is not proper for a minor. The use of multiplier is not good for a minor as they do not have an income. A global award will suffice. In the circumstances, a child of 2 years will attract a global award of Kshs. 800,000/=. I therefore set aside the award and replace it with Ksh. 800,000/=. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the grounds of excess or insufficiency.

30. The court cannot base an appeal decision on conjecture, hyperbole, and surmises. The court cannot pick a figure arbitrarily. The duty of the court regarding damages is settled, and the state of Kenya's economy and the people generally, as well as the welfare of the insured public, must be at the back of the mind of the trial court. In the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results that should prevail in Kenya, where the conditions relevant to the assessment of damages,

such as rents, standards of living, levels of earnings, costs of medical supervision, and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter & Hancox JJA)March 30,1983. The general picture, all the circumstances, and the effect of the injuries on the person concerned must be considered.

The fall in the value of money generally and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling must be taken into account.

Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.

But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

31. Finally, in deciding whether to disturb the quantum given by the lower court, the Court should be aware of its limits. As an exercise of discretion, it should be done judiciously and conclusively in circumstances to ensure that the award is not too high or too low to be an erroneous estimate of damages.

32. The court of appeal pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs. Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

> The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts or left out of account a relevant one or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of damages.

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

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

34. Therefore, for me to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure. The use of a global figure is cleaner. In the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR the court stated as follows;

> On review of the evidence it may be just on the facts of this particular case to adopt the global sum assessment approach. Where the trial court considers that a particular case justice would be better served by applying a global sum approach instead of a multiplier to substantially

dispose off the assessment of damages. There can be no misdirection for that procedure. To put simply one cannot even rule out that the deceased income generating activities entitled him to monthly income of Ksh,.18,000/= per month. Had the deceased continued for longer he was to provide for the dependents. I find no reason to take a different view of from the learned trial magistrate with regard to an assessment on loss of dependency under the *Fatal Accidents Act*.

35. The second question is liability. There is an appeal on liability. No appeal against the award on special damages. Therefore, the Appellant's evidence having been that she was aware of the presence of a child in the parking lot, it was foolhardy to proceed when the child is in front. The reality, from DW1, is that the Appellant was interested in running away from NTSA. Therefore though there is no cross appeal, the finding of a 2 year old as liable is a nullity. In Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

36. There cannot be a basis for letting a nullity remain. Under the circumstances, the finding on liability is set aside. The correct finding is that either the driver was liable or not. A child of 2 years cannot be held liable for contributory negligence. In the circumstances, the Appellant is to be 100% liable. The finding of contribution is unlawful.

37. This court is entitled under article 165(6) to be satisfied with the legality of proceedings. In this case, it was not legal to find a child negligent. I am perturbed by the court's decision to blatantly ignore the Court of Appeal decision with abandonment. It is even shocking that the court ignored the tenets relating to section 112 of the *Evidence Act*.

38. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, Justice G V Odunga as then he was stated as doth:

> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
>
> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

39. The court awarded Ksh 48,000/= when Ksh 120,000/= was proved. However, there is no cross-appeal. I shall let the sleeping dogs lie.

40. In the circumstances, the appeal is partly allowed and partly quashed for being a nullity pursuant to Article 165(6) of *the Constitution*.

Determination

41. In the upshot, I make the following orders: -

    a. The appeal on liability is quashed as it is a nullity. The Appellant shall be 100% liable.

    b. Appeal on special damages is dismissed.

    c. Appeal on loss of expectation of life is dismissed.

    d. Appeal on the loss of dependency is allowed. The award is set aside and replaced with a sum of Ksh. 800,000/=.

       This works as follows:

       i. Pain and suffering Ksh. 100,000/=

       ii. Loss of dependency Ksh. 800,000/=

       iii. Loss of expectation of life Ksh. 100,000/=

       iv. Special damages Ksh. 45,000/=

       Total - Kshs. 1,045,000/=

    e. Appeal on pain and suffering is dismissed.

    f. Stay of execution for 30 days.

    g. The Deputy Registrar of this court to serve the court with this order.

    h. File is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Nanjira for the Appellant

Were holding brief for Oremo for the Respondent

Court Assistant – Michael