Kenindia Assurance Company Limited v IG (Minor suing thro' next friend and mother PBO) (Civil Appeal E039 of 2023) [2024] KEHC 1207 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1207 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E039 OF 2023

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

KENINDIA ASSURANCE COMPANY LIMITED .... APPELLANT

AND

IG (MINOR SUING THRO' NEXT FRIEND AND MOTHER PBO) .... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable D.O. Mac' Andere given on 31/3/2023 in Kisii CMCC 469 of 2019.
2. The Memorandum of Appeal is a humougous, argumentative repetitive and prolixious a paragraph behemoth consisting of 4 pages running from pages 6 – 9 of the record of Appeal. A memorandum of appeal should be concise and address only grounds that are being Appealed Upon. It is not a thesis of what could have been or an analysis if evidence. Order 42 Rule 1 provides are doth:-

   " 1. Form of appeal –

   (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.

3. The Court of Appeal had this to say in regard to rule 86 of the Court of Appeal Rules, which is pari materia with order 42 Rule 1, 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..."

4. Further in 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."

5. 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.

6. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to

take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

7. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of Selle and another Vs Associated Motor Board Company and Others [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

> " .. 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 re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally."

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

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

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

Background

10. The matter relates to a suit filed via a Plaint dated 25/6/2019 and filed on 27/6/2019. The plaintiff pleaded that on 4/4/2006 the plaintiff sustained injuries. He sued in Kisii CMCC 244 of 2015 and the Court awarded Kshs. 3,336,315 plus costs and interest which all amounted to 4,408,880. The said liability was covered under Section 10 (1) of Cap 405. The Plaintiff prayed for Kshs. 4,408,888.

11. The Defendant filed defence under protest in the defence they denied covering the said Motor Vehicle Registration No. KWM 584F under policy No. 116/081/1088/20006/17/03.

12. They further averred that they are strangers to Kisii CMCC 244/ 2015. They stated that they are not bond to satisfy the decree, no notice was served, they have never had a contract with one Evans Okwemwa.

13. For clarity, Kisii CMCC 244 of 2015 was initially filed with time as Kisii High Court HCCC 25 of 2008 before being transferred in 2015 to the lower upon enhancement of the jurisdiction of the lower courts.

14. In the Amended Plaint filed in the primary suit, that is, Kisii HCCC 25/2008 the 2nd Defendant was sued as the beneficial owner of motor vehicle registration KWM 584. The said motor vehicle was being driven by one James Nyangai Osoro. Maurice Nyabuto was said to be the registered owner. The victim was a pupil playing with other students outside their school compound when the accident occurred. This was changed through amendment to state that they were awaiting a vehicle to attend the funeral of one of their teachers who had died. The Pupil reportedly suffered the following: -

    a. Bilateral fracture of the superior puvic ramus

    b. Bilateral fracture of the inferior pub ramus

c. Posterior urethral injury with resultant urethral stricture.

d. Fracture left femur

e. Blunt injuries left shoulder.

15. The Amended plaint was further amended on 29/11/2023 pursuant to leave granted on 25/11/2013 to state that the minor was outside the school compound gate going for a funeral of their teacher. It appears that the 3rd Defendant in the suit died and was replaced by the administrators.

16. A notice of institution of the suit was served on 12/5/2008 via registered man to the Appellant. Annexed thereto at page 65 of the Record is was a police abstract naming James Nyangai Osoro the driver of KWM 584 Isuzu Lorry as the driver and wherein the driver was fined Kshs. 11,000/= of 8-months imprisonment.

17. The Respondent is named as one of the injured. One John Mogere (Deceased) was the pedestrian who died resulting in the charge of causing death by dangerous driving. The court in the primary court entered judgment for Kshs. 3,336,315 and costs of 309,648/=. This resulted in the declaratory suit herein. The court decided as doth: -

a. The prayers sought are granted as prayed.

18. This is the kind of judgment that should be frowned upon. There is no harm in the court indicating what it is allowing. It is a dangerous precedent to state allowed as prayed. Upon delivery of a short judgment given on 31/3/2023, the Appellant appealed to this court. As hitherto lamented, set out humongous grounds.

19. There are only three issues that arise from the said grounds, that is: -

a. Whether the Respondent proved its case on a balance of probabilities.

b. Whether the court can enter judgment for a sum over 3,000,000

c. Reliefs spent to the parties.

Analysis

20. This matter turns on the pleadings filed. The defence was evasive on what the Appellant's defence was. By stating that Evans Okemwa was not its insurer, the Appellant did not answer the case before it. The question before the court was whether the Appellants were liable under the contract of insurance policy, No. P/116/081/0880/2006/17/03.

21. The owner and policy holder stated in the police abstract to be Evans Okemwa Nyabuto of 182 Nyasiongo. Most crucially the driver was James Nyangae Osoro. He was the driver and was convicted on his own plea. Pursuant to Section 46, 47 and 47A of the *Evidence Act*, the judgment in the traffic case was binding unless factors for exclusion are shown to exists. The sections state: -

> " 46. Judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.
>
> 47. Any party to a suit or other proceeding may show that any judgment, order or decree which is admissible under the provisions of this Act and which has been proved by the adverse party, was delivered by a court not competent to deliver it, or was obtained by fraud or collusion.

> 47A. A final judgment of a competent court in any criminal proceedings which declares any person to be guilty of a criminal offence shall, after the expiry of the time limited for an appeal against such judgment or after the date of the decision of any appeal therein, whichever is the latest, be taken as conclusive evidence that the person so convicted was guilty of that offence as charged.

22. It may not be useful on liability. However, the issue before the court was not liability for the accident but liability to settle the judgment in Kisii CMCC 2544 of 2018. Both the driver and the owner were sued. The defence raised that they were not the insurers of Evans Okemwa. This was irrelevant in the presence of the insured driver. There is no doubt whatsoever, that the 1st Defendant in Kisii CMCC 244/2015 was the driver for the subject motor vehicle.

23. This makes it unnecessary to find whether Evans Okwemwa was the insured. Such a defence that is evasive is worthless. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in the appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

24. A contract of insurance indemnities not only the insured owner but also the insured driver. What is insured is the motor vehicle. The insurance cannot escape liability simply because the owner was not joined in the proceedings. It is enough that the same was driven by an authorised driver. Even where it was not for the authorised purpose, there has to be a repudiation. In the case of, James Akhatioli Ambundo v Lion of Kenya Insurance Co Limited [2021] eKLR, for which, I am persuaded, where the court succinctly, stated as doth:-

> " The position stated by DW1 that third parties injured by a diver who is covered under the third party insurance policy are covered by the policy is the correct position in law. The presumption is that the insured vehicle will not always be driven by the insured owner. Although the third party can easily escape these huddles by enjoining the owner or insured to the case, it does not follow that where the owner of the insured vehicle is not enjoined then the third party's claim is not covered by the policy. The mandatory aspects of the third party policy calls upon the insurer to settle the third party's claim first and cannot avoid making good the damage. Section 4 of Cap. 405 states that no person shall use or permit to be used a vehicle on the road without a third party insurance policy. The owner of the accident vehicle permitted the vehicle to be used on the road. He had a third party policy which has to settle the claim by the appellant.

One can raise several scenarios in cases involving third party claims like the present case. Could it have been different if the accident vehicle was driven by Mr. Francis O. Rao's (the insured) wife or child. I believe the insurer would have come to the rescue of the insured if his property were to be attached by the third party had the accident been caused by the wife or child. Another scenario is whether if the policy was comprehensive and the vehicle was damaged, could the insurer alleged that Mr. Michael Njaraita was not covered under the policy and decline to compensate Francis O. Rao. In my considered view, in all these scenarios, the insurer is liable to settle the claims.

As observed by Justice Visram, regard has to be made to the insurance policy. There is no dispute that Michael Njaraita was an authorized driver. The policy document was produced but the trial court seems to have been expecting a totally different document. The policy was procured through an insurance broker, Jardine Alexander Forbes. Under the subtitle "Driver" the policy states as follows:-

> "The insured or any other person authorized by him and by law to drive the insured motor vehicle(s)."

25. Secondly the Appellant filed a well written standard defence, complete with a relying affidavit stating they had a good defence. However, they did not tender any evidence in their defence.

26. Having not tendered evidence the defence became useless. It is mere averments a defence however beautifully or practically drawn canon be a substitute for evidence without evidence, the averments in the plaint and evidence tendered become unrebutted. Failure to rebut the respondent's evidence, means that the defendant cannot rely on the defence. In the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR, the court, Justice C Kariuki, J stated as doth: -

> " 37. The appellant chose not to call any witness despite it having filed a defence. In Shaneebal Limited vs County Government of Machakos [2018] eKLR, Odunga J while quoting with approval various court decisions held as follows (in relation to failure to tender evidence in support of averments in a defence:
>
>> ".......According to Edward Muriga through Stanley Muriga vs Nathaniel D. Shulter Civil Appeal No. 23 of 1997, where a defendant does not adduce evidence the plaintiff's evidence is to be believed as allegations by the defence is not evidence. In CMC Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103; [1976-80] 1KLR 835, Madan J (as he then was) expressed himself as hereunder:
>>
>> Pleadings contain the averments of the parties concerned. Until they are proved or disproved, or there is an admission of them or any of them, by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation. Until their truth has been established or otherwise, they remain un-proven. Averments in no way satisfy, for example, the definition of "evidence" as anything that makes clear or obvious; ground for knowledge, indication or

testimony; that which makes truth evident, or renders evident to the mind that it is truth…."

38. But what are the effect of failure by the appellant to tender evidence in rebuttal? The court in Shaneebal Limited vs County Government of Machakos [2018] eKLR (supra) addressed this issue in paragraphs 24 to 29 and while citing other case laws it held that where no defence is filed but no witness is called to give evidence in support of the defence, it means that the defence renders the plaintiff's case unchallenged.

39. That where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."

27. Nevertheless, even where the matter proceeds exparte, the duty and burden of proof remains with the plaintiff or alleges. This is in line with section 107, 108 and 109 of the *Evidence Act* which provides as doth: -

28. The burden of proof is set out in Sections 107 – 109 of the *evidence Act*. They provide as follows: -

" Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

29. In the case of MS (Suing through father and next of kin) SSB v Francis Kalama Mulewa [2019] eKLR, the Court D. O. Chepkwony stated as doth: -

" 14. Similarly, in the case of Susan Mumbi Waititu –vs- Kefala Greedhin, NRB HCC 3321 of 1993, the Court stated that: -

"The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that he who alleges has to prove. It's for the Plaintiff to prove her case on the balance

of probability and the fact that the Defendant doesn't adduce any evidence is immaterial".

30. In the case of Mary Wambui Kabugu –vs- Kenya Bus Services Ltd, Civil Appeal No.195 of 1995, Bosire JA expressed himself as hereunder: -

> " The age long principle of law is that he who alleges must prove. The appellant's case in the court below was that her husband was seriously injured in a road traffic accident due to negligence on the part of the respondent's driver. She did not, however, adduce evidence to establish that fact or any blame on the respondent. Her evidence on the accident was simply found him admitted at Kenyatta National Hospital with multiple injuries and in critical condition. She did not, of her own knowledge, know how he had sustained those injuries. The nurses who told her about the accident which gave rise to this suit were not called to testify. Nor did the appellant call any eye witness or witnesses to the accident to testify on it. She did not also call any other evidence from which some inference could be drawn as to the cause of the accident. In those circumstances the learned trial Judge was bound to come to the conclusion he did that the appellant did not on a balance of probabilities prove her case. On that ground alone the appeal would be dismissed".

31. On the other hand, if some credible evidence is tendered and the defendant does not rebut the same, the court is entitled to make a negative inference if no evidence is tendered in rebuttal. In the case of 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:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
>
> > "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
>
> 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 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."

32. In this matter, the police abstract and the lower court file indicated who the river and the insured were. There is no allegation on the plaintiff that the abstract is frictions.

33. There were no allegations that the police were fed with hog wash. An abstract, in the absence of evidence of the contrary represent a true state of the police file. There is no requirement to produce the insurance certificate. Pray, here does a victim of as traffic accident get an insurance certificate? It is the police who collect details and enter into the abstract. Until the contrary is shown, then I find that the evidence on the police abstract showed that the suit motor vehicle was insured by the Appellant. The insured driver was equally a party.

34. There is no explanation given why the Appellant is not liable. They have special knowledge on their insurance policies. Nothing could have been harder then produce evidence that they were not the insurers. How come the court is demanding proof from a Defendant? Section 107, 108 and 109 of the *Evidence Act* provide for the burden on whoever alleges. They alleged contrary to evidence on record that they were not the insurer and as such they have the burden of proof. They have special knowledge as provided under Section 112 of the *Evidence act*. The said Section provides as doth: -

> " 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

35. The third aspect is the statutory Notice. The same was served via registered post on 12/5/08. There is no rebuttal. More specifically after being served, the appellant did not comply with section 12 of the Insurance Third Party *Insurance Act*, Cap 405. It provides as doth: -

> " 12. Duty of person against whom claim made to give information
>
> (1) Any person against whom a claim is made in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 shall, on demand by or on behalf of the person making the claim, state whether or not he was insured in respect of that liability by any policy having effect for the purposes of this Act or would have been so insured if the insurer had not avoided or cancelled the policy and, if he was or would have been so insured, give such particulars with respect to that policy as were specified in the certificate of insurance issued in respect thereof under section 7.
>
> (2) If, without reasonable excuse, any person fails to comply with the provisions of this section, or wilfully makes any false statement in reply to any such demand as aforesaid, he shall be guilty of an offence."

36. By failing to respond, they became non suited on whether they were insurers. In the case of Kenyan Alliance Insurance Company Limited v Naomi Wambui Ngira & another (Suing as the Legal Representatives and Administrators of the Estate of Nelson Machari Maina (Deceased) [2021] eKLR;

37. It is said to be an offence to fail to so respond to such notice served. In the present case, the Respondents have argued that despite being served with the statutory notice in compliance with Section 10 (2) of

the Act, the Appellants did not respond to the same. This assertion has not been controverted. Indeed, it would have been good practice to respond to the statutory notice and state why it deemed it was not liable. This would have saved the Respondent the trouble of filing the declaratory suit it so filed and this would also have saved judicial time and resources. But as to whether or not failure to respond implies that liability would be attached against the said insurer for all such claims against persons it has insured, this Court finds in the negative. Notably, under Section 12 (2), failure to respond to the statutory notice attracts liability for an offence. The Section does not say that failure to do so would make one automatically make one liable for settlement of Judgments entered against their insureds. Had the drafters of this law intended so, they would have expressly provided for the same.

38. The other aspect, I noted from the proceedings that they alleged that a declaratory suit had been obtained. This is not a serious postulation Order 2 Rule 4 (1) provides as doth:-

> " Unfortunately the defendant opted to be evasive contrary to the tenets of Order 2 Rule 4 which provides as doth: -
>
> > "4. Matters which must be specifically pleaded [Order 2, rule 4.] (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, , fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
> >
> > a. which he alleges makes any claim or defence of the opposite party not maintainable;
> >
> > which, if not specifically pleaded, might take the opposite party by surprise; or
> >
> > which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.
>
> (3) In this "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.

39. Therefore, anything that will catch the other side by surprise must be pleaded. This was not done as such it is not available to the Appellant.

40. I find and hold that the Respondent proved that they were entitled to be indemnified. I therefore dismiss the issue of liability. The second aspect is whether the court erred in awarding Kshs.4,405,888/= when the law limits to Kshs. 3,000,000/=. The Appellant placed reliance on Section 5(b) (iv) of the insurance (Motor vehicle Third Party Risks) Act Cap 405. The Section 5 provides as doth: -

> " Requirements in respect of insurance policies in order to comply with the requirements of section 4, the policy of insurance must be a policy which—
>
> (a) is issued by a company which is required under the *Insurance Act*, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
>
> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising

out of the use of the vehicle on a road: Provided that a policy in terms of this section shall not be required to cover—

(i) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or

(ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or

(iii) any contractual liability;

(iv) liability of any sum in excess of three million shillings, arising out of a claim by one person.

41. It is true that the court cannot award more than Kshs. 3,000,000/= for any one claim. However, the question to ask ourselves, is whether the court awarded more than Ksh. 3,000,000/=. To be able to answer the question, we have to dissect, the sum of 4,405,888. It is made up of the following

a. General damages 3,000,000/=.

b. Special damages 336,615/=

c. Cost and interest from the lower court.

42. The reality is that gaily we have 2 kinds of insurance companies. There are those that pay apriori and there are those that have to be compelled to pay. The first kind of insurance companies sometimes settle even before the case goes to court, resulting in savings on costs. The second type wouldn't pay, can't pay till a threat of winding up is raised. One has to just peruse the cause lists throughout the company in any one week as against licensed insurance companies to classify this.

43. Those who are compelled to pay, have to bear the costs of their being not able to pay on time and without a court battle. This is where costs and interest come in. Out of Kshs. 3,336,615 awarded, the same is made up of Kshs. 3,000,000/= general damages and 336,615 Special damages.

44. A sum of Kshs. 336,618 is over and above the 3,000,000 /= per claim. This is the Appellant is not bound to settle. Priority is always given to amounts actually incurred in this case the special damages of Kshs. 336,615. The balance out of Ksh 3,000,000/= is Kshs 2,663,385. these the Appellant is liable to pay. of Thus the Appellant liable to settle as follows: -

a. Special Damages - Kshs. 336,615

b. general damages -Kshs 2,663,385

Total -Ksh. 3,000,000

45. Special damages are always prioritized as they were incurred. They attract interest from the date of filing of CMCC No. 244 of 2015 (Formerly HCC 25/2008 that is on 10/4/2008 at court rates till payment in full. The sum of Kshs. 2,663,3385 attracts interest from the date of judgment in Kisii CMCC 244/2015, that is from 18/9/2018 at court rates.

46. It is settled that simple interest on liquidated damages should commence from the date of filing the suit. In the celebrated Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 the court stated as follows:

> The principle that emerges is that where a person is entitled to a liquidated amount or to specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interests from the date of filing suit. Where, however, damages have to be assessed by the Court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of the judgment.

47. Similarly, in Jane Wanjiku Wambu v Anthony Kigamba Hato & 3 others [2018] eKLR, the court stated as follows:

> 32. I have come to the conclusion that the Learned Trial erred by not adverting her mind to whether interest was payable on the liquidated sum she ordered the Respondent to pay to the Appellant. Had the Learned Trial Magistrate done so, she would have likely reached the conclusion that the Appellant was entitled to an award of interest at Court Rates from the time of filing the suit since she had already concluded that the Appellant was entitled to a liquidated amount which she had been deprived of by the actions of the Respondents. This is the predictable rule on award of interest on liquidated sums that has emerged from our Courts' repeated application of Section 26 of the *Civil Procedure Act*. The cases cited above reached the conclusion that where a claim is for liquidate damages, unless there is good cause, the interest should be calculated from the date of filing the suit.

48. The court in 244/ 2015 awarded costs. Costs are payable over and above the 3,000,000/= per claim. The raison d'etre for paying costs is not due to the claim. It is due to representation. Costs are provided for under Section 27 of the *Civil Procedure Act* which provided as doth: -

> " 27. Costs (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

49. The award of costs, therefore, is not contrary to Section 5 (b) (iv). When a claim is allowed or dismissed, costs follow the event. The costs are therefore independent of the limit on the claim. Doing otherwise will create tyranny where the insurance companies will waste judicial time knowing that in any case, they are eating into the claimant's money. The guiding principles applicable on costs follow the event, and judicious exercise of the discretion was enunciated in the case of Jasbir Singh Rai & 3 others

vTarlochan Singh Rai & 4 others (Sup. Ct. Petition No. 4 of 2012; [2014] eKLR), where the supreme court posited in a binding manner as doth:

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

50. The other aspect is that if interest is not a creation of Cap 405. This is a penalty or not paying in time. The amendment to Cap 405, being a later statute did not amend by implication, Section 26 of the *Civil Procedure Act*. Section 26 of the *civil procedure Act* Provides as doth: -

> "26. Interests (1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
>
> (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum."

51. Therefore, a sum of Kshs. 3,000,000/= as awarded in 244/2015 continues to attract interest as per section 26 of the *Civil Procedure Act*.

52. The court was thus correct in awarding Kshs. 4,405,000 except that she failed to exclude from general damages a sum of Kshs. 336, 315 out of the total award. It is thus advisable that even where the amounts are impending together they are segregated to avoid amending judgment already delivered.

53. In the end I will partially allow the appeal and order that sum of Kshs. 2,663,385, General Damages and Kshs. 336,610 in Special Damages together with costs of Kshs. 135,250 award in 244/2015 and cots in the primary suit be awarded to the Respondent.

54. Given the marginal success, the respondent will have ¾ costs, that is a sum of Kshs. 135,250/= stay for 30 days.

Determination

55. The upshot of the foregoing I allow the appeal marginally as follows: -

a. The Appeal on liability is dismissed in *limine*.

b. The Appeal related to the statutory notices is dismissed

c. The Appeal in quantum is allowed to the extent only that the court erred in awarding Kshs. 336,15, instead of 3,000,000 accordingly I set aside the award and substitute the same with: - The Appellant is bound to settle: -

i. General Damages of Kshs. 2,663,385 and special of Khs. 336,615 making a total of Kshs. 3,000,000/=

ii. The sum of Kshs. 336,615 will attract interest from the date of filing CMCC 244/2015 that is on 10/4/2008 till payment in full.

iii. A sum of Kshs. 2,663,385 will attract interest from the date of Judgment in Kisii CMCC 244/2015 that is on 21/9/2018.

iv. The Appellant shall pay costs and interest thereon on Kshs. 309,648 Amended in Kisii MCC 244/ 2015.

v. The Appellant to pay costs as assessed in 469/2019.

d. Payment of interest and costs over and above Kshs. 3,00,000 is not inconsistent with Section 5(b)(iv) as the same does not amend by implication Sections 26 and 27 of the *Civil Procedure Act*.

e. The Appellant shall ¾ bear costs, that is a sum of Kshs. 135,250 of the Respondent in this matter pursuant to exercise of discretion under Section 27 of the *Civil Procedure Act*.

f. 30 days stay

g. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant Brian