Nyamache Tea Factory Limited v Mose & another (Suing as Personal Representatives and Legal Administrators of the Estate of Jane Kerubo Mose – Deceased) (Civil Appeal 26 of 2023) [2024] KEHC 1120 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1120 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 26 OF 2023

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

NYAMACHE TEA FACTORY LIMITED ..... APPELLANT

AND

ABIGAEL KEMUNTO MOSE ..... 1ST RESPONDENT

EVELYNE NYARESO ..... 2ND RESPONDENT

SUING AS PERSONAL REPRESENTATIVES AND LEGAL ADMINISTRATORS OF THE ESTATE OF JANE KERUBO MOSE – DECEASED

JUDGMENT

1. This matter is a fairly straight forward appeal from the decision of Hon. C. Nsindai, PM given on 14/2/2023 in Ogembo CMCC No. 33 of 2017. The Appellant was the defendant in the case, in the lower court.

2. The Appellant filed a propitious unseemly repetitive and long winded 17 paragraph memorandum of appeal. The same breaches every known rule on conciseness of pleadings. The Appellant should file concise Memorandum of Appeal. Under 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 (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:
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> > "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. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the first Appellate court

6. 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.

7. 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."

8. 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."

9. 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.

10. 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..."

11. 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."

12. The duty of the court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

13. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of .....is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts.

> The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

14. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

15. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

16. The foregoing statement had been ably elucidated by Sir Kenneth O'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
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> Appellate Court is not justified in substituting a figure of its own for
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> that awarded simply because it would have awarded a different figure
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> if it had tried the case at the first instance..."

17. For the appellate court, 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.

18. The Respondent filed humongous submissions on 17/11/2023. The Appellant filed submission, 23 pages long hard copy- if I don't refer to any aspect, if not for want of effort but economy of space.

Appellant's submissions

19. The appellant gave a chronology of events with a suit filed on 15/11/2016 for a road accident on 25/5/2002, 14 years and 6 months after the occurrence of the accident and 11 years and 6 months after the limitation period ended. They state that the suit was time barred and extension of time had no legal effect. They also state that the accident was due to the negligence of the Deceased.

20. The respondent's reason for not filing sui within times as that JS Odongo advocate was instructed but disappeared hence he could not file suit. She stated she knew the accident.

21. The Appellant summarized the memorandum of Appeal into 5 prolixious grounds These 5 grounds are equally repetitive. They submitted that the Magistrate erred in not deciding the legality of extensions of time. Their main ground was that the court was wrong in not deciding on the question of the extension of time.

22. They submit that the decision of Mary Wambui Kabugu V Kenya Bus Service Limited [1997] eKLR settles the question on how to deal with exparte application for leave.

> " This majority decision was followed by this court in the case of Yunes K. Oruta and Another v Samwel Mose Nyamato Civil Appeal No. 96 of 1984 (unreported). In his judgment in the case of Bernard Mutenga Mbithi v Municipal Council of Mombasa and Another Civil Appeal No. 3 of 1992, (unreported) Kwach, J.A. albeit, abiter dicta, set out the issue most succinctly thus:
>
> > "..... the question whether or not the plaintiff was entitled to the extension can only be challenged in the proceedings. This is one of the exceptions to the general rule that a party against whom an ex parte order has been made can only apply to the court which made the order to set it aside.".
>
> This court, in its more recent decision in the case of Michael Miana and K. P. & T. Corp. v Stanley Kigara Kagombe Civil Appeal No, 109 of 1996, (unreported) expressed a somewhat conflicting view to that expressed in the unanimous decision of this court in Oruta. The reasons for this are twofold. Firstly, Cozens v North Devon Hospital Management Committee and Another (1966) 2 All E. A. 79, Yunes K. Oruta and Another v Samwel Mose Nyamato Civil Appeal No. 96 of 1984 (unreported and the judgment of Kwach, J. A. in Mbithi which might have influenced it in reaching its decisions, were not brought to the attention of this court when it was considering Maina, and secondly, and this is important, the English authority upon which this court placed great reliance in Oruta, namely, Craig v. Kanseen (1943) 1 K. B. 256, which not only, did not deal with the question of limitation of actions but which also, as can be seen, was decided some twenty years before the English Limitation Act of 1963 was passed, some twenty three years before Cozens, and some twenty four years before our Limitation Act was passed, was clearly inapt for the determination of the point in issue in Maina whether an ex parte order made under the Limitation Act, was "void or voidable". For these reasons, I would venture to say that the decision of this court in Maina was per incuriam."

23. It is their case that the challenge of leave is a matter within the province of a full court hearing the suit. They relied on the case of Joseph Mbindyo & 3 others v Tana And Athi Rivers Development Authority [2010] eKLR as doth: -

24. They state that the requirements of section 27 (2) have not been met. On this they rely on Joseph Mbindyo & 3 others v Tana and Athi Rivers Development Authority [Supra]. They also attribute negligence to PW1 and PW2. They rely on Kiema Muthoka -vs- Kenya Cargo Handling Service Ltd (1991) 2 KAR 258.

25. They urge that I dismiss the suit, in the Court below and allow the Appeal.

Respondent's Submissions

26. The Respondent filed submissions on 17th November 2023. They submitted that the Respondent's suit fell within the exemption under Section 4(2) of the *Limitation of Actions Act*. It was their case that

the court granted leave to file the suit out of time based on the materials presented by the Respondent per Sections 27 and 28 of the *Limitation of Actions Act*. They also relied on River Bank Academy & Anthony Maina Gacheru v another [2015] eKLR as follows:

> " I therefore find that the trial magistrate did not err in extending time. On this point I adopt the holding in Kenya Cargo Handling Services Limited Vs Ugwang KLR [1985] page 593 where the Court of Appeal held as follows:-
>
> "1. A claim for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract of employment or in tort simpliciter, and a claimant may make an election as which of those actions he intends to pursue.
>
> 2. Section 27 of the *Limitation of Actions Act* (Cap 22) does not lay down any period of limitation. All it does is to state certain circumstances under which the period of limitation provided for actions in tort does not apply. That section does not affect actions for personal injuries founded on contract as it relates exclusively to actions founded on tort..."

27. The Respondent submitted that the Respondent proved negligence and the Court was correct in so finding. It was in addition submitted that the appellant on the other hand did not adduce any evidence and the statement of defence remained mere allegations. Reliance was placed on the case of Motex Knitwear Limited V Gopitex Knitwear Mills Limited [2009] eKLR thus:

> " Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the Defence rendered by the 1st Plaintiff in support of the Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."

28. On quantum, it was submitted that loss of dependency was correctly awarded based on the global sum at Kshs. 1,500,000/= and was commensurate and not inordinately high. Reliance was placed on the case of China Civil Engineering & another v Mwanyoha Kazungu Mweni & another [2019] eKLR 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 Kshs. 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*."

29. On pain and suffering, reliance was placed on the case of David Kahuruka Gitau v Macncy Ann Wathithi (2016) eKLR to submit that Kshs. 100,000/- as awarded was not inordinately high as to be interfered with. On the loss of expectation of life, the Respondent submitted that the trial court did not err in awarding Kshs. 150,000/= and correctly based the decision on the case of Benedetta Wanjiku Kimani v Changwon Cheboi & Another (2013) eKLR.

30. On special damages, they submitted that the same was specifically pleaded and strictly proved and the court was correct in awarding Kshs. 30,550. Reliance wax placed on the case of Jane Katumbu Mwanzia Vs T.M. Mwanzui & Attorney General [2001] eKLR as follows:

> " Although there was no special proof by way of receipts that the Plaintiff is entitled to funeral expenses, this Court will allow a sum of K.shs. 100,000/=. In my view, this is a reasonable expense which cannot be ignored merely because the Plaintiff could not produce any receipts in support of the same. In deciding this, this court is well aware that special damages must not only be specifically proved but also proved. However, there are cases, as in this one where the Court will be called upon to apply its wisdom and decide the case in light of social realities of the day. It is very hard for people attending to burial procedures of their loved ones to concern themselves with matters of details such as receipts for every expense in contemplation of a suit which they may not even be aware of at the time of the burial. To insist on strict legal rules in such a case would not only amount to a denial of justice but also present the Court as being out of touch with reality."

31. I was urged to dismiss the Appeal.

Analysis

32. In order to proceed I will address the aspect of extension of time. Given the length and nature of written submission filed it is futile to summarize then here. I shall apply such parts that will suffice.

33. The 17 grounds of Appeal are basically on three issues:-

    a. Liability for the accident

    b. Inordinately high damages under the *Law Reform Act* and

    c. The proof or raison d'etre for extension for time.

34. I will deal with each of the issues, seriation. Before that I need to contextualize, problem liaised and conceptual the legal context for the deed herein. The cause of action is said to have arisen on 23/5/2002. It involves beefwood Lorry KAD 495M and the Deceased Jane Kerubo Mose. The appellant is said to be a company engaging in processing tea with its office within Kisii County.

35. The plaintiff filed suit on 15/11/2016, a period of 14 years 5 months and 8 days after the occurrence of the accident. This was 11 years 5 months and 8 days out of time. In other words, it is 4 limitation periods later. The period of delay is long. The same is inordinate and must be justified to stand.

36. The death certificate indicate that he deceased died of cardiopulmonary arrest due to internal bleeding. The respondents were given a police abstract on 11/6/2002. At paragraph 1 of the abstract the owner of KAD 495M Bedford lorry is given as KTDA, Nyamahe Tea Factory P O Box 380 - Kisii.

37. There is a Chief's letter dated 6/5/2012 produced. Vide Misc. Application No. 13 of 2018 the court allowed the filing of Ogembo SRMCC 33 of 2017.

38. There is also an order given by Justice Okwany on 23/3/2017 allowing filing of suit within 7 days. That is where the rubber meets the road.

    a. The first question the court will ask is whether there was leave to file suit out of time.

    b. Secondly, whether leave was obtained in meets the requisite provisions of the law.

c. Thirdly, whether an appeal lies from a decision of the High Court grant limited time for filing suit to the lower court.

39. The *limitation of actions act* provides for filing of suit within 3 years in respect of torts. Section 4(2) of the Limitation of Act Cap 22 Laws of Kenya provides as doth: -

> " 4. Actions of contract and tort and certain other actions
>
> (1) ...
>
> (2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

40. There are special circumstances to extend time for tort. They were set out in Section 27 of the *Limitation of Actions Act*. It provides: -

> " 27. Extension of limitation period in case of ignorance of material facts in actions for negligence, etc. (1) Section 4(2) does not afford a defence to an action founded on tort where—
>
> a. The action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and
>
> b. The damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and
>
> c. The court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and
>
> d. The requirements of subsection (2) are fulfilled in relation to the cause of action.
>
> (2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
>
> (a) Either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
>
> (b) In either case, was a date not earlier than one year before the date on which the action was brought
>
> (3) This section does not exclude or otherwise affect—
>
> (a) Any defence which, in an action to which this section applies, may be available by virtue of any

written law other than section 4(2) of this Act (whether it is a written law imposing a period of limitation or not) or by virtue of any rule of law or equity; or

(b) The operation of any law which, apart from this section, would enable such an action to be brought after the end of the period of three years from the date on which the cause of action accrued."

41. From the reading of this Section, 27 of the *Limitation of Actions Act*, the court may extend time on the following grounds: -

    1. Material facts were or facts of a decisive nature were outside the constructive or actual knowledge of the plaint.

        a. Till after 3 years lapsed but or 2 years after the accident.

        b. The case was brought less than 1 year after knowing those acts.

42. In this case the parties were aware of the cause of actions as at the time of death of the deceased.

43. Secondly, any leave obtained is exparte in its nature. The plaintiff still has a duty to prove those grounds during the full hearing. In other words, the defendants does not need to set aside the leave but challenge the same at the hearing. The Respondent obtained leave twice. First on 23/3/2017 and on 8/5/2018. The suit was filed on 15/11/2016 by a plaint dated 14/11/2016 and verified on 14/11/2016. The leave that was obtained on 23/3/2017 was for filing within 7 days, that its between 14/2/2017 and 21/2/2017. It cannot apply retrospectively to the suit filed by 14/11/2016.

44. The second order obtained on 8/5/2018, was obtained 444 days after filing the suit that is on 20/2/2017.letters of administration were issued on 25/10/2016. Even if it is taken that the plaintiff became aware on the date he filed for letters of administration or when they were granted, she had become non-suited by 25/10/2017. Seeking leave days later did not help.

45. Secondly, is it true that the material facts were outside the knowledge actual or constructive of the plaintiff. All the documents were ready by the first month of the accident. The chief's letter written 10 years later still show the defendant was known. It is my humble and considered view that all facts of decisive character were within the actual or constructive knowledge of the plaintiff.

46. Actual in that the cause of death and the fortfeasors were known. The Appellant was a company whose whereabouts were known. The death certificate was available from 12/8/2002. There was nothing remaining to be dealt with. The facts relied on in both applications are not facts set out in Section 27 of the Limitations of actions act. Leave was thus improperly obtained. The suit in the court below was time barred by dint of Section 4(2) of the *Limitation of Actions Act*.

    28. The third aspect is that if the suit, is already filed, the leave must be obtained within the suit before service of summons after service of summons any other proceedings are a nullity. It is stealing a match on the Appellant. The Plaint was a nullity. There is nothing to build on anything that is null and void? 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."

47. The suit was a nullity from day one. The leave was not supported in the main heating. It was the duty of the Respondent to support though evidence the grounds for grant of leave.

48. Thirdly, leave can only be obtained once. Justice Okwany gave leave to file suit in future. The same was not filed. The Respondent proceeded to the lower court after the High Court orders lapsed. He could not do so.

49. The order given was a nullity as it amounted to Appealing Justice Okwany's orders to the lower court. As much as I understand the desperation to validate an invalid suit, the respondent unfortunately did not succeed. She was left with a nullity in her hands.

50. I therefore find that the suit was improperly before the court and ought to have been dismissed.

51. On liabilities, the Applicant did not bother to tender evidence on liability. The Respondent indicated that her daughter died in a road accident. A police officer was called to produce an abstract. He did not ascertain how the accident occurred. The same indicated that it was pending under investigations since 11/6/2006.

52. There was no evidence connecting liability of the Appellant. The plaintiffs is under duty to proof her cause even in formal proof. 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:-
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> > "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".
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> 15. 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".

53. It must be understood that we have not reached liability without fault. Nothing was placed on the court record to show negligence. I find that once cogent evidence is tendered, the defence is under duty to rebut the same. If they do not tender evidence the plaintiff's evidence remains uncontroverted in the case of Leo Investment Limited v Mau West Limited & another [2019] eKLR, justice C Kariuki held 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."

54. However, in this case there is no evidence on liability. I cannot find the Appellant liable without evidence of negligence. No attempt was made to have evidence, however, tenuous in regard to negligence.

55. I therefore dismiss the case and allow the appeal on liability. The Respondent did not proof her case.

56. Even where a suit is dismissed the court is bound to assess damages. The Court is therefore bound to deal with quantum even where the case is dismissed.

57. In the case Mordekai Mwangi Nandwa versus Ms. Bhogals Garage Ltd Civil Appeal No 124 of 1993 (UR). The court made the following observations on this issue:

> " The judge was clearly under a legal duty to assess the damage she would have awarded to the appellant if he (judge) had found for him. That was in compliance with this court's then repeated directions to trial Judges to proceed in that manner so as to obviate the need for sending back a case to them to assess damages in the event of this court allowing an appeal. The practice of assessing damages by a trial judge irrespective of whatever his findings are does not and cannot mean that such a judge is writing an alternative judgment"

Quantum

58. As regards quantum the courts have settled that the same is discretionary. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Servcie 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.

59. 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 Counsel, 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..."

60. 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.

61. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

    b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

    c. The award is simply not justified from evidence.

62. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

63. The deceased herein was 32 years old as per the death certificate. The court indicated that she was pushed to make a colossal award of 1,500,000. She does not indicate who pushed her. The award of damages is not taken. It must be based on the evidence on record. There was no evidence that the deceased will have lived to 55 as opposed to a ripe old age of 70 y ears. The most important factor is not her age but the useful life to the dependent.

64. The child and mother were indicated as dependents as at the time of testimony the child was of tender years. No evidence was produced. However, it appears the child was 5 years at the time of the mother's demise. She will have been available to the minor for 16 years. In 2002 the minimum was wage 7330/=.

65. In the case of, Fredrick Kimokoti Imbali & 2 others v AKW & another (Suing as Legal administrators of the Estate of the late AK (Deceased) [2019] eKLR, Justice S N Riechi stated as doth; -

> " Damages awarded by the court are monetary compensation for the loss or injury sustained. Its aim is to bring the injured party to the same level he would have been before the injury. It is also to award for loss sustained and material loss suffered by the plaintiff or his estate by the wrongful act of the defendant. Where there is death, the aim is to compensate the dependants or estate of the monetary contribution the deceased was making to the dependants.
>
> In Kuloba J in measure of damages for bodily injury Law Africa Page 5 stated;
>
> a. In suit brought in respect of bodily injuries, the dominant rule of law which constitutes the fundamental and overriding principles underlying the whole law of damages and which governs the measure of damages, is the principle of compensation which is also Latinized as the principle of restitutio in integrum. This means that an award for bodily injury is intended to be compensatory in nature; that is to say that the plaintiff should receive in money terms no more and no less than his actual loss. The basic idea in awarding damages, with the exception of exemplary damages, then, is the attempt to make good on the principle of restitutio in integrum, that which is lost in recognition of the fact that actionable harm has been inflicted with resultant loss for which the law ordains compensation as far as can be done in terms of money. Accordingly, case after case in this volume proceeds on the normal principle that the victim should, in so far as money can do it, be placed in the position he should have occupied before he sustained the injury for which he is now getting his reparation or compensation.
>
> Damages as early as last centaury has materialized the same objective. In Livingstone Vs. Rawyanda Coal Co. (1880) 5APP Case R5 at 39 Lord Black bum defined the measure of damages as;
>
> > "That sum of money which will put the party who has been injured or who has suffered in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."

In MC Gregor on Damages 19th Edition Sweet & Maxwell (page 1590) on general method of assessment the Editor's state:

> The Court have evolved a particular method for assessing the value of the dependency, or the amount of pecuniary benefit that the dependency could reasonably expect to have received from the deceased in the future. This amount is calculated by taking the present annual figure of the dependency, whether stemming from money or goods provided or services rendered, and multiplying it by a figure which, while based upon the number of years that the dependency might reasonably be expected to last, is discounted so as to allow for the fact that a lump sum is being given now instead periodical payments over the years. This latter figure has long been called for multiplier; the former figure has come to be referred to as the multiplicand. Further adjustments, however, may or may not have to be made to multiplicand or multiplier on account of a variety of factors, namely the probability of future increase or decrease in the annual dependency, the so-called contingencies of life, and the incidence of inflation and taxation. Moreover, the value of the dependency can include not only that part of the deceased's earnings which he would have expended annually in maintaining his dependants but also that part of his earnings which he would have saved and which would have come to his dependants by inheritance on his death; and there may also be included a sum in respect of loss attributable to the cessation of contributions which the dependants were the nominated beneficiaries. Alternative methods of dealing with these savings have appeared: either they are regarded as compromised in the figure of annual dependency to be multiplied by the multiplier or they are excluded from the figure of annual dependency and a separate, and additional, sum is calculated and awarded in respect of them.

66. A Dependency ratio of 2/3 will have sufficient. This works out to be 7330x16x2/3x12= 938,240/=. Alternatively given her age and the age of the dependants, a lump sum of Ksh 1,000,000/= will suffice. I will have therefore set aside 1,500,000/= and substituted with 1,000,000/= as a lump sum.

Determination

1. The upshot of the foregoing is that I make the following orders: -
    a. The Appeal herein is allowed in its entirety. The suit in the lower court is dismissed.
    b. Given the circumstances of this case, the parties shall bear their own costs in this court and in the court below.
    c. Both files are 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: -

M/s Awino for the Appellant

M/s Ndemo for the Respondent

Court Assistant - Brian