Keroche Breweries v Onsare & another (Suing as a Representative of the Estate of Jared Kemosi Oyaro - Deceased) (Civil Appeal 58 (E004) of 2020) [2024] KEHC 2577 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2577 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 58 (E004) OF 2020

DKN MAGARE, J

MARCH 12, 2024

BETWEEN

KEROCHE BREWERIES .... APPELLANT

AND

HYRINE KWAMBOKA ONSARE .... 1ST RESPONDENT

THOMSON OGETI KEMOSI .... 2ND RESPONDENT

SUING AS A REPRESENTATIVE OF THE ESTATE OF JARED KEMOSI OYARO - DECEASED

(an appeal from the Judgment of the Hon. Dennis Mikoyani given on 31/8/2020 in Kisii CMCC 212 of 2016.)

JUDGMENT

1. This is an appeal from the Judgment of the Hon. Dennis Mikoyani given on 31/8/2020 in Kisii CMCC 212 of 2016. The Appellant was the Defendant in the lower court.
2. The amended Memorandum of Appeal dated 15/10/2020 raised 12 odd grounds (pun intended).
3. The grounds are repetitive unseemly and prolixious. Most of the grounds are pure hyperbole and raise nothing more than words and sentences. For example, grounds 12, was as doth: -

   > " The learned Magistrate erred in law and in fact in failing to appreciate the legal position to be considered. The court award is unsustainable and baseless in the circumstances."

4. What is this ground raising? The grounds of Appeal make some of the most painful reading. I had to contextualize and conceptualise the grounds to understand them. I ignored ground number 12 as it did not raise any issue at all.

5. These are only 2 issues raised in this appeal. The issues I can discern from the Appeal are as follows: -

   a. The question of award of General damages of Ksh. 2,631,861.80 without concrete documentary evidence.

   b. The issue of proof of a sum of Kshs. 86,870 as Special Damages.

6. The memorandum of Appeal is the best way not write a memorandum of appeal. Conciseness is paramount. It does not serve any useful purpose for the Memorandum of Appeal not to communicate the intention of parties. The rest are simply hyperbole.

7. Order 42 Rule 1 of the Civil Procedure Rules 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.

8. The Court of Appeal had this to say about compliance with Rule 86 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..."

9. 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."

10. 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.

11. 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."

12. 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."

13. 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.

14. 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..."

15. 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."

16. 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.

17. 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."

18. 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.

19. 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.

20. 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..."

21. 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.

22. 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.

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

24. 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 different.

25. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

Pleadings

26. The Respondent filed suit on 22/8/2016 for an accident on 11/5/2016. The Respondent is a legal representative of the estate of the Late Jared Kemosi Oyaro. (deceased).

27. The appellant was the owner of Motor vehicle KBV 274R Toyota - Hillux pick up. The deceased was said to be lawfully walking along the verge of Kisii – Kiligoris road where at Tendere area, when motor vehicle Registration No. KBV 274R hit him.

28. The Deceased is said to have left 5 Dependants, the widow, father and three children between 8-14 years. The deceased was 29 years old earning 30,000/= reported in good health. They prayed for damages under their *Law Reform Act*. I don't know why the father was included when the Deceased was married.

29. The matter was hitherto heard by Honourable Naomi Wairimu on 1/11/2017. The exparte proceedings were set aside and the defendant allowed to file defence by a Ruling dated 17/10/2018.

30. The Appellant filed a defence on 07/8/2018. The less said about the defence, the better. The defendants denied being the owner of motor vehicle Registration KBV 274R. They made an evasive defence that they are not the owner but if they were, they blamed the deceased for contributory negligence. They then pleaded 15 particulars of negligence which are boringly repetitive contrary to Order 3 Rule 2 of the Civil Procedure Rules, which provides as doth: -

> "2. Formal requirements [Order 2, rule 2.]
>
> (1) Every pleading shall be divided into paragraphs numbered consecutively, each allegation being so far as appropriate contained in a separate paragraph.
>
> (2) Dates, sums and other numbers shall be expressed in figures and not words.

31. The matter subsequently proceeded court. The impugned judgment was delivered on 31/8/2020 by the Hon. Dennis Mikayan SPM, as then, he was as follows: -

    a. Liability – 70:30

    b. Loss of dependency 2,631,862.80

    c. Loss of expectation of life 70,000/=

    d. Pain and Suffering 14,000

    e. Special damages 86,8770

    Total Kshs. 2,802,732.80

Evidence

32. Liability was recorded on 15/2/2020, at 70:30. The Respondent testified on 4/11/2019. She stated that they had child 18 years, 14 years and 12 years as tat the time of testimony. She stated that the deceased was buried at a cost of 150,000.

33. The deceased was reportedly in good health. She produced all the exhibits.

34. The witness was born in 1980 and as such was 36 years at the demise of demise of the deceased. The deceased was 29 years old. The first born was born in 2001. The ages were not adding up. The defendant did not testify parties filed submissions.

35. In the lower court, the court was urged to use the minimum wage of Kshs. 10,107 as provided for under *Labour Institutions Act* No. 12 of 2007. The deceased was 29 years and hence they prayed for 31 years as multiplier. Dependency ratio for 2/3 was suggested and as such a total of Kshs. 2,506,560.80 made up as hereunder: -

    10,107.10x12x31x2/3 = Kshs. 2,506,560.80.

Appellant's submissions

36. The appellant filed submissions on 4/02/2023. They stated that they relied on the case of Nairobi HCCA NO. 134 of 1998: Texcal House Service Station Ltd & Another vs. Timo Kalevi Jappinen & Another ; where the court is said to have laid own principles of the assessment of damages. They relied in the Case of Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR where the court of Appeal sitiing in Nyeri stated as doth: -

    > " Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

37. They submitted the award of Kshs. 20,0000/= will suffice as general damages for pain and suffering. The court had awarded less.

38. On loss of expectation of life they submitted that a sum of Kshs. 100,000 will suffice. They relied on the case of Benedeta Wanjiku Kimani v Changwon Cheboi & another [2013] eKLR, where the court of Appeal sitting in Nakuru stated as follows: -

> " 5. In common law jurisprudence of which Kenya is part, the courts have evolved two principles, loss of expectation of life and pain and suffering by the deceased, for award of damages under the *Fatal Accidents Act* for pain and suffering .... determined what is commonly referred to as a conventional sum which has increased over the years from Kshs 10,000/= to Sh 100,000/= currently. The basis of the increase has basically been based upon the increase of life expectancy from 45 years to run 60 years currently, that life itself was, until cut short by the accident worth something to the estate. The generally accepted principle is that very nominal damages will be awarded on this head claim if of death followed immediately after the accident. Higher damages will be awarded if the pain and suffering was prolonged before death. In this case, the conventional figure for loss of expectation of life is shs 100,000/= and I award the said."

39. They submit that the court ought to have used a multiplier of 26 years in view of the life expectancy Road traffic, vagaries of Aids, Covid 19. The later 2 Aare not relevant in determining vagaries of life.

40. They relied on the case of Alice Ombachi & another v Jerusha Kemunto Mokaya & Joshua Ageta Mokaya [Suing As Legal Representatives And Administrators of The Estate of Risper Nyaboke Mokaya (Deceased) [2019] eKLR, where Justice E N Maina stated as doth:

> " or the multiplier the rule as summarized by Ringera J, in Beatrice Wangui Thairu Vs. Hon. Ezekiel Barngetuny & Another (Suppra) is that "in choosing the said figure.... the court must bear in mind the expectation of earning life of the deceased, the expectation of life and dependency of the dependants and the chances of life of the deceased and dependants. The sum thus arrived at must then be discounted to allow the legitimate considerations such as the fact that the award is being received in lump sum and would if wisely invested yield returns of an income nature."

41. They state that the deceased lived in Kisii Municipality. A sum of 8,000/= was the minimum wage in Kisii. I am however see the evidence of this assertion which I dismiss, off hand.

42. They relied on the case of Charles Omwenga Ongiri & another v Daniel Muniko [2017] eKLR, where justice A C Mrima stated as follows: -

> " A Court when dealing with an appeal of this nature must always be reminded of the principles for consideration as enumerated by the Court of Appeal in the case of Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs. A.M.M Lubia & Another (1982-88) 1 KAR 777. The Court expressed itself clearly thus: -
>
> "the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, 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 the damage.'

43. They submitted and quite erroneously that only receipt in their name were to be awarded. They did not challenge specific special damages. They do not expect the court to sight and know which receipts are disputed. In any case it is not the respondent who died. Receipts are not expected to be in her name.

Respondents Submission

44. The Respondent stated that the our calculated the loss erroneously, after agreeing that 2/3 was agreed on. The calculation was indicated as 10,107x31x12x1/3= 3,3759,804. The figure is clearly wrong on the face of the record. They stated the correct calculation is 10,017x31x12x2/3=2,506,536.

45. They urge the court to award this amount less contribution agreed. Otherwise, I was urged to dismiss the Appeal

Analysis

46. In this context this is an appeal on quantum. I shall therefore address each aspect.

Pain and suffering

47. The court awarded a sum of Kshs. 14,000/= for pain and suffering. They placed relainceo nthe case of Munguti & another (Both suing as the administrators of the Estate of the Late Katama George Chamanje Mkangi - Deceased) v Bolpak Trading Company Limited & another (Civil Case 224 of 2007) [2023] KEHC 19651 (KLR) (Civ) (29 June 2023) (Judgment) where the court stated as doth: -

> "This amount is inordinately low. However, there was no cross Appeal over the same. In the case of Having settled the above, the court will now address the damages sought and awardable under the *Law Reform Act* and the *Fatal Accidents Act*. On general damages for pain and suffering, from the pleadings and evidence tendered, it is apparent that the accident took place on or about the 6th of March 2004. The death certificate further confirmed that the deceased died on the date of the accident. Upon consideration of the award in the sum of Kshs. 100,000/ suggested by the Plaintiffs, the court is persuaded to award the sum of Kshs. 50,000/ taking into account inflationary trends, and the case of Lucy Wambui Kihoro (Suing As Personal Representative Of Deceased, Douglas Kinyua Wambui) v Elizabeth Njeri Obuong [2015] eKLR. Therein, the court awarded the sum of Kshs. 20,000/ under this head in respect of a person who died on the date of the accident."

48. An appeal on this ground is not serious. The amount awarded are less than modest. The Appeal on pain and suffering is hereby dismissed.

49. Loss of expectation was awarded but there was no appeal on this. I shall ignore submissions on the same. In any case the same is within the conventional amounts.

Special damages

50. The court awarded Kshs. 86,870/= as special damages. The award of funereal is not to be taken as strictly as other special damages. Funeral expenses must have been incurred as the deceased, surely was not buried without expenses. In the case of Munguti & another (Both suing as the administrators of the Estate of the Late Katama George Chamanje Mkangi - Deceased) v Bolpak Trading Company Limited

& another (Civil Case 224 of 2007) [2023] KEHC 19651 (KLR) (Civ) (29 June 2023) (Judgment), Justice C Meoli stated as doth; -

> " That notwithstanding, the courts have acknowledged that in spite of the absence of receipts, it is a general fact that funeral expenses must have been incurred in the burial of a deceased person.
>
> 42. The Court of Appeal in Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR, stated the following on the subject: -
>
> 43. Similarly, the Court of Appeal in Capital Fish Kenya Limited v the Kenya Power & Lighting Company Limited [2016] eKLR said that:"We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved...We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc..."

51. Funeral expenses were proved and proper. In the circumstances I do not find the appeal on special damages, merit. Accordingly, I dismiss the appeal on that respect.

Loss of Dependency

52. The court awarded a sum of Kshs. 2,631,862.80 based on the following: -

    a. Multiplier – 31 years.

    b. Dependency ratio – $^{2}/3$

    c. Multiplicand – Ksh. 10,107

53. In reality, the figure 2,631,873.80 has within it embedded a mathematical error.

54. Dependency ratio of 2/3 was agreed upon by both parties. The minimum wage of Kshs. 10,107/=. The minimum wage is provided in schedule 1 column 3 of Legal Notice No. 117.

55. In the circumstances the court was correct in using the figure of 10,107/=.

56. The last issue was use of 31 years as a multi plier. The question of substituting 31 for 26 is not, in itself an issue of exercise of discretion. The court gave 31 years as a multiplier. Dependency of to 26 is simply substituting one discretion against another. I decline the invitation.

57. However, I note that the court did not take into consideration the vagaries of life and other vicissitudes of life. This is informed also that payment was to be paid in lump sum. The award was proper except in so far as the same was not subjected to reduction of thereof due to the vicissitudes of life.

58. The normal period for the 29 year olds is between 20-25. However, the Appellant graciously offered 26 years. The Appellant, was however, kind enough to suggest a figure of 26 years, which is more than sufficient. I adopt the same. I also note that the age of the dependants should be taken into consideration. 31 years is excessive only to the extent that it is not discounted with vicissitudes of life and other vagaries of living.

59. In the circumstances, I set aside the award of 31 years and in lieu thereof, substitute with 26 years. I set aside the multiplier of 31 years and substitute with 26 years as a multiplier. Every other prayer shall remain as awarded by the lower court.

60. The general damages for loss of dependency works out as follows: -

Ksh. 10,017 x 12x 26 x 2/3 =Ksh. 2,083,536

61. I therefore set aside the award on general damages for loss dependency and in lieu thereof, I substitute with a sum of Ksh. 2,083,536/=, subject to contribution.

62. Given the marginal change of amounts, each party shall bear their own costs.

Determination

63. The Court makes the following determination: -

   a. The Court allows the Appeal partly, sets aside the award on general damages for loss dependency and in lieu thereof, I substitute with a sum of Ksh. 2,083,536/=, subject to contribution

   b. 30 days stay of execution.

   c. The rest of the award to remain.

   d. This therefore works as follows: -

      a. Liability 70: 30 as entered by consent

      b. General damages for loss of dependency Ksh. 2,083,536/=,

      c. General damages for loss of expectation of life Ksh. 70,000/=.

      d. Pain and suffering Ksh. 14,000/=,

      e. Sub- Total Ksh. 2,167,536/=,

      f. Less 30% Ksh. 650,260

      TOTAL Ksh. 1,517,276

      g. Special damages Ksh. 86,870/=,

      h. Total total Ksh. 1,604,146

      i. Specials which are not subject to contribution shall attract interest from the date of filing suit while general damages shall attract interest from the date of judgment in the lower court.

   e. Each party to bear their own costs.

   f. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF MARCH, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

…………………………

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

M/s T.O. Nyangosi & Company Advocates for the Respondents

Mose, Mose & Milimo Advocates for Appellant

Court Assistant- Brian