Obure v Agoya & another (Suing as the legal representatives and administrators of the Estate of Edina Osebe Ondari – Deceased) (Civil Appeal E154 of 2021) [2024] KEHC 2841 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2841 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E154 OF 2021

DKN MAGARE, J

MARCH 7, 2024

BETWEEN

ISAACK OBIRI OBURE .... APPELLANT

AND

ELIUD MOKAYA AGOYA & CLIFF AGOYA OMARE (SUING AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF EDINA OSEBE ONDARI – DECEASED) .... RESPONDENT

JUDGMENT

1. This is an Appeal from the judgment and Decree of the Honourable G.N. Barasa RM, in Ogembo 2/11/2021 in Ogembo CMCC 264/2019. The Appellant filed 12 odd grounds (pun intended). The grounds are prolixious, repetitive, unseemly and a waste of judicial time.
2. In an oxymoronic mantra, despite having 12 issues the Appellant pretended to summarize them into 2 grounds of quantum and liability.
3. The grounds are thus only 2: -
    a. Whether the court erred in its finding on liability.
    b. Whether the award of quantum was so inordinately high as to amount to erroneous estimate of damages so that the court was plainly wrong in award of damages.
4. It should be recalled that 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.

5. It is thus a tired expression to state that one is summarizing grounds, when that was the original call. 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..."

6. The postulations by the court of appeal are not singular cries. In *Kenya Ports Authority v Threeways Shipping Services (K) Limited* [2019] eKLR, the court of Appeal, differently constituted 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."

7. Most of the issues raised in the Appeal are ancillary, repetitive, prolixious and a waste of judicial time. 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.

8. In the case of *Mbogo and another v 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."

9. The duty of the first appellate Court was settled by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v 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."

10. 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.

11. In the case of *Peters v 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…"

12. In *Nyambati Nyaswabu Erick v 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."

13. 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 public must be at the back of the mind of the trial Court.

14. The foregoing was settled in the cases of *Butter v Butter* Civil Appeal No 43 of 1983 (1984) KLR where the Court of Appeal 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 uniformity 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.”

15. 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.

16. The Court of Appeal, pronounced itself succinctly on these principles in *Kemfro Africa Ltd v Meru Express Service v 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.

17. 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 v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v 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…”

18. 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.

19. 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.

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

21. Similarly in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v 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 differently.

22. 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

23. Vide a Plaint filed on 14/11/2023, the Respondent sued the Appellant over an accident involving motor vehicle Registration No KBY 653B Nissan Vannet at Kisii – Kilgoris road at Mogonga area where the deceased pedestrian was reportedly walking on the verge of the road. The deceased left 4 sons and the husband. She was 20 years old and was of good health.

24. The Respondent pleaded Kshs 168,800 Special damages. The Respondent prayed for damages under the *Law Reform Act* and the *Fatal Accident Act*.

25. The Defendant entered appearance and thereafter filed defence on 13/1/2020. They denied the occurrence of the accident and in the usual prevarications blamed the Plaintiff for negligence. The Plaintiff was the administrator of the estate of the late Edina Osebe Ondan (Deceased).

26. They filed neither witness statements of Defence documents, despite indicating so. It should be noted that they filed defence and then entered appearance. The proper document is therefore the Defence by dint of order 6 Rule 3(4) of the *Civil Procedure Rules*, which provide as follows: -

> "(4) Where a defence contains the information required by Rule 3 it shall where necessary be treated as an appearance."

27. It was not necessary to file a defence thereafter. A Reply to Defence was filed and issues joined. Thereafter the matter proceeded for hearing. Only the Respondent testified. The Court delivered Judgment as doth: -

    Liability – 80:20

    Quantum – Kshs 2,888,000

    Less Kshs 576,000

    Sum Due Kshs 2,304,000

    General damages Kshs 2,351,500

28. The court found liability as follows: -

> "Liability has been pegged on the fact that I had an experience on the organization at Moganga stage and seen the confusion present between trader's pedestrians, passengers. I therefore apportion liability at 80:20 in favour of the Plaintiff.

29. The Respondents testified and produced evidence. Appellant filed submission on liability and quantum. They stated that the Defendant was sued over Motor Vehicle Registration No KBY 653D

and there was no proof of ownership. They relied on the case of *Daniel Toroitch Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, the Court of Appeal held that: -

> "It is a firm procedure that even where a defendant at has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on balance of probabilities, does not change even in the absence of rebuttal by the other side."

30. In the case of *Lucy Muthoni Munene v Kenneth Muchange & another* Nairobi HCC 858 of 1988 Justice Ringera dismissed the case for lack of evidence and stated: -

> ".. it is an elementary principle of adjective law that 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. In a personal injury claim that betokens that the plaintiff must make out that the Defendant is negligent as alleged. The legal burden of proof is clearly on the plaintiff and he must show that the loss is to be attributed to the negligence of the Defendant. If he does not discharge that burden by adducing evidence from which it could be inferred that on a balance of probability the defendant is negligent, then he cannot succeed even though the court may be welling with sympathy for him ..."

31. They stated that the witness is .... thus rely on the case of *Bwire v Wayo & Sailoki* (Civil Appeal 302 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment)

> "Eyewitness testimony is critical in both criminal and civil trials, and is frequently accorded high status in the courtroom. Direct evidence is evident that if believed, directly proves a fat in issue. Directly means that a person does not have to make any inferences or presumptions as to proof. Direct evince is a piece of evidence often in the form of the testimony of witnesses or eyewitnesses accounts ... The evidence tendered by the respondent in the lower court is not directed evidenced. It has no probative value and in absence of further evidence connecting it with what happened at the scene, the court could not properly draw an inference or make a reasonable conclusion as to how the accident occurred. This being the quality of the evidence tendered, there was no basis at all upon which the magistrate court reasonably make a finding that liability had been established on 100% basis as against the appellant."

32. They pray that the suit as regards liability be dismissed in limine.

33. They then went into quantum. They relied on the test in the case of *Jennifer Mathenge v Patrick Muriuki Maina* (2020) eKLR which was set out as follows: -

> "On quantum court in determining whether to interfere with the same or not, the court has to bear in mind the following principles on assessment of damages;
>
> i. Damages should be inordinately too high or too low
>
> ii. They are meant to compensate a party, for the loss suffered but not to enrich a party, and as such they should be commensurate to the injuries suffered.

iii. Where past decision are taken into consideration, they should be taken as mere guides and each case depends on its own facts.

iv. Where past awards are taken into consideration as guides an element of in inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment … "

34. They relied on the case of *Francis Odhiambo Nyunja & 2 others v Josephine Malala Owinyi (Suing as the legal administrator of the estate of Kevin Osore Rapando (Deceased)* [2020] eKLR where the court said: -

> " The Court of Appeal, in *Bashir Ahmed Butt v Uwais Ahmed Khan* (1982-88) KAR, set out the parameters within which an appellate court will interfere with an award of general damages, when it stated:
>
> > "An appellate court will not disturb an award for general damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect and so arrived at a figure which was either inordinately high or low..."
> >
> > Similar sentiments were expressed in *Loice Wanjiku Kagunda v Julius Gachau Mwangi* CA 142/2003 (UR), by the same court, when it said:
> >
> > > "We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257)."

35. They pray the award of 20,000 be awarded. On loss of dependency, they state that it was wrong to use a multiplier of 30 years and a multiplicand of 12,000/= yet the deceased was 20 years. They suggested 10 years. They prayed that I award 480,000/= for loss of dependency and 20,000/= for pain and suffering.

36. I cannot trace the Respondent's submissions.

Analysis

37. After analyzing the duty of the court, I realize that the court did not analyze evidence on liability. The police abstract was not analyzed. The court used his personal experience. He did not tender this experience of use in matters of local notoriety. The court fell into deep error and caused a miscarriage of justice. It is unnecessary to evaluate evidence based on the personal experience of the court. I therefore set aside the finding on the liability.

38. For reasons, I am about to state I shall not handle quantum. By descending into the arena, the court moved from its hallowed seat as a neutral arbiter. He set no material on his view of the witnesses and the impression he got. In the circumstances, the decree cannot be sustained. I therefore set aside the entire judgment and decree.

39. Was there an error on the part of the Respondent? There was no error. The court has no basis to support the finding of 80: 20 per cent. This court has to options. To analyse the evidence itself and come with a finding. The other is to remit he matter for trial. Order 42 rule 24 and 25 provide as follows: -

> " 24. Remand of cases [Order 42, rule 24.] Where the court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point, and the decree is reversed on appeal, the court to which the appeal is preferred may, if it deems fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence, if any, recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand.
>
> 25. Where evidence on record sufficient appellate court may determine case finally [Order 42, rule 25.] Where the evidence upon the record is sufficient to enable the court to which the appeal is preferred to pronounce judgment, the court to which the appeal is preferred may, after resettling the issues, if necessary, finally determine the suit, notwithstanding that the judgment of the court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the court to which the appeal is preferred proceeds."

40. In this matter the court eschewed its role and completely failed to analyze the evidence. This resulted in a judgment that is indefensible but for which none of the 2 parties before the court is to blame.

41. The only viable option is to order the matter to be reheard. This time, the court hearing must make a decision based on evidence and not hyperbole, or conjecture before a different court, who shall re-hear the matter and come with a proper verdict.

42. Regarding costs, the supreme court in the case of *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling) while referring to their earlier deciosin in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR Mutunga, CJ & P; Rawal, DCJ & V-P; Tunoi, Ibrahim, Ojwang, Wanjala, Ndungu, SCJJ) stated as doth: -

> " The guiding principles applicable in costs were as stated in Jasbir Singh Rai where we stated that costs follow the event with the discretion of the court exercised judiciously by stating:"[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."

43. Given that the mistake was the court's, I shall make no orders as to costs.

Determination

44. In the circumstances I make the following orders: -

a. The judgment and decree is unsafe given that the court's experience and not evidence on record was applied.

b. The judgment based on conjecture, hyperbole and feelings is a nullity, I therefore set the same aside.

c. I direct that the matter be remitted to Ogembo Law Courts for hearing and determination afresh before a court other than Hon. G.N. Barasa.

d. Each party to bear its own costs.

e. This file is closed.

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

KIZITO MAGARE

JUDGE

In the presence of:-

Kimondo Gachoka & Company Advocates for the Appellant

T.O. Nyangosi & Co. Advocates for the Respondent

Court Assistant - Brian