Murithi v Maina (Civil Appeal 11 of 2020) [2024] KEHC 4972 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4972 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 11 OF 2020

DKN MAGARE, J

MAY 9, 2024

BETWEEN

PURITY MURITHI ..... APPLICANT

AND

PETER KINYUA MAINA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the decision of the Hon. V.S Kosgei given on 25/2/2020 in Karatina SPMCC 83 of 2016. The Appellant was the plaintiff in that matter. The matter arose related to a fatal accident on 26/1/2013.

2. The Appellant filed a humongous 7 paragraph grounds of Appeal. The grounds are argumentative unseemly and not easy to fathom. The Appeal was filed after the Court dismissed the Appellant's suit for lack of merit.

3. 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.

4. 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 lords 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."

5. 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.

6. 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..."

7. 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."

8. 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.]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 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."

9. 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.

10. 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.

11. 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.

12. 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.

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

14. 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."

15. The Appellant filed suit on 27/1/2016 over an alleged accident on the night of 26/27/1/2013 which caused the deceased injuries that resulted into his demise on 11/5/2013. The Appellant set forth special damages of Ksh 88,221 and particulars pursuit to statute. The Appellant was the only dependant. The deceased died earning 12,000/= at the age of 26 years. In her statement she stated she was in Nakuru when she received the unfortunate news.

16. She took out letters of administration intestate on 26/1/2015. The police abstract indicated that the case is pending under investigation to confirm if the vehicle was involved in an accident. Judgment in default of Appearance was entered on 15/8/2019. The matter proceeded for proof on 29/10/2019. The Appellant gave evidence. She stated she was no there she was called by the sister. She did not know how the accident occurred.

17. The Appellant filed submissions. The court rendered itself hence this appeal. The court found that the liability was not proved.

Analysis

18. The court came to the inevitable conclusion that the Appellant is under duty to proof their case. The court also assessed damages. Indeed, the court was correct in that respect. The trial court is under duty to assess damages even where a suit is dismissed.

19. In the case of Christine Kalama v Jane Wanja Njeru & another [2021] eKLR, Justice Nyakundi stated as follows: -

> "It is helpful to remind the Learned Trial Magistrate that procedural Law binds her to assess damages even if she is in doubt of proof of liability. As an appeal's Court the principles in

Mwana Sokoni v Kenya Bus Services & Others {1982 – 1988} 1 KAR 870 are not applicable on account of the facts of this case where no assessment of damages was never undertaken by the Learned Trial Magistrate."

20. In Mohamed Mahmoud Jabane v High Shine Butty Tongoi CA No. 2 of {1986} KLR Vol. 1, the Court of Appeal stated as follows:

> " The correct approach in award of damages are:
>
> a. Each case depends on its own facts.
>
> b. Awards should not be excessive for the sake of those who have to pay premiums, medical fees or taxes (the body politic).
>
> c. Compensable injuries should attract comparable awards.
>
> d. Inflation should be taken into account.
>
> e. Loss of future earnings has to be pleaded.
>
> f. Loss of earnings power is part of the general damages.

21. The injuries are personal to the person injured. The can be no two sets of injuries that are similar. The court endevours to get similar injuries and awards. The Court of Appeal in Ugenya Bus Service v Gachuki CA No. 66 of {1981 – 1986} KLR 567 stated as doth:

> " General damages for personal injuries are difficult to assess accurately so as to give satisfaction to both parties. There are so many incalculables. The imponderables vary enormously. It is a very heavy task and one cannot aim for precision."

22. I cannot fault the court on the reasoning on minimum wage and 1/3 given that the deceased was single. However, the multiplier should have been accelerated downwards due to vagaries and vicissitudes of life. A multiplier of 21 should suffice noting that the mother was also over 50 years. Multiplier must take into consideration both the age of the Defendant and the age of the Deceased.

23. There would have worked as doth 12,000x 1/3 x 21 x 12=1,000,000/=. The same figure can be arrived through award of a lump sum amount of Kshs. 1,000,000/=. damages for both law reform and pain and suffering are proper.

24. In the of Sarah Naitore M'ikunyua v Geofrey Mwangi Bor & another [2021] eKLR, Justice Edward M. Muriithi, stated as follows: -

> " I extensively dealt with the principles on award of damages with respect to loss of dependency in the case of Crown Bus Services Limited & 2 Others Vs Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala) (Deceased) Kabarnet HCCA No. 9 of 2019 where I held as follows concerning the formula for calculation of dependency: -
>
> "Both parties agree as to the formula for computation of dependency as observed by Ringera, J. as he then was in Beatrice Wangui Thairu case, supra. Indeed, Ringera J's observation was based on the principles for assessment of dependency in Kenya developed in the 1957 case of Peggy Frances Hayes and Others v. Chunibhai J. Patel and Another cited by the Court of Appeal for Eastern Africa in Radhakrishen M. Khemaney v. Mrs Lachaba

Murlidhar (1958) E.A. 268, 269 (per Air Owen Corrie Ag. JA with whom Briggs, V-P and Forbes, JA agreed) as follows:

"I have no doubt as to the principles which are to be applied to this appeal. In Civil Case No. 173 of 1956, delivered on March 26, 1957, in the Supreme Court of Kenya in an action brought by Peggy Prances Hayes and others against Chunibhai J. Patel and another, the principles applied by the learned chief justice, as he then was, were as follows:

"The court should find the age and expectation of working life of the deceased, and consider the wages and expectations of the deceased (ie. his income less tax) and the proportion of his net income which he would have made available for his dependants. From this it should be possible to arrive at the annual value of the dependency, which must then be capitalized by multiplying by a figure representing so many years' purchase. The multiplier will bear a relation to the expectation of earning life of the deceased and the expectation of life and dependency of the widow and children. The capital sum so reached should be discounted to allow for the possibility or probability of the re-marriage of the widow and, in certain cases, of the acceleration of the receipt by the widow of what her husband left her as a result of his premature death. A deduction must be made for the value of the estate of the deceased because the dependants will get the benefit of that. The resulting sum (which must depend upon a number of estimates and imponderables) will be the lump sum the court should apportion among the various dependants."

Upon an appeal against this judgment this court held ([1957] R.A. 748 (C.A.):

"That the method of assessment of damages adopted by the learned chief justice was correct.""

Simply, the formula for dependency, therefore, is the multiplicand, that is the annual net income multiplied by a suitable multiplier of expected working life lost by the deceased by the premature death, and further by a factor of the dependency ratio, that is the ratio of the deceased's income utilized on her dependants.

25. On liability. It is noted that we have not yet reached an error of no fault claims. The duty of the Appellant is set out in Sections 107 – 109 of the *Evidence Act*, which provides as doth: -

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

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

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

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

26. The burden of proof is on a party who will lose if no evidence was tendered. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took

place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

27. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

28. Evidence tendered did not create any nexus between death and the accident. The evince was inadmissible hearsay. Even the police could have been called. It is worse when the police records doubt the authenticity of the accident.

29. It is a strong thing for me to differ with the exercise of discretion. 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."

30. In this case there was no proof of liability. The suit was properly dismissed. It is sad that a life was lost. However, there was no evidence led as to the cause of death. The evidence was bare. In the case of EMC (A minor suing through MNC) v James Irungu Nyanja [2020] eKLR, the court stated

> " No doubt that an interlocutory judgement was entered against the Respondent. But on introspecting the general meaning of the word "Interlocutory" it merely means 'on the interim'. What this implies is that the Court had prima facie entered an interim judgment against the Respondent for his failure to enter appearance and file a defence. But then, at the formal proof hearing it was incumbent upon the Appellant to demonstrate how the accident occurred, who caused the accident and to what extent liability for the accident could be apportioned to the Respondent. To this extent the Appellant totally failed ... the Court must emphasize one undeniable fact; that in as much as the Appellant's obligation at formal proof hearing was to adduce evidence for assessment of general damages, this did not lessen her (Appellant's) burden to demonstrate not only how the damages would be arrived at but also the relationship of the defendant with the alleged liability. More so, bearing in mind the cardinal principle that he who alleges must proof in cases where negligence is alleged. This was aptly set out by the Court of Appeal in the case of East Produce (K)Limited v Christopher Astiado Osiro, Civil Appeal No.43 of 2001 which held that:

> "It is trite that the onus of proof is on he who alleges and in matters where negligence is alleged, the position was laid in the case of Kiema Mutuku Vs Kenya Cargo Hauling Services Ltd (1991) ..... in which the Court held that:
>
> 'There is as yet no liability without fault in the legal system in Kenya, and a Plaintiff must prove some negligence against the defendant where the claim is based on negligence."

31. There was no allegation of negligence in the Appellant's evidence. The witness neither saw what happened nor laid any basis for liability. It is not enough that there was interlocutory judgment. Even in formal proof liability must be proved.

32. In the case of Samson S. Maitai & Anor v African Safari Club Ltd & Anor [2010] eKLR, Emukule, J observed thus;

> " ..... I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption."
>
> Can hearing therefore, by formal proof, be similar to a full hearing" According to the observations of Emukule, J, in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits."

33. Consequently, I dismiss the Appeal for lack of merit. On cost, this Appeal was not defended. Therefore, each party should bear their own costs.

Determination

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

    a. The Appeal lacks merit and is accordingly dismissed.

    b. Each party to bear its own costs.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 9TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for respondent

Miss Ogonda for the Appellants

Court Assistant- Brian