Territorial Works Limited v Kibuchi (Suing as representative of the Estate of Anthony Karoki Wangari – Deceased) (Civil Appeal E017 of 2023) [2024] KEHC 6543 (KLR) (4 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6543 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL E017 OF 2023

DKN MAGARE, J

JUNE 4, 2024

BETWEEN

TERRITORIAL WORKS LIMITED .... APPELLANT

AND

ESTHER WANGARI KIBUCHI (SUING AS REPRESENTATIVE OF THE ESTATE OF ANTHONY KAROKI WANGARI – DECEASED) .... RESPONDENT

(Being an appeal against the Judgment of Hon. Viola Kosgei (SRM) in Karatina Civil Case No. 39 of 2018 delivered on 28{{^th}} February, 2023)

JUDGMENT

1. This is an appeal from the decision of Viola Kosgei – SRM given on 28/2/2023 in Karatina PMCC No. 39 of 2018. The appellant was the first defendant in the lower court.
2. The Appellant filed 6 grounds of appeal, namely:
   a. That the learned magistrate erred in fact and in law by finding the appellant wholly liable in negligence in disregard of the sum of evidence adduced at the hearing regarding deceased's evident contributory roles in the accident.
   b. That the learned magistrate erred in fact and in law by finding the appellant liable based on eye witness' contradictory written and oral testimony.
   c. That the honourable learned magistrate erred by making decisions on quantum that was erroneous, without proper basis and against the weight of evidence.
   d. The honourable learned magistrate erred in law and in fact in awarding damages under the *Fatal Accidents Act* which were not pleaded in the Plaint.

e. That the learned magistrate erred in law and in fact in making the award on general damages for pain and suffering which was excessive in the circumstances, noting that the deceased died instantly.

f. That the learned magistrate erred in law and fact in adopting a multiplier of 30 years in calculating loss of dependency without taking into consideration vagaries and uncertainties of life and the relevant law governing assessment of damages for loss of dependency.

1. The appeal is prolixious and otherwise unseemly. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 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."

2. 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:
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> "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..."

3. 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:
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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."

4. 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

5. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

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

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

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

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

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

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

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

10. 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."

11. 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.

12. 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."

13. 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 considering the circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

14. 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.

15. 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…"

16. 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.

17. 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.

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

19. 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."

20. 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.

21. There are only two issues:

    a. Whether the court erred in its finding on liability.

    b. Quantum, in particular a multiplier of 30 years.

The Pleadings

22. The Appellant filed suit on 25/5/2018 claiming damages for an accident on 13/9/2017 in which Anthony Karoki Wangari died. It involved motor vehicle Registration No. KHMA 510J driven by the 2nd Defendant (who is not party to the Appeal).

23. The only defendant was said to be the Appellant. Special damages of 350/= were pleaded.

Evidence

24. After several false starts the Respondent testified on 27/9/2022 before V.S. Kosgei, SRM. She adopted her list of documents and exhibits together with her statement as evidence in chief.

25. In the statement the Respondent stated that the deceased used to earn 20,000/=. He was 35 years old. According to the death certificate the deceased was a 35 year old farmer who died at Jamii Hospital on 13/9/2017. The Respondent stated that she was 57 years old.

26. PW2 Mathew Ngatia testified that the driver reversed automatically and knocked the deceased. On cross examination he stated that the road was wet. The said trucker passed the deceased but reversed after passing the deceased.

27. PW1 Wilson Juma testified that on 13/9/2017 he was on the site. He stated that the deceased was walking, fell on the grader.

28. The court analyzed evidence and found the Appellant 100% liable. On pain and suffering the court awarded 100,000/=. On loss of expectation of life the court awarded 100,000/=. On loss of dependency the court awarded 827,538/=. No special damages were awarded.

3. The duty of this court is not to substitute the judgment of the subordinate court with mine. The court awarded pain and suffering and loss of expectation of life at 100,000/= each. This is a proper amount. In Retco East Africa Limited v Josephine Kwamboka Nyachaki & another [2021] eKLR, the court awarded 100,000/- for a deceased who died 30 minutes later. It stated as doth: -

> “ The court heard that the deceased died after 30 minutes. That was not controverted. The deceased must have suffered considerable pain. The awards for pain and suffering are usually nominal but each case must be determined on its own merits. In the persuasive case of Mercy Muriuki & another v Samuel Mwangi Nduati & another (Suing as the Legal Administrator of the Estate of the late Robert Mwangi) [2019] eKLR, the court observed: -
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> “The generally accepted principle therefore is that very nominal damages will be awarded on these two heads of damages if the death followed immediately after the accident. The conventional award for loss of expectation of life is Ksh. 100,000/- while for pain and suffering the awards range from Ksh. 10,000/= to Ksh. 100,000/= with higher damages being awarded if the pain and suffering was prolonged before death.”

29. The deceased was run over by a heavy ton grader and suffered excruciating pain from which he died. Award for the two limbs are dismissed.

30. The award of 877,538/= under loss of deppendancy was made up of 6,890/= x 30 years x 12 x ⅓. In this amount only 30 years were disputed. The deceased was 35 years while the mother was 57 years. She had between 13 to 23 years of useful dependency. The court of Appeal in the case of Isaack Kimani Kanyingi & Another (suing as the legal represtaive of the estate of Losise Gathoni Mugo (deceased) vs Hellen Wanjiru Rukanga [2020] eKLR where it held a minimum wage ought to be adopted as a multiplier where monthly income could not be ascertained or is unascertainable.

31. In Ezekiel Barng’entuny –vs-Beatrice Thairu HCC No. 1638 of 1988 where Justice Ringera (as he then was) held thus; -

> “ The principles applicable to an assessment of damages under the *Fatal Accidents Act* are all too clear. The court must in the first instance find out the value of the annual dependency. Such value is usually called the multiplicand. In determining the same the important figure is the net earnings of the deceased. The court should then multiply the multiplicand by a reasonable figure representing so many years purchase. In choosing the said figure usually called the multiplier, the court must bear in mind the expectation of earning life of the deceased. The expectation of life and dependency of the dependents’ and the chances of life

of the deceased and the dependents. The sum thus arrived at must then be discounted to allow the legitimate consideration such as the fact that the award is being received in a lump sum and award if wisely invested yield returns of an income nature."

32. The amount will be paid in a lump sum hence the need to accerate downwards due to vagaries of life. In the case of *West Kenya Sugar Company Ltd v Mayaka & another (Suing as the administrators/legal representatives of the Estate of Edward Maserebu (Deceased)) (Civil Appeal 133 of 2022)* [2023] KEHC 22418 (KLR) (22 September 2023) (Judgment), Justice Nyakundi adopted a multiplier of 20 years for a 51 year old.

32. In the case of Board of Governors of Kangubiri Girls High School & another vs Jane Wanjiku Muriithi & another [2014] eKLR where the Court of Appeal adopted the findings of Nambuye, J.A in Cornelia Eliane Wamba-v- Shreeji Enterprises Ltd. & Others- H.C.C.C No. 754 of 2005:-

> "The choice of a multiplier is a matter of the courts discretion which discretion has to be exercised judiciously and with a reason."

34. Therefore 20 years is a proper multiplier. There was no dispute on other limbs. This works out to 6,890/= x 20 x 12 x ⅓ = Kshs.551,680/=.

34. The amount is sufficient noting that the deceased did not have children or a wife. I therefore set aside the award of Kshs.827,538/= and substitute the same with a sum of Kshs.551,680/=.

34. Costs are provided under Section 27 of the *Civil Procedure Act*, which stated as follows: -

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

13. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(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, before, 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.

34. Costs follow the event. The Appeal has mixed results. Each party should bear their own costs.

Determination

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

    a. The appeal on liability is dismissed.

    b. Appeal on general damages is allowed to the extent only that a sum of Kshs.827,538/= is set aside and substituted with an award of Kshs.551,680/= as damages for loss of dependency. The rest of the prayers remain. This works as:-

        i. General damages for loss of dependency – Kshs.551,680/=.

        ii. Loss of Expectation of Life – Kshs.100,000/=.

        iii. Pain and suffering – Kshs.100,000/=

        iv. Nil special damages.

    c. The general damages shall attract interest from the date of Judgment in the lower court.

    d. Each party to bear its costs in the Appeal.

    e. The Appellant to bear costs in the subordinate court.

    f. 30 days stay.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 4TH DAY OF JUNE, 2024.

KIZITO MAGARE

JUDGE

In the presence of:-

Miss. Jayo for the Appellant

Mr. Kamwenji for the Respondent

Court Assistant- Jedidah