Githinji & another v M'imanyara & another (Suing as the Administrators of the Estate of Linus Muriithi) (Civil Appeal E400 of 2023) [2024] KEHC 8787 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8787 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E400 OF 2023

DKN MAGARE, J

JULY 24, 2024

BETWEEN

PATRICK MAINA GITHINJI ..... 1ST APPELLANT

REUBEN MUINDE MAINA ..... 2ND APPELLANT

AND

STELLA KANUGU M'IMANYARA ..... 1ST RESPONDENT

M'IMANYARA M'CHOKERA ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATORS OF THE ESTATE OF LINUS MURIITHI

(Appeal from the Judgment and decree of Hon. G.O. Omodho, PM dated 28/4/2023 arising from Milimani CMCC No. E8983 of 2021.)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. G.O. Omodho, PM dated 28/4/2023 arising from Milimani CMCC No. E8983 of 2021.
2. The appeal is on liability and quantum. The Appellants were the Defendants in the court below.
3. The Memorandum of Appeal, however, is a classic study on how not to write a Memorandum of Appeal. The Appellants filed a prolixious 9-paragraph argumentative memorandum of appeal filed on 4th April 2023. The grounds are argumentative, unseemly and do not please the eye.
4. Order 42 Rule 1 requires that the memorandum of appeal be concise. The same provides as 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."

5. The Court of Appeal had this to say in regard to rule 86 (which is pari materia with order 42 Rule 1) in the case of Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat [2020] eKLR: -

> "We are yet again confronted with an appeal founded on a memorandum of appeal that is drawn in total disregard of rule 86 of the Court of Appeal Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 18 grounds of appeal that lack focus and are repetitively tedious. It is certainly not edifying for counsel to present two dozen grounds of appeal, and end up arguing only two or three issues, on the myth that he has condensed the grounds of appeal. This Court has repeatedly stated that counsel must take time to draw the memoranda of appeal in strict compliance with the rules of the Court. (See Abdi Ali Dere v. Firoz Hussein Tundal & 2 Others [2013] eKLR) and Nasri Ibrahim v. IEBC & 2 Others [2018] eKLR. In the latter case, this Court lamented:
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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..."

6. Further in Kenya Ports Authority v Threeways Shipping Services (K) Limited [2019] eKLR, the court of appeal observed that: -

> "Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether Section 62 of the *Kenya Ports Authority Act* ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In *William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013*, this Court stated:
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> > "The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

7. The memorandum of appeal raises only two issues, that is: -

   a. Liability

   b. The quantum of damages

8. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.

9. The plaint dated 14/4/2021 claimed damages for an accident involving motorcycle Registration No. KMEM 453Y which occurred on 1st March, 2021 while the deceased was riding on his said motorcycle and the 2nd Appellant was driving the 1st Appellant's motor vehicle Registration No. KCR 436K. The Respondents blamed the driver of motor vehicle Registration No. KCR 436K for the accident for carelessly knocking down the deceased's motorcycle. The Plaintiff set forth particulars of negligence for the motor vehicle.

10. The Appellants entered appearance and filed defence denying the particulars of negligence and injuries pleaded in the plaint.

11. The court below heard the parties and proceeded to render judgment on 28/4/2020. In the Judgment, the court found 100% liability against the 1st and 2nd Appellants. The court also awarded damages as follows:

    i. Pain and suffering Kshs. 150,000/=

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

    iii. Loss of Dependency Kshs. 4,927,272/=

    iv. Special Damages Kshs. 105,260/=

    TOTAL KSH 5,279,532/=

12. Aggrieved by the finding of the lower court, the Appellants lodged a memorandum of appeal hence this appeal.

Evidence

13. The Plaintiffs testified as the administrators of the estate of the deceased. PW1, Atanga Lucas relied on his witness statement dated 14/4/21 and stated that the driver of the motor vehicle Registration No. KCR 436K was driving on the service lane and the wrong side of the road hence the accident. On cross examination, it was his case that he was 10 metres away from the scene and witnessed the accident.

14. PW2 was PC Jackline Naeku. She testified that motor vehicle Registration No. KCR 436K was to blame. On cross examination, she stated that there was a charge of causing death by dangerous driving pending in court.

15. PW3 was Stella Karugu, mother of the deceased. She testified that the deceased used to work and sent her upkeep. That the deceased was taken to Kenyatta Hospital in ICU where he succumbed to the injuries.

16. The Appellants did not call any witness. They closed their case.

Submissions

17. The Appellants submitted that the lower court erred in its finding on liability and quantum.

18. It was submitted that the Respondent did not prove the case on liability against the Appellant as required under Section 107,108 and 109 of the *Evidence Act* and so the trial court erred in finding otherwise that the Appellant caused the accident. That the evidence of PW2 was not of probative value to establish liability because she was not at the scene of the accident and did not conduct investigations. They relied on Joseph Muthuri v Nichlas Kinoti Kibera (2022) eKLR.

19. On quantum, it was submitted that the award was inordinately high for the loss of dependency. They submitted that a multiplicand based on the minimum wage for 2018 of Kshs. 13,572/= and multiplier of 20 years at the ratio of 1/3 would have been appropriate.

Respondent's submissions

20. They also filed submissions dated 14/3/2024. It was submitted that the lower court was correct in its finding both on quantum and liability. On liability, it was submitted that the Respondent discharged their burden of proof to the required standard while the Appellants did not testify. That per the evidence of PW2, it was clear that motor vehicle Registration No. KCR 436K was the one that caused the accident and the driver was charged. They relied on the case of Linus Nganga Kiongo & Others v Town Council of Kikuyu (2012) eKLR to submit that in the absence of testimony of the Appellants, their defence was a mere statement and the Respondents' case was unchallenged.

21. On quantum, the Respondent submitted that the award by the trial court were commensurate to the injuries and should not be disturbed. They relied inter alia on the cases of Innocent Ketie Makaya Denge v Peter Kipkore Chesere & Another (2015)e KLR and Mwita Nyamohanga & Another v Mary Robi Moherai & Another (2015)e KLR.

22. I was urged to dismiss the Appeal.

Analysis

23. This being a first appeal, the court should with judicious alertness re-evaluate the evidence, and consider arguments by parties and apply the law thereto, and, make its own determination of the issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

24. In the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123, the court stated as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

25. 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."

26. 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."

27. 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.

28. 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..."

29. The issue in this case is whether the lower court erred in its finding on liability and quantum.

30. The Appellants did not appeal that the award on pain and suffering and loss of expectation of life were erroneous. The Appeal on quantum relates to the award on loss of dependency.

31. On liability, the Respondents blamed motor vehicle Registration No. KCR 436K for the accident. The lower court found liability at 100% for the Respondents as against the Appellants. The Appellants did not adduce any evidence to controvert the Respondents' case on liability. In the case of Janet Kaphiphe Ouma & Another –vs- Maries Stopes International (Kenya), Kisumu HCCC No. 68 of 2007, Ali Aroni, J citing the decision in Edward Muriga through *Stanley Muriga –vs- Nathaniel D. Schulter, Civil Appeal No. 23 of 1997* that:

> " In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence."
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> 16. Guided by the above case, I find the statements in the defence filed on 10th December 2014 remain mere allegations having not been substantiated orally in court by the Appellant to controvert the Respondents testimony."

32. There was no explanation from the Defence. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
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> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

33. I have perused the judgment of the lower court. The learned magistrate correctly found that the evidence of the Respondent was uncontroverted since the Appellants failed to call any witness to testify in court. Consequently, I have no hesitation in dismissing the appeal on liability.

Quantum

34. The Court of Appeal, pronounced itself succinctly on the principles for disturbing award of damages 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.

35. It is thus settled that for the appellate court, to interfere with the award it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

36. Fact finding is primarily the duty of the trial court and once evidence is presented before it on the basis of which it could arrive at a finding one way or the other, as was held in *Job Obanda vs. Stage Coach International Services Limited & Another Civil Appeal No. 6 of 2001*, it is not for the appellate court to set aside the trial court's exercise of discretion and substitute its own simply because if it had been the trial court it would have exercised the discretion differently.

37. Furthermore, in Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:

> " It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
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> "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it."..."

38. Therefore, in assessing injuries arising from a road traffic accident, consistency in the award of damages is necessary for judicial predictability and certainty. This is achieved through awarding similar injuries with similar or relatively similar damages. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

39. The principle on the award of damages is settled. In Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another [2017] eKLR the court set out the principles which guide the court in the assessment of damages in a personal injury case. The considerations include but not limited to; -

    1) An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    2) The award should be commensurable with the injuries sustained.

    3) Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    4) Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    5) The awards should not be inordinately low or high.

40. There is no dispute that the deceased was 30 years at the time of his demise.

41. I have perused the impugned judgment and I note that the lower court adopted a multiplier of 30 years and a multiplicand of 2/3 with income of Kshs. 20,517.80/-. The court as such adopted 20,517.80/- based on Legal Notice No. 125 on Regulation of Wages Order, 2022.

42. In Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47, the Court of Appeal held that:

> " In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

43. It is this court's finding that the award based on 30 years failed to take into account the vicissitudes and vagaries of life. 30 years was excessive in the circumstances. The wife of the deceased was also separated and did not prove dependency. The mother was a nominal dependent and the children were the only dependents. This does not however take away 2/3 dependency ratio. It only means that substantial award will go to the children. Only the award under law reform and burial expenses can be given to the mother and by extension the grandfather who is an administrator.

44. Lastly, the lower court applied Kshs, 20,517.80 on the basis of Legal Notice No. 125 of 2022. The correct Legal Notice would be the one at the time of death being 10/3/2019, hence Legal Notice No. 112 of 2017. Therein, Kshs. 16,724.75 was applicable for a driver or rider. I therefore set aside the award in this regard.

45. The Court in Beatrice Wangui Thairu –vs- Hon. Ezekiel Barngetuny & Another – Nairobi HCCC. No.1638 of 1988 (unreported), Ringera J, as he then was, held at page 248 that:

> " 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 purchases. 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 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 a lump sum and would if wisely invested yield returns of an income nature."

46. Also, the mother was 53 years, basically 17 years to reach the bibilical age of 70 years. The children were minors and would depend on the deceased until they reach 21 years. The multiplier of 15 years would therefore suffice. This works out as follows:

> 12 x 16,724.75/= x 15 x 2/3 = Kshs. 2,006,970/=. Even where the court was to use a lump sum, a sum of Kshs. 2,000,000/= would suffice.

47. In the circumstances, I set aside the award on damages for loss of dependency and substitute thereof with Ksh. 2,006,970/=.

Determination

48. In the upshot, I make the following orders:

a. The Appeal on liability is dismissed.

b. The Judgment of the Lower Court on damages for loss of dependency is set aside and substituted with Kshs. 2,006,970/=.

c. Damages for pain and suffering remains Kshs. 150,000/=

d. Damage for loss of expectation of life remains Kshs 100,000/=

e. As the appeal is partially successful, each party shall bear their own costs in the appeal.

f. Stay of execution for 30 days.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 24TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for parties

Court Assistant – Jedidah