Nduse & another (Suing as the Legal Representatives of the Estate of Felix Masaku Mbevo - Deceased) v Mwakutwaa (Civil Appeal E070 of 2022) [2023] KEHC 21052 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21052 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E070 OF 2022

DKN MAGARE, J

JULY 6, 2023

BETWEEN

ROSEMARY KAMOTHE NDUSE ..... 1ST APPELLANT

AUGUSTUS MUTISO KYANIA ..... 2ND APPELLANT

SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF FELIX MASAKU MBEVO - DECEASED

AND

BAKARI SALIM MWAKUTWAA ..... RESPONDENT

JUDGMENT

1. This is an appeal form the Honourable Sandra Ogot SRM given on 6/5/2022 in Msambweni Civil Suit No. E32 of 2021. The appellant was the Plaintiff in the matters. The Appellant raised 6 grounds of Appeal namely:-

    i. The Learned Magistrate erred both in law and fact when she dismissed the plaintiffs suit with costs despite the weight of the evidence tendered.

    ii. The Learned Magistrate's erred both in law and fact when she dismissed the evidence of an eye witness and misdirected herself on determination of liability against the doctrine of stare desis.

    iii. The Learned Trial Magistrate's erred both in law and fact when she failed to appreciate the doctrine of Res Ipsa Loquitor was applicable in the circumstances of the case.

    iv. The Learned Magistrate erred in law and fact when she misdirected herself by not appreciating the evidence tendered found liability on the respondent.

v. The learned magistrate erred both in law and fact when she held that, there was no eye witness and failed to appreciate liability could only be apportioned between the parties on 50:50 basis.

vi. That the Learned Trial Magistrate erred both in law and fact and misdirected herself in accepting the evidence of the driver (defendant) without caution since it could be tilted to observe the respondent from blame.

2. The 6 grounds basically are to raising one issue. The Court erred in law and in fact in dismiss the case on liability against the weight of evidence and precedent.

3. It is not failure to raise concise issues only where compliant with order 42 Rule 1 will suffice. Order 42 Rule provides. The Memorandum if Appeal was repetitive and prolixious. It repeats the issue of liability and is argumentative in is nature. This is not in line with order 42 Rule 1 of the Civil Procedure Rules which provides as 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.
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> (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.

4. The court of Appeal had this to say in regard to rule 86 (which is pari mateira 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..."

5. 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."

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

   a. The Court erred in finding the appellant liable despite evidence to the contrary

   b. The damages were excessive in the circumstances

Duty of the first Appellate Court

7. 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 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."

9. The duty of the 1st Appellant 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."

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 vs Sunday Post Limited [1985] 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 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."

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 and injury public must be at the back of the mind of the trial Court.

14. 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."

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 High Court, 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.

17. 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.

18. 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.

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

20. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, 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. 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.

Evidence and Pleadings

22. The plaintiff was said to be lawfully walking off the road along Ukunda Likoni Road at Ndenyenye are on 8/2/2020. This is where motor vehicle registration KCF 831A lost control, veered off the road and hit the deceased who sustained fatal injuries. The deceased left behind dependants as listed in the plaint.

23. The deceased was aged 38 years. As per the death certificate he was a Jua Kali Artisan.

24. The defendant filed defence on 12/3/2021. They denied occurrence of the accident and at the time it occurred the deceased was negligent. This kind of defence is not proper. It is either the accident occurred or did not occur. The case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR,where the court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R. in Thorp v Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible", (underling supplied).
>
> I will also add that the crucial deficiency of a general denial which I have already described, also applies to the evasive, inconsistent and contradictory alternative general traverse in he appellant's defence. This was that if the respondent had extended any overdraft facilities without stating the amount involved, to the appellant which was moreover, denied, then the same and here again, without stating how and when, had been paid. Such a spurious pleading in the alternative cannot give any merit to the defence and so also makes it one which discloses no reasonable defence for all purposes including that of 0 6 r 13(1)(a)."

25. On 28/10/2021 Pc Dominic Asamua of Diani Police station testified. He stated that the driver a school bus whose number he didn't know overtook me and a pedestrian cross the road from the right to left. He knocked pedestrian who died on the spot.

26. The driver was said to be at 70 Kph. The driver was required to driving be at 50 Kph in the accident area. PW2 testified that and produced exhibits 1, 2, 6 and 7 she stated that deceased was earning 25,000. He had 3 children aged between 15, 10 and 7. There was also a 62 year old mother.

27. PW3 also testified that Felix on the side of the road when a vehicle hit me. He stated he was with him when the vehicle hit he deceased. The motor vehicle came towards the deceased and the witness and hit the deceased.

28. DW1 testified that he stated that he did not hit the deceased off the road but on the road. He stated that the deceased died on the spot. He blames the deceased.

29. On cross-examination, he stated that the deceased cross suddenly. The deceased changed from them. He stated that he does not know why the overtaking vehicle did not hit the deceased. He stated that a land cruiser was following him. It overtook the wetness's vehicle. He was driving below 80Kph. He knew that at schools and residence at schools and residence he had to drive below 80 Kph.

30. The deceased is said to have died at the middle of the road. The deceased hit he windscreen and the impact threw him on the road. Parties filed detailed submissions. The court then gave judgment. She found PW3 lying about the accident. The court found that he was driving at 60 Kph then he was not negligence.

Analysis

31. The case turns on the interpretation of the requirement under Section 60(1). The Court is entitled to take judicial notice of the natural cause of events. I note that every person remembers facts that are only favaourable to them. The defendant in the witness statement stated that he was being chased with an unknown land cruiser at full lights.

32. A man emerged suddenly from the rights without checking whether the road was clear. I recall in the defence be stated that the deceased suddenly dashed across the road.

33. I do not believe and the court below had no reason to believe the Defence witness. The court correctly captured the question in the proceedings, if the deceased came from the right and there was an overtaking motor vehicle, how come the deceased was not hit by the speeding land cruiser. It should be recalled equally that the report to the police was that it was the school but that were overtaking.

34. Further it was generally agreed that he was in his own words driving over 50 Kph. The same was said to be a school zone. He stated that he was going at 60 Kph. However, the impact does not reflect 60Kph. The deceased was hit, the bonnet and came to the ground. The matatu Driver must have been speeding.

35. Secondly if the land cruiser had just overtaken the matatu, and did not hit the deceased, the distance of 3 to 4 meters crossing were sufficient for a vehicle being driven at 60 Kph to cross the point where it was overtaken before the deceased crossed the road.

36. The reality is that, if the deceased was crossing from right or left to the driver had sufficient opportunity to brake. If the defence witness was unable to brake, it was because of the high speed. The impact was inconsistent with the postulations by the Defence witness.

37. PW3 stated that he was at the scene. He was 2 meters away from the deceased. He described how the accident occurred. There was nothing brought to hear on whether he was injured. He was questioned on whether he reported to the police.

38. On the other hand the evidence of the police officer was a statement of what the Defence witness told him. The police man was not lying the was relaying the information as received from Bakari Salim

Mwakutwaa. Salim later changed one aspect, that it was a land cruiser and not a school bus that was overtaking.

39. He must have recalled or been informed that the court could not belief the story of a school but on as they are hardly out at the said time. The Defence witness purported that the deceased focused on the land cruiser and not the subject motor vehicle. The evidence clearly show that there was no land cruiser. A good driver will always remember the numbers of a vehicle that was chasing him it could be that they were having a road race or an adrenaline competition and in the process the deceased suffered.

40. I therefore find that the finding by the court that PW3 was lying on had no basis in fact. His evidence is cogent and explains the evidence consistently with the rest. The deceased was not in the middle of the road but on the left side. The deceased hit the Bonnet and had to fell on the opposite direction from where he was hit. Even if I have to believe the Defence witness the time must have been picked as he was crossing.

41. There is no offence crossing the road. It is the driver who was not careful and came at extremely high speed and killed the deceased. I do not find the deceased to have rushed across the road. In the circumstances there is no basis of holding him contributorily negligence. He was lawfully off the road, where the motor matatu hit him, hit he Bonnet and ran.

42. I find the respondent 100 % liable for the accident. I set aside the order dismissing the suit an in lieu thereof allow the suit at 100% liability.

43. The appellant postulated on a 50:50on a 50:50 in case of doubt. In this matter I have no doubt whatsoever from the evidence and as such reject an invitation to find 50: 50.

Quantum

44. There was no appeal on quantum. There was no appeal on quantum. There were misdirections in the case but the court has no basis to disturb them. I therefore enter judgment for the appellant as decreed by the court below.

    a. Loss of expectation of life 200 ,000/=

    b. Pain and suffering 20,000/=

    c. Loss of dependence 7, 240 95 x 12 x15 x2/3 = 868,914

    d. Special damages 550/=

    e. Funeral Expenses 30,000/=

Determination

45. The upshot is that I allow the Appeal herein in the following terms: -

    a. The judgment and decree of the Honourable Sandra Ogot given on 6/5/2022, be and is hereby set aside on liability. In lieu therefore I find the Respondent 100 % liable for the said accident.

    b. There was no appeal on quantum, I therefore enter judgment for the appellant as proposed by the court below as doth, on quantum;

        i. Loss of expectation of life 200,000/=

        ii. Pain and suffering 20,000/=

        iii. Loss of dependency 868,914

iv. Special damages 550

v. Funeral expenses 30,000

Total 1,1090,464

c. Special damages and funeral expenses shall attract interest at court rates form the date of filing suit in the subordinate court.

d. General damages shall attract interest at court rates from 6/5/2022, the date of judgment in the lower court.

e. Costs of Kshs. 125,000/= to the appellants.

f. 30 days stay of execution

g. This file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF JULY,2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

No appearance for the Appellant

Mr. Jengo for the Respondent

Court Assistant - Brian