Maina & 3 others v Navalayo (Suing on behalf of the Estate of Shariff Hassan) (Civil Appeal 232 of 2021) [2024] KEHC 17086 (KLR) (22 April 2024) (Judgment)

Neutral citation: [2024] KEHC 17086 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 232 OF 2021

DKN MAGARE, J

APRIL 22, 2024

BETWEEN

JOHNSTONE MAINA ..... 1ST APPELLANT

DANIEL KINUTHIA GATONYE ..... 2ND APPELLANT

MUTTAH MWANGOJO ..... 3RD APPELLANT

SWEDI ANGUS ..... 4TH APPELLANT

AND

ZAINAH NAVALAYO (SUING ON BEHALF OF THE ESTATE OF SHARIFF HASSAN) ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree given on 9/11/2021 by Hon. J. Nyariki in Mombasa CMCC 645 of 2018. The Appellants were defendants in the matter. Whereas it is true they were all defendants, the 3rd 'Appellant was not represented by the firm of Kimondo Gachoka and company advocates. Their interests are diverse to the '3rd Appellant. This is self-evident even in submissions.

2. The appellants were the defendants in the lower court. The memorandum of appeal was dated 2/12/2021 was concise as required under Order 42 Rule one which provides as follows: -

> " Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -
>
> "1. Form of appeal –
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> 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."

3. The appellant raised the following grounds of appeal.

   a. The learned magistrate erred in law and in fact in holding that the Appellant (sic) was 100% liable for the accident in the absence of any concrete evidence to demonstrate the same.

   b. The learned magistrate erred in law and in fact and misdirected himself by proceeding on wrong principles of law when assessing damages as awarded to the Respondents and failed to apply precedents and proper tenets of the law application.

   c. The learned magistrate erred in law and in fact and misdirected himself by awarding a sum in respect of General and special damages that were high and excessive taking into account amounts used to arrive at the figures were not proved by the Respondent and in the circumstance (sic) occasioned a miscarriage of justice.

   d. The learned magistrate erred in law and in fact by failing to adequately evaluate the evidence and submission and thereby arrived at a decision unsustainable in law.

4. The problem with them memorandum of Appeal is being presumptuous and dealing in vanity. The aspect of unsustainability in law, miscarriage of justice, concrete evidence are conclusions that that only this court can reach. The memorandum of appeal should never be argumentative. As a point of departure grounds 4, is general and unjustifiable. There are only two issues raised in the grounds of Appeal: -

   a. Liability

   b. High and excusive award of damages

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 conclusively are 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.

Pleadings

21. The Respondent filed submission on 3/5/2019 claiming damages against the Appellant who were the owners of motor vehicle Registration No. KMDW 842K. The Respondent was the widow of the late Shariff Hassan (deceased). The 1st and 4th Appellants were beneficial owners of motor vehicle Registration No. KBE 301 L driven by 2nd appellant.

22. The 3rd Appellant was the owner of motor cycle registration No. KMDW 842K. Particulars of negligence were given for the 2 sets. 1st and 2nd defendants jointly and severally and the 3rd and 4th defendants jointly and severally. The deceased left a widow and 5 children aged between 3 – 15 years.

    Special damages of Kshs. – were pleaded.

a. Abstract 100

b. Medical expenses 50,000

c. Search 550

d. Funeral expenses 10,000

Total 60,650

23. The respondent was granted letters of administration on 20/6/2018 and filed suit on 3/5/2019. All the appellants entered Appearance on 11/6/2020. The advocates entered appearance on behalf of Were Johnsotne Maina, Daniel Kinuthi Gatonye and Swedi Angus. From the record a request of judgment had been marked against Muta Mwangojo.

24. The defence blamed Motor Cycle Registration No. KMDW 842K and the deceased. The said motor cycle was owned by the 3rd Defendant. They denied the deceased was a lawful fare paying passenger in Motor Vehicle Registration number KBE 301 L along Mombasa - Nairobi road at Saratoga area.

25. I was flummoxed to note that the same Appellants who were blaming each other were Appealing together. How this Happened it is still a mystery. The dire ramifications, however, shall be known shortly.

Evidence

26. The Respondent testified that the appellant worked at Bayusuf and Sons Ltd. earning 500 per day. She adopted her statement. The appellants, without any basis in law, objected to the death certificate. Death was not one of the issues that had been contested. The death certificate is irrelevant where letters of administration of have been issued unless there is contest on the age of the deceased, which can be proved by other means.

27. Parties must understand that Order 11 requires notice of objections are to be raised at the directions level. Nevertheless, the Respondent surmounted the same by producing a summary of a death certificate- totally unnecessary expense which hinders access to justice.

28. The first witness, a police officer testified that there was a road accident. He stated that Motor vehicle registration No. KBC 301 L was to blame. This evidence was unrebutted since the appellants did not testify.

29. The Respondent produced all the documents in the list of documents. The defence closed their case without calling evidence. The court found the appellants 100% liable.

Analysis

30. The first seed of doubt was planted by the trail court. The court erroneously indicated that the plaintiffs evidence was not water tight. Courts should never question their own decisions. There is no test known as water tight evidence.

31. The burden of proof is set out in sections 107 to 109 of the *evidence Act* 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."

32. Parties are bound to prove their case against a balance of probabilities. This is to say that it is more likely than not that the acts complained of occurred. 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."

33. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the Court 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."

34. The court is bound to adopt he findings of fact by the court below unless they were baseless. In this case the Appellants did not tender any evidence. This ipso facto, means that the plaintiff's evidence is unrebutted. The evidence of PW2 the police officer was that the 1st, 2nd and 4th appellant's vehicle was to blame for the accident.

35. There was no evidence against the 3rd Appellant. Moreso, none against the deceased. The court was wrong in stating that the evidence was not water tight. The evidence just needs to be believable on a balance of probabilities.

36. In this case there was cogent evidence that motor vehicle Registration number KBE 301 L was to blame. The driver of the said motor vehicle, was alive and kicking. He had first hand information and special knowledge on how the accident occurred. He chose not to testify. Under section 112 of the *Evidence*

act, I am bound to make a negative inference. In the case of Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, justice G V Odunga as then he was stated as doth:

> " In my view, the fact that the document in question was authored by the Appellant's agent and was produced by consent of the parties themselves entitled the learned trial magistrate to rely on it. The Court of Appeal in Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278 had this to say on the issue:
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> "Where documents are put in by consent, as for example an agreed bundle of correspondence, the usual agreement is that they are admitted to be what they purport to be (so as to save the necessity for formal proof of each document)."
>
> 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> '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."

37. I therefore do not find any merit in the Appeal against the finding of 100% liability. I note that the 3rd Appellant was not represented by the firm of M/s Kimondo Gachoka and Company Advocates. They have an adverse interest against the said party. The appeal in his name is therefore untenable. This is on the basis that this was a party the three appellants were blaming in their pleadings for occurrence of the Accident. However, they did not join him as a Co-Respondent.

38. The Appeal on behalf of an adverse party cannot be sustained. As a result, I strike out the appeal filed erroneously in the name of the 3rd Defendant. The only Appellants are the 1st, 2nd and 4th Appellants.

39. The evidence against the 1st, 2nd and 4th Appellant was not rebutted. It was cogent evidence. I agree with the holding by justice J Onyango in Abere v Ondieki (Civil Appeal 09 of 2019) [2022] KEELC 14600 (KLR) (3 November 2022) (Judgment) as doth: -

> " Before outlining my findings on the above submissions by the parties it is important to state that the applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The duty of proving averments contained in the plaint lay squarely on the Appellant. In Karugi & Another V. Kabiya & 3 Others [1987] KLR 347 the Court of Appeal stated that:
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> "The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof.... The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

40. The Consequent upon the foregoing, I find that the motor vehicle registration No. KBE 307 L was to blame as it was overtaking carelessly. I find the appellants 100% liable. I dismiss the appeal on liability as untenable. I affirm the decision of the lower court on the issue.

41. On quantum the court found that a dependency ratio of 2/3 was proper. The deceased was 30 years on the case of Hyder Ntheya Musilu & Another – v s- Chiria Wu Yi Ltd and another (2017) eKLR, where the court applied a multiplier of 28 years for a 32 years.

42. The court also relied on the case of Regina Wanjiku and Lucy Wangui Kinara –vs- Kanju Trading Ltd and Simeon Kiplimo Murey and 3 Others vs Kenya Bus Management Services Ltd and 4 Others (2014) eKLR and as a result awarded Kshs 100,000/= for loss of expectation of hire. The court awarded Kshs. 50,000 for pain and suffering and Kshs. 60,000 for funeral expenses.

43. The court erred in finding the deceased to be aged 30 years. The death certificate indicated 34 years. Using the same party of reasoning the deceased could have lived into the ripe old age of 70 years. However due to vicissitudes of life, he would have died earlier. Taking into consideration that the money is also being given in lump sum, I find a multiplier of 30 years excessive. A multiplier of 25 years, will be proper.

44. The court adopted 13,000 being reasonable considering the minimum wage. The court must elect whether to use the minimum wage or an amount proved. This brings in certainty. It cannot be both.

45. From the evidence, the earning of Kshs. 13,000/= was not proved. It does not mean that the deceased was not earning. The deceased died in 2016.

46. The minimum wage was Kshs 14,025. The amount applied was less than the minimum wage. There was no appeal on this limb. The court will thus use the lower courts amount which is lower than the minimum amount.

47. This works out as follows: -

    13,000x2/3x12x25= 2,600,000/=

48. I therefore set aside General damages or loss of dependency of Kshs. 3,120,000 in lieu thereof, I enter judgment for Kshs. 2,600,000. To that extent Appeal on General damages succeeds, partly.

49. On special damages, the respondent pleaded funeral, medical expenses, medical expenses and motor vehicle search. It must be recalled that Special damages must be specifically pleaded and be strictly proved. In the case of DAVID BAGINE vs MARTIN BUNDI [1997] eKLR, the court of Appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
>
> "Plaintiffs must understand that if they bring actions for damages it is for thm to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

50. In this matter funeral expenses were given as a matter of course as this must have been merited. Funeral expeses are not a matter of course. However, a sum of Ksh 10,000/= is modest. In the case of Keroche Breweries v Onsare & another (Suing as a Representative of the Estate of Jared Kemosi Oyaro - Deceased) (Civil Appeal 58 (E004) of 2020) [2024] KEHC 2577 (KLR) (12 March 2024) (Judgment), this court stated as doth:-

> " The court awarded Kshs. 86,870/= as special damages. The award of funereal is not to be taken as strictly as other special damages. Funeral expenses must have been incurred as the deceased, surely was not buried without expenses. In the case of Munguti & another (Both suing as the administrators of the Estate of the Late Katama George Chamanje Mkangi - Deceased) v Bolpak Trading Company Limited & another (Civil Case 224 of 2007) [2023] KEHC 19651 (KLR) (Civ) (29 June 2023) (Judgment), Justice C Meoli stated as doth; -
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> "That notwithstanding, the courts have acknowledged that in spite of the absence of receipts, it is a general fact that funeral expenses must have been incurred in the burial of a deceased person.
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> 42. The Court of Appeal in Premier Diary Limited v Amarjit Singh Sagoo & another [2013] eKLR, stated the following on the subject: -
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> 43. Similarly, the Court of Appeal in Capital Fish Kenya Limited v the Kenya Power & Lighting Company Limited [2016] eKLR said that:
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> "We do not discern from our reading of this decision a departure from the time tested principle that special damages should not only be specifically pleaded but must also be strictly proved...We are of course aware of the court occasionally loosening this requirement when it comes to matters of common notoriety for example a claim for special damages on burial expenses where the claimant may not have receipts for the coffin, transport costs, food etc..."

51. The search was proved at Ksh 550. The same is allowed. However as regards Kshs. 50,000/= medical expenses, no evidence was led on the same. There was no evidence led on the cost for a police abstract. On the face of it, it is indicated to be given for free. I therefore set side amounts of specials for the police abstract and medical expenses. A sum of 10,550 was however proved.

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

i. The appeal by the 3rd appellant is struck out.

ii. The court finds the 1st, 2nd and 4th appellants 100% liable. I set aside the order that the 3rd defendant is liable and order that 1st, 2nd and 4th appellants are 100% liable.

iii. I set aside award of damages for loss of dependency and substitute in an award of Kshs 2,600,000/=.

iv. I allow appeal on special damages. I set aside Kshs. 60,650 and substitute with an award of Kshs. 10,550/=.

v. The awards on loss of expectation of life of Ksh 100,000/= and pain and suffering for Ksh. 50,000/= are affirmed.

vi. This makes the total award to be Ksh. 2,760,550/= together with costs and interest.

vii. The Respondents shall have costs in the lower court.

viii. Each party to bear cost in this appeal.

ix. The lower court file be returned to the lower court.

x. This file is closed.

xi. 30 days stay of execution.,

DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 22ND DAY OF APRIL, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

..... Advocates for the Appellant

..... Advocates for the Respondent