Capture Transport Limited v Mwinyijaka & another (Civil Appeal 88 of 2022) [2023] KEHC 18223 (KLR) (8 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 88 OF 2022

DKN MAGARE, J

MAY 8, 2023

BETWEEN

CAPTURE TRANSPORT LIMITED ..... APPELLANT

AND

RAMADHAN RASHID (SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF RASHID ABDALLA JUMA) ..... 1ST RESPONDENT

ZUBEDA RASHID MWINYIJAKA ..... 2ND RESPONDENT

JUDGMENT

1. The Resident Magistrate Hon. Muchoki delivered Judgment on 26/5/2022 in Mombasa CMCC 1653 of 2019. This was over a road traffic accident in which the deceased died. The Respondent had filed for damages under the *Law Reform* and *Fatal Accidents Act*. The impugned judgment was to as follows: -

    a. Liability 70:30

    b. General damages for pain and suffering Ksh 100,000/=

    c. Loss of expectation of life Ksh 100,000/=

    d. Loss of dependency Ksh 2,149,440

    e. Special damages. Ksh 26,500/=

    Total Ksh 2, 375,900/=

    f. Less 30% Liability 712,782/=

    Sum due 1,663,158/=

2. The Appellant who was the defendant in the lower court filed 7 Paragraph memorandum of Appeal. The Grounds are of course repetitive and raise only 2 issues: -

a. The proof of liability

b. damages were inordinately high or were not awardable.

3. It is high time that advocates complied with order 42 Rule 1 by having concise ground of Appeal. The Rules provides as doth; -

> " 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."

4. The memorandum of Appeal should thus be concise and raise real issues and not general issues. The court of Appeal had occasion to deal with this issue in the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* [2020] eKLR, where the court stated as follows: -

> " 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.
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> 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:
>
> "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."

5. A memorandum of appeal should be concise and to the point. Having 11 grounds is to prolixious and does not in any way enhance the appeal. It only wastes the court's precious time and paper.

Pleadings

6. The Respondent vide a plaint filed on 23/9/19 and dated 23/9/2019 claiming damages for the accident that resulted in the death of Rashid Abdalla Juma. The Deceased left behind a mother aged 42 and siblings aged between 10 – 23 years old.

7. The Deceased was 20 years at the time and was the 1st Respondents 1st child. The Respondent pleaded that the accident of 11/6/2018 was caused by the Appellant who was the owner of KCD 971J ZF 1087 Mercedes Trailer.

8. The Appellant filed defence dated 4/3/2020. They blamed Motor Cycle Registration No. KMDY 773 H and the deceased.

Appellants Submissions

9. The appellant filed submission on 3/3/23 where they raise issue with the occurrence of the accident on the date and negligence. This is not a good defence. It is either the accident occurred or not. The Appellant cannot keep prefabricating.

10. The defence took issue with the court's finding that the Respondent's evidence was unchallenged. They also raise issue with the award of damages where the court did not rely on any comparable evidence. The Appellant cited several authorities.

11. The Respondent was to file submissions but did not. Only the day of hearing parties highlighted submissions. The Respondent also submitted orally.

Duty of the Appellate Court

12. 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.

13. This was aptly stated in the case of *Peters v Sunday Post Limited* [1985] EA 424 where in the latter case, the 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..."

14. In *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, the Court of Appeal enunciated the same principle 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 retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this 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..."

Liability

15. The deceased was the rider of motor cycle registration No. KMDY 773H Yamaha. The death certificate indicate that the deceased was 20 years old. The said motor cycle was involved in an accident with Motor Vehicle Registration KCD 971J/ZF 1087. The said Motor Vehicle Registration KCD 971J/ZF 1087 was registered in the name of the Respondent and their Financiers Giro commercial Bank Ltd.

16. Motor vehicle registration No. KCD 971J / ZF 1087 was registered the under the name of the defendant. The critical if test for the motor cycle shows no preachment defects. There was however, offside side mirror which was damaged. The defence blame the deceased.

17. The plaintiff testified and adopted his statement. They also had PC Isaac Obaga to testify. The rider was blamed for the accident. The defence did not testify. Without testimony there can be no basis for

Apportioning liability unless the plaintiff negligence. There was evidence on the blame for the rider. He was however not in a position to testify having died.

18. The other person in the equation is the driver. In the absence of the driver, it must be construed against them. However, in this case there was contradictory evidence on part of the Appellant. This was a collision of a vehicle and a motor cycle. They are both deemed to be equally negligence in absence of evidence to the contrary.

    a. In the circumstances the only option open to the court of was 50:50. Therefore set aside the award of 70:30 and substitute the same with 50:50. This was settled in the case of *Simon Waweru Mugo v Alice Mwongeli Munyao* [2020] eKLR, where the court, D. K. Kemei stated as follows: -

> ”Where negligence has been established and where there is a head on collision the court is required to make a call on apportionment of liability. Spry V P in *Lakhamshi v Attorney General*, (1971) EA 118, 120 rendered himself thus:
>
> “ It is now settled law in East Africa that where the evidence relating to a traffic accident is insufficient to establish the negligence of any party, the court must find the parties equally to blame. A judge is under a duty when confronted by conflicting evidence to reach a decision on it. In the case of most traffic accidents it is possible on a balance of probabilities to conclude that one other party was guilty or both parties were guilty of negligence. In many cases as for example where vehicles collide near the middle of a wide straight road in conditions of good visibility with no courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. Although it is usually possible, but nevertheless often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, yet where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence, the position is different. It is difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot properly be inferred from the circumstances of the accident.”

19. In the circumstances, I set aside the finding on liability and enter liability at 50: 50 between the deceased and the Respondent.

Quantum

20. The court awarded the following:-

    Pain and suffering 100,000/=

    Loss of expectation of life 100,000/=

    Loss of Dependency 2,149,440

    Special damages Kshs. 26,500/=

    Total 2,375,540

The above amount as then subjected to liability.

Loss of expectation of life

21. The court awarded Ksh. 100,000/=. The Appellant is Seeking to reduce the same to 70,000/=. I cannot do that. It is not the duty of the court to substitute the opinion of the court with its own. An award of 70,000/= was made over 21 years ago. An award of a 20 year old. It could be even higher as the larger part of life was still to be lived. In *Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another* (No 2) [1985] eKLR, the court of Appeal stated: -

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, 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 the damage. See *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.

22. In the case of *Crown Bus Services Ltd & 2 others v Jamilla Nyongesa and Amida Nyongesa (Legal Representatives of Alvin Nanjala (Deceased)* [2020] eKLR, justice Edward M. Muriithi, held as doth the court of appeal held as doth: -

> " 21. The confusion appears to have arisen because of different reporting of the Kemfro case (supra) which was heavily relied on by Mr. Kiplagat. The version he relied on is from [1982-88] 1 KAR 727 which concentrates on the decision of Kneller JA in extracting the ratio decidendi. The same case, however, is more fully reported in [1987] KLR 30 as *Kemfro Africa Ltd t/a Meru Express Services 1976 & Another v Lubia & Another* (No. 2) and the ratio decindendi is extracted from the unanimous decision of all three Judges. It was held, inter alia, that:-
>
> 6. An award under the *Law Reform Act* is not one of the benefits excluded from being taken into account when assessing damages under the *Fatal Accidents Act*; it appears the legislation intended that it should be considered.
>
> 7. The *Law Reform Act* (Cap 26) section 2 (5) provides that the rights conferred by or for the benefit for the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of the deceased persons by the *Fatal Accidents Act*. This therefore means that a party entitled to sue under the *Fatal Accidents Act* still has the right to sue under the *Law Reform Act* in respect of the same death.
>
> 8. The words 'to be taken into account' and 'to be deducted' are two different things. The words in Section 4 (2) of the *Fatal Accidents Act* are 'taken into account'. The Section says what should be taken into account and not necessarily deducted. It is sufficient if the judgment of the lower court shows that in reaching the figure awarded under the *Fatal Accidents Act*, the trial judge bore in mind or considered what he had awarded under the *Law Reform Act* for the non-pecuniary loss. There is no requirement in law or otherwise for him to engage in a mathematical deduction."

Pain and suffering

23. The court awarded Ksh 100,000/=. The only reason given is the authority of *Tochard Steam and Kenya Power v Mutie Muli & Another* eKLR. We are left to speculate on the exact reason for such an award. Pain and suffering is granted then the deceased suffered pain or the nature of death was so grievous that it could be said to be excruciating. The date of death is 11/06/2018. The accident occurred on 11/6/2018. The place of death if the Kipevu road. The immediacy of death was not examined on. The death occurred on the same day at the scene of accident.

24. An award of Ksh. 100,000 is on the higher side as to amount an erroneous estimate of damages. I therefore set the same aside and substitute thereto an award of Ksh. 50,000/=.

Special damages

25. Special damages must be particularly pleaded and specifically pleaded. The Respondent pleaded the following special damages.

    Funeral expenses 5,000/=

    Police abstract 500

    Death certificate 1000

    Letters of administration 2000

    Total 26,500

26. The court awarded the same. Receipts were produced and I am satisfied that the court below was correct.

Loss of dependency

27. The court awarded Ksh. 2,149,440/= made up of: -

    Dependency ratio ½

    Multiplier 30 years

    Multiplicand 12,912

28. The amount of 12,912 was from the pay slips. This was the salary for Ksh. 19,600 less statutory deductions leaving a sum of Ksh 17,912.

29. I am satisfied that the deceased salary was 17,912. He must have used the bulk on himself leaving a share of 1/3 to the dependants, the father and mother. In the case of *Rodgers Kinoti v Linus Bundi Murithi & another* [2022] eKLR, the court, J. N. Njagi, held as doth: -

    " The guiding factor in determining the dependency ratio where the deceased is unmarried is the re-statement by the Court of Appeal in Dickson Taabu Ogutu (supra) that:

    "The extent to which the family is being supported must depend on the circumstances of each case. To ascertain it the judge will analyze the available evidence as to how much the deceased earned and how much he spent on his family. There can be no rule or principle in such a situation."

    In that case, where the deceased was unmarried, the court used a dependency ratio of 1/3.

24. In the instant case the trial court did not give any reason as to why it opted for dependency ratio of ½ as opposed to the appellant`s submission of 1/3. The deceased in the matter was survived by his parents. He had just finished form 4 and was preparing to go to college. The respondents never led evidence on the extent to which they were dependent on the deceased. As dependency is a question of fact the extent of it was not proved.

30. There is no basis for held as the loss of dependency. In *Dismas Muhami Wainarua v Sopon Kasirimo Maranta (Suing as administrator and or personal representative of the estate of Partinini Supon (Deceased)* (2021) eKLR where the court held that:

> "44. The deceased left behind parents. He must have supported them in some way. In that regard the ratio could not have been 2/3. The respondent's counsel agreed that the dependency ratio of 2/3 was on the higher side and suggested a ratio of ½. Although the deceased was not married, it would be difficult to assume without evidence that he gave ½ of his income towards his parents' support. The ratio of 1/3 would be appropriate."

31. The true dependents are the father and mother. From the plaint the mother was 42 years. She could have depended on the deceased to a ripe age of 70 years. However, due to vicissitudes of life, the life could have been considerably cut down. He could also have married and have new dependants. A multiplier of 23 years is proper. This is informed by several decisions. In the case of *Bash Hauliers v Dama Kalume Karisa & another* [2020] eKLR, the court, Njoki Mwangi, held as doth: -

> 31. In the case of *Paul Ouma v Rosemary Atieno Onyango & Peter Juma Amolo (suing as the legal representative in the estate of Joseph Onyango Amolo (deceased)* [2018] eKLR, Judge J.A. Makau affirmed a multiplier of 20 years which had been adopted by the Trial Magistrate for a deceased who was 38 years old. In the case of *Elizabeth Chelagat Tanui & Another v Arthur Mwangi Kanyua* [2013] eKLR, H.P.G Waweru J adopted a multiplier of 18 years where the deceased was 36 years old. In the case of *Pleasant View school Limited v Rose Mutheu Kithopi & Another* [2017] eKLR, Judge J. Kamau affirmed a multiplier of 20 years which had been adopted by the Trial Court, for a 36 year old man.
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> 32. In the case of *Nancy Marigu Gabriel (suing as legal representative of the estate of Linus Njeru Marigu (deceased) v David Kimani* [2015] eKLR, Judge F. Muchemi substituted a multiplier of 15 years that had been adopted by the Trial Court with one of 22 years for a 33 year old man.
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> 33. Having referred to the above authorities in considering if the multiplier of 20 years adopted in this case was reasonable, this Court has no basis to interfere with the discretion exercised by the Hon. Magistrate in adopting a multiplier of 20 years for the deceased who was 32 years old. I uphold the decision of the Hon. Magistrate in that regard"

32. An award of 23 could be sufficient. I therefore set aside the award of 30 years and substitute with 23 years. This works out as follows: -

    1/3 x17,912x12x23=1,647,904.

33. I therefore partially allow the appeal

Determination

34. The appeal is allowed partially in the following terms: -

    a. Appeal on liability succeeds to the extent that an award of 70:30 is set aside and substituted with an award of 50:50

b. damages for pain and suffering of Ksh 100,000/= are set aside and substituted with Ksh. 50,000/=

c. Appeal on damages under the *Law Reform Act* is dismissed.

d. General damages for loss of dependency are set aside and substituted with a sum of Ksh. 1,647,904. This works out as follows: -

Liability 50:50

General damages for loss of dependency 1,647,904

Damages under law reform 100,000

Damages for pain and suffering 50,000/=

Special 26,500

Total 1,824,404

Less 50% 912,202

Total award 912,202

e. The special damages to attract interest from date of filing in lower court while general damages attract interest from date of Judgment in the lower court.

f. The file is closed.

g. The judgment be served on the trial court forthwith.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 8TH DAY OF MAY 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr Baya for the Appellant

No appearance for the Respondent.