**Alkano v Mwangi & another (Civil Appeal E006 of 2022)**
**[2024] KEHC 9890 (KLR) (29 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9890 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NYERI**

**CIVIL APPEAL E006 OF 2022**

**DKN MAGARE, J**

**JULY 29, 2024**

**BETWEEN**

**NURU GUYO ALKANO ..... APPELLANT**

**AND**

**VINCENT NJUGUNA SAMUEL MWANGI ..... 1ST RESPONDENT**

**AUTO INDUSTRIES LIMITED ..... 2ND RESPONDENT**

***(Being an appeal from the Judgment and Decree of Hon. J. Macharia (SPM) in Nyeri CMCC No. 1 of 2019 delivered on 20th January, 2022)***

## JUDGMENT

1. This is an appeal from the judgment and decree of Hon. J. Macharia given on 20/1/2022. The Appellant filed a memorandum of appeal under order XLI Rule 1 of the Civil Procedure Rules. That rule was repealed over 14 years ago.

2. The memorandum of appeal is a classic study in inconcise Memorandum of Appeal. The same is contrary to Order 42 Rule 1 of the Civil Procedure 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.

3. 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:
>
> "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..."

4. 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."

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. This was aptly stated in the case of Peters v Sunday Post Limited [1958] EA 424 where, the court of Appeal 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..."

7. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

8. The Appellant was the Plaintiff in the lower court. The 9 grounds raise only 3 issues:-

   a. Liability against the pillion passenger.

   b. Quantum.

   c. Liability of the respondent.

9. The 2nd Respondent was a third party in the court below.

10. In the case of Peters v 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..."

11. In Nyambati Nyaswabu Erick v 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."

12. 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.

13. The foregoing was settled in the cases of Butter v Butter Civil Appeal No. 43 of 1983 [1984] KLR where the Court of Appeal held as follows at 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."

14. 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.

15. The court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd v Meru Express Servcie v 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.

16. 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 v 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..."

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 erroneous 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.

**Pleadings**

20. The Appellant filed suit on 4/1/2019 against the 1st Respondent. The 1st Respondent was the owner of motor vehicle Registration KBL 152X. The appellant was a pillion passenger on motor cycle Registration No. KMDD 072X.

21. The Appellant suffered the following injuries:

    a. Head injury with fracture of the skull and intracranial haematomas.

    b. Fracture of the right femur.

    c. Fracture of the lateral malleolus of the right ankle.

    d. Blunt injury to the left shoulder.

22. He pleaded specials of 3,000/=.

23. The 1st Respondent filed defence on 9/12/2019 stating that they were strangers to paragraph *4* in particular whether the Appellant was a pillion passenger. They blamed the owner of motorcycle Registration No. KMDD 072X. They also blamed the plaintiff.

24. A statement was written by the 1st Respondent as the owner of the motor vehicle Registration No. KBL 152X. He blamed the rider for the accident. They sought and joined Auto Industries Ltd as a third party. The Notice was dated 2/9/2020 but filed on 30/9/2020.

25. Directions were sought vide an application dated 30/4/2021. The court entered interlocutory Judgment on 5/3/2021.

26. The Appellant produced exhibits 1-8. He stated that the motor cycle was owned by Auto Industries as registered owners. In re-examination, it was indicated that the driver was to be charged.

27. 1st defendant testified and adopted his statement. He stated that the road had a lot of pot holes. He was avoiding pot holes when the bike suddenly emerged. He said he could not see the other side properly. He blamed lack of signs and yellow line. He stated that the driver was to blame. He testified that the vehicle toppled on the side of the road.

28. The court apportioned liability at 50:50 between the Appellant and 1st Respondent. The court awarded general damages of Kshs. 1,000,000/=, specials of 3,000/=

**Analysis**

29. In Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, the court of appeal, [O'kubasu, Githinji & Waki,JJ.A] stated as follows: -

> " We have considered the submissions of both counsel, the authorities cited before us and we are persuaded by Mr. Mwangi learned counsel for the appellant that we must interfere with the judgment of the superior court. There is no doubt that an accident occurred between the two vehicles on the Nyeri - Mweiga road at the time stated by the two witnesses. In our assessment of the scanty evidence on record however both the lorry driver and the motorcyclist failed to exercise the degree of care and skill reasonably to be expected of a person driving a vehicle on a public highway. They were in our view equally to blame. We therefore apportion liability for the accident at 50/50."

30. In this matter the 1st Respondent admitted that he was trying to avoid the potholes. Ipso facto, he had dangerously gone to a wrong lane. This was in a blind corner. Whether the motor bike was on high speed or not the accident could not have occurred had the 1st Respondent remained in his lane. By admitting that he was trying to avoid pot holes, there was no yellow line and there were no road signs, the 1st Respondent was admitting to negligence.

**Inference**

31. The burden of proof is on whoever alleges. It is set out in section 107-109 of the *Evidence Act* which provides as follows: -

> " 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. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau v 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 v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the judges of appeal held that:

> " Denning J. in Miller v 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. Further, there was no evidence of blame by the Appellant. In the circumstances I set aside the finding on liability and in lieu thereof find the 1st Respondent 100% liable. The third party did not enter appearance. In the circumstances Oder 1 Rule 17 comes into play. The court cannot apportion liability in the circumstances.

35. Order 1, Rule 17 of the Civil Procedure Rules provides as follows: -

> " If a person not a party to the suit who is served as mentioned in rule 15 (hereinafter called the third party ) desires to dispute the plaintiff's claim in the suit as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, the third party must enter an appearance in the suit on or before the day specified in the notice; and in default of his so doing he shall be deemed to admit the validity of the decree obtained

against such defendant, whether obtained by consent or otherwise, and his own liability to contribute or indemnify, as the case may be, to the extent claimed in the third-party notice:

Provided that a person so served and failing to enter an appearance within the period fixed in the notice may apply to the Court for leave to enter an appearance, and for good cause such leave may be given upon such terms, if any, as the court shall think fit."

36. On quantum a sum of Kshs. 1,000,000/= was awarded. There was no deformity found. No percentage of permanent disability. However the Appellant was using one crutch. The interlocking nail within need to be removed at a cost of 50,000/=. The award of 1,000,000/= was proper.

37. The prayer that liability be apportioned against the 2nd Respondent is not in the appeal. It is dismissed in limine.

38. The award of 1,000,000/= is proper. In the circumstances I dismiss appeal on quantum.

**Determination**

39. In the circumstances I make the following orders:

    a. The appeal on liability is allowed. The judgment against the Appellant is set aside. The Appellant was not to blame. The 1st Respondent is held 100% liable.

    b. The appeal on quantum is dismissed. Future medical expenses though proved, was not pleaded.

    c. Costs of 95,000/= to the Appellant.

    d. 30 days stay of execution.

    e. The file is closed.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.**

**Judgment delivered through Microsoft Teams Online Platform.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of:-**

**Mr. Mahugu for the Appellant**

**Muriuki for the 1st Respondent**

**No appearance for 2nd Respondent**

**Court Assistant – Jedidah**