Macharia v Mutua (Civil Appeal 13 of 2022)
[2023] KEHC 27078 (KLR) (20 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 13 OF 2022

DKN MAGARE, J

DECEMBER 20, 2023

BETWEEN

THIGA DAVID MACHARIA ..... APPELLANT

AND

JULITA KALUNDE MUTUA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. M.L. Nabibya – PM dated 20/1/2022 arising from Mombasa CMCC No. 844 of 2009.

2. The Appeal is on liability and quantum.

3. The Memorandum of Appeal, however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolitixious 8 - paragraph argumentative Memorandum of Appeal filed on 31st January 2022. The grounds are argumentative, unseemly and do not please the eye to read.

4. Order 42 Rule 1 that 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.
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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."

5. 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..."

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. The quantum of damages

   b. Liability

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

9. The Plaint claimed damages for an accident involving Motor Vehicle Registration No. KAU 919N in which the Respondent was a passenger and Motor Vehicle Registration No. KBA 061Y. The Respondent blamed the driver of Motor Vehicle Registration No. KAU 919N for the accident for carelessly driving and permitting it to collide with Motor Vehicle Registration Number KBA 061Y.

The Plaintiff set forth particulars of negligence for each of the vehicles. The Plaintiff pleaded injuries as follows: A cut to the left hand, bruises on the right leg and blunt object injury to the right leg.

10. The Appellants entered appearance and filed Defence denying the particulars of negligence and injuries pleaded in the Plaint. However, they Appellant did not testify or call witnesses.

11. The Trial Court heard the parties and proceeded to render judgement on 20th January 2022. In the Judgement, the Court found 100% liability against the 1st and 2nd Defendants. The court also awarded the Plaintiff Kshs. 200,000/- in General Damages and Special Damages of Kshs. 2,000/-.

12. Aggrieved by the finding of the Trial Court, the Appellant lodged a Memorandum of Appeal hence this Appeal.

Submissions

13. The Appellant filed submissions dated 17th July 2023.

14. 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.

15. Counsel submitted that there cannot be liability on the part of the Appellant without a fault and relied on the case of *East Produce (K) Ltd vs Christopher Atiado Asiro* (2006) eKLR.

16. It was further submitted that the Appellant was not liable because the negligence was not the proximate cause of the damages and it is the driver of Motor vehicle KBA 061Y who was the immediate cause of the accident. Reliance was placed on the case of *Edward Mzamili Katana vrs CMA Motors Group Ltd* (2006) eKLR.

17. The Appellant did not submit on quantum of damages.

Respondent's Submissions

18. The respondent filed submissions dated 29th June 2023 and urged this court to find that the trial court correctly found on the basis of the available evidence and on a balance of probabilities that the Appellants were 100% liable for the accident. The Respondent relied on the case of Karuru Munyororo vs Joseph Ndumia HCCC No. 1988 of 1988.

19. It was further submitted that the Appellant did not call any witnesses or testify and there defence remained mere allegations leaving the Respondent's case uncontroverted. Reliance was put *inter alia* on the case of *D.T Dobie & Co. Ltd vs Wafula Chebukati* (2014) eKLR.

20. On quantum, counsel submitted that the curt did not err in the assessment of the damages.

21. The Respondent relied on otiose authorities and no current authority was cited to assist the court. I will not replicate the authorities here.

Analysis

22. 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.

23. 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. 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.

26. 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."

27. 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."

28. 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.

29. 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..."

30. The issue in this case is whether the court should set aside the Judgement and Decree of the Trial Court.

31. On liability, the Appellant blamed Motor Vehicle Registration Number KBA 061Y. The trial court found liability at 100% for the 1st and 2nd Defendants. I note the 1st and 2nd Defendants were the owners of motor vehicle registration number KAU 919N and motor vehicle registration number KBA 061Y respectively.

32. The Respondent on the other hand was a passenger in motor vehicle registration number KAU 919N. The materials placed before the court found no liability on her part. The Appellant filed no evidence or called any witnesses.

33. I have perused the judgement of the lower court. The trial court correctly found that the evidence of the Respondent was uncontroverted since the Appellant called no witness. The witnesses, especially the driver of motor vehicle registration number KBA 061 Y would have been crucial to encapsulate how the accident may have occurred. I find on fault on the part of the trial court finding liability on the part of the Defendants. However, I do not find any reason why the 3rd Defendant was not blamed or w secluded from liability. The issue is however mute as no party had opted to raise it in this Appeal.

34. In the case of *Netah Njoki Kamau & Another V Eliud Mburu Mwaniki* [2021] eKLR, Justice Mary Kasango, stated as doth: -

> " 18. The appellants faulted the trial court for dismissing their claim in the light of the respondent not calling any evidence. What the appellant did in laying the failure of their case on the trial court was that they failed to appreciate that they bore the burden of proof to prove the allegations in their pleadings. The Court of Appeal in the case *Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau* (2016) eKLR had occasion to consider the burden of proof of the plaintiff where the defendant failed to adduce evidence. The court stated in that case:-
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> > " We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. 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. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

35. This court will not find liability merely on the basis that the Appellant did not call witnesses or testify. Conversely, the materials placed before the court do not point to an error on the part of the trial court as to liability.

36. On a balance of probabilities, the court correctly inferred that the accident was caused by the two motor vehicles involved. This burden was discharged by the Respondent. I will not disturb the finding of the trial court.

Quantum

37. 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.

38. 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 if I handled the case in the subordinate court, I would have awarded a different figure.

39. Damages must be commensurate with similar injuries.

40. I note that the Respondent suffered a cut on the hand, bruise and blunt object injury on the leg.

41. 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.

42. 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."..."

43. The trial Court did not cite comparable authorities in its determination. This was in error. 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"

44. 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.

45. In *Francis Omari Ogaro v JAO (minor suing through next friend and father GOD* [2021] eKLR, the court, justice Ester Maina granted Ksh 180,000/= for similar soft tissue injuries.

46. In *Lilian Anyango Otieno v Philip Mugoya Ogila* [2022] eKLR, the court, Fred A. Ochieng, J (as he then was) awarded 150,000/= for soft tissue injuries.

47. Further, in *Justine Nyamweya Ochoki &Another V Jumaa Karisa Kipingwa* [2020] eKLR, in which the Plaintiff suffered blunt injuries to the chest, left wrist and lower lip. The trial court awarded Ksh 300,000/=, but on appeal the same was reduced to Ksh 150,000/=.

48. Similarly, in the case of *Ndungu Dennis Vs Ann Wangari Ndirangu & Another* [2018] eKLR, in which the Plaintiff sustained soft tissue injuries to the lower right leg and to the back. the Trial Court awarded Kshs. 300,000/- but on appeal, the award was reduced from Ksh 300,000/= to Ksh 150,000/=.

49. All these authorities show that the Award by the trial court was not inordinately low as to amount to an erroneous estimate of damages.

50. In the upshot I will interfere with the award of General Damages. The Appeal on General Damages is thus without merit.

Determination

51. In the circumstances, I make the following orders: -

    a. The Appeal on both liability and quantum is dismissed with costs to the Respondent.

    b. The Respondent shall have costs of Ksh. 55,000/= for the Appeal.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 20TH DAY OF DECEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Nyaga for the Appellant

No appearance for Respondent

Court Assistant- Brian