



REPUBLIC OF KENYA



**Sarai v Hull Marine Enterprises & another (Civil Appeal 15 of 2023)
[2023] KEHC 27226 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27226 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 15 OF 2023
DKN MAGARE, J
DECEMBER 20, 2023**

BETWEEN

RAMA ABDALLA SARAI PLAINTIFF

AND

FELIX GUMBAO ODHIAMBO 1ST RESPONDENT

HULL MARINE ENTERPRISES 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and decree of the Honourable W K Cheruiyot delivered on 18/1/2023 in Mombasa CMCC 1153 of 2023. The memorandum of Appeal has a whopping 9 grounds and 4 prayers.
2. The grounds are too Prolixious and offend Order 42 Rule 1, 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.
 - (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 in regard to rule 86 (which is *pari materia* 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:

“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. 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 the 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:

“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. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate’s court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the first Appellate court

6. 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.



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 *Butler Vs Butler* 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 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 the quantum given by the Lower Court, the Court should be aware of its limits. Being an exercise of discretion the exercise should be done judiciously. Is my duty 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 Service 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.

Analysis

18. The Appellant pleaded that he was earning 124,815 per month and was aged 48 years. He lost earning capacity. He further stated that he lost special damages.

19. On special damages, I note that the dispute is not whether they were incurred but whether, they were proved by the Appellant. Special damages must not only be particularized but must be specifically 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 Sabhani 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 them 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"

20. I agree that the amount of money was spent on the treatment. However, the invoices were to Kenya Ports Authority. They are not refundable to the plaintiff. There is thus no special damages suffered by the Appellant. I find no trouble dismissing the claim for special damages.
21. On general damages, the court is under duty to re-evaluate the evidence. 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 it 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.”
22. Dr. Udayan found fracture and there was no deformity. He was said to have fully recovered with no permanent disability Examination was on 23/8/2022. He is said to be a known polio case with a left lower limb.
23. Dr. Adede gave 20% permanent partial disability. This is an oxymoron. Disability is either permanent or permanent. I agree with Dr. Udayan Sheth that there was no permanent disability.
24. An award of Kshs. 550,000/= is sufficient in the circumstances. The partial disability had healed in over time.

Loss of earning capacity

25. The earning capacity is given when temporary or permanent incapacity is incurred. The same has to arise from the accident. Dr. Adede stated that the left lower limb is generally short. However, there was no injury on the wasted area.
26. The injury was on the left femur thigh bone upper third. The incapacity thus not related to the accident.
27. Dr. Udayan confirmed that this was a known polio case. This explains the loss of the lower limb.
28. Consequently, there was no disability. I dismiss the claim for loss of earning capacity.
29. Dr. Adede suggested Kshs. 120,000 for the replacement of implant. The P3 shows that there were 2 nails in situ. The nails were already removed in April, 2022 at Pandya Hospital. The same cannot be future medical expenses where it is already incurred. It becomes special damages that must be strictly proved.
30. I dismiss the claim for future medical expenses.
31. In the circumstances, I make the following findings: -
 - a. The Appeal on General damages for pain, suffering and loss of amenities is dismissed.
 - b. The future medical expenses were not proved.
 - c. The claim for Kshs. 419,494 as Specials Damage is dismissed. Only Kshs. 550/= as Special Damages was proved.
 - d. The claim for loss of earning capacity is untenable in view of the lack of the disability.



- e. Costs of Kshs. 780,000/= to the Respondent.
- f. 30 days stay of execution.

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

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Adede for the Appellant

No appearance for the Respondent

Court Assistant - Brian

