MG Auto Trading & another v Nyariki (Civil Appeal E096 of 2023)
[2025] KEHC 3039 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3039 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E096 OF 2023

DKN MAGARE, J

MARCH 6, 2025

BETWEEN

MG AUTO TRADING ..... 1ST APPELLANT

VINCENT OIRERE MOSOTA ..... 2ND APPELLANT

AND

JEFTER NYAMOI NYARIKI ..... RESPONDENT

JUDGMENT

1. This appeal arises from the Judgment and decree of the subordinate court delivered by Hon. W. Kugwa (RM) on 19.7.2023 in Kisii CMCC No. 213 of 2020.

2. The Memorandum of Appeal dated 17.7.2023 raised 9 grounds of appeal. The grounds are, however, argumentative, winding and repetitive. The distinct grounds of appeal are just two issues: quantum and liability. It is also surprising that the judgment was delivered on 19.7.2023, and the memorandum of appeal is dated 17.7.2023. I presume the Memorandum of Appeal was erroneously dated. Still, I do not consider this fatal in light of Article 159 of the *Constitution* requiring the court to disregard undue procedural technicalities.

3. The prolixious memorandum of appeal is contrary to Order 42 Rule 1 of the Civil Procedure Rules which provides as doth: -

> " 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 Court of Appeal had this to say about compliance with Rule 86 [now Rule 88] 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:
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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..."

5. The court abhors repetitiveness of grounds of appeal which tend to cloud the key issues in dispute for determination by the court. 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."

Pleadings

6. The Respondent claimed damages vide a plaint dated 21.4.2020, for an accident pleaded to have occurred on 7.3.2020 along Kisii township road. It was stated that the Respondent was walking when the driver of motor vehicle registration No. KBC 321R lost control and hit the Respondent. The Respondent set forth particulars of negligence and special damages. The injuries were pleaded as follows:

    i. Left shoulder dislocation

ii. chest contusion

iii. Bruising to the face

iv. Blunt trauma to the back

v. Bruises to the trunk

7. The special damages were also pleaded as follows:

i. Medical report Ksh. 6,500/=

ii. Motor vehicle search Ksh. 550/=

iii. Treatment expenses Ksh. 1,320/=

Total Ksh. 8,370/=

8. The Appellants filed their defence dated 3.8.2020. They denied the particulars of negligence as pleaded by the Respondent and blamed the Respondent for the accident.

9. The lower court considered the matter and awarded reliefs as follows:

i. Liability agreed at 100% for the Respondent

ii. Special damages Ksh 8,370/=

iii. General damages Ksh. 350,000/=

Evidence

10. PW1 was No. 85663 PC Kunelo Wafula. He adopted evidence in a related matter, being CMCC No. 217 of 2020. He testified that the accident occurred on 07.03.2022 at the stage area involving the motor vehicle registration number KBC 321R. On cross-examination, he stated that he was not the investigating officer. The matter was still pending investigation.

11. PW2 was Dr. Morebu Peter Momanyi. According to him, the Respondent suffered a dislocation of the left shoulder with blunt injuries to the back and bruises to the face and trunk and was treated at Kisii Referral Hospital. He produced his medical report dated 9.3.2020. The x-ray film showed the dislocation.

12. PW3 was the Respondent. He testified that he was walking from Keroka towards Nyamira. He was on the left side of the road, off the road, and had a shoulder dislocation that had not healed.

13. DW1 was Dr. Jeniffer Kahuthu. She testified for the Appellant, arguing that the Respondent had a dislocated shoulder. However, she stated that as healing progressed, physiotherapy was unnecessary. The Appellant's driver did not testify.

Submissions

14. The Appellant submitted on quantum that Kshs. 200,000/= was adequate compensation, considering the injuries the Respondent suffered. They inter alia cited Lamu Bus Services & Another v Caren Odhiambo Okello (2018) eKLR.

15. On the part of the Respondent, it was submitted that the award by the lower court was proper and commensurate to the injuries that the Respondent suffered. Reliance was placed inter alia on Samuel

Martin Njoroge Kamunyu v Mildred Okweya Barasa (2020) eKLR and Kenya Power & Lighting Co. Ltd v Mary Akinyi HCCA No. 72 of 2007.

Analysis

16. This being a first appeal, this court is under a duty to reevaluate and assess the evidence and make its own conclusions. It must, however, remember that a subordinate court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand.

17. This Court will not interfere with an inferior court's exercise of judicial discretion unless it is satisfied that its decision is clearly wrong. In the case of Mbogo and Another vs. Shah [1968] EA 93 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."

18. The duty of the first appellate court was set out in the case of Selle and another Vs Associated Motor Board Company and Others [1968]EA 123, where the Judges in their usual gusto, held 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-subordinate and the Court of Appeal is not bound to follow the subordinate 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."

19. The question of liability is raised obliquely and not succinctly. This is in grounds 2 and 7. The latter is not a serious ground as it is secondary to the primary decision. It is a failure to consider submissions on quantum and liability. Submissions cannot be a basis for setting aside. The court does not need to indicate that it has considered submissions. Mwera J, posited as follows when postulating on what is the role of submissions are. He stated that they are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim. In the case of Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 it was stated that:

> "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case."

20. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. There presence or absence does not in any way prejudice a case as held in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, that:

> "As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which

may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

21. The Court of Appeal was more succinct in that Submissions cannot take the place of evidence when they addressed the question in the case of Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

22. The ground of failure to consider submissions is unmerited and is dismissed. The other part of liability is not clear from ground 2. The Appellant did not testify. He did not thus give his version of the story, which is within his special knowledge. Failure to testify means that the court is duty bound to adversely infer the said failure.

23. In this case, the area was well known. The driver did not testify. He had all the opportunity to testify but failed to do so. The court is entitled to infer that the evidence he could have given was adverse to the Appellant's case. 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:

> 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 the 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."

24. It was the Appellant's duty to prove contributory negligence. This duty was laid out in the case of Mac Drugall App V Central Railroad Co. Rbr 63 Cal 431 where the court held that;

> " In an action to recover damages for a personal injury alleged to have been received through the negligence of the defendant, contributory negligence on the part of the plaintiff is a

matter of defence and it is an error to instruct the jury that the burden of proof is on the plaintiff to show that the injury occurred without such negligence".

25. Without evidence of contribution, the court was duty-bound to find as it did. The appeal on liability is unmerited and, consequently, dismissed.

26. On quantum, the lower court awarded Kshs. 350,000/- in general damages but without citing any supporting authority. In this case, the only medical report produced was one by Dr. Morebu Peter Momanyi dated 9.3.2020 for the Respondent and Dr. Jeniffer Kahuthu dated 21.6.2022. The Respondent herein pleaded injuries as follows:

    i. Left shoulder dislocation

    ii. Chest contusion

    iii. Bruising to the face

    iv. Blunt trauma to the back

    v. Bruises to the trunk

27. It was the common position of the two medical reports that the Respondent suffered a dislocation of the shoulder among soft tissue injuries. The court has to assess the effect of the injuries on the Appellant. There is no reason to doubt the evidence of the medical doctor obtained in the medical reports referenced above. Viewed in line with the finding of the lower court, I equally, in the absence of any contrary medical evidence, find no reason to fault the lower court's finding and, therefore, uphold the injuries suffered as the injuries pleaded and proved on evidence.

28. Therefore, this court has to establish similar fact scenarios, though bearing in mind that no two cases are precisely the same and that it is inevitable that there will be disparity in awards made by different courts for similar injuries as established in Southern Engineering Company Ltd. vs. Musingi Mutia Civil Appeal No 46 of 1983 [1985] eKLR. However, the Court of Appeal in Odinga Jacktone Ouma v Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards."

29. 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.

30. Circumstances in which an Appellate court will interfere with the quantum of damages awarded by a trial court were clearly laid out in the case of Kenya Bus Services Limited vs. Jane Karambu Gituma Civil Appeal Case No. 241 of 2000 where the Court of Appeal stated as follows:

> " ...in this regard, both the East African Court of Appeal (the predecessor of this Court) and this court itself have consistently maintained that an appellate court will not interfere with the quantum of damages awarded by a trial court unless it is satisfied either that the trial court acted on a wrong principle of law (as by taking into account some irrelevant factor or leaving out of account of some relevant one or adopting the wrong approach), or it has misapprehended the facts, or for those or any other reasons the award was so inordinately high or low so as to represent a wholly erroneous estimate of the damages."

31. The Court of Appeal pronounced itself succinctly on the principles of disturbing awards of damages in Kemfro Africa Limited t/a "Meru Express Services (1976)" & another v Lubia & another (No 2) [1985] eKLR as follows:

> 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.

32. The foregoing statement had been ably elucidated by Sir Kenneth O'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance v British Columbia Electric Co Ltd, in the decision of Henry Hilanga v 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.'

We find the words of Lord Denning in the West (H) & Son Ltd (1964) A.C. 326 at page 341 on excessive awards on damages important to replicate herein thus:

> " I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a National Health Service. But the health authorities cannot stand huge sums without impending their service to the community. The funds available come out of the pockets of the taxpayers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation."

33. The words of Lord Denning were reiterated by Nyarangi, JA. in Kigaragari v Aya [1985] eKLR thus:

> " I would express firmly the opinion that awards made in this type of cases or in any other similar ones must be seen not only to be within the limits set by decided cases but also to be within what Kenya can afford. That must bear heavily upon the court. The largest

application should be given to that approach. As large amounts are awarded, they are passed on to members of the public, the vast majority of whom cannot just afford the burden, in the form of increased costs for insurance cover (in the case of accident cases) or increased fees."

34. Further, in the case of Kilda Osbourne v George Barned and Metropolitan Management Transport Holdings Ltd & another Claim No. 2005 HCV 294 being guided by the principles enunciated by both Lord Morris and Lord Devlin in H. West & Sons Ltd v Shephard {1963} 2 ALL ER 625 Sykes J stated as follows:

> " The principles are that assessment of damages in personal injury cases has objective and subjective elements which must be taken into account. The actual injury suffered is the objective part of the assessment. The awareness of the claimant and the knowledge that he or she will have to live with this injury for quite sometime is part of the subjective portion of the assessment. The interaction between the subjective and the objective elements in light of other awards for similar injuries determines the actual award made to a particular claimant."

35. It is common reasoning that astronomical awards may lead to increased insurance premiums thus hurting the insurance industry as well as the economy. See the case of H. West and Son Ltd v. Shepherd [1964] AC.326 (supra) where it was stated that:

> " ...but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
>
> In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional....."

36. With the above guide, if the award is inordinately high, then I will have to set it aside. If, however, it is just high but not inordinately high, I will not do so. For the appellate court 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.

37. I thereof proceed to determine similar fact cases in relation to damages as applicable to this appeal. In Coast Broadway Co. Ltd v Elizabeth Alaka Achebi [2015] eKLR the court affirmed an award of Kshs 300,000/- for a plaintiff that had suffered a dislocation of the shoulder in 2015.

38. In the case of Patrick Kinoti Miguna v Peter Mburunga G. Muthamia [2014] eKLR the plaintiff was awarded Kshs 300,000/- after he proved that he had sustained dislocation of the shoulder resulting to post traumatic arthritis and also had loose teeth, in 2014.

39. In the case of Mara Tea Factory Limited v Lillian Bosibori Nyandika [2021] eKLR, the Plaintiff, who suffered a head injury, dislocation of the left shoulder joint, dislocation of the left wrist joint, and a deep cut wound on the head, was awarded Ksh. 300,000/=, down from Ksh. 400,000/= that the lower court had awarded in 2021.

40. The injuries suffered by the Respondent in the appeal herein are largely similar to the above cases involving shoulder dislocation. Therefore, I am guided that the award of Kshs. 350,000/= granted by the lower court was not inordinately high, and I uphold it.

41. On special damages, the pleadings and evidence show that the Appellant pleaded and proved Ksh. 8,370/=, which the lower court granted. In the absence of an appeal on how this award was improper, I uphold it.

42. The net effect of the foregoing is that the appeal on quantum equally fails.

Determination

43. In the upshot, I make the following orders:-

    a. The appeal lacks merit and is dismissed.

    b. The Respondent shall have costs of the appeal of Kshs. 85,000/=.

    c. 30 days stay of execution.

    d. 14 days right of appeal.

    e. File is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 6TH DAY OF MARCH, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Munji for the Appellant

Mr. Were for the Respondent

Court Assistant – Michael

M. D. KIZITO, J.