Ongwae v Ogega (Civil Appeal E100 of 2023)
[2025] KEHC 3567 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3567 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E100 OF 2023

DKN MAGARE, J

MARCH 10, 2025

BETWEEN

JARED ONGWAE ..... APPELLANT

AND

BEVON MOGONGO OGEGA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. D.O. Mac'Andere (SRM) dated 3.8.2023 arising from Kisii CMCC No. E500 of 2022. The Memorandum of Appeal dated 11.08.2022 was on quantum. The grounds are argumentative, unseemly, and do not please the eye. This is contrary to Order 42 Rule 1, which requires that the memorandum of appeal be concise. The same 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."

2. The Court of Appeal had this to say in regard to rule 86 [now 88] of the Court of Appeal Rules(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..."

3. The court abhors repetitiveness of grounds of appeal, which tend to cloud the key issue in dispute for determination. 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."

4. The Plaint dated 7.1.2022 claimed damages for an accident on 4.10.2021 involving motorcycle Registration No. KMDW 621H in which the Respondent was the rider and motor vehicle Registration No. KCH 302C which was driven and owned by the Appellant. The accident is said to have occurred at Daraja Moja. The Respondent set forth particulars of negligence against the Appellant and pleaded Ksh. 7,050/= as special damages and injuries as follows:

    a. Abdominal contusion

    b. Bruises of the right elbow joint and forearm

    c. Right knee joint contusion with resultant patella

    d. Right foot contusion

Evidence

5. The Respondent testified as PW1. He relied on his witness statement dated 7.7.2022 and a bundle of documents of the same date, which were produced in evidence. He stated that he suffered injury to the

back, right elbow, and dislocation of the right leg. He stated that he healed, but the knee experienced pain. PW2 Corporal Paul Mulatia testified on the occurrence of the accident.

6. DW1 was Dr. James Obondo Otieno who testified that he was an Orthopedic Surgeon. He examined the Respondent over the accident of 4.10.2021. He stated that the Respondent suffered soft tissue injuries. He saw scars of healed wounds. The Respondent had no dislocation. He stated on cross-examination that he saw the Respondent after one year. He admitted that he relied on medical evidence from Kisii Teaching and Referral Hospital. He stated that a patella dislocation is a clinical diagnosis and not a radiological one. He said that dislocation is reduced immediately; a person will remain with it for life.

7. The Court delivered its Judgment on 31.1.2024. The Judgment was as follows:

   a. Liability 100% against the Appellant

   b. General damages – 350,000/=

   c. Special damages – 7,050/=

      Total Kshs. 357,050/=

8. The Appellant was aggrieved on the question of damages and appealed. The appeal was argued vide written submissions. The Appellant, filed submissions on both quantum and liability. I shall ignore submissions on liability as there is no ground of appeal on the same. This is in line with Order 42 Rule 4, which posits as follows:

> The appellant shall not, except with leave of the court, urge or be heard in support of any ground of objection not set forth in the memorandum of appeal; but the High Court in deciding the appeal shall not be confined to the grounds of objection set forth in the memorandum of appeal or taken by leave of the court under this rule:
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> Provided that the High Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

9. On general damages, the Appellant submitted that a sum of Ksh90,000/= will suffice. They relied on the case of Ephraim Wagura Muthui & 2 others v Toyota Kenya Limited & 2 others [2019] eKLR. In that matter, the 1st Appellant averred that he sustained contusion on the right elbow leading to subluxation, contusion on the forehead and back. He was awarded 90,000/=. The 2nd Appellant pleaded that he suffered contusion on the forehead, neck, lower back and right thigh and was awarded. 90,000/=. The 3rd Appellant's case is that he suffered cut wound on the parietal area of the head, contusion on the neck, blunt trauma to the chest, cut wound on the left leg and blunt trauma to the back. He was awarded Ksh 100,000/=.

10. The Respondent filed submissions stating that the award was proper.

Analysis

11. 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.

12. In the cases of Peters vs Sunday Post Limited [1958] EA 424, 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..."

13. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...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..."

14. 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.

15. The foregoing statement had been elucidated in the case of Butler vs. Butler Civil Appeal No. 43 of 1983 (1984) KLR, where Keller JA stated the following regarding the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, wherethe conditions relevant to the assessment of damages, such as rents, standards of living, levels of earnings, costs of medical supervision and drugs, may be different. Kimothia v Bhamra Tyre Retreaders[1971]EA(CA-K); Tayab and Ahmed Yakub & Sons v Anna May Kinanu Civil Appeal 29 of 1982 (Law, Potter &Hancox JJA)March 30,1983.The general picture, all the circumstances and the effect of the injuries on the particular person concerned must be considered.
>
> The fall in the value of money generally, and the leveling up or down of the rate of exchange between the Kenya Shs 20 and Pound Sterling, must be taken into account.
>
> Some degree of uniformity, however, is to be sought in awards of damages and the best guide is to pay regard to recent awards in comparable cases in local courts. Bhogal v Burbridge [1975] EA 285 (CA-K). None, alas, has been cited to us.
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> But a member of an appellate court may ask himself what award would have been made? There are differences of view and of opinion in the task of awarding money compensation in these matters, of course, and if the one awarded by the trial judge is different from one's own assessment, it is not necessarily wrong. H West & Sons Ltd v Shephard [1964] AC 326, Lord Morris of Borth-Y-Gest; also Hancox JA in Tayab (1983 KLR, 114).

16. Therefore, 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. However, where damages are at large, they must be commensurate with similar injuries.

17. 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."

18. 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; -

    i. An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.

    ii. The award should be commensurable with the injuries sustained.

    iii. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.

    iv. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.

    v. The awards should not be inordinately low or high.

19. The matter turns on whether to believe Dr. Obondo or the Respondent's doctor. The Appellant indicated, without evidence, that Dr. Obondo found there was no dislocation. He stated so in chief. However, he caved in cross-examination that, indeed, there was dislocation. Such evidence is worthless as expert evidence. This court appreciates that courts have impressively expressed the extent of application of an expert opinion in judicial proceedings and the general trend is that such evidence is not necessarily conclusive and binding. As was held in Shah and Another vs. Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

20. Further, the Court of Appeal addressed the question on how to treat expert opinion in the case of Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 that:

> " ... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."

21. Courts must give proper respect to the opinions of experts. But such opinions are not, as it were, binding on the courts and the courts must hold them as stated in the case of Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, where 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:-

> " 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."

22. This court will independently reevaluate the expert reports herein. The Appellant's expert could not impeach the treatment notes, P3, and Nyameino's medical report. He had these reports in his possession but did not bother to lay a basis for differences, whether in approach or metrics. Thus, such a report lacks expertise and cannot be relied upon.

23. Nyameino indicated a crepe bandage was applied to the knee joint. This is not a decoration. A crêpe bandage is supposed to compress the injured part of the body, limit movement, and prevent swelling. This could not have been done if only bruises were suffered.

24. Considering similar decisions will shed light on the range of awards. In the case of *Ogembo & another v Maisa (Civil Appeal 72 of 2021)* [2023] KEHC 436 (KLR) (26 January 2023) (Judgment) the Plaintiff who suffered the following injuries was awarded Ksh. 800,000/= that was reduced on appeal to Ksh. 300,000/=:

    a. Chest contusion

    b. Blunt trauma to the scalp

    c. Degloving injury on the right hand

    d. Degloving injury on the left knee

    e. .Deep cut wound on the right knee

    f. Bruises on the left toes

25. In the case of Francis Ndungu Wambui & 2 others v Purity Wangui Gichobo [2019] eKLR the Plaintiff suffered a laceration to the left foot as well as a degloving injury to the base of the thumb and was awarded Ksh 250,000/=.

26. In Martin Mutuku & another v SN (Suing through his mother and next friend DC) [2021] eKLR Sergon J. reduced an award of Ksh.600,000/= to Ksh.300,000/= for abrasions on the scalp, blunt injuries to the chest, blunt injuries to the abdomen, and degloving injuries on the left foot.

27. In the circumstances, the award by the court below was proper. There is no basis for disturbing the award. In the circumstances, there is no basis to interfere with the award on quantum. The appeal, therefore, is dismissed.

28. The next question will be who will pay for the costs. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen percent per annum, and such interest shall be added to the costs and shall be recoverable as such.

29. The Court of Appeal in the case of Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law is that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

30. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

31. In the circumstances, the appeal is dismissed with costs of Ksh. 85,000/= to the Respondent.

Determination

32. The upshot of the foregoing is that I make the following orders: -

a. The appeal is dismissed with costs of Ksh. 85,000/= to the Respondent.

b. 30 days stay of execution.

c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 10TH DAY OF MARCH, 2025. JUdgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms. Anyango for the Appellant

Ms. Chepkorir for the Respondent

Court Assistant – Michael