Roy Parcel Services v Magori (Civil Appeal E039 of 2024)
[2025] KEHC 3777 (KLR) (10 March 2025) (Judgment)

Neutral citation: [2025] KEHC 3777 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL E039 OF 2024

DKN MAGARE, J

MARCH 10, 2025

BETWEEN

ROY PARCEL SERVICES ..... APPELLANT

AND

JOSCAH KERUBO MAGORI ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. P. K. Mutai (PM) given on 19.2.2024 in Kisii CMCC No. E222 of 2023. The Appellant was a Defendant in the lower court. The court heard the matter and delivered judgment as follows:

    a. Liability 85:15 in favour of the Respondent against the Appellant

    b. General damages Ksh. 500,000/=

    c. Special damages Ksh.7,050/=

    d. Costs of the suit

2. The Appellants were aggrieved and filed a 5-paragraph Memorandum of Appeal on quantum. They set out the following grounds of appeal:

    a. The learned trial magistrate grossly misdirected himself in treating the evidence and submissions on quantum before him superficially and consequently coming to a wrong conclusion or the same.

    b. The learned trial magistrate misdirected himself in ignoring the principles applicable in awarding quantum and relevant authorities cited in the written submissions presented and filed by the Appellant.

c. The learned trial magistrate erred in awarding a sum in respect of damages which was so inordinately high in the circumstances that it represented an entirely erroneously estimate vis-à-vis the Respondent.

d. The learned trial magistrate proceeded on wrong principles when assessing the damages to be awarded to the Respondent (if any), and failed to apply precedents and tenets of law applicable.

e. The learned trial magistrate failed to apply himself judicially and to adequately evaluate the evidence and exhibits tendered on quantum and thereby arrived at a decision unsustainable in law.

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

(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.

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 issue is only one, whether the damages awarded were so inordinately high as to amount to an erroneous estimate of damages. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. It behooves counsel to have a precise and concise memorandum of appeal that is not unseemly. The issue of submissions is not a serious question in an appeal process. 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."

6. The ground related to submissions is therefore dismissed for lack of merit. This is for a good reason. Mwera J, posited as follows when postulating on what is the role of submissions. 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:

> " 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."

7. Submissions are not, strictly speaking, part of the case, the absence of which may do no prejudice to a party. Theit precence 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."

8. 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."

Pleadings

9. Being an appeal on quantum, going to the pleadings related to liability is unnecessary. The Respondent pleaded that she suffered the following injuries:

    a. Deep cut wounds on the right knee

    b. Physical and psychological pains

    c. Chest contusion

    d. Blood loss

    e. Bruises on the right upper limb

    f. Bruises on the right thigh

    g. Blunt trauma to the back.

10. The pleaded injuries of physical and psychological pains and blood loss are no injuries but effects, which cannot in metric terms be measured.

Evidence

11. Dr. Morebu Momanyi testified and produced a medical report of bruises on the face, bruises on the right upper limb, bruises on the left upper limb, bruises on the left knee, bruises on the right knee, and chest contusion. The injuries left ugly scars. He produced medical treatment notes, appointments, treatment notes, P3 forms, and medical reports and receipts.

12. The Respondent testified as PW2. She adopted her statement, enumerating injuries. She stated she was injured on both legs, face and hands.

Submissions

13. The Appellant relied on the case of Ossuman Mohamed & Anor. vs Saluro B. Mohamed - Civil Appeal No. 30 of 1997, where it was held that:

> " Damages must be within limits set out by decided cases and also within limits the Kenyan Economy can afford. Large damages are inevitably passed to members of public, the vast majority of whom cannot afford the burden, in the form of increased insurance or increased fees. (See the case of Osman Mohamed & Anor vs. Saluro Bundit Mohamed Civil Appeal No. 30 of 1997."

14. They also relied on the case of Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others (supra) where, Justice D.S. Majanja held as follows:

> " 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."

15. On quantum, they relied on the case of Nyambati Nyaswabu Erick vs Toyota Kenya Ltd & 2 Others (supra) where the court awarded Ksh. 90,000/= for mild tenderness on the chest and a scar on the right temporal maxillary area.

16. The parties relied on the case of Isaac Kang'ethe & another v Andrew Thuku Looremeta [2022] KEHC 1413 (KLR), where, the court set aside the award of Ksh. 800,000/= made by the trial court and substituted with an award of Ksh.600,000/= . I do not think that a fracture of the bone of the brain or nerve injury can be described as a soft tissue injury. I do not see the relevance of the case to the dispute herein. They also relied on the case of Toyota (Kenya) Limited v Express (Kenya) Limited [2013] KECA 468 (KLR).

17. The Respondent relied on the case of Telkom Orange Kenya Limited v I.S.O minor suing through his next friend and mother J N [2018] eKLR, where the court awarded a sum of Ksh. 500,000/- as general damages, in lieu of award of Ksh. 950,000/- for head injury occasioning a depressed skull, fracture of the skull, loss of consciousness, scars of the left tempo-parietal area and bruises on the left leg.

18. The Respondent prayed that the appeal be dismissed.

Analysis

19. This being a first appeal, this court must evaluate and assess the evidence and make its own conclusions. It must, however, remember that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence firsthand. 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."

20. 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 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-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."

21. The Court is to remember that it has neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, the documents still speak for themselves. The observation of documents is the same as that of the lower court, as parties cannot read into those documents matters extrinsic to them.

22. In the case 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..."

23. The first appellate court is under duty to have regard to award in similar cases and not foreign awards. In the case of Butler Vs Butler Civil Appeal No. 43 of 1983 (1984) KLR Keller JA, stated as follows in regard to 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.
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> 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.
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> 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.
>
> 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).

24. There must be a relationship between the award and the nature of injuries suffered. In HB (Minor suing through mother & next friend DKM) v Jasper Nchonga Magari & another [supra], the court stated:

In cases of this kind, as the one being challenged by the appellant, what would be the general expectations of the trial court? There is obviously a relationship between the award and the nature of injuries suffered. The burden upon the claimant is in justifying the compensation on the threshold outlined in Cornilliac v St. Louis [1965] 7 WIR 491. This is simply for the trial court to take into account:

(a) The nature and extent of the injuries sustained.

(b) The nature and gravity of the resulting physical disability.

(c) The pain and suffering which had to be endured.

(d) The loss of amenities suffered; and

(e) The extent to which, consequentially, the claimant's pecuniary prospects have been materially affected.

25. A claimant to the accident might get well and restore to his or her original health status prior to the accident. Sometimes that is not the case in most instances, as stated in the case of Butt v Khan {1981} KLR 470 and Kitavi v Coastal Bottlers Ltd {1985} KLR 470).

> " Although one would expect that in the normal course of things, the claimant to the accident might get well and restored to his or her original health status prior to the accident sometimes that is not the case in most instances. It is necessary to find the correct bearing which seldom alludes the Judges with expertise and knowledge on this areas of specialization. An appellate court will not disturb an award of damages unless it is so inordinately high or low as to

represent an entirety erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived a figure which was either inordinately high or low."

26. 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.

27. In the case of National Industrial Credit Ltd & 2 others v MNO (Minor Suing Thro' next of friend and mother FNM) (Civil Appeal E035 of 2023) [2024] KEHC 3824 (KLR) (18 April 2024) (Judgment) the court stated that the case law showed that claimants who suffered soft tissue injuries similar to the injuries suffered by the Respondent.

28. There is only one issue for determination, that is, whether the award of Ksh. 500,000/= was inordinately excessive as to amount to an erroneous estimate of damages.

29. In Francis Omari Ogaro v JAO (minor suing through next friend and father GOD [2021] eKLR in a decision of 28.10.2021, the court stated that a sum of Ksh. 180,000/= will be sufficient for far more serious soft tissue injuries.

30. In Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, on the 2nd day of December 2019, the court found an award of Ksh. 300,000/= excessive and reduced it to 175,000/= for lesser injuries.

31. The court is aware that the Court of Appeal succinctly pronounced 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.

32. In the case of Ufrah Motors Bazaar *& another v Kibe (Civil Appeal 39 of 2021*) [2023] KEHC 1285 (KLR) (27 January 2023) (Judgment), this court confirmed an award of Ksh 220,000/- for soft tissue injuries, that is: right shoulder joint, soft tissue injuries of the chest, soft tissue injuries of the back, deep lacerations on the right-hand arm, forearm and hand, soft tissue injuries of the knee joints and soft tissue injuries of the right hip joint.

33. Noting the inflation, passage of time, and the nature of the injuries, the award of Ksh. 500,000/= is inordinately high. In the circumstances, the award of Ksh 200,000/= is proper. An award of Ksh. 500,000/= is inordinately excessive. The award of damages is set aside. In lieu thereof, a judgment is entered for Ksh. 200,000/=.

Costs

34. 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 per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

35. 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.

36. The Supreme Court has 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– those 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.

37. The best order is for each party to bear its own costs.

Determination

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

a. The appeal is allowed. The award of Ksh. 500,000/= is set aside. In lieu thereof, I enter judgment on general damages for Ksh. 200,000/= subject to liability. The general damages will attract interest from the date of judgment in the lower court.

b. Each party to bear its costs.

c. 30 days stay of execution.

d. 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: -

Mr. Byron Menez for the Appellant

Ms. Gogi for the Respondent

Court Assistant – Michael