Githaiga & another v Kingori (Civil Appeal 46 of 2015)
[2025] KEHC 6810 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6810 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 46 OF 2015

DKN MAGARE, J

MAY 15, 2025

BETWEEN

SAMWEL GITHAIGA ..... 1ST APPELLANT

JIMMY MITHAGA ..... 2ND APPELLANT

AND

DAVID MWANIKI KINGORI ..... RESPONDENT

(Appeal from the Judgment and decree of Hon. R.K. Langat (PM) given on 19.11.2015 in Othaya SRMCC No. 3 of 2014)

JUDGMENT

1. This is an appeal from the Judgment and decree of Hon. R.K. Langat (PM) given on 19.11.2015 in Othaya SRMCC No. 3 of 2014. The Appellant was the Defendant in the lower court. The court heard the matter and delivered judgment as follows:

    a. Liability 95:5% in favour of the Respondent against the Appellant by consent General damages Ksh. 200,000/=

    b. Special damages Ksh. 23,500/=

    c. 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:

    1. The Learned Magistrate erred in fact and in law in finding that the Respondent was entitled to general damages that were too high and without considering the Provision of Cap 405 The Insurance (motor Vehicle Third Party Risks) (amendment) Act, which gives a guideline on how compensation ought to be computed.

2. The Learned Magistrate erred in fact and in law in failing to apply the above act where compensation for soft tissue injuries is set at 2% of the maximum compensation of Kshs 3,000,0000 which translates to Kshs 60,000 and instead awarded general damages at Kshs. 200,000 (Kenya Shillings Two Hundred Thousand).

3. The Learned Magistrate erred in law and in fact in misdirecting himself in disregarding an Act of Parliament as above quoted under the hierachay of the laws of Kenya as provided by Section 3 of the *Judicature Act* and instead relid on judicial precedents.

4. The Learned Magistrate erred in law and in fact in awarding general damages of Kshs 200,000 for injuries he appreciated to be soft tissue injuries.

5. The Learned Magistrate erred in law and in fact in failing to consider conventional awards for general damages in similar cases.

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

(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:
>
> > "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.

Pleadings

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

    a. blunt injury on the left side of the face.

    b. cuts on the right side of the face

    c. Back injuries with cervical spine injuries

    d. blunt injury to the left shoulder joint

    e. blunt injury to the lower limbs

    f. dental injuries as the patient lost the right upper premolar.

Evidence

7. Parties recorded consent on liability at 95:5. The documents attached to the list of documents were all admitted as evidence. Dr F W. Muleshe's report dated 7. March 2014 showed the following injuries:

    a. Bruises around the right eye.

    b. Back tenderness

    c. Inability to lift the left hand and leg.

    d. Blunt injury on the left side of the face.

    e. Reduced air entry on the left side of the chest.

8. The good doctor found no complications and stated that the Respondent had healed. The only injury not noted was dental injuries, as the patient lost the right upper premolar. The medical examination was done almost a year later. The court stated that Dr. LAICHENA confirmed the plaintiffs' injuries. Their injuries were also indicated in the treatment notes from Othaya District Hospital.

Submissions

9. The Appellant relied on the cases of the Appellant and submitted that an award of Ksh. 80,000-100,000/= would suffice. They relied on the decision in Denshire Muteti Wambua v Kenya Power & Lighting Co. Ltd [2013] KECA 528 (KLR), CM Kariuki, GK Oenga, AK Murgor posited as follows:

> Further, we observe that the learned trial Judge failed to appreciate that in assessment of damages for personal injuries the general method of approach is that "comparable injuries should as far as possible be compensated by comparable awards keeping in mind the correct level of awards in similar cases" (see the decision of the court in Arrow Car Limited vs Bimomo & 2 Others [2004] 2 KLR 101). Although the award of damages was at the discretion of the trial court, that discretion required to be exercised judicially. The learned trial Judge did not consider any of the authorities cited by counsel for the parties so as to guide herself on the assessment of the damages. If she had done so, she probably would have seen that the award

she made was not in consonance with decided cases. The award of damages by the learned trial Judge was, in our view, so inordinately low that it is a wholly erroneous estimate of the damage.

10. Reliance was further placed on the case of George Kinyanjui t/a Climax Coaches & another v Hassan Musa Agoi [2016] eKLR, where Kimondo J, held as hereunder:

> 9. As a general rule, an appellate court will not interfere with quantum of damages unless the award is so high or inordinately low or founded on wrong principles. See Butt v Khan [1982-88] KAR 1, Arkay Industries Ltd v Amani [1990] KLR 309, Karanja v Malele [1983] KLR 42, Kemfro Africa Limited & another v Lubia & another [1987] KLR 30, Akamba Public Road Services Ltd v Omambia Court of appeal, Kisumu, Civil Appeal 89 of 2010 [2013] eKLR.

11. On quantum, they relied on the case of Godwin Ireri v Franklin Gitonga [2018] KEHC 6614 (KLR), where DAS Majanja, set aside the award of Ksh.. 300,000/- as general damages and substituted it with an award of Ksh. 90,000/= for the plaintiff sustained two cuts on the forehead, cuts on the scalp to the occipital region, bruises on the left ankle, and bruises on the right knee.

12. They further submitted that in the case of George Mugo & another v A K M (Minor suing through next friend and mother of A M K [2018] KEHC 5871 (KLR), D. K. Kemei J, set aside the judgement of the trial court by substituting the sum of Ksh..300,000/= with an award of Ksh..90,000/= as general damages for blunt injury left shoulder, blunt chest injury interior, bruises of left wrist region and blunt injury left arm.

13. Further, they placed reliance on the case of Lamu Bus services & Anor –vs- Caren Adhiambo Okello (2018) eKLR where the claimant sustained a dislocation of the left shoulder joint, a deep cut wound on the left chin, a deep cut wound on the left thigh and a blunt injury to the left thigh. An award of Ksh. 200,000/= was reduced to Ksh. 130,000/= on appeal. They also cited George Kinyanjui t/a Climax Coaches & Anor –vs- Hussein Mahad Kuyale (supra), where the claimant sustained injuries on his chest, neck, knees, and lost two teeth. Finally, they relied on Ndung'u Dennis –vs- Ann Wangari Ndirangu & Anor (2018) eKLR, where the claimant sustained injuries on the right lower leg and bruises on the back. An award of Ksh. 300,000/= was reduced to Ksh. 100,000/= on appeal.

14. The court has not laid its eyes on the Respondent's submissions.

Analysis

15. 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."

16. The duty of the first appellate court was settled 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 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."

17. Normally 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. 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..."

18. In this matter, however, no witnesses were heard. The court was in the same state as the lower court. perusing documents. In the case of Sugut v Jemutai & 3 others (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

19. regarding documents, the same speak for themselves and do not require parole evidence to expound them. In Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> " Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself,

without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.

20. In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;

> " It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence."

21. the Appeal being on General damages, the court must proceed on the premises that these are damages at large. Therefore, the Court does its best to reach an award reflecting the gravity and nature of injuries. 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."

22. 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, it was stated as follows in regard to the award of damages.

> " This court has declared that awards by foreign courts do not necessarily represent the results which should prevail in Kenya, where the 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.
> >
> > 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).

23. There has to be a relationship between the award and the nature of injuries suffered. They cannot be based on arbitrary figures, conjectures, or surmises. 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.

24. A claimant to the accident might get well and restore to his or her original health status before 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."

25. 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.

26. There is only one issue for determination, that is, whether an award of Ksh. 200,000/= was inordinately excessive as to amount to an erroneous estimate of damages. the doctors were in agreement that the injuries were serious soft tissue injuries. the treatment notes reflected the same. the authorities 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."

27. However, a medical report will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. This also occurs where the medical reports concur on the extent of the injuries. It is not expected that the injuries will be word for word the same. It must be remembered that medical reports are still opinions that must accord to surrounding circumstances. The Court of Appeal, on its part in Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs. Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139 held 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."

28. The evidence of a medical report, as is in this case, must be considered along with all other available evidence. A court would be perfectly entitled to do so if there is a proper and cogent basis for rejecting the expert opinion. 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:-
>
> > "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."

29. This court will independently reevaluate an expert report herein. The Respondent suffered soft tissue injuries, which the doctor classified as harm in the P3. Harm means bodily hurt, whether permanent or temporary. 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.

30. In Elizabeth Wamboi Gichoni v Benard Ouma Owuor [2019] eKLR, on 2/12/2019, the court found an award of Ksh. 300,000/= excessive and reduced to 175,000/= for lesser soft tissue injuries.

31. 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 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.

32. In the circumstances, there is no merit in the appeal. the same is dismissed.

33. 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.

34. 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.

35. 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.

36. In the end, each part shall bear its own costs given that the appellant did not file submissions

Determination

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

    a. The Appeal is dismissed, and each party is to bear its costs.

    b. The file is closed.

DELIVERED, DATED, AND SIGNED AT NYERI ON THIS 15TH DAY OF MAY, 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ms Nanjala for the Appellant

No appearance for the Respondent

Court Assistant – Michael