Mokono v Maranga (Civil Appeal 121 of 2021)
[2024] KEHC 1157 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1157 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 121 OF 2021

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

JULIUS MORARA MOKONO ..... APPELLANT

AND

ELVIS MARANGA ..... RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. E.A Obina – PM dated 28/7/2020 arising from Kisii CMCC No. 531 of 2018.

2. The Memorandum of Appeal, however, is a classical study on how not to write a Memorandum of Appeal. The Appellant filed a prolitixious 10 - paragraph argumentative Memorandum of Appeal dated 6th October 2021. The grounds are unseemly and do not please the eye to read.

3. Order 42 Rule 1 that requires that the memorandum of Appeal be concise. The same provides as doth: -

> " 1. Form of appeal –
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> 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 in regard to rule 86 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:
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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. 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."

6. The Memorandum of Appeal raises only two issues, that is: -
   a. The quantum of damages
   b. Liability
7. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time.
8. The Plaint dated 15th August 2018 claimed damages for an accident that occurred on 30/3/2018 involving the Respondent and Motor Vehicle Registration Number KBN 139C owned by the

Appellant. Motor Vehicle Registration No. KBN 139C was driven by an agent of the Appellant. The Respondent set forth particulars of negligence for the vehicle. He pleaded injuries as follows:

i. Left nasal borne fracture

ii. Head injury

iii. Chest concussion

iv. Oxorrhea

v. Blunt trauma to the left shoulder

vi. Bruises on the right leg.

Record of Appeal

9. I note that the preparation of the Record of Appeal in this case took considerable time and space and was only filed on 22nd February 2022 when judgment was delivered on 28th July 2020.

10. For obvious reasons, close to two years was spend following up on the Lower Court records, to mention typed court proceedings and a copy of the judgement and decree.

11. While parties appealing to this Court have hinged the delay in commencing Appeal hearings on the lateness of filing Records of Appeal due to delay in obtaining typed court proceedings, judgment and decree from the Trial Court, the Record of Appeal is a creature of the Court of Appeal. The Record of Appeal in the High Court is a matter of practice. The High Court is a Court of record. It is bound to refer to the Trial Court's notes and pleadings.

12. Section 79G of the *Civil Procedure Act* provides as follows: -

> " Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against excluding from such period anytime which the lower court may certify as having been requisite for preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal."

13. In other words, once a decree is filed, then the Appeal is ready for hearing. Most appeals delay because of delays in the preparation of the Record, which is unnecessary and undesirable.

14. The Record of Appeal is filed in the Court of Appeal. That is why the Court of Appeal does not call for the original court file. It relies on the competency of the Record from the High Court, since the High Court, is a Court of record as opposed to the Subordinate Court.

15. Therefore, it is a waste of judicial time to argue on the completeness of the Record of Appeal. The only completeness desired should relate to the Trial Court file.

16. For instance, the Record of Appeal filed in this suit is inadequate. Though it took close to two years preparing it, it is of little value and this court will still heavily rely on the Lower Court file which has fortunately accompanied the file. The Record of Appeal either inadvertently or intentionally omitted the proceedings for the Plaintiff's testimony in Court. The copies of exhibits produced by the parties are equally faint and illegible from the Record of Appeal but clear in the Lower Court file. The Lower Court file definitely is of value to this court.

17. Order 42 rule 13(4) provides as follows: -

> "(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
>
> a. the memorandum of appeal;
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> b. the pleadings;
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> c. the notes of the trial magistrate made at the hearing;
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> d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
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> e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
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> f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:
>
> g. Provided that—
>
> 1. a translation into English shall be provided of any document not in that language;
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> 2. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

18. Though there is no requirement for filing a Record of Appeal, those who wish to file should file the following as per order 42 rule 13(4) of the Civil Procedure Rules: -

a. Memo of Appeal

b. Plaint and summons

c. Defence and counter claim

d. Reply to defence

e. Proceedings

f. Exhibits.

g. Judgments and Decree/ruling/order

h. Statements admitted in evidence.

1st Defendant's Defence

19. The first Defendant filed Defence dated 10th December 2018 and blamed the Plaintiff for the accident. The Defendant is now the Appellant herein.

Evidence

20. The Plaintiff adopted his written witness statement dated 15th August 2018 and Bundle of Documents of the same date.

21. It was his case that he was a fare paying passenger in the accident motor vehicle and he suffered injuries due to negligent driving by the driver who caused the accident. He testified that he suffered injuries to the head shoulders, chest and leg.

22. On cross-examination, it was his case that he broke nasal bridge. He suffered blunt injury to his neck. The Plaintiff then closed his case.

23. The Defendant called DW1, Dr. Jennifer Kahutho who produced a medical report. It was her case that the Plaintiff suffered head injury as opposed to fracture.

24. On cross-examination it was her case that there was no fracture but the other stated injuries were correct.

25. The Court delivered its Judgment on 28/7/2020. The Judgment was as follows:

    a. Liability 100% against and the Defendant.

    b. General Damages 500,000/=

    c. Special Damages 14,430/=

    d. The Plaintiff shall have the costs and interest at court rates from the date of judgement.

26. The Court did not indicate the total award. It is important when delivering judgments, the court comes up with the full, spectrum of the judgment. It should not let lawyers do the calculations on their own.

Submissions

27. Parties chose to rely on the submissions as filed in the Lower Court. In other words, parties did not file submissions in support or opposition to the Appeal. I will nonetheless proceed to determine the Appeal.

28. During the hearing of this Appeal, the Appellant prayed and it was allowed that the ground challenging liability be abandoned. The court marked that ground as abandoned.

29. Consequently, the Appeal is only on the quantum of damages. The Plaintiff pleaded injuries as follows:

    vii. Left nasal borne fracture

    viii. Head injury

    ix. Chest concussion

    x. Oxorrhea

    xi. Blunt trauma to the left shoulder

    xii. Bruises on the right leg.

30. I note that Appellant contesting the injuries suffered by the Respondent on the ground that the Appellant's Medical Doctor assessed the injuries to be head injury and not nasal borne fracture as pleaded.

31. I have perused the two medical reports produced by the respective parties. I am however minded that in Timsales Ltd. =vs= Wilson Libuya (2008) eKLR Justice D.K. Maraga, held as doth: -

> " .... A medical report by a doctor who examines him much later is of little, if any help at all. Although it may be based on the doctor's examination of the Plaintiff on who he may, like in this case, have observed the scars, unless it is supported by Initial treatment card it will prove the Plaintiff indeed suffered an injury on the day and place he claimed he did."

32. This was also reiterated by Justice R E Ougo in Easy Coach Ltd =vs= Joyce Moraa Asiago (2021) eKLR.

> " .... In my view, treatment notes are the basic documents as they are made immediately after the accident by the treating medical practitioner on injuries sustained) See Johnstone Koech V. Ibrahim Abdi Maalim (2021) eKLR and are more credible compared to medical reports made along after the occurrence of the accident."

33. 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.

34. 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..."

35. 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..."

36. 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.

37. 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 vs British

Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

> " The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance..."

38. 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.

39. Damages must be commensurate with similar injuries.

40. The Trial Court awarded General Damages of Kshs. 500,000/-. The Appellant, aggrieved, appeals on the ground that the award was inordinately high because according the Appellant, Kshs. 250,000/- would be adequate compensation.

41. I have noted that in the Lower Court, the Appellant submitted for an award of Kshs. 200,000/- while the Respondent submitted for Kshs. 700,000/-.

42. The Appellant relied on the case of Duncan Mwendwa & 2 Others v Silas Kinyua Kithela (2018), eKLR. Therein, the Plaintiff suffered injuries of blunt head injury with intracerebral hematoma, damage to tendon of left finger and soft tissues and was awarded Kshs. 350,000/- in General Damages.

43. The Respondent on the other hand relied on the case of MOR v Fransciscan Sisters of Immaculate (2017) eKLR where the Plaintiff who suffered a major extensive degloving injury on the frontal scalp and forehead was awarded Kshs. 700,000/- in General Damages.

44. I note that the Trial Court did not cite any authorities based on which the award of Kshs. 500,000/= for General Damages was granted.

45. By re-evaluation of evidence, I have also noted that both reports by the Medical Doctor who first examined the Respondent and the Medical Doctor who subsequently examined the Respondent ruled out the presence of a fracture.

46. On examination, Dr. Morebu Momanyi for the Plaintiff concluded that the Respondent sustained head injury with multiple severe injuries that were healing. I take into consideration too that this report was not tested in cross examination. Dr. Jennifer Kahuthu for the Appellant on the other hand concluded in her Medical Report dated 22nd October 2019 that the Respondent had suffered a head injury. She ruled out fracture in cross examination.

47. I consequently proceed to determine whether damages as awarded were inordinately high. I proceed on the understanding that 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.

48. 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.

49. The Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR stated that "comparable injuries should attract comparable awards"

50. 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.

51. The difficult nature of the court's task in assessing damages was expressed by the Court of Appeal in George Kirianki Laichena v Michael Mutwiri NRB CA Civil Appeal No. 162 0f 2011 [2011] eKLR where it observed that:

> It is generally accepted by courts that the assessment of damages in personal injury cases is a daunting task as it involves many imponderables and competing interests for which a delicate balance must be found. Ultimately the awards will very much depend on the facts and circumstances of each case...

52. I therefore analyze similar fact authorities.

53. In Duncan Mwenda & 2 others v Silas Kinyua Kithela [2018] eKLR, the Plaintiff suffered severe blunt head injury with intracerebral hematoma, damage to the extensor tendon of the left middle finger and soft tissue injuries on the chest wall. The Court awarded Kshs. 350,000/- in General Damages. The Appellant relied on this case in the Trial Court.

54. In Francis Ochieng and Another v Alice Kajimba MGR HCCA No. 23 of 2014 [2015] eKLR, the Plaintiff sustained a cerebral concussion with loss of consciousness for two hours, massive haematoma on the right parietal head, subconjuctual haematoma of the right eye, loss of 5 anterior lower and two upper teeth, perioribital ecchymosis and cut wound on the right hand and knee. The court held that an award of Kshs. 350,000/- was awarded in 2015.

55. In Cecilia W. Mwangi and Another v Ruth Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal awarded Kshs. 350,000/- in 1997 for the following injuries; head injury (cerebral concussion), cut wound over the vertex of the scalp, cut wounds over the right lower left and injury to the pelvis resulting in fractures of the right superior and inferior rami.

56. From the avalanche of authorities cited, it is indeed impossible to find similar authorities where the plaintiffs sustained similar injuries. It is for that reason that the court must consider only comparable injuries and awards.

57. I also consider that as was held in the cases of Rahima Tayab and Another v Anna Mary Kinaru [1987-88]1 KAR 90, Simon Taveta v Mercy Mutitu Njeru NYR CA Civil Appeal No. 26 of 2013

[2014] eKLR and Stanley Maore v Geoffrey Mwenda NYR CA Civil Appeal No. 147 of 2002 [2004] eKLR).

> ... the court in awarding damages must always bear in mind that money cannot renew a physical frame that has been battered and shattered and that the courts' only concern is to fair and reasonable compensation. In arriving at what is fair and reasonable the court ought to ensure that there is uniformity in the general method of approach and so far as possible comparable injuries should attract similar awards.

58. Based on the cited authorities, I note that the award by the Trial Court of Kshs. 500,000/= was high but not inordinately high. The proposed award of Kshs. 250,000/- is inordinately low.

59. Therefore, the award of the Lower Court on quantum was high but not inordinately high. I shall not disturb it.

60. The Appellant did not Appeal against the award on Special Damages which I shall not disturb as well.

Determination

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

    a. The Appeal is dismissed.

    b. The Respondent shall have costs of the Appeal assessed at Kshs. 75,000/-.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 7TH DAY OF FEBRUARY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Kimondo Gachoka & Co. Advocates for the Appellant

Sonye J. Ondari & Co. Advocates for the Respondent

Court Assistant- Brian