Mose & another v Moraa & another (Civil Appeal 133 of 2021) [2024] KEHC 1121 (KLR) (7 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1121 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL APPEAL 133 OF 2021

DKN MAGARE, J

FEBRUARY 7, 2024

BETWEEN

JOSHUA ONSONGO MOSE & ANOTHER .... PLAINTIFF

AND

GLADYS MORAA & ANOTHER .... DEFENDANT

(Appeal from the Judgment and Decree of the Honourable E.A. Obina Principal magistrate, given on 14/10/2021 in Kisii CMCC 552 of 2017)

JUDGMENT

1. This is an appeal from the Judgment and Decree of the Honourable E.A. Obina Principal magistrate, given on 14/10/2021 in Kisii CMCC 552 of 2017. The Appellants were the Defendants. The appellants filed appeal with a whopping 9 grounds of appeal, as hereunder: -

    i. The learned Magistrate erred in law and misdirected himself when he failed to consider the appellant's submission on both points of law and facts.

    ii. That the learned Magistrate's decision was unjust, against the weight of evidence and was based on misguided points of fact and wrong principles of law and has occasioned a miscarriage of justice.

    iii. That the Learned Magistrate erred in law and misdirected himself when she failed to consider the provisions of set out in The Insurance (Motor Vehicles Third Party Risks) (Amendment) Act, 2013, Cap 405.

    iv. The learned Magistrate erred in law and fact in awarding the Plaintiff/Respondent Kshs. 300,000/= for general damages hence arriving at a wrong finding as regard the nature of injuries sustained by the Plaintiff.

v. The Learned Trial Magistrate erred in law and fact by awarding the plaintiff an inordinately high quantum as damages in the circumstances of this case.

vi. The Learned Magistrate erred in law and fact in awarding a sum that was so excessive as to an amount that is so erroneous as to the estimate of general damages suffered by the plaintiff.

vii. The Learned Magistrate erred in fact and in Law in failing to consider the Appellant's submission on Quantum and liability and legal authorities relied upon in support thereof.

viii. The learned Magistrate erred in law and fact by overly rely on the Respondents submission which were not relevant and without addressing his mind to the circumstance of the case.

ix. The Learned Magistrate erred in fact and in law in failing to consider conventional award s in cases of similar nature.

2. The Appellant should file concise Memorandum of Appeal. Order 42 Rule, 1 provides are doth: -

> " 1. Form of appeal –
>
> (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.

3. 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:
>
> > "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…"

4. 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:
>
> > "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."

5. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The question this court will have to deal with is whether the magistrate's court had jurisdiction to hear and determine this dispute. This is the only issue addressed in submissions before the court below and before this court.

Duty of the first Appellate court

6. 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.

7. In the case of Mbogo and Another vs. Shah [1968] EA 93 where 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."

8. 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 law looks in their usual gusto, held by 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."

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

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

11. 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."

12. The duty of the Court regarding damages is settled that the state of the Kenya economy and the people generally and the welfare of the insured and injury public must be at the back of the mind of the trial Court.

13. In the case of Jennifer Mathenge v Patrick Muriuki Maina [2020] eKLR. The Court held: -

> " Damages should not be inordinately too high or too low
>
> 1. They are meant to compensate a party, for the loss surfed but not to enrich a party, and as such they should be commensurate to the injuries surfed.
> 2. Where past decision are taken into consideration, they should be taken as mere guides and each case depends on its own facts.
> 3. Where past awards are taken into consideration as guides an element of inflation should taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.... -

14. The foregoing was settled in the cases of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appealed held as follows as paragraph 8.

> " In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree of ......is to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration."

15. Finally, in deciding whether to disturb quantum given by the Lower Court, the Court should be aware of its limits. Being exercise of discretion the exercise should be done Judiciously conclusively are circumstances to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

16. Therefore, for me 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.

17. So my duty as the appellate court is threefold regarding quantum of damages: -

    a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.

b. To ascertain whether the award is too high as to amount to an erroneously assessment of damages.

c. The award is simply not justified from evidence.

18. To be able to do this, I need to consider similar injuries, take into consideration inflation and other comparable awards.

19. Similarly, in the duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> "The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

20. 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..."

21. 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.

22. The issues that arose from the appeal are: -

i. Quantum was excessive

ii. Liability.

iii. Pleadings

23. The plaintiff filed suit against 3 defendants. The 1st appellant was said to be the registered owner and driver of MV KZB 418 while the second was the owners of KCD 290D. There was an accident on 27/7/2017 and the Respondent who was a passenger in Motor Vehicles Registration KZP 418 on a funeral processor was injured astoring Kisligoris road at Menyimewa.

24. The two mortar vehicles were blamed and the special damages of 7,600 was pleaded. The 2nd and 3rd defendants, the Appellants herein filed defence on 16/11/2017 denying liability, ownership and blamed Motor vehicle registration No. KBR 165B which violently collided with KCD 290 D. They blamed motor vehicle Registration KZB 418, and the plaintiff. Particulars of negligence for both were set out. Nothing was said of KBK 165 B.

25. The 1st defendant does not appear to have been involved and is not party to the Appeal.

Evidence

26. The Respondent testified on 27/1/2021 and adopted her statement. She produced documents while. Dr. Momanyi produced the medical report on cross – examination she stated that she had injuries on the head, back, hands and legs.

27. On cross examination by the advocates for Appellant she stated that she had not fully healed and had not worked since she got injured. Dr. Momanyi stated that the Respondent had a degloring injury on the shoulder cut wounds on the head, back, right hand and ankle region.

28. On cross examination he explained that a deploring injury is cut wound which involves peeling of the skin.

29. The plaintiffs case was closed. In a rather unorthodox manner. The parties closed their case where waiting to produce a medical reports. It is unprocedural that there can be no proceedings after closure of a case. Nevertheless, the parties filed submissions.

30. The Court delivered its judgment as follows: -

    a. Liability had been agreed in 544 of 2018 at 20:30:50

    b. General damages 300,000/=

    c. Special damages 7,600/=

    d. Costs of the suit

Appellant's Submissions

31. The appellants submitted that this raised only issue of quantum. This is notwithstanding the fact that ground 7 of the memorandum of appeal raises both quantum and liability. They set out he injuries surfed by the Respondent –

    i. Cut wound on the scalp

    ii. Cut wound on the upper back

    iii. degloving injury on the shoulder

    iv. deep cut wound on the right hand

    v. deep Cut wound on the ankle

32. They place reliance on the case of Michael Okello -vs- Priscilla Atieno (2021) eKLR. where the Court stated that comparable injuries showed as far as possible be compensated by comparable awards.

33. The Appellant relied further on the decision in the case of Godfrey Wamalwaya Wamba -vs- Kyalo Wambua (2018) eKLR, where they urge that state that the court should have awarded 100,000/=. They also refer to some decisions passed in between 2012 and 2019 for more serious injuries.

34. The Respondent filed submissions on 14/3/2023. They state that the test case, being 5441/2018 was not appealed therefore the court should not disturb liability. To this I agree.

35. On general damages they state that the court of cannot substitute simply because it could have arrived at a different figures. Reliance was placed on the case of Catholic Diocese of Kisumu vs. Sophia Achieng

Tete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

> " It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate."

36. The respondents had not healed more than 3 years after the accident. They rely on the cases of Francis Ochieng & another v Alice Kajimba [2015] eKLR where 350,000/= was awarded. Further the case of Easy Coach Limited v Emily Nyangasi [2017] eKLR, where the claimant hand was injured on the right leg, right hand and left leg and that she was treated as an inpatient and that skin from the right thigh was grafted to the left lower leg where the court upheld award of Ksh. 700,000.

37. It was their case that 300,000/= was not so high as to amount to an erroneously estimate of damages

Analysis

38. Having had a consent on liability, the court has no business determining liability. I therefore dismiss the grounds related to liability.

39. On Quantum, the duty of the court was settled by the Court of appeal in The Court of Appeal, pronounced itself succinctly on these principles 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.

40. The foregoing statement had been ably elucidated by Sir Kenneth 'Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Counsel, 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..."

41. The aspect of discretion was settled in Mbogo & Another vs. Shah [1968] E.A. 93 at page 96, where the legendary Sir Charles Newbold P elucidated the point in the most poignant way as hereunder: -

> :"...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case

as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice....”

42. The decision in Easy Coach Ltd case (supra) was far were services as it involved skin grafting from the right thigh to the left lower legs.

43. On the case of Francis Ochieng and another -vs - Alice Kajimba (2015) eKLR, the claimant herein had cerebral confusion, massive hematoma on the right parietal head sub conjunctival hematoma of the right eye, peri orbital laceration and loss of 5 anterior lower and 2 upper teeth among others. The same is not applicable to the current status.

44. In the lower court the Appellate used 2013 and 2018 authorities with minor injuries while the Respondent use the authorities they have used in the Appeal both sets of authorities are not application as they are more than 2 years old were, not comparable. Using a 2015 decision in 2021 does not make sense, in terms of comparison.

45. The comparable injuries especial or a deploring injury attract between 250,000 – 350,000. In the case of Barchia Leonard Mbaabu & another v Angeline Ngesa Rambim [2019] eKLR, Justice Cherere noted as doth: -

> “ 13. Appellants on the other hand offered Kshs. 300,000/- and relied on H. Young Construction Company Ltd v Richard Kyule Ndolo [2014] eKLR where plaintiff was awarded Kshs. 250,000/- for degloving injury to the left leg with loss of skin over the calf muscles and Blunt injury to the left ankle joint; Jackson Wanyoike v Kenya Bus Services Ltd & another [2003] eKLR where plaintiff was awarded Kshs. 300,000/- for a serious degloving injury of the skin to the left knee and left leg, bruising of the head, multiple, lacerations of the scalp and the right eyebrow and Spin Knit Limited vs. Johnstone Otara where Kshs. 300,000/- was awarded for crush injury, dislocation and cracks of the right hand which healed with permanent scars with contractures of the five fingers and a of permanent disability to be 20%.

46. I agree with the foregoing. The award was proper in the circumstances. it is not so high inordinately high as to amount to an erroneous estimate of damages. I therefore dismiss the Appeal in limine with costs of 80,000/= to the Respondent.

Determination

47. The upshot of the foregoing is that I make the following determination: -

    a. The appeal on liability is baseless as there is a determination from a test suit being Kisii CMCC 544 of 2018.

    b. The appeal on Quantum is unmerited and is consequently dismissed with costs of Kshs. 80,000/= to the Respondent.

    c. The same be paid within 30 days, in default execution do issue.

    d. The file is closed.

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

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant - Brian