Ogando v Watu Credit Limited & another (Civil Suit E098 of 2022)
[2024] KEHC 3074 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3074 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CIVIL SUIT E098 OF 2022

DKN MAGARE, J

MARCH 14, 2024

BETWEEN

PATRCIA KARANI OGANDO ..... APPELLANT

AND

WATU CREDIT LIMITED ..... RESPONDENT

AND

JUDY NYANGATE ONGERA ..... DEFENDANT

JUDGMENT

1. This is an Appeal from the Judgement and Decree of Honourable P.K Mutai delivered at the Chief Magistrates court on 26/10/2021 in KisiiCMCC 372 of 2021.
2. The same raised the following grounds of appeal: -
    a. The learned Magistrate erred in both law and fact by awarding the Appellant general damages of Kes 450,000/- only, despite the overwhelming evidence on record that demonstrated that the Appellant suffered serious injuries that should have attracted a higher figure in general damages.
    b. The learned Magistrate erred in both fact and law by failing to take into consideration all the documentary evidence in the form of treatment notes, discharge summary, and medical reports that demonstrated the seriousness of the injuries that the Appellant suffered.
    c. The learned Magistrate erred in law and fact by disregarding the authorities on quantum of damages that were submitted by the Appellant's Advocates.
    d. The learned Magistrate misconstrued the Appellant's case on the issue of quant misdirected herself on the law and evidence and therefore arrived at a wrong conclusion.

e. The learned trial Magistrate went out of his way by proposing the Appellant to have gone to a neurosurgeon, when there were overwhelming and satisfactory reports by competent medical doctors touching on the injuries the Appellant suffered.

3. 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.

4. This was aptly stated in the case of Peters vs Sunday Post Limited [1958] EA 424 where, the court of Appeal 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..."

5. 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..."

6. The appeal is on quantum. It raises one issue only. However, the Appellant has split the same into prolixous 5 grounds of appeal which is both unnecessary and a waste of judicial time. This is because order 42 of the Civil Procedure Rules ordains that a memorandum of appeal be concise. 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.
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> (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.

7. The Court of Appeal had this to say regarding 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..."

8. 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."

9. The rest of the issues are ancillary, repetitive, prolixious and a waste of judicial time. The only issue the court will deal with is the question of the exercise of the court's discretion, whether it was judicious or not. The rest is evidence in support of the one ground.

10. It is imperative at this early time to point out that parties are bound by their pleadings. Evidence that is in the medical records by not pleaded is otiose. It is unusable and does not help parties. Parties must plead their case before proceeding to proof them. In Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth:

> " It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG)

vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

> ".....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

11. To determine the exercise of discretion the court will consider the pleaded injuries, the medical evidence, and relevant authorities. I will therefore dismiss in limine the appellant's ground 3. It is not a stand-alone ground. Submissions and authorities are suggestions that are neither persuasive nor binding on the court. They express the party's partisan view of the case. It cannot be a ground to overturn a decision. Submissions are not evidence and as such, however beautifully calligraphed, the submissions, concrete proof still stands as the goal of litigation. This aspect of pleadings was addressed by a Tanzanian court in the case of Salim Said Mtomekela Versus Mohamed Abdallah Mohamed, Dar-Es-Salaam Court of Appeal Civil Appeal No. 149 Of 2019(Mugasha. J.A. Kihwelq. J.A. Rumanyika. J.A p where it was held as doth: -

> "Pleading in law means, written presentation by a litigant in a law suit setting forth the facts upon which he/she claims legal relief or challenges the claims of his opponent. It includes claims and counterclaim but not the evidence by which the litigant intends to prove his case ... That said, since the pleading is a basis upon which the claim is found, it is settled law that, parties are bound by their own pleadings and that any evidence produced by any of the parties which is not supportive or is at variance with what is stated in the pleadings must be ignored. See Barclays Bank (T) Vs Jacob Muro, Civil Appeal No. 357 of 2018 [where] the Court cited with approval a passage in an article by Sir Jack I.H. Jacob bearing the title,
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> "The Present Importance of Pleadings", first published in Current Legal Problems (1960) at p. 174 whereby the author among other things said: "As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings..."

12. On submissions the position I hold is that parties cannot rely on submissions to do that which should have been done by pleadings and evidence, in the case of Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR, justice G V Odunga as then he was stated as doth: -

> " It also relied on submissions of the parties to which no agreed documents were annexed. Submissions, with due respect, do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of

submissions. As was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:

> "Submissions simply concretize and focus on each side's case to win the court's decision that way. Submissions are not evidence on which a case is decided."

19. The same Judge in Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:

> "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 judgment. 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."

20. Similarly, in Ngang'a & Another vs. Owiti & Another [2008] 1KLR (EP) 749, the Court held 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 that 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."

21. As stated by the Court of Appeal in 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

13. The plaintiff pleaded the following injuries

    a. head injury with loss of consciousness.

    b. Linear fracture left mastoid part of the left temporal bone with associated left hemomastoid and left sphenoid hemosinus.

    c. Diastatic fracture left lambdoid suture.

    d. Bifrontal and left temporal and parietal contusion hemorrhages.

    e. Thin left frontal acute subdural hemorrhage.

    f. Bilateral subarachnoid hemorrhage.

    g. Intracerebral hematoma.

    h. Brain edema causing mass effect with 10mm shift of midline structures to the right.

    i. Left parietal acute subdural bleed.

    j. Chest contusion.

    k. Lacerations on the left shoulder.

    l. Bruises on the right parietal region.

14. The Appellant prayed for damages they also pleaded that the Appellant's permanent degree of disability was assessed at 20% and her head injuries could be complicated later with post-traumatic epilepsy or psychoses and she was still spending on painkillers which are expensive and have side effects.

15. The court indicated as follows, considering the injuries suffered, comparable and inflations, the plaintiff is awarded Ksh 450,000/= as general damages. This triggered the appeal herein. This is where the court also has difficulties with the judgment. This court is supposed not to interfere with the findings of the court unless the same is not based on a judicious exercise of discretion. In this matter, the parties referred to diametrically opposite authorities.

16. The court did not resolve the dispute which set of parties are correct. The comparable decisions are not referred to. How do I then know whether they are comparable?

17. Inflation applies from the date an authority was decided. How do I know that a correct inflationary factor has been applied? In short, there is nothing on record to show the exercise of discretion. How did the court arrive at 450,000/=? These are questions that weaken the decision on general damages. I am aware that the court is the finder of facts. However, what do you do if the court eschews the finding of facts?

18. The Court is to bear 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, the 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.

19. 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."

20. 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 insured public must be at the back of the mind of the trial Court.

21. 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: -

> " 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 [uniformity] 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 leveling up and down of the facts of exchange between currencies...should be taken into consideration."

22. 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.

23. The Court of Appeal, pronounced itself succinctly on 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 former Court of Appeal for East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account 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.

24. 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 is 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..."

25. 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.

26. 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.

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

28. There is an injunction however, no two decisions or injuries are the same. There can be no two injured persons who are injured the same. The court has to look at the nearest estimate, having in mind the major injuries and the soft tissue injuries that were pleaded and proved.

29. This matter was the most medicalized I have dealt with. There were treatment notes/discharge summary, p3 form, Mr. Gaya's report, Dr. Orina and Dr Momanyi's reports. I have noted errors where Gaya is referred to as Dr. Gaya instead of his name, Mr Gaya. This is a title earned by consultant surgeons. I also noted advocates appearing before me addressing themselves as Mr. while they have not passed the honour of using the knife correctly.

30. The P3 indicated a healed pink scar on the shoulder region, mild tenderness on the left lateral thoracic region, healed right parietal eminence, and intracerebral haematoma. The discharge summary has a diagnosis of intra-cerebral haematoma with care instructions for physiotherapy at Marani. No operations were carried out. She was managed conservatively. All these are to the effect that the appellant had head and shoulder injuries. The injuries had not given rise to psychosis nor epilepsy. The anxiety was not pin pointed to arise from the accident.

31. CT Scan showed thin left from subdural haemorrhage.

32. Mr Z Gaya found the following injuries

a. Head injury resulting into intracerebral haematoma

b. Soft tissue injuries to the pelvis

c. Soft tissue injuries to the chest

d. Lacerations on the left shoulder area.

33. The injuries are serious but not as serious as the Appellant will want the court to believe. Though there is a thread of incoherence, causality was not established. The injuries healed and left scars. Though indicating in pleadings to be on pain killers, it was not evident in court.

34. My task therefore is to analyse the award in light of the foregoing and satisfy myself that the award is lawful. The test was set out in the case of Gitobu Imanyara & 2 Others vs. Attorney General [2016] eKLR, where the Court of Appeal held that: -

> " ...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled.

This is the principle enunciated in Rook v Rairrie [1941] 1 All ER 297. It was echoed with approval by this Court in Butt v. Khan [1981] KLR 349 when it held as per Law, J.A that:

> 'An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely 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 at a figure which was either inordinately high or low."

35. In the case of Gatete Muthee David v Joseph Charo Ndaa [2021] eKLR, the court, Nyakundi J awarded a sum of Ksh 500,000/= on 8/1/2021 for head injury with, Loss of consciousness (30 minutes), Disorientation (confusion), Severe blunt injury in the abdomen with bleeding within the abdomen (haemoperitoneum), Vomiting of blood, blunt injury to the waist, Shock and abrasion on the right elbow.

36. In Artan Hussein & 2 others v Said Hamadi Upepo [2017] eKLR, justice Njoki Mwangi confirmed an award of Ksh 900,000 for more serious injuries.

37. In the circumstances I find that the court below erred in awarding Ksh 450,000/=. I set the same aside and award Ksh. 800,000/= subject to agreed contribution. Costs of Ksh. 97,500/= for the appeal.

Determination

38. The upshot of the foregoing is that the Court makes the following orders:-

    (a) The appeal is allowed in the following terms: -

        a. The general damages of 450,0000/= are set aside. In lieu thereof, I substitute with a sum of 800,000/=.

        b. Costs of Ksh 97,500/=.

    (b) The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14TH DAY OF MARCH, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

M/s Bw'oigara, Getange & Company Advocates for the Appellant

M/s Omwenga & Co. Advocates for the Respondent

Court Assistant - Brian