Kiboi v County Government of Nyeri (Civil Appeal 57 of 2022)
[2024] KEHC 6650 (KLR) (22 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6650 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 57 OF 2022

DKN MAGARE, J

MAY 22, 2024

BETWEEN

JOSHUA MAGUA KIBOI ..... APPELLANT

AND

COUNTY GOVERNMENT OF NYERI ..... RESPONDENT

JUDGMENT

1. This is an Appeal form the decision of the Honourable E.N. Angima given on 12/9/2022 in Nyeri CMCC E292 of 2021.

2. I cannot fathom the philosophical underpinning of the matter herein. There must have been underlying malaise that made parties to involve the court on in the most mundane of all the cases. This case is a classic example on why the minimum amounts for the cases to go to the High Court should be introduced and enforced.

3. I had to burn midnight oil for a matter that is purely bruised egos and misplaced sense of self importance. The claim relates to Motor Vehicle Registration KAC 722R which was parked opposite Batian.

4. The Appellant is said to have paid out 8:26 hours via mpesa. He then received a call from a friend that the motor vehicle was clamped by the Respondents agents. The said motor vehicle was said to have been parked in a manner amounting to obstruction. A sum of Kshs. 3600/= was thus paid as fine.

5. The Appellant sought Kshs. 3000/= an amount paid together with penalty. Aggravated damages for Define, and trespass. The said motor vehicle is said to have been clamped for obstruction. This was at 8:57am. on 7/9/2020.

6. Demand letters had been issued. The county replied on a without prejudice basis that the vehicle was parked in the opposed direction over the indicative marking. This was said to be contrary to Nyeri County Revenue Administration Act 2014, Revised 2020.

7. The county entered appearance as stated in their defence that a motor vehicle Registration No. KAE 772R was wrongly parking causing obstruction.

8. Upon hearing the case, the court dismissed the case with each party bearing its now costs. The suit is said to be related to E291 of 2021. The court noted that there Appellant testified that there were 2 other vehicles that were similarly parked but were not clamped. The Defence witness stated that the Appellant entered through the exit and parked on the parking lanes. The Defence witness agreed that the vehicle was properly parked in terms of yellow line. However, the same was against flow of traffic.

9. The court found that the action contravenes Section 53 (1) of the *Traffic Act*. The court dismissed the suit.

Analysis

10. For a matter involving a claim for Kshs. 4500 the parties wrote humongous 6 grounds of Appeal:-

    a. That the learned magistrate erred in law and in fact in failing to consider the entirety of the evidence tendered by the Appellant, there by occasioning a gross miscarriage of justice.

    b. That the learned magistrate erred in law and in fact in failing to take into account relevant considerations and in taking into account irrelevant considerations, thereby occasion a gross miscarriage of justice.

    c. The learned magistrate erred in law and in fact in framing her own issues for determination other than those by the parties, thereby occasioning a gross miscarriage of justice.

    d. That the learned magistrate erred in law and in fact in failing to consider the persuasive authorities by the Appellant, thereby occasioning a gross miscarriage of justice.

    e. That the learned magistrate erred in law and in fact in descending to the arena of the litigants and imputing that the Appellant was a vexatious litigant, thereby occasioning a gross miscarriage of justice.

    f. That the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at erogenous findings in the judgment, thereby occasioning a miscarriage of justice.

    g. That the learned trial magistrate filed to address her mind to the pleadings on record and the evidence by the parties, thereby occasioning a miscarriage of justice.

11. The issues raised are ancillary, repetitive, prolixious and a waste of judicial time. This is contrary to order 42 rule 1 of the *Civil Procedure Rules*, which 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."

12. The Court of Appeal had this to say about compliance with Rule 86 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..."

13. In the case of *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."

Duty of the first Appellate court

14. 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.

15. In the case of *Mbogo and Another v. 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."

16. 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 v 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."

17. 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.

18. In the case of *Peters v 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..."

19. In *Nyambati Nyaswabu Erick v 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 injury public must be at the back of the mind of the trial Court.

21. The foregoing was settled in the cases of *Butter v 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 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 levelling 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 v Meru Express Service v. 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.

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 v British Columbia Electric Co Ltd*, in the decision of *Henry Hilanga v 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..."

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

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. 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 different."

29. For the appellate court, to interfere with the award it is not enough to show that the award is high or low or even that had I handled the case in the subordinate court, I would have awarded a different figure.

30. They sought that the court orders a refund of their money. The Respondent was to file submission by 23/3/2024.

31. Upon review of the evidence, I do not find any error by the court. The evidence points out to the commission of the offence. The question of parking fees is irrelevant. The enforcement officers were acting out their duties. The action was not quashed. Therefore, the court could not interfere with such ministerial acts, which are on the face of it legitimate.

32. The Appellant had a duty of care. This duty is set out in a long line of cases stopping at the question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in *William Kabogo Gitau v. George Thuo & 2 Others* [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

33. In *Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another* (2015) eKLR, the judges of Appeal held that:

> " Denning J. in *Miller v Minister of Pensions* (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> > " That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

18. The respondent has a responsibility to designate while the appellant has a duty to follow the designation. This did not happen. The Appellant failed to discharge a simple duty placed on him under sections 107-109 of the *Evidence Act* as follows: -

> " 107.
>
> (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

19. I do not find any merit in the Appeal. It should never have been filed. The Appellant is testing his rights to an extreme. However, no damages can arise without breach of a duty of care of law. The Appeal on liability is accordingly dismissed. I note that the court did not assess damages. Had the case been proved the court is bound to assess damages. The appellant failed to discharge the duty to prove his case. Put converse, the Appellant endevoured to destroy his own case. There was nothing to find the respondent liable. The court was correct in dismissing the case. In *Lei Masaku v Kalpama Builders Ltd* [2014] eKLR, the court noted as follows: -

> " It has been held time and again by the Court of Appeal that the court of first instance assess damages even if it finds that liability has not been established. To have casually dismissed the suit and failed to address that issue of damages in this case is a serious indictment on the part of the trial court. Both the trial court and this court must assess damages as they are not courts of last resort. Their decisions are appealable and the appellate court needs to know the view by the Court of first instance on the issue of quantum. To the extent that the trial court failed to assess damages, its judgment was a serious flaw and cannot stand. It therefore behooves this court to assess quantum."

20. There were no actual damages pleaded. Emotional distress is not part of what constitutes damages. In this case, had the cases been proved, it was a proper case for award of nominal damages. In *Barclays Bank of Kenya Limited v Hellen Seruya Wasilwa* [2021] eKLR, the court stated as follows: -

> In the case of *Shiraku v Commercial Bank of Africa* [1988] KLR 67 it was stated as follows:
>
> > " To wrongly dishonour any cheque is to do some injury in fact. If that is right, then it is not necessary to plead and prove damages. But in ordinary circumstances, the damages will be quite modest. They will be more than nominal damages but not so greatly more as to be excessive."
>
> I do find that the Respondent is entitled to nominal damages which should not be so low as to amount to no compensation for the harm caused and not so high as to amount to severe punishment to the appellant who breached the contract. The term "nominal damages" was defined in the case of *Kanji Naran Patel v. Noor Essa And Another*, (1965) EA 484 while referring to the case of *The Mediana* (1900) AC 116, as follows:
>
> > " Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damage that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damages does not mean small damages. The extent to which a person has right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a

variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages."

21. Therefore, court however, erred in not assessing damages. The entire episode took place in less than one hour. There were not damages shown. In a case of this nature, normal damages of 10 ,000/= will have sufficed. Had the appellant proved his case, the court will have awarded a nominal damages of Ksh 10,000/- as no actual damages were suffered.

22. Nevertheless, there was no proof of damages. In the circumstances I find the Appeal lacks merit. The minimum costs in the High Court is Kshs. 75,000/= for this kind of matter. I award the same.

Determination

23. I make the following orders: -

    a. The appeal lacks merit and is accordingly dismissed with costs of Kshs. 75,000/= payable within 30 days in default execution do issue.

    b. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 22ND DAY OF MAY, 2024.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of :-

Miss Karimi for the Respondent

No appearance for the Appellant

Court Assistant- Brian