Mapesa v Egesa (Civil Appeal 143 of 2022) [2024] KEHC 6246 (KLR) (16 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6246 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 143 OF 2022

DKN MAGARE, J

MAY 16, 2024

BETWEEN

CHARLES OSOSO MAPESA ..... APPELLANT

AND

MICHAEL EGESA ..... RESPONDENT

JUDGMENT

1. This is an appeal from the judgment and decree of the Honourable J B Kalo given on 30/4/2022 in Mombasa CMCC 2502 of 2018. The appellant was the plaintiff who was successful on liability but had issues with quantum. Therefore, the Appeal is on quantum. The Appellant filed 8 prolixious grounds of Appeal. The grounds of Appeal should be concise and raise only issues of fact and law that the Court erred on but not evidence. The issue of submission is not a ground of Appealing. This is because submission are not evidence.

    1. Order 42 Rule 1 of the Civil Procedure Rules 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.

            2. 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:
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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..."

3. 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:
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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."

4. 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.

Analysis

5. 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.

6. 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."

7. 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."

8. 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.

9. 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..."

10. 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."

11. 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.

12. 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 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."

13. 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.

14. 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.

15. 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.

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

17. 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: -

> "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.

18. 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.

19. Given that the Appeal is on quantum I shall subsume submissions for both sides in the judgment. It is unnecessary to raise background pleadings since only quantum is in issue. Vide a Plaint dated 4/10/20218, the plaint pleaded the following injuries –

    a. Fracture of the skull left eye socket (orbital floor)

b. Fracture of the skull left check bone (xygomatic cheek bone)

c. Deep cut on the left eye

d. Cut on the left little finger

e. Blunt object injury to the face (left cheek – zygomatic) and left knee.

20. Vide a judgment delivered on 30/8/2022 the court made the following awards: -

a. Liability 80%

b. General damages Ksh. 250,000/=

c. Special damages Ksh. 12,926

21. The appellant had pleaded the following special damages: -

a. Medical Treatment tests 12,058/=

b. Medical report 2,000/=

c. Total 14,058

22. I was wondering whether the medical costs and expenses and treatment cost and expenses mean the same thing. Medical costs and Treatment cost are the same therefore to use medical treatment costs and expenses is tautological. I shall refer to them as treatment costs. From the document at page 60 no fracture for dislocation was seen.

23. The P3 showed soft tissue injuries on the left knee joint, cut wound on the small finger. No injury on thorax and abdomen, deep cut wound on the lateral side of the left eye and left zygomatic region (near the ear) with swelling on the left zygomatic and fracture of the left orbital floor. The treatment record on 14/5/2018 showed fracture of bones and soft tissue injuries, cut wound was dressed. Dr. Ajoni Adede examined the Appellant and found the following –

a. After 2 months and 9 days. Walks unsupported.

b. The left of the face is swollen, deformed and there is an ugly, disfiguring keloid 6cm x 1cm scar left eye

c. The patient has difficulty in opening the mouth wide. The left little figure has 4cm scar

d. X- Ray displays the fractures and may be attached.

e. Notes above and p3 Form concur and may be annexed.

24. The good doctor found 8% partial disability due to the multiple skull fracture, jaw joint stiffness deforming keroid facial scar, fracture sites remain a weak point for life even if the bones unite, they can re-fracture. Other soft tissue had no residual disability.

25. Regarding damages, the Appellant suggested a sum of 1,500,000/=. They relied on several cases of Ksh. 1,000,000 – 2,500,000/=. The authorities referred were for more serious injuries.

26. The Respondent submitted that a sum of Ksh. 500,000/= would have sufficed. The point of departure was that the court relied on Dr. Seth's report and found that the Appellant sustained soft tissue injuries. The court dismissed the fractures that were reportedly found. He then proceeded to reconcile P3 with the treatment notes. Page 14 of the P3 clearly shows showing Fracture of the left orbital floor.

27. The treatment notes had soft tissue injuries and facial bones fracture. They indicate A CT scan for the head was. Further, a crepe bandage was applied over the head. On examination there was no signoff fracture.

28. However, the CT scan showed fracture of orbital floor and left zygomatic region but the eye ball was intact. The appellant was referred for orthopedic review.

29. These injuries are also contained largely in Dr. Ajoini Adede's report. The court therefore erred in purporting to interpret medical documents and overruling Dr. Ajoni Adede without evidence to the contrary.

30. The P3 confirmed the fractures. It is therefore the right place for the Court to interfere with the finding of the court below as the same was not based on any evidence on record. It is true that the Appellant suffered soft tissue injuries.

31. It is equally true that there were facial fractures, especially the zygomatic region and the orbital floor on the left side. A crepe bandage will always be applicable for facial fracture, sprain and strain. Dr. Seth's report was produced by consent was filed after Dr. Adede's report. The good doctor had that Dr Adede's report. He was to comment on the findings of the first doctor and Rule then out. He did not do so.

32. The same could not be said of Dr. Adede. He did not have the advantage of seeing Dr. Seth's report. Unfortunately, both reports were admitted without calling the makers.

33. This implies that the parties had no issues with the report. The differences can only be attributed to time. The report that was last in time can be due to subsequent healing. The Appellant had only 8% disability. Dr. Adede posited that even where they re- unite, there is a danger of a re- fracture.

34. In Nesco Services Limited v CM Construction [EA] Limited [2021] eKLR, the court, Justice G V Odunga J, as he then was, stated as doth: -

> " 41. Since the said author was for reasons unknown to the Court not called to testify and dispute its authenticity, adverse inference could be made thereon. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows:
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> > "Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
> >
> > > 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
> > >
> > > Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

35. The court will treat the expert report as part of the evidence and analyst its soundness. In the case of Stephen Kinini Wang'ondu vs. The Ark Limited [2016] eKLR from which the Judge drew out

four tests to be applied by a court when considering admission and acting on expert evidence as more particularly set out in the ruling and which we also find prudent not to rehash and expressed himself thereon, inter alia, as follows: -

> " In my view its correct to state that a court may find that an expert's opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert's testimony where he finds the expert's reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert's process of reasoning must therefore be clearly identified so as to enable a court to choose which of competing hypotheses is the more probable. It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court "of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence." An expert report is therefore only as good as the assumptions on which it is based. An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based."

36. The court in the above matter continued as doth: -

> " In Shah and Another vs. Shah and Others [2003] 1 EA 290 wherein Ombija, J. expressed himself on this issue, inter alia, as follows:
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> > "One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct...The expert opinion is however limited to foreign law science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field...However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify an expert may result in exclusion of his testimony...The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so...If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of one expert in preference to the opinion of the other, is the responsibility of the court...Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."

37. The net effect is that I find and hold that the appellant suffered serious fractures. In the case of David Kibue Mchomba & another v Alex Mutua Munyao [2019] eKLR, the Plaintiff suffered simple fracture to the head and the trial court awarded Ksh 800,000/=, which was upheld on appeal in 2019.

38. Further, In Maintenance Limited and Another v WA (a minor suing through father next friend SKH) ELD HCCA No. 52 of 2008 [2015] eKLR where the court upheld an award of Ksh. 800,000/- in 2015 where child sustained a depressed fracture of the skull on the left temporal area, brain concussion and soft tissue injuries and loss of consciousness for 3 hours.

39. In the case of Isaac Waweru Mundia v Kiilu Kakie Ndeti t/a Wikwatyo Services MKS HCCC No. 312 of 2009 [2012] eKLR where the court awarded of Ksh. 1, 000,000/- as general damages in 2012. The Plaintiff suffered a fracture at the base of the skull, comminuted complex mandibular fracture (right condylar neck fracture) with malocclusion and loss of the left lower incisor tooth, right eye vertical dystopia and diplopia on the left gaze.

40. The award of Ksh 250,000/= for such serious injuries was not proper. The court was plainly wrong. 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.

41. 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..."

42. In the circumstances the Appeal is successful. I set aside thee award of Ksh. 250,000/= and in lieu thereof I substitute with a sum of Ksh. 800,000/=.

43. On costs, the Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation....

> Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

44. There was no Appeal on specials of Ksh. 12,926/= as such the same is confirm as awarded.

45. Lastly, costs follow the event. In this case the Appellant was a sum of Ksh. 800,000/= and costs. I am surprised that the trial court ignored the offer for 500,000/= from the Respondents. It means the court did not read the submission as the Appellant was lamenting.

Determination

46. In the circumstances I find that the appeal is merited. I allow the same as follows: -

    a. I set aside the award of Ksh. 250,000/= as General damages and in lieu thereof I award a sum of Ksh. 800,000/=.

    b. This works out as follows: -

        General damages Ksh. 800,000

        Less 20% Ksh. 160,000

        Subtotal Ksh. 640,000

        Add specials damages Ksh. 12,926

        Total Ksh. 652,926

    c. Specials of Ksh. 12,926 shall not be subjected to contribution and shall attract interest from 30/10/2019 the date of filing of the further Amended plaint.

    d. General damages shall attract interest from 30/8/2022 the date of judgment till the date of payment.

    e. Cost of Ksh. 125,000/= to the appellant.

DELIVERED, DATED AND SIGNED VIRTUALLY ON THIS 16TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Ms Bosire and Partners Advocates for the Appellant

Mogaka, Omwenga and Mabeya Advocates for the Respondent