Darshakkumar & another v Wanjiku (Civil Appeal E684 of 2023)
[2024] KEHC 7625 (KLR) (Civ) (11 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E684 OF 2023

DKN MAGARE, J

JUNE 11, 2024

BETWEEN

PATEL KANTIBHAI DARSHAKKUMAR ..... 1ST APPELLANT

JEET KUMAR PATEL ..... 2ND APPELLANT

AND

JOSEPH KINYANJUI WANJIKU ..... RESPONDENT

(Being an appeal from the Judgment of Hon. Selina Muchungi - SRM in Milimani CMCC No. E5931 of 2020, delivered on 2nd December, 2022)

JUDGMENT

1. This is an appeal from the judgement of the Hon. Selina Muchungi given on 2/12/2022 in Milimani CMCC E5931 of 2020. The Appellants were defendants in the lower court.
2. The appellants filed an appeal on both quantum and liability and set out 8 grounds of appeal as doth:
    a. That the learned magistrate erred in law and fact in finding that the appellants were 100% liable in failing to appreciate that the evidence on record did not support the decisions he arrived.
    b. That the learned magistrate erred in law and in fact in finding that the respondent was not negligent.
    c. That the learned magistrate erred in law and in fact in failing to consider the evidence adduced while finding on negligence and quantum.
    d. That the learned magistrate erred in law and in fact in failing to find that the respondent contributed to the occurrence of the accident on the face of the pleadings and evidence adduced.

e. That the learned magistrate erred in law and fact and ended up misdirecting himself in awarding exorbitant quantum of damages of Ksh.250,000/= by failing to appreciate and be guided by the prevailing range of comparable awards granted the injuries sustained by the respondent herein.

f. That the learned magistrate erred in law and fact in making such a high award on general damages and awarding special damages that were not specifically pleaded and proved as to show that the magistrate acted on a wrong principle of law.

g. That the learned magistrate's award on damages was so high as to be entirely erroneous.

h. That the learned magistrate's award was made without considering the medical evidence, authorities and appellants' submissions before the court and failed to appreciate the nature of injuries sustained by the respondent and failed to be guided by authorities on comparable awards and hence ended up making an excessive award.

i. That the whole judgment on quantum and liability was against the weight of evidence before the court.

3. The grounds are humongous and unseemly. Order 42 Rule 1 requires conciseness. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 1. Form of appeal –
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> 1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively.

4. The Court of Appeal had this to say 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..."

5. 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."

6. There are only two issues raised:

   i. Inordinately high award.

   ii. 100% liability.

Pleadings

7. The Respondent filed suit claiming damages arising out of an accident on 17/7/2020 involving motor vehicle Reg. No. KBP 507C and KMEJ 709G along Limuru road near Hennessis Lounge. Injuries suffered were:

   a. Blunt injuries – chest wall.

   b. Swollen, tender, painful left leg and left knee.

   c. Swollen, tender, painful left ankle.

8. The defendant filed defence denying liability. They blamed the Respondent as the owner of motor cycle Reg. No. KMEJ 709G.

Evidence

9. PW1-PC Isaac Mukenya testified that there was an accident involving KBP 507C and motor cycle registration NO. KMEJ 709G Boxer. He produced the abstract. The public reported that motor vehicle Registration No. KBP 507C hit KMEJ 709 Boxer. He failed to give was at a junction. There is no bus indicated in the abstract.

10. The Appellant stated that he was riding along Limuru road. The motor vehicle registration No. KBP 507C was entering the main road and hit him. This was at noon. He denied overtaking. The defendant closed the case.

11. A report by Dr. Aswin Madhiwala dated 20/4/2021 was produced by consent and the case closed. The court entered judgment at 100% against the Appellant for failing to give way. This was also due to not tendering evidence.

12. On quantum he awarded Ksh.250,000/= as general damages. The court found the Respondent suffered multiple soft tissue injuries. This was rebutted in this appeal.

Analysis

13. 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.

14. 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."

15. 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."

16. 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.

17. 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..."

18. 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."

19. 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.

20. 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."

21. 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.

22. 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.

23. 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..."

24. 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.

25. 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.

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

27. 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.

28. 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.

29. On liability there was no evidence tendered by the Appellant. The Respondent's evidence was unrebutted. In Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR, Odunga, J. stated as follows on the consequences of failure by a party to call evidence:

> "What are the consequences of a party failing to adduce evidence? In the case of *Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002* Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:
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> "Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail."
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> Again in the case of *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001* the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."

30. The burden of proof of negligence was on the Respondent under Section 107-109. The standard of proof is set out in sections 107-109 of the *Evidence Act* as hereunder: -

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

31. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. 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."

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

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
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> "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."

33. In the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] eKLR, for the burden of proof, where the court of Appeal [O'kubasu, Githinji & Waki, JJ.A] posited as hereunder: -

> " We have carefully examined the evidence on record from the two eyewitnesses but are not satisfied that the learned Judge made a balanced view of it. He did, as he was entitled to, believe the evidence of one of them but he did not state why he could not believe the other eye witness. Indeed he did not refer to that evidence at all other than simply reproducing it.... It was submitted by Mr. Mburu, learned counsel for the respondents that the onus was on the appellant to prove her case and it never shifted to the respondent. We agree with that proposition.
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> As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:
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> "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."

34. The evidence tendered by the Respondent was cogent. It showed that the Appellant was to blame. However, the Appellant did not tender evidence in rebuttal. I note that the Respondent was on the

main Limuru road. It was the Appellant's driver who joined from a junction road. Effectively they could only join when it is safe to do so and when they joined, it was unsafe.

35. In that regard without rebuttal there is no dispute on liability. I therefore dismiss the appeal on liability in limine.

36. On the other hand the court awarded Ksh.250,000/= for soft tissue injuries. In the case of FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] eKLR, Justice R Nyakundi enhanced damages from Ksh 60,000/= to Ksh 100,000/= for minor soft tissue injuries, which were blunt object injury to the head, neck, limbs thorax and abdomen.

37. Awards must be such that comparable injuries should attract comparable award as per the Court of Appeal in Odinga Jacktone Ouma V Moureen Achieng Odera [2016] eKLR.

38. In the case of Lilian Anyango Otieno v Philip Mugoya Ogila [2022] eKLR, Justice F. Ochieng as then he was awarded 150,000/= for Right hand pain Right ribs pain Joint pain at the elbow.

39. The injuries suffered by the respondent did not include cuts and other more serious injuries. A sum of Ksh. 150,000/= will have sufficed on the basis of the authorities above. A sum of Ksh. 250,000/= was inordinately excessive in the circumstances.

40. I therefore set aside the award of Ksh. 250,000/= and substitute with Ksh. 150,000/=. Each party shall bear its costs.

Determination

41. The court therefore makes the following orders:

    a. The appeal on liability is dismissed.

    b. Judgment on general damages is set aside and in lieu thereof I enter judgment for Ksh.150,000/=.

    c. Each party shall bear its costs.

    d. The Respondent shall have costs in the lower court.

    e. 30 days stay.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 11TH DAY OF JUNE, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Appellants

Ms. Mumbi for the Respondent

Court Assistant - Jedidah