Kingoo & 2 others v Ntenge (Civil Appeal E798 of 2022)
[2024] KEHC 7606 (KLR) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7606 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL E798 OF 2022

DKN MAGARE, J

JUNE 20, 2024

BETWEEN

THOMAS MUTALA KINGOO ..... 1ST APPELLANT

WILFRED ARON ..... 2ND APPELLANT

SIYARAM ENTERPRISES ..... 3RD APPELLANT

AND

KIVUVA NTENGE ..... RESPONDENT

(Being an appeal from the Judgment of Hon. H. M. Nyaberi - SRM in Milimani CMCC No. 10692 of 2018, delivered on 8th September, 2022)

JUDGMENT

1. This is an appeal from the Judgment and decree of the Hon. H. M. Nyaberi given in Nairobi CMCC 10692 of 2018.
2. In that judgment the Appellants were found to be 100% liable jointly and severally. The court awarded the following:
    a. General damages Kshs.450,000/=
    b. Special damages Kshs.10,950/=
    Total - Kshs.460,950/=

Pleadings

3. The Respondent filed suit on 5/12/2018 for an accident on 13/10/2018 along Eastern Bypass at Ruai underpass where the Respondent was travelling in motor vehicle Registration KBN 243H. The said

motor vehicle is said to be owned by the 1st Appellant. It was involved in an accident with motor vehicle registration KCP 019T. Particulars of negligence were set out. The nature of injuries were as follows:-

i. Head concussion

ii. Blunt injury – chest and back

iii. Bruises – left hand

iv. Blunt injury – left hip and left leg

v. Blunt injury rib cage

4. The special damages were pleaded as follows:-

a. Medical report Kshs.8,000/=

b. Search fee Kshs.550/=

c. Medical expenses Kshs.4,000/=

5. The Respondent was examined by Dr. G.K. Mwaura. The injuries were said to have fairly healed. The said doctor was paid Kshs.8,000/= for medical report.

6. A search showed Thomas Mutala Kingoo as the registered owner of motor vehicle registration KBN 243H from 25/10/2010.

7. The Appellants entered appearance and filed defence for all the 3 Appellants. In spite of their interest being diametrically opposite. A joint defence was filed on 21/5/2023. Particulars of negligence was set out against the Respondent who was a passenger. There are no particulars of negligence against any party other than the Respondent.

8. The matter was heard and parties filed humongous submissions. The Memorandum of Appeal raised only 2 issues:

a. The excessive quantum.

b. The decision was against weight of evidence.

9. Though indicated to be an appeal on both quantum and liability, I cannot see any appeal on liability.

Proceedings

10. Ex-parte judgment was entered against the 1st Respondent who was subsequently set aside by consent. On 28/5/2019 vide a consent dated 20/5/2019 and filed in court on 21/5/2019 and signed for advocates for the parties.

11. The matter delayed with the Appellant adjourning for some flimsy reasons. The hearing proceeded on 18/3/2021 where the Respondent testified. The plaintiff produced a report dated 25/10/2018. He also produced the defence report. On cross examination he stated that motor vehicle registration KCP 019T applied emergency brakes and hit KBN 243H from behind.

12. PW2 PC Samuel Shauri of Ruia Police Station stated that he was summoned over motor vehicle registration KBN 243H and KCP 019T. He produced the police abstract. The witness stated that motor vehicle registration which was carrying passengers made a U-turn and hit motor vehicle registration KCP 019T.

13. During defence hearing Jeniffer Kahutu testified on the injuries. The Appellants did not testify on the cause of accident. Upon analyzing the evidence the court found both parties jointly and severally liable.

14. On the injuries the court awarded the amount stated above. The court relied on the case of Amani Kazungu Karema v Jackmash Auto Ltd & Another [2021] eKLR and Embu Road Services v Riimi (1968) EA22 and Mzuri Muhhidin v Nazzar Bin Seif (1961) EA 201, Menezes Stylianicers Ltd CA No. 46 of 1962.

15. The Appellants who were defendants in the lower court were aggrieved with the decision. They thus filed a 6 paragraph Memorandum of Appeal that is repetitive and prolixious. Order 42 Rule 1 of the Civil Procedure Rules provides are doth: -

> " 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."

16. 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..."

17. 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."

18. 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.

19. 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."

20. 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."

21. 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.

22. 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..."

23. 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."

24. 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.

25. 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."

26. 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.

27. 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.

28. 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..."

29. 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.

30. 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.

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

32. 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.

33. 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.

34. In Jane Chelagat Bor v Andrew Otieno Oduu [1988-92] 2 KAR 288; [1990-1994] EA 47, it was stated as follows: -

> "...In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency..."

35. In Stanley Maore v Geoffrey Mwenda [2004] eKLR, the Court of Appeal suggested thus: -

> "...we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases."

36. In Hellen Waruguru Waweru (Suing as the legal representative of Peter Waweru Mwenja v Kiarie Shoe Stores Limited [2015] eKLR, the Court of Appeal posited as follows: -

> "As a general principle, assessment of damages lies in the discretion of the trial court and an appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an 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. The Court must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damages." (Also see Butt v Khan [1981] KLR 349)."

37. The Memorandum of Appeal does not raise any issue on liability. Even where they generally talk of weight of evidence, they had no evidence. The court cannot deal with liability as it is not pleaded.

38. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> "
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> " 11. 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 be in consonance 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: -
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> ".....it is now trite 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.....
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> ...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."

12. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> 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 fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty 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. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

12. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....'"

39. There are no elements of illegality. Therefore the limb of illegality is dismissed in limine.

40. The only question remaining is quantum. The Respondent stated that he was injured on the head, chest, hands and legs. He testified that he could not carry anything over 5 litres. No evidence of this complication is in any report or pleadings.

41. A police officer testified on occurrence of the Accident. The Appellant's doctor's behalf of someone else. The respondent's doctor was no cross examined. Both doctors' reports were not produced by the makers. The doctors did not explain their findings. The Appellant's attempted to do so through another doctor.

42. In dealing with expert reports, the other evidence must be taken into consideration. In Shah and Another vs. Shah and Others [2003] 1 EA 290 wherein Ombija, J. expressed himself on this issue, inter alia, as follows:

> " 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."

43. The degree of injury was classified as harm. The P3 form produced by the Respondent 12 days after event stated that there were no injuries indicated for the head and neck. This coincides with the Appellants' report that there was no concussion. The rest of the injuries were soft tissue, blunt injury chest and back, bruises left hand, blunt injury left hip and left leg, and blunt injury rib cage.

44. In the case of John Muchiri Nderitu & another v Grace Njoki Njuguna [2021] eKLR, the court awarded Kshs.150,000 as general damages for injury to the right shoulder, injury to the chest, Injury to the back, and injury to the left leg with haematoma in 2021.

45. In the case of Michael Okello –v- Priscilla Atieno [2021] eKLR Justice R.E. Aburili awarded Ksh 250,000/= for injury to the right shoulder, injury to the chest, injury to the back, and injury to the left leg with haematoma. These were more serious injuries.

46. The court did not consider any authority on quantum. F.M (Minor suing through Mother and next friend in the case of MWM) v JNM & another [2020] eKLR the court awarded Kshs.100,000/ for blunt object injury to the head, blunt object injury to the neck, blunt object injury to the thorax, blunt object injury to the abdomen and blunt object injury to the limbs.

47. The test to be applied in an award of special damages is clearly articulated. In the circumstances an award of Kshs.450,000/= was excess. An award of Kshs.150,000/= will suffice. Consequently, I set aside the award of Kshs.450,000/= and substitute with Kshs.150,000/=.

48. The Respondent suffered minor soft tissue injuries and bruises. The parties must understand that the frame cannot be returned. This is simply to compensate for pain and suffering. In the case of H West and Son Ltd v Shepherd (1964) AC 326 the House of Lords in England stated that:-

> " ... but money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional ..."

49. The final order that commends itself is to allow the Appeal on quantum. As regards costs, section 27 of the *Civil Procedure Act* provides as follows: -

> (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

50. 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.

Determination

51. In the circumstances I make the following orders:

    a. The Appeal is merited on quantum only. Consequently, I set aside the award of Kshs.450,000/= as general damages for pain and suffering and substitute therewith with an award of Kshs.150,000/=.

    b. The Respondent shall have cost of the court below.

    c. The parties to bear their own costs on the appeal.

    d. The file is closed.

    e. 30 days stay.

DELIVERED, DATED and SIGNED at NYERI on this 20th day of June, 2024.

Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:-

Mwangi for the Appellant

No appearance for the Respondent

Court Assistant - Jedidah